NORTH CAROLINA REPORTS

VOLUME 368

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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JENNIFER C. PETERSON

---

[1] Retired 31 May 2016. [2] Appointed 1 June 2016. [3] Appointed November 2015.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
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	Elaine Bushfan	Durham
	Michael O'Foghludha	Durham

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12	James F. Ammons, Jr.	Fayetteville
	Claire Hill	Fayetteville
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13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
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	Tanya T. Wallace	Rockingham
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22A	Joseph Crosswhite	Statesville
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[1] Retired on 29 February 2016. [2] Became Senior Resident on 1 March 2016. [3] Sworn in 1 April 2016. [4] Retired on 31 March 2016.
[5] Retired on 19 August 2016. [6] Became Senior Resident on 22 August 2016. [7] Sworn in 4 September 2015. [8] Retired on 29 January 2016.
[9]Became Senior Resident on 1 February 2016. [10]Sworn in 3 June 2016. [11] Retired on 26 January 2016. [12] Retired on 26 January 2016.
[13] Sworn in 1 July 2016. [14] Resigned on 20 October 2015. [15] Sworn in 1 July 2016. [16] Sworn in 15 August 2016. [17] Sworn in 30 August 2016.
[18] Sworn in 10 June 2016. [19] Sworn in 8 March 2016. [20] Sworn in 6 November 2015.[21] Sworn in 25 July 2015.

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Margaret L. Sharpe	Greensboro
Charles M. Vincent[23]	Greenville
J. Kent Washburn	Burlington
Charles W. Wilkinson, Jr.	Oxford

[1] Retired on 31 August 2016. [2] Retired 29 April 2015. [3] Sworn in 18 May 2016. [4] Sworn in 1 January 2016. [5] Retired on 31 August 2016.
[6] Became Chief on 1 September 2016. [7] Sworn in 15 December 2015. [8] Sworn in 4 December 2015. [9] Retired on 31 December 2015.
[10] Sworn in 3 June 2016. [11] Retired on 31 May 2016. [12] Became Chief on 1 June 2016. [13] Sworn in 13 November 2015.
[14] Died on 13 October 2015. [15] Became Chief on 24 November 2015. [16] Sworn in 26 February 2016. [17] Resigned on 4 September 2015.
[18] Sworn in 16 May 2016. [19] Died on 11 September 2015. [20] Sworn in 1 September 2016. [21] Sworn in 1 September 2016.
[22] Resigned on 21 March 2016. [23] Sworn in on 30 October 2015.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

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The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2011 and have been issued a certificate by the Board.

Kurt Samuel Abourched ..... Raleigh
Victor Howell Adelman ..... Charlotte
Christine Elizabeth Agnone ..... Jacksonville
Breeze Luddeke Alcorn ..... Greenville
Kelli Yvonne Allen ..... Charlotte
John McRae Alsup ..... Bangar, ME
Karl Joseph Amelchenko ..... Wilmington
Amanda Walker Anders ..... Huntersville
Kristy Shafic Andraos ..... Kernersville
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Steven Christopher Back ..... Rutherfordton
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Terence Odell Barber ..... Durham
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Kathryn Webb Bradley ..... Durham
Paris Sherrill Branch-Ramadan ..... Henderson
Matthew Alexander Brawner ..... Raleigh
Andrew Steven Brendle ..... Raleigh
Kathleen Kenney Brennan ..... Charlotte
Alexandra Wade Bresee ..... Charlotte
Shea Richard Browning ..... Maggie Valley
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Katherine Shaw Clothier Serfas ..... Winston-Salem
Adam Christopher Setzer ..... Winston-Salem
Liedeke Allyn Sharp ..... Chapel Hill
Thomas Camden Shealy ..... Spartanburg, SC
Tracey Allyson Sherpinskas ..... Wade
Leslie D. Sherrill ..... Raleigh
Kathryn Hicks Shields ..... Raleigh
Marcus Allen Shields ..... Durham
Brian C. Shillito ..... Winston-Salem
Colin Shive ..... Chapel Hill
Ronald James Shook, II ..... Charlotte
Travis John Short ..... Winston-Salem
Jonathan Ross Shrader ..... Winston-Salem
Joseph Grant Sigmon ..... Greensboro
Scott Paul Silvers ..... Raleigh
Christian Toufic Simaan ..... Summerfield
Elizabeth Lenore Simmons ..... Kernersville
Ashley Irwin Sims ..... Williamsburg, VA
Jeanette Segovia Sims ..... Durham
Jonathan Lee Sink ..... Charlotte
Berkley Carrington Skinner, IV ..... Durham
Samuel Allen Slater ..... Raleigh
Vanessa Ann Smart ..... Charlotte
Alden Hamilton Smith ..... Lexington
Allison Wilson Smith ..... Charlotte
Asher Alexander Smith ..... Cary
Ashley Renee Smith ..... Cary
Bridget Smith ..... Apex
Kelly Beth Smith ..... Charlotte
Raiford Laurence Smith ..... Mooresville
Roger Arrie Smith ..... Winston-Salem
Tara Caitlin Smith ..... Summerfield
Ashley Britton Snyder ..... Charlotte
Whitney Blair Sorrell ..... Raleigh
Julie Christine Spahn ..... Charlotte
Angela Ruth Spong ..... Chapel Hill
Michael Julian Sprague ..... Greensboro
Alka Srivastava ..... Cary
Stephen Troy Staley ..... Holly Springs
Catherine Flannery Stalker ..... Greensboro
Lorea Ann Stallard ..... Cary

Nathan Edward Standley ..... Raleigh
Ericca Dannielle Starling ..... Raleigh
Jessica Elizabeth Steffey ..... Huntersville
David Craton Stephens ..... Elon
Jennifer Stevens ..... Wendell
Colby Bourne Stevenson ..... Charlotte
Matthew Stilwell ..... Cary
John Parker Stone ..... Greensboro
Holly Marie Stott ..... Johnson City, TN
David Strauss ..... Durham
Cooper J Strickland ..... Lynn
William Scott Strickland ..... Chapel Hill
Ryan Stump ..... Charlotte
Elizabeth Davis Styons ..... Jacksonville
Susan Maria Sullivan ..... Winston-Salem
Elizabeth Renee Suttles ..... Hendersonville
Andrew Paul Tamayo ..... Charlotte
Andrew Addison Taylor ..... Charlotte
John Taylor ..... Raleigh
Yansea Kinnamon Taylor ..... Belmont
William Ray Tew ..... Thomasville
Valerie Jo Thomas ..... Winston-Salem
Eddie Lamar Thomas ,Jr. ..... Chapel Hill
Brett Andrew Thompson ..... Morrisville
Whitney Lewis Thompson ..... Charlotte
Deanna Thorne ..... Raleigh
Jack Alex Thornton ..... Lewisville
William McBride Thorsen, III ..... Columbia, SC
Ryan Brett Tiede ..... Cornelius
Lauren Marie Tierney ..... Durham
Paul Nicholas Tongsri ..... Durham
Samuel Benjamin Tonkin ..... Asheboro
Stefani Michele Trapp ..... Sewickley, PA
Ronald Allen Traud ..... Raleigh
Christina Lee Trice ..... Charlotte
Stephanie Carol Trotter ..... Lexington, SC
Jamie Danielle Turnage ..... Wilmington
Henry Clay Turner ..... Chapel Hill
Alexander MerkC Vang ..... Chapel Hill
Sreenivas Vedantam ..... Charlotte
John Villalon ..... Winston-Salem
Judy Visoury ..... Raleigh
Joseph Andrew Vossen ..... North Wilkesboro
Beady Bennette Waddell, III ..... Gastonia
Alison Haas Wadsworth ..... Charlotte
Lindsey E. Wakely ..... Raleigh
Ursula Lee Walder ..... Rural Hall
Katharine S. Walker ..... Charlotte
Emily Louise Wallwork ..... Mint Hill
Mary Elizabeth Walrod ..... Raleigh

Mary-Katherine Bane Walston ..... Raleigh
Thad Aaron Walton ..... Charlotte
Donald Adam Wanee ..... Durham
Christopher Thomas Ward ..... Winston-Salem
Tiffany Grace Ward ..... Raleigh
Ashley Lynn Warner ..... Colfax
Jacob Paul Warner ..... Colfax
Megan Hart Warren ..... Charlotte
Nora Foster Warren ..... Raleigh
Brittany Nicole Waters ..... Shelby
Julie M. Watson ..... Winston-Salem
Julianna Louise Wenn ..... Raleigh
India Whedbee ..... Raleigh
Joel Ruben White ..... Trinity
Tiffany Marie Whitfield ..... Fayetteville
Ross Wilfley ..... Charlotte
Michael David Wilhelm ..... Clayton
Jamie Avril Wilkerson ..... Durham
Alicia Dawn Williams ..... Raleigh
Heather Trealyne Williams ..... Richmond, VA
Jonathan Derrick Williams ..... Winston-Salem
Lakisha Rene Williams ..... Cary
Jacquelyn Kay Hutson Willingham ..... Raleigh
Christopher Charles Wilms ..... Raleigh
Alexander James Wilson ..... Raleigh
Jeremy M. Wilson ..... Wilmington
Lawrence Wilson ..... Cary
Lindsey Diane Wilson ..... Charlotte
Douglas Elizabeth Wink ..... Greensboro
Ray Halford Womble, III ..... Raleigh
John Terry Wood ..... Hickory
Rebecca Elizabeth Wood ..... Winston-Salem
Sarah Luella Wood ..... Hubert
Robert Newlin Wood, III ..... Raleigh
Holly LaBarge Wright ..... Staley
Jessica Lynn Yanez Penaloza ..... Greensboro
Aleksandr Yegiyants ..... Raleigh
Megan Hutchins Youngblood ..... High Point
Tyler Lane Younts ..... Asheboro
Elizabeth A. Zager ..... Fuquay-Varina
Cynthia L. Zakary ..... Huntersville
Daniel Joseph Zamora ..... Cornelius
Brian Robert Zawrotny ..... Winston-Salem
Vanessa Rachel Zboreak ..... Winston-Salem
Paul Lawrence Zucchino ..... Raleigh

LICENSED ATTORNEYS

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2011 and have been issued a certificate by the Board.

James Michael Berger ..... Applied from the State of Pennsylvania
Bridget Alison Blinn ..... Applied from the State of Texas
Christopher Warren Brown ..... Applied from the State of Missouri
Kelly Peterman Burch ..... Applied from the State of Georgia
Thomas James Campbell ..... Applied from the State of Pennsylvania
Avery Martin Chenin ..... Applied from the State of Ohio
Claire Cody Coleman ..... Applied from the State of Georgia
Eric Andrew Contre ..... Applied from the State of Connecticut
Walter Carl Dauterman ..... Applied from the State of Georgia
Jeffrey Scott Davis ..... Applied from the State of Texas
Preston Bryan Davis ..... Applied from the State of Georgia
Joseph D. Delfino ..... Applied from the State of New York
Sandra Hurm Dermody ..... Applied from the State of Georgia
Harry Tucker Dewey ..... Applied from the State of Tennessee
Timothy Joseph Driscoll, Jr.. ..... Applied from the State of Missouri
William J. Edwins ..... Applied from the State of New York
Jennifer Rasile Everitt ..... Applied from the District of Columbia
Thomas Andrew Fairhall ..... Applied from the State of Washington
Thomas Andrew Farnen ..... Applied from the State of Georgia
Robert Alan Fleischacker ..... Applied from the State of Wisconsin
John David Fred ..... Applied from the District of Columbia
Arthur Sidney Friedman ..... Applied from the State of New York
Ian Nathan Friedman ..... Applied from the State of Ohio
Clarence William Gaylor, III ..... Applied from the State of New York
Eric William Goodale ..... Applied from the District of Columbia
John S. Hahn ..... Applied from the District of Columbia
Ryan Frank Haigh ..... Applied from the State of Missouri
Alexandra Basis Holleman ..... Applied from the State of Georgia
Steven William Hudnut ..... Applied from the State of Oregon
Matthew Lyndon Jamison ..... Applied from the State of Georgia
Ashley Diane Liu Kirkman ..... Applied from the State of Georgia
Donald Eugene Knapp, Jr.. ..... Applied from the State of Arkansas
Clark Louis LeBlanc ..... Applied from the District of Columbia
Daniel Adam Lewis ..... Applied from the District of Columbia
John Howard Lewis ..... Applied from the State of Massachusetts
Scott Stephen Lincicome ..... Applied from the District of Columbia
Taylor Higgins Ludlam ..... Applied from the State of Georgia
Thomas John Ludlam ..... Applied from the State of Georgia
David Harold Lund ..... Applied from the State of Massachusetts
Katharine Elizabeth Marshall ..... Applied from the State of New York
Jon Patrick McGough ..... Applied from the State of Texas
Marguerite Elizabeth McLamb ..... Applied from the District of Columbia
Jeffrey Jay Meek ..... Applied from the State of Georgia
Colin Michael Miller ..... Applied from the State of New York
Gary Dean Miller ..... Applied from the State of Tennessee

LICENSED ATTORNEYS

Lyle Daniel Nichols ..... Applied from the State of Georgia
Stuart M. Paynter ..... Applied from the District of Columbia
Karen Ann Popp ..... Applied from the District of Columbia
Roslyn Poznansky ..... Applied from the State of Massachusetts
Jeffrey Steven Price ..... Applied from the State of Tennessee
Henry Haywood Robbins ..... Applied from the State of New York
Mindy Birman Sanchez ..... Applied from the State of New York
Melissa Jonnease Sawyers ..... Applied from the State of Georgia
Daniel Martin Segal ..... Applied from the State of New York
Lenor Cathleen Marquis Segal ..... Applied from the State of New York
Thomas Cortland Shanahan ..... Applied from the State of Georgia
Richard Lamar Sizemore ..... Applied from the State of Georgia
Deborah Ann Gold Smith ..... Applied from the State of Georgia
Jane Ann Smith ..... Applied from the State of Missouri
Michelle Sarah Spak ..... Applied from the State of Texas
Tamika Jones Springs ..... Applied from the District of Columbia
Craig Alan Stokes ..... Applied from the State of Texas
Justin Michael Tafe ..... Applied from the State of New York
Joseph Wesley Thomas ..... Applied from the State of Michigan
Edward Francis Thompson ..... Applied from the State of Wisconsin
Laurence Tomar ..... Applied from the State of Pennsylvania
Christopher T. Vrountas ..... Applied from the State of New Hampshire
Robert Hammock Wall ..... Applied from the State of Georgia
Molly A. Ward ..... Applied from the State of Illinois
Ann Lee Warren ..... Applied from the District of Columbia
James Michael Weiss ..... Applied from the State of Missouri
Jonathan Neil Wike ..... Applied from the State of Tennessee

LICENSED ATTORNEYS

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2012 and have been issued a certificate by the Board.

Melissa Neel Abrams ..... Raleigh
James Robert Allen ..... Durham
Michelle Colvin Allen ..... Raleigh
Leslie Hall Amos ..... Raleigh
Matthew Allen Lawson Anderson ..... South Boston, VA
Najib Azam ..... Greensboro
Blair Nicole Bacisin ..... Raleigh
Nina Strickland Banks ..... Durham
Sarah Elizabeth Banks ..... Charlotte
Meredith Morrison Barbee ..... Concord
Helena Leigh Bell ..... St. Louis, MO
Myra Dean Blake ..... Chapel Hill
William David Bost ..... Salisbury
Michael Patrick Bradenham ..... Spring Lake
Joyce Prevette Brafford ..... Raleigh
Adam Gray Breeding ..... Cornelius
Phillip Thompson Brown ..... Charlotte
Danielle Jessica Brudi ..... Mooresville
Amanda Kaye Bryan ..... Charlotte
James Leroy Bryan ,Jr. ..... Raleigh
Adrienne Danielle Bryant Clark ..... Wilson
Pamela James Butler ..... Wilmington
Joseph Michael Cabosky ..... Granville, OH
Christine Laura Camacho ..... Charlotte
Alexis LaStar Carr ..... Greenville
Zshakira Jovan Carthens ..... Durham
Yuli Andrea Castro Lezcano ..... Durham
Courtney Harris Chacos ..... Durham
Aaron Youngjin Chang ..... Fayetteville
Whitney Arjeudi Cherry ..... Jamestown
Whitney Campbell Christensen ..... Bullock
Daniel Mo Chung ..... Charlotte
Kristofer John Cook ..... Durham
Ross Andrew Cook ..... Chapel Hill
Chanel Crawford ..... New Bern
Brenna Adair Davenport ..... Graniteville, SC
Morgan Renee Davis ..... Raleigh
Anthony Starkey De Soto ..... Hollywood, FL
Laura Erb Dean ..... Chapel Hill
Steve Lamar Dellinger ..... Richmond Heights, MO
Brian Joseph Dempsey ..... West Orange, NJ
Christopher Timothy Lawn Douglas ..... Charlotte
Eileen Chandler Earnhardt ..... Henrico, VA
Kriston Daniel Efird ..... Charlotte
Matthew Paul Ellinwood ..... Cary

Susan Marie Ervin ..... Mooresville
James Edward Lawrence Fickling ..... Lexington, SC
Mindy Chek Fisher ..... Charlotte
Amy Calvo Folk ..... Durham
Darren Charles Frank ..... Charlotte
Carson Whitney Freeman ..... Newton
Robert John Gallagher ..... Southern Pines
Mary Catherine Gamble ..... Charlotte
Yang Gao ..... Durham
Ryan Christopher Garka ..... Charlotte
Allison Brook Garren ..... Cary
Harrison Mann Gates ..... Reidsville
Elizabeth Mansfield Gerber ..... Beverly Hills, FL
Kelly Elizabeth Gibbs ..... Arlington, VA
Rachel Opperman Gilbert ..... Charlotte
Megan Eileen Giltner ..... Charlotte
Natalie Christine Gominger ..... Durham
Sarah Elizabeth Gray ..... Monroe
Kyndra Leigh Griffin ..... Gastonia
John Andrew Hamilton, II ..... Charlotte
Michael Clyde Harman ..... Charlotte
Megan Elizabeth Harrigan ..... Charlotte
Zachary Christian Herrmann ..... Thomasville
Alex Daniel Herskowitz ..... Durham
Margaret Brooke Howard ..... Polkton
Aymie Barrows Huntington ..... Fuquay-Varina
Erin Leigh Hurd ..... Fuquay-Varina
Joseph Robert Hurwitz ..... Asheville
Mary Lynn Irvine ..... Chapel Hill
Jennifer Dudar Isham ..... Asheville
Jonathan Hasbrouck Jacobs ..... Saint Louis, MO
Aaron Victor Jacobson ..... Durham
Vinisha Joshi ..... Charlotte
Danielle Elana Katz ..... Charlotte
Rachel Alexandra Kepley ..... Indian Trail
Leslie Ann Kirkman ..... Charlotte
Kyle Douglas Kirtley ..... Pineville
Alena Augusta Kleshik ..... Charlotte
Ira Knight ..... Winston-Salem
Jaime Renee Kue ..... Jacksonville
Kristi VanderLaan Kung ..... Raleigh
Julie Elizabeth Lamberth ..... Durham
Raymond Dennis Large, III ..... Greensboro
Thomas Wellington Layman ..... Clemmons
Da Bok Lee ..... Centreville, VA
Daniel A. Lewis ..... Charlotte
Violeta Limbert-Mason ..... Charlotte
Marcus Reeves Little ..... Madisonville, KY
Jennifer Michelle Litwak ..... New Bern
Jeffrey Warren Loewy ..... Durham

Daniel Christopher Lyon ..... Charlotte
Jennifer L. Malone ..... Cameron
Candace Alexis Mance ..... Asheville
Howard Asanobu Marsilio ..... Raleigh
Amy Jo Martin ..... Millers Creek
Robert Patrick Martin ..... Lexington, SC
Christiaan Mazza ..... Raleigh
Christine McArthur ..... Cary
Ellen Parker McCarley ..... Charlotte
Shon Emery McCarley ..... Charlotte
Melia Brannon McCraw ..... Chesnee, SC
Brandon Lee McPherson ..... Raleigh
Danielle Elizabeth Miller ..... Kings Mountain
John Michael Miller ..... Charlotte
Mona Mohajerani ..... Cary
Vanessa Jean Monroe ..... Raleigh
Lauren Elizabeth Morrissette ..... Charlotte
Mackenzie Brooke Morse ..... Durham
Mueni Muli ..... Fuquay-Varina
Beth Nasadowski ..... Charlotte
Kip David Nelson ..... Greensboro
Jennifer Ellen New ..... Raleigh
Brittany Allison Nickels ..... Rutherfordton
Elizabeth Ashby Nixon ..... Concord
James Martin Page ..... Wilmington
Jennifer Lynn Patty ..... Charlotte
Ann Wilson Payseur ..... Belmont
Christopher Chandek Peace ..... Charlotte
Jonathan Jason Perkins ..... Chapel Hill
James Bond Perleth, II ..... Fayetteville
Michael Andrew Pisetsky ..... Durham
Jarrette Michael Pittman ..... Rocky Mount
Gregory Legare Pleasants ..... Greensboro
Michael Robert Poterala ..... Raleigh
Eric Marc Poulin ..... Johns Island, SC
Mary Helen Prince ..... Raleigh
Jason Edward Ramey ..... Stoneville
Orly Reznik ..... Cary
Erin Kristine Riggs ..... Durham
Michael Vincent Rizzo ..... Charlotte
Ellen Gilbert Rose ..... Etowah
Lori Driver Russell ..... Hillsborough
Guhan Santhappan ..... Houston, TX
David Timothy Schaefer ..... Greensboro
Erin O'Kane Scott ..... Andalusia, AL
Lyndsey Ryan Sharpe ..... Charlotte
Megan Montgomery Shepard ..... Charlotte
Matthew Christopher Sherlock ..... Charlotte
Nathan Gray Shore ..... Yadkinville
Richard Joon Sin ..... Raleigh

Paxon Sinsangkeo ..... Charlotte
Beverley Ann Smith ..... Greensboro
Joshua David Smith ..... Burlington
Timothy Haagen Snyder ..... Charlottesville, VA
Jennifer Marie Sotack ..... Raleigh
Arthur Joseph Strollo, III ..... Concord
George Barrett Swayne, Jr. ..... Winston-Salem
Isla N. Tabrizi ..... Charlotte
Holly Kristen Taylor ..... Raleigh
Michael Madison Taylor ..... Madison, MS
Lynn Dee Thesing ..... Asheville
Tiffany Radford Tschudi ..... China Grove
Zachary Ryan Unger ..... Charlotte
Michael Patrick Vaio ..... Raleigh
Sean Paul Vitrano ..... Wake Forest
Janet Marie Wallace ..... Greensboro
Kelvin Ricky Watson, Jr. ..... Greensboro
Jessica Bell West ..... Raleigh
Kristin Marie White ..... Charlotte
Lance Christian Williams ..... Gastonia
Kellie Marie Wills ..... Cary
Katherine Hill Worden ..... Raleigh
Elizabeth Rebecca Youngkin ..... Durham

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in July 2012 and have been issued a certificate by the Board.

Albert Brennan Aberle ..... Greensboro
Alexander Abramovich ..... Miami, FL
Lauren Kellis Ackermann ..... Durham
Jeremy Denton Adams ..... Raleigh
Ilesanmi Olaseni Adaramola ..... Ringgold, VA
James Stewart Adcock, III ..... Fuquay-Varina
Meghan Lara Addison ..... Charlotte
Justin Evan Agans ..... Charlotte
Jonathan Paul Alef ..... Charlotte
Dene' Vicole Alexander ..... Durham
Jeffrey Edward Alexander ..... Charlotte
Latavia Shante Alexander ..... Charlotte
Kristen Diane Alkire ..... Greensboro
Lauren Jade Allen ..... Gainesville, FL
Stephen Charles Allen, Jr. ..... Charlotte
Sheyna Rachel Sears-Roberts Alterovitz ..... Chapel Hill
Jane Marie Michael Anders ..... Mount Holly
Alice Christie Chen Anderson ..... Winston-Salem
Elizabeth Marie Anderson ..... Sealevel
Jennifer Lynn Anderson ..... Chapel Hill
Jessica Louise Anderson ..... Charlotte

Valerie Justine Andrade ..... Pittsboro
Richard Wyatt Andrews, II ..... Pittsburgh, PA
Danielle Carrie-Belle Appelman ..... Mobile, AL
Melissa Ann Apperson ..... Wilmington
Charles Van Dyke Archie ..... Raleigh
Sarah Jessica Arena ..... Stokesdale
Calvin Grant Armstrong ..... Landis
Kimberly Anne Arndt ..... Wilimington
Lisa Williford Arthur ..... Greensboro
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Laura Dendy Askins ..... Fuquay-Varina
Aysun Burcu Atakturk ..... Cary
Andrew David Atkins ..... Charlotte
Tara Michelle Austin ..... Hudson
Christopher Charles Avery ..... Greensboro
Kristy Michelle Avery ..... Statesville
Gwendolyn Keeter Babson ..... Winnabow
Lorelle Antoinette Babwah ..... Carrboro
Andrew Royer Bagnell ..... Natick, MA
Ryan Timothy Bakelaar ..... Durham
Elizabeth Ashley Baker ..... Huntersville
Katherine Marie Barber ..... Winston-Salem
Blake Paul Barnard ..... Raleigh
Christopher Glenn Barnes ..... Smithfield
Catherine Price Barr ..... Charlotte
Nigel Anthony Barrella ..... Washington, DC
Laura Gray Barringer ..... Charlotte
Carl Adam Barrington, III ..... Fayetteville
Raven Moira Barron ..... Hickory
Margaret Aiken Barrow ..... Raleigh
Jessica Kristin Battle ..... Henrico, VA
Rachel Carter Beard ..... Raleigh
Elizabeth Rene Beavers ..... Eden
Seth Davis Beckley ..... Clemson, SC
Blair Kristen Beddow ..... Weddington
Bradley Scott Bell ..... Midlothian, VA
Stephen Jenkins Bell ..... Winston-Salem
Greer Elizabeth Benge ..... Winston-Salem
Gary Carl Benthin ..... Charlotte
Kathryn Paige Mitchell Berntson ..... Burlington
Andrew Lee Berrier ..... Holly Springs
Michael James Berwanger ..... Winston-Salem
Taran Bree Beshers ..... Charlotte
Aaron Benjamin Biek ..... Charlotte
William Casey Biggerstaff ..... Durham
Steven Joseph Birkos ..... Durham
Katelyn Denise Bishop ..... Terre Haute, IN
Kara Nicole Bitar ..... Durham
Chanelle Aurora Blackie ..... Charlotte
Teresa Mary Blake ..... Raleigh

Camille Elizabeth Blanton ..... Charlotte
Lisa Anne Bloch ..... Ft. Lauderdale, FL
Rachel Marie Bloom ..... Durham
Sarah Covey Blount ..... Bethel
David Rufus Boaz ..... Winston-Salem
Richard Wayne Bobholz ..... Durham
Nicole Michele Boddie ..... Cary
Justin Nicholas Bolling ..... Charlotte
Dan Wilson Bolton, III ..... San Antonio, TX
Alexandra Cameron Boney ..... Wilmington
Crystal Boni ..... Durham
Thomas Edward Booms ..... Charlotte
Elise Victoria Bouchard ..... Durham
Catherine Michelle Boutaud ..... Cary
Blake Younger Boyette ..... Wilmington
Lauren Youngs Boyette ..... Wilmington
Justin Kyle Brackett ..... Mooresboro
Martha Bradley ..... Raleigh
Ryan Alexander Bradley ..... Saluda
Corry Jermaine Brannen ..... Charlotte
John David Branson ..... Charlotte
Lauren Rose Brasil ..... Cary
Daina Bray ..... Chapel Hill
Eric George Brei ..... Charlotte
Emily Drew Bretz ..... Charlotte
Noah Elliot Brisbin ..... Salisbury
Daniel Jackson Britt ..... Fayetteville
Mallory Christine Britt ..... Seven Lakes
Amy Carroll Brodland ..... Greensboro
Stuart Riedel Bromfield ..... Greensboro
Kimberly Jill Brow ..... Charlotte
Benjamin Hunter Brown ..... Winston-Salem
Kelly Jean Brown ..... Mooresville
Benjamin Hayes Brownlow ..... Greensboro
Miles Stuart McFarland Bruder ..... Raleigh
Patrick Keith Bryan ..... Asheville
Amy Tenille Buchanan ..... Durham
Orla Marie Buckley ..... Chapel Hill
Joseph Douglas Budd ..... Raleigh
Patrick Thomas Buffkin ..... Raleigh
Paul Morgan Bumbarger ..... Hickory
Elizabeth West Bunton ..... Stoughton, MA
Anna Ksor Buonya ..... Raleigh
Kimberly Marie Burke ..... Clemmons
Heather Elizabeth Burleson ..... Durham
Lyle John Burnham ..... Cary
Travis Andrew Bustamante ..... Charlotte
Whitney Jo Butcher ..... Raleigh
Nickolas Xavier Butler ..... Jacksonville
Quintin DeVon Ithiel Byrd ..... Raleigh

Edward Paul Byron ..... Charlotte
Jocelyn R. Calvin ..... Durham
Christopher James Campbell ..... Concord
Lauren Kathryn Campbell..... Raleigh
Anna Gray Carpenter ..... Charlotte
Amanda Robyn Carrano..... Matthews
Andrew Finley Carson .....Greenville, SC
Cameo Sade Carter..... Durham
George Wiman Carter, Jr..... Charlotte
Brian Nicholas Steven Caruth..... Durham
Baccuhus Holland Carver.....Lillington
Amanda Bray Cascio ..... Charlotte
Mandy Lynn Castle .....Greensboro
Anastasia Vandana Caton ..... Fuquay-Varina
Bo Brandon Caudill ..... Raleigh
Ann Meade Chace .....State Road
Matthew Scott Chambers ..... Durham
Linda Chang..... Charlotte
Sophia Anne De Meillon Chase.....Fairfax, VA
Cheryl Hui Ping Chew ..... Durham
Devin Clark Chidester..... Mount Pleasant, SC
Holly Jacquelyn Christy ..... Marble
Ashley Brooke Church..... Charlotte
Stewart Rhyne Cincotta..... Charlotte
William Tylor Claggett..... Charlotte
Ashley Donielle Clark..... Durham
Cesar Nathan Clark ..... Durham
Kim M. Clarke.....Hillsborough
John Thomas Clarkson .....Daniel Island, SC
Eva Ruth Clement.....Asheville
Carla Hermida Clements..... Charlotte
Lindsay Nora Clifton ..... Raleigh
Andrew Taylor Cline..... Mount Pleasant
Leslie Marie Cockrell ..... Charlotte
Brent Lee Cole.....Asheboro
Andrew Karis Coleman .....Greenville, SC
William E. Collier, III ..... Charlottesville, VA
Claire Louise Collins ..... Charlotte
Travis Wright Colopy..... Cary
Andrew Euta Colvin ..... Easley, SC
Everett Michael Compitello..... Deep Gap
Megan Eileen Connole .....Greensboro
Lee Collin Cooper.....Greensboro
Robert Houston Core, Jr..... Greensboro
Melissa Yong Cormier ..... Cary
Tara Maloney Corn ..... Raleigh
John Graham Corriher ..... Durham
John William Costello ..... Chapel Hill
Jeremy Allan Cotten..... Raleigh
Kate Wesley Cotten..... Raleigh

William Tyler Craft ..... Raleigh
Lauren Carol Cranford ..... Greensboro
Margaret Alison Craven ..... Raleigh
Colin Scott Crawford ..... Winston-Salem
Michael Joseph Crook ..... Cary
Timothy James Crotts ..... Raleigh
Ashley Ann Crowder ..... Charlotte
Amy Nicole Crowe ..... Mount Holly
David Ryan Crowe ..... Greensboro
Amanda Marie Cubit ..... Fort Mill, SC
Layla Cummings ..... Durham
Kelly Margolis Dagger ..... Cary
Matthew David Dameron ..... Mount Holly
Elizabeth Ruth Dangel ..... Charlotte
Taylor Anderson Daniel ..... Blanch
Michael David Danielson ..... Raleigh
Andrea Christina Davis ..... Durham
Andrea Lambeth Davis ..... Greensboro
Bailey Driver Davis ..... Raleigh
Stacie Lynne Davis ..... Shelby
Alvaro Ruben De La Calle ..... Summerfield
Heather Denise Deal ..... Wilmington
Ashley Elizabeth Dean ..... Durham
Courtney Michael Delaney ..... Charlotte
Parin Desai ..... Indian Trail
Costina Marie Detterman ..... Morrisville
Christopher Ryan Detwiler ..... Chapel Hill
Colin Patrick Dietch ..... Reidsville
Jeffrey Duane Dillman ..... Durham
Brandi Nicole DiRusso ..... Mount Airy
Christopher E. Dodge ..... Raleigh
Susan Marie Dodge ..... Randleman
Heather Nicole Dolan ..... Wilmington
Dennis William Dorsey ..... Mooresville
Thomas Gregory Doucette ..... Durham
Nicholas Joshua Dowgul ..... Raleigh
Nicole Marie Downing ..... Chapel Hill
Samuel Mark Drezdzon ..... Washington, DC
Danielle Dayne Duff ..... Hickory
James David Duncan ..... York, SC
Jamie Elizabeth Duncan ..... Fort Mill, SC
Lauren Shirocky Dungan ..... Huntersville
Thomas Andrew Dykers ..... Chapel Hill
Ashley Nicole Eatmon ..... Wilson
Chidera Rita Ejim ..... Concord
Anthony Justin Eldreth ..... Raleigh
Jonathan Ashley Ellis ..... Charlotte
Shonaka Latheisha Ellison ..... Raleigh
Marina Ruth Emory ..... Columbia, SC
Joshua Roy Engel ..... Irvine, CA

Meghan Dawson Engle ..... Charlotte
Scott Spencer Eren ..... Chapel Hill
Brodie Davis Erwin ..... Charlotte
Kelli Lorraine Espaillat ..... Matthews
Haley Karen Costello Essig ..... Raleigh
Thomas Alexander Eybl ..... Columbia, SC
Bethan Renee Eynon ..... Chapel Hill
William Joseph Farley, III ..... Belmont
Jordan Leigh Faulkner ..... Hickory
Phillip Hampton Feagan ..... Columbus
Patrice Michelle Featherstone ..... St. Petersburg, FL
Nathan Hammerberg Fey ..... Charlotte
Bryan Casey Fife ..... Inman, SC
Thomas Filopoulos ..... Durham
Patrick Doherty Finn ..... Charlotte
Macy Bass Fisher ..... Raleigh
Jacklan Maree Fitzwater ..... Davidson
James Russell Fleischer, Jr. ..... Lenoir
Tina Alecia Flowers ..... Winston-Salem
Faith Swymer Foote ..... Vass
Jordan Matthew Ford ..... Raleigh
Christopher Thomas Fowler ..... Charlotte
Joseph Zachary Frost ..... Raleigh
Joseph Walker Fulton ..... Laurinburg
Brandon Michael Furlong ..... Ballwin, MO
Adam Daniel Furr ..... Greensboro
Varsha D. Gadani ..... Raleigh
Natasha Michelle Gaggar ..... Winston-Salem
Stacey Marlise Gahagan ..... Chapel Hill
Joshua B. Gaines ..... Washington, DC
Mary Ruth Gann ..... Durham
Robert Alexander Garner, IV ..... Jamestown
Nicholas Denson Garrard ..... Jackson, MS
Kristin Leigh Gatter ..... Charlotte
Leann Alaine Gerlach ..... Raleigh
Sarah Elizabeth Gibson ..... Charlotte
Nicholas Matthew Giddings ..... Cary
Michael Gray Gillespie ..... Wilmington
Phillip Hunter Gillespie ..... Charlotte
Robert Harding Gilmore ..... Clinton
William Edward Gingher ..... Greensboro
Lee Meredith Ginter ..... Charlotte
Kaitlyn Ann Girard ..... Rockingham
Joshua William Goodman ..... Charlotte
Zachary Kowal Goodman ..... Washington, DC
Christopher Knowles Gottfried ..... Winston-Salem
James Ryan Grant ..... Raleigh
Ben Solomon Greenberg ..... Raleigh
Emily Rebekah Greene ..... Lumber Bridge
Travis Greene ..... Monroe

Jennifer Laird Gregorin ..... Fayetteville
Stephania Hinnant Griffin ..... Concord
Samantha Lynn Grill ..... Charlotte
Bruce Dean Grindstaff ..... Spruce Pine
Daniel Moises Liddle Gude ..... Charlotte
Alan William Guffy ..... Camden, SC
Ashley Elizabeth Haake ..... Charlotte
Selene Ava Haedi ..... Chapel Hill
Benjamin James Halfhill ..... Lowell
Robert Adrian Hamill ..... Raleigh
Sherri Lynn Hamlett ..... Burlington
Jonathan Robert Hankin ..... Charlotte
Amanda Katherine Hannon ..... Wilmington
Jeffrey James Hannon ..... Colorado Springs, CO
Raina S. Haque ..... Winston-Salem
Jamieson Lindley Hardee ..... Atlanta, GA
Madison Ann Hardee ..... Greensboro
John Andrew Hardin ..... Raleigh
William Scott Harkey ..... Raleigh
Emily Bridges Harp ..... Charlotte
Hilary Loch Harper ..... Durham
Robert Charles Harrawood ..... Greenville
Caitlin Merritt Harrison ..... Burlington
Joshua William Harrold ..... Atlanta GA
Kim Andrews Harsey ..... Charlotte
Robert Warren Hartley, III ..... Charlotte
Tracy Waller Hasse ..... Waldorf, MD
Albert Taylor Hayes ..... Charlotte
Daniel Coleman Hayes ..... Raleigh
Sarah J. Hayward ..... Greensboro
Anthony Richard Heary ..... Miami Beach, FL
Katherine Taylor Heath ..... Winston-Salem
Carli Grey Heath-Stanley ..... Vanceboro
Jamie Allison Heavner ..... Jamestown
Virginia Lynn Hebert ..... Hickory
Valerie Marie Hein ..... Charlotte
Kayvon Masoud Hejazi ..... Greensboro
Danyeale Leagh Hensley ..... Charlotte
David Christopher Herring ..... Raleigh
Sean Franklin Herrmann ..... Charlotte
Jamie Lowe Hester ..... Belews Creek
James Derrick Hibbard ..... Key Biscayne, FL
Kathleen Elizabeth Hicks ..... Winston-Salem
Michael Bradley Hill ..... Raleigh
Parker Russell Himes ..... Cornelius
Charles William Hinnant, III ..... Charlotte
Michael Petty Hinton ..... Murfreesboro
Lauren Nicole Hobson ..... Raleigh
Candace Ashley Hoffman ..... Raleigh
Andrew Elliot Hoke ..... Raleigh

William Randall Holcomb ..... Greensboro
Barrett Grey Holland ..... Raleigh
Antares Starr Holloway ..... Grand Falls
Michael Justin Holoman ..... Raleigh
Amber Brooke Holt ..... Charlotte
John Wallace Holton ..... Durham
Stephen McIntyre Honeycutt ..... Charlotte
Elizabeth Dean Hopkins ..... Durham
Murphy Parham Horne ..... Black Mountain
Jason Rudolph Horrell ..... Apex
Derek Hillary Hoselton ..... Charlotte
Shannon Kathleen Hough ..... Charlotte
Ashley Anne Housaman ..... Charlotte
Parisa Houshmandpour ..... Greensboro
Bridget M. Howard ..... Charlotte
Joshua Graham Howell ..... Tryon
Elizabeth Holland Hoyle ..... Winston-Salem
Chelsea Katherina Hsieh ..... Morrisville
Justin William Hudson ..... Clemmons
Martha Glenn Hudson ..... Charlotte
William Russell Hummel ..... Charlotte
Keosha Celes Hunt ..... Pembroke
James Patrick Hunter ..... Asheville
William Louis Hunter ..... Charlotte
John Henry Hunter, III ..... Durham
Donavan John Hylarides ..... Winston-Salem
Paige Elizabeth Inman ..... Wilmington
Peter David Isakoff ..... Raleigh
Elizabeth Burger Jackson ..... Spring Lake
Brooks Foster Jaffa ..... Charlotte
Steven Georege Janik ..... Cleveland, OH
Elizabeth Watson Janson ..... Charlotte
Joseph Michael Janusz ..... Charlotte
Abigail Sheldon Jeck ..... Chapel Hill
Joelle Deborah Jefcoat ..... Charlotte
Michelle Kathleen Moss Jerome ..... New Bern
Jennifer Ruth Joeckel ..... Burlington
Matthew Brantley Johnson ..... Dunn
Matthew Ryan Johnson ..... Davidson
Steven Frank Johnson, II ..... Greenville
Carrie Osborne Johnston ..... Greensboro
Isaac Andrew Johnston ..... Raleigh
Alina Marie Jolly ..... Morganton
Erika Nicole Jones ..... Grifton
Jacinta Darnae Jones ..... Bethel
Marshall Gilchrist Jones ..... Raleigh
Terri Ann Jones ..... Westminster, MD
Stuart Manly Jones, Jr. ..... Charlotte
Robert Bruce Josey, Jr. ..... Raleigh
Kevin Andrews Joyce ..... Chapel Hill

Marc Tyrik Joyner ..... Florence, SC
Charles Roy Kabugo-Musoke ..... Gastonia
Keith Edward Karlsson ..... Raleigh
Andrew Adams Kasper ..... Durham
David Thomas Kasper ..... Clemmons
Benjamin Neil Kastan ..... Raleigh
Jeb Stuart Kelly ..... Durham
William Andrew Kelly ..... Kernersville
Danielle Kathleen Kennedy ..... Charlotte
Richard Karl Kettler ..... Charlotte
Sabeen Javed Khawaja ..... Raleigh
Samuel Rea Kilgore, III ..... Raleigh
Jessica Leigh Kimble ..... Winston-Salem
Katherine Anne King ..... Winston-Salem
Rachel Lacy King ..... Durham
Stacy Alise King ..... Durham
Andrew Jay Kisz ..... Jacksonville, FL
Elizabeth Mary Klein ..... Lexington
Richard Christopher Klein ..... Chapel Hill
Anthony Alphonse Klish ..... Raleigh
Stephanie Radi Klitsch ..... Charlotte
Johanna Marie Knight ..... Johnson City, TN
Lauren Niell Knipp ..... Winston-Salem
Jeffrey Scott Koehler ..... Greensboro
James Adam Kraehenbuehl ..... Hollidaysburg, PA
Matthew Richard Kraus ..... Fuquay-Varina
Daniel Kraviec ..... Charlotte
Martin John Kreshon, III ..... Charlotte
Jonathon James Krois ..... Cary
Amanda Sloane Kuker ..... Arlington, VA
Glenn Grayson Kunkes ..... Charlotte
Hee Jin Kwak ..... Morrisville
Emily Claire Laborde ..... Raleigh
Selena Diane Lackey ..... Trinity
Clark Hardy Carpentier Lacy ..... Charlotte
Jeffrey Joseph Lakin ..... Carrboro
Christen Paige Lambert ..... Chapel Hill
Joseph Cannon Lambert ..... Winston-Salem
William Grayson Lambert ..... Charlotte
Zeno Bascum Lancaster ..... Canton
Christopher Robert Landry ..... Waxhaw
Catherine Bethea Lane ..... Summerfield
Dustin Charles Lang ..... Raleigh
Derrick Alan Lankford, Jr. ..... Charlotte
Katherine Aldrich Lautensack ..... Charlotte
Caroline Herron Lawler ..... Greenville
Brandi Lee Lawrence ..... New Bern
Bryan Charles Lawrence ..... Charlotte
Pamela Renee Lawrence ..... Wilmington
James Ruffin Lawrence, III ..... Cary

Steven James Lawson ..... Waxhaw
Matthew David Leach ..... Greensboro
Aaron Raymond Lee ..... Huntersville
Carissa Nancy Lee ..... Charlotte
Lindsay Ann Levine ..... Kinston
Laura Howell Lewis ..... Raleigh
Erin Marie Liang ..... Boston, MA
Scott Michael Libfraind ..... Raleigh
Katie Nicole Linehan ..... Carrboro
Zachary S. Linsey ..... Winston-Salem
George Grey Littlewood ..... Durham
Shiyao Liu ..... Plymouth, MN
Christina West Lizzio ..... Charlotte
Catherine Rose Lloyd ..... Pittsboro
Charles Evan Shelton Lohr ..... Raleigh
Zachary Wayne Long ..... Wilmington
Howard Winfred Long, II ..... Charlotte
Dominic Paul Longo ..... Cornelius
Erinique Longsworth ..... Charlotte
Kimberly Mantooth Lott ..... Cary
Edmund Stratton Luggen ..... Raleigh
Allison Jo Lukanich ..... Raleigh
David Hassan Macala ..... Pineville
Jillian Evelyn Mack ..... Durham
Katherine Marie Madon ..... Wilmington
Jack Richard Magee ..... Raleigh
Jeffery David Maggs ..... Winston-Salem
Shea Braden Maliszewski ..... Holly Springs
Harmony Rene Mancino ..... Raleigh
Anne Copland Maness ..... Chapel Hill
Savannah Kathryn Mangum ..... Gastonia
Robert William Manoso ..... Knoxville, TN
Kevin Matthew Marcilliat ..... Piney Creek
Zachary Brent Marquand ..... Chapel Hill
Antoine Gerell Marshall ..... Raleigh
Christina Loraine Marshall ..... Raleigh
Meghan Dimond Martie ..... Raleigh
Donald Henry Martinat, III ..... Raleigh
Jennifer Codi Mathews ..... Lexington
Catherine Lee Matoian ..... Raleigh
Jonathan Scott Matthews ..... Columbia, SC
Rosemary June Matthews ..... Rocky Mount
Carolyn Anne Mayer ..... Charlotte
Andre Timothy McDavid ..... Raleigh
Adam Leslie McBroom ..... Charlotte
Kimberly Ann McCurry ..... Shelby
Margaret Titchener McDonald ..... Raleigh
Maureen Christine McDonnell ..... Columbia, SC
Lindsey Brooke McGaha ..... Charlotte
Ashley Buehler McGough ..... Reidsville

Janet Celeste McIlwain ..... Durham
Amanda Joyce McKinney ..... Jamestown
Lora Jasmine McKinney ..... Raleigh
Christopher William McLain ..... Greensboro
Anna Katherine McLeod ..... Greensboro
John Price McNames ..... Winston-Salem
Shaunda Laurelle McNeill ..... Pasco, WA
Gabriela Marie McQuade ..... Washington DC
Charles Robert Medlin ..... Charlotte
Pavan Kumar Mehrotra ..... Chapel Hill
Meghan Colleen Melo ..... Durham
Jeremy Hunter Mendenhall ..... High Point
Leslie Anne Meyer Finley ..... Angier
Hannah Elizabeth Miller ..... Hickory
Nicholas Alvin Miller ..... Selden, NY
Santana Sade Miller ..... Leland
Lee Joseph Miller-Finkel ..... Charlotte
Miriah Danielle Millis ..... Greensboro
Brian Timothy Mills ..... Valdese
Brooke Tolman Mills ..... Valdese
Eric William Mills ..... Asheville
Eric Adams Mine ..... Durham
Tierryicah Deneen Mitchell ..... Fayetteville
David Franklin Mofford ..... Hickory
Monica Arlene Moncrieffe ..... Raleigh
Jefferson Andrew Moors ..... Chapel Hill
Benjamin Dwight Moose ..... Newton
Joseph Paul Morahan, III ..... Raleigh
Brian Scott Morgan ..... Greensboro
Amber Rose Morris ..... Waxhaw
Jill Beth Morris ..... Charlotte
William Austin Morris ..... Greenboro
Katharine Martha Morton ..... Clemson, SC
William Joseph Mossor ..... Morehead City
Ivan Henry Mousaw ..... Charlotte
Richard Evert Munday ..... Winston-Salem
Daniel Stephen Murdock ..... Raleigh
Leandra Elizabeth Murray ..... Charlotte
Evan Monroe Musselwhite ..... Raleigh
Elizabeth Joy Namirr ..... Charlotte
Todd Houston Neal ..... Southern Pines
Joshua David Neighbors ..... Raleigh
Brittany Paige Nelson ..... Charlotte
Christine Elizabeth Nelson ..... Vienna, VA
Emery Drew Nelson ..... Lexington
Lauren DeMille Nelson ..... Matthews
Timothy Graham Nelson ..... Raleigh
Erica Renee Nesmith ..... Charlotte
Richard Hampton Nettles ..... Charlotte
Patrick Donald Newman ..... Beaufort

Philip Crighton Newsom ..... Charlotte
Steven Craig Newton ..... Morrisville
Johanna Elizabeth Nichols ..... Danvers, MA
Terrell Nathaniel Nicholson ..... Nashville
Virginia Radford Niehaus ..... Chapel Hill
Joshua David Nielsen ..... Hendersonville
Joseph William Norman ..... Mooresville
George David Norris, Jr. ..... Trenton
Andrew Jonathan Norton ..... Raleigh
Zia Cromer Oatley ..... Durham
Mark William Oberlatz ..... Charlotte
Simon John O'Brien ..... Huntersville
Katherine Margaret O'Connor ..... Fanwood, NJ
Katharine Paige O'Hale ..... Smithfield
Tamara A. Okoli ..... Cary
Joseph Daniel Orenstein ..... Kernersville
James William O'Rourke ..... Chapel Hill
Michael Noah Oswald ..... Mebane
Kara Brooke Ottesen ..... Holly Springs
Jessica Clare Ouellet ..... Sanford
Stephen Robert Outten ..... Southern Shores
David James Overton ..... Raleigh
Kenneth Duane Pack, Jr. ..... Matthews
Thomas Arthur Packer ..... Larkspur CA
Jerauld Brian Pafford ..... Moyock
Jane Yumi Paksoy ..... Chapel Hill
Landon Antione Pannell ..... Morrisville
Jorge Ivan Pardo ..... Charlotte
Danielle Starling Pardue ..... Wilkesboro
Ashleigh Sierra Parker ..... Raleigh
Kelly Elizabeth Parker ..... Winston-Salem
Rebekah Antonia Parker ..... Archdale
Thomas Gerard Pasakarnis ..... Winston-Salem
Robert Allen Patchett ..... Cary
Manisha Pravinchandra Patel ..... Greensboro
Jennifer Elizabeth Paternostro ..... Charlotte
Fern Ann Paterson ..... Charlotte
Aneta Yordanova Paval ..... Apex
George Anderson Payne, Jr. ..... Clemmons
James Inman Pearce ..... Durham
Robin Brayden Pemberton ..... Davidson
Hathaway Steele Pendergrass ..... Carrboro
Ross Elliot Pendley ..... Matthews
Whitney Lundy Pennington ..... Marion, VA
Matthew John Pentz ..... Durham
Gabriel Alexander Perez ..... Wake Forest
Casey Renee Perry ..... Charlotte
Michael Brookes Peters ..... Tarboro
Jonathan Antwan Peterson ..... Raleigh
Alexander Dung Pham ..... Greensboro

Jamie Sheila Phillips..... Raleigh
Whitney Shea Phillips..... Holly Springs
Heather Harris Piercy..... Charlotte
Michael Joseph Pierrie..... Raleigh
Kavita Rani Pillai..... Eads, TN
Steven Gordon Pine..... Cary
Danielle Pinol..... Jackson, NJ
Jacqueline Marie Pires..... Morrisville
Cynthia Annette Plante..... Raleigh
Nicole Marie Pluchinsky..... Raleigh
Brittany Lynn Plundo..... Charlotte
Amanda Nicole Poe..... Raleigh
Amy Alderman Poe..... Chapel Hill
Caitlin McLaughlin Poe..... Greensboro
Kevin Christopher Poe..... Greensboro
Andrew Joseph Poltorak..... Westlake, OH
Brooks Turner Pope..... Charlotte
Barry John Porter, Jr.. ..... Durham
Jacob William Postle..... Waxhaw
Nekia Jauane Pridgen..... Greensboro
Craig Matthew Principe..... Winston-Salem
Nathan Ryan Proctor..... Greensboro
Allison Leigh Purmort..... Charlotte
James Carstarphen Purnell, V..... Charlotte
Sara Elizabeth Quick..... Winston-Salem
Steven Wilson Quick..... Raleigh
Ryan Shane Rabah..... Charlotte
Joshua Granger Rabon..... Georgetown, SC
Noorassa Aroosha Rahimzadeh..... Pfafftown
Anna Elizabeth Ralph..... Albuquerque, NM
Alfred Bradley Randall..... Mesa, AZ
Serenity Shea Rasmussen..... Greenville
Daniel George Rawlins..... Yellow Springs, OH
Lauren Nichole Raynor..... Raleigh
Heather Nicole Reading..... Cary
Clarissa Denise Rebman..... Cary
Erin Brady Rega..... Clemmons
Ashley Katherine Reger..... Matthews
Amber Renae Reinhardt..... Catawba
Christopher Michael Reintjes..... Jacksonville
Ann Ansley Revels..... Sanford
Ashlee Tara Rhoades..... Kannapolis
Kristin Ayers Rice..... Mebane
Kimberly Allen Richards..... Winston-Salem
Christopher David Richardson..... Charlotte
Leah D'Aurora Richardson..... Durham
Shayla Christine Richberg..... Durham
Cole Beyer Richins..... Matthews
Meghan Mara Rief..... Raleigh
Sonya Nisha Rikhye..... Cary

Davis Franklin Roach ..... Raleigh
David Allen Roberts ..... Charlotte
Richard Lee Robertson, Jr.. ..... Charlotte
Sharika Monique Robinson ..... Morrisville
Tara Antoinette Rodriguez ..... Fayetteville
Eric Louis Roehrig ..... Carrboro
Kathleen Carson Rose ..... Asheville
Emily Bryte Rosemann ..... Goldsboro
Phillip Clay Ross ..... Charlotte
Sarah Amanda Rothecker ..... Raleigh
Randall Davidson Rouse, Jr. ..... Arden
Robert Watterson Runyans ..... Chapel Hill
Jeffrey Robert Russell ..... Raleigh
Caitlin Elizabeth Ryan ..... Charlotte
Keri Upchurch Ryser ..... Raleigh
Brittany Mae Sajbel ..... Huntersville
Kathryn Bennett Saleeby ..... Grifton
Sara Isabel Salehi ..... Charlotte
Brad Andrew Salmon ..... Lillington
Courtney Grace Salzer ..... Wingate
Wade Banker Sample, Jr.. ..... Charlotte
Kyle Brandon Sanders ..... Fayetteville
Nicki Caroline Sanderson ..... Four Oaks
Samuel Aaron Saunders ..... Raleigh
Kevin Matthew Sayed ..... Wilmington
Katherine Jordan Schadler ..... Charlotte
Jesse Andrew Schaefer ..... Raleigh
Mathew Walker Schantz ..... Greensboro
Alexander Michael Scharyj ..... Atlanta, GA
Stephen Harris Schilling ..... Durham
Jennifer Pilcher Schneier ..... Greensboro
Margaret Susannah Scholz ..... Raleigh
Devin James Schoonmaker ..... Durham
Sarah Elias Schtakleff ..... Raleigh
Robin Alexander Seelbach ..... Hendersonville
Jonathan Daniel Seiglie ..... Durham
David Aaron Senter, Jr.. ..... Lillington
Walter Joseph Sepulvado, Jr. ..... Fayetteville
Alyssa Marie Iglesias Serpa ..... Chapel Hill
Martin Alexander Sewell ..... Raleigh
Tiffany Nicole Sexton ..... High Point
Andrew Joseph Seymour ..... Raleigh
April L. Sgro ..... Franklin
Kyle Edward Shannon ..... Raleigh
Elyssa Kathleen Sharp ..... Durham
Kristen Fehl Shearin ..... Matthews
Edward Allen Shifflette, III ..... Kernersville
Benjamin Earl Shook ..... Charlotte
Allyson Sloane Shroyer ..... Rutherfordton
Matthew Campbell Sides ..... Lake Wylie, SC

Michael Simmons ..... Charlotte
Rush Alexander Simmons ..... Huntersville
Allegra Amelia Sinclair ..... Chapel Hill
Michael Dale Smallwood ..... Raleigh
Elizabeth Jane Smart ..... Winterville
Alison Elizabeth Smith ..... Winston-Salem
Ashley Vanessa-Marie Smith ..... Olivia
Christina Phelps Smith ..... Goldsboro
Richard Christian Smith ..... Beaufort
Sarah Goodin Smith ..... Durham
Benjamin Albert Snyder ..... Manassas, VA
Jessica Ann Soles ..... Hillsborough
Rosalia Maria Sotelo ..... Willow Springs
Claudia Lorena Soto ..... Charlotte
Samantha Ellen Souza ..... Waxhaw
Lindsey Wheeler Spain ..... Chapel Hill
Marcus Aaron Spake ..... Charlotte
Benjamin Thomas Spangler ..... Raleigh
Lindsey Thomas Long Spangler ..... Raleigh
Cassidy Lynn Spencer ..... Wilkesboro
Matthew Leonard Spencer ..... Huntersville
Ryan Alan Spencer ..... Raleigh
Megan Elizabeth Spidell ..... Greensboro
Erin Nicole Spritzer ..... Durham
Joanna Woodley Spruill ..... Chapel Hill
Ryan Robert Stage ..... Charlotte
Ellen Marie Stanley ..... Charlotte
Shantia Joy Stanley ..... LaGrange
Hayes Kirkland Stanton ..... Murrells Inlet, SC
James Andrew Stanton ..... Greensboro
Hannah Davis Stetson ..... Winston-Salem
James Frederick Stevens ..... Whitsett
Andrew Harold Stevenson ..... Asheville
Kerri-Ann Melissa Stewart ..... Cameron
Morgan Eugene Stewart ..... Chapel Hill
Timothy Davidson Stewart ..... Sheridan, WY
Gary Wayne Stiltner ..... Hickory
Mary Catherine Stokes ..... Ayden
Kyla Ruth Stone ..... Robbins
Ian Robert Story ..... Charlotte
Rachel Nicole Stroup ..... Beulaville
Isaac Wade Sturgill ..... Charlotte
Amanda Michelle Styron ..... Cedar Point
Cameron David Sullivan ..... Clayton
Mary Kenyon Sullivan ..... Raleigh
Lisa Karen Swanson ..... Mebane
Laura Else Swink ..... Charlotte
Adam Nolan Tabor ..... Falls Mills, VA
Sarah Nicole Tackett ..... Cary
Marshall Lee Taft ..... Durham

Tziporah Schwartz Tapp ..... Hillsborough
Michael Clark Tarwater, Jr. ..... Charlotte
Thomas Andrew Tate ..... Cary
Kevin Michael Taylor, Jr. ..... Cary
Hailey Mulconrey Theile ..... Morrisville
Amanda Leighanne Gaddis Thesing ..... Dallas
Jeremy David Thibodaux ..... Durham
Jeremy Alexander Thomas ..... Locust
Katherine Walton Thompson ..... Asheville
Matthew Vincent Toldero ..... Winston-Salem
Elizabeth Capper Tramm ..... Asheville
Caroline Marie Trapeni ..... Winston-Salem
Christina Davidson Trimmer ..... Charlotte
Daniel Stephen Trimmer ..... Charlotte
Anthony Heath Tripp ..... Raleigh
Brittany Suzanne Tuck ..... Timberlake
Allison Elizabeth Turner ..... Charlotte
Karla Tanisha Turner ..... Charlotte
Davita Fraesca Turrentine ..... Fayetteville
Preston Wade Tyndall, II ..... Durham
Christopher Lewis Tyner ..... Chapel HIll
Chelsea Elaine Uhlman ..... Charlotte
Patryk Amechy Utulu ..... Durham
Lisa Marie Valdez ..... Hildebran
Benjamin Harris Van Steinburgh ..... Raleigh
Mark Steven Van Wieren ..... The Woodlands, TX
Hilary Rose Ventura ..... Mountain Rest, SC
Natalie Maria Vermitsky ..... Winston-Salem
Jessica Blair Vickers ..... Fuquay-Varina
Theresa Eileen Viera ..... Morrisville
Mihaela Godorozea Villarroel ..... Valparaiso, IN
Michelle Ann Vincler ..... Winston-Salem
Selen Demirpolat Vining ..... Huntersville
Nicole Cheri Vinson ..... Tampa, FL
Kanha Kim Vuong ..... Fayetteville
Juliane Lange Wagner ..... Durham
Jenna Kathryn Walley ..... Winston-Salem
Austin Ryan Walsh ..... Charlotte
Alexander Gray Walton ..... Raleigh
Amos Shraga Waranch ..... Wilkesboro
Alexander Hiram Ward ..... Cary
John Borden Ward ..... Raleigh
Shilanka Inel Ware ..... Hillsborough
Alexander William Warner ..... Charlotte
Namal Chithranga Warshakoon ..... Morrisville
Eric Kiehm Washburn ..... Virginia Beach, VA
Jason Allan Watson ..... Concord
Richard Allan Waugaman, III ..... Raleigh
William Nevins Weaver ..... Raleigh
Ann Capps Webb ..... Washington, DC

Carter Bentley Webb ..... Asheville
Taylor Catherine Webb ..... Charlotte
Holly Eilene Weisiger ..... Charlotte
Matthew Casey Weissman-Vermeulen ..... Washington, DC
Jennifer Renee Wells ..... Raleigh
Stacy Elizabeth Wells ..... Cary
David Isaacson Werner ..... Raleigh
Stuart Alan West ..... Chapel Hill
Megan Daisy Westbrook ..... Charlotte
Melissa Blake Westmoreland ..... Greensboro
Travis Lee Wherry ..... Winston-Salem
Rebecca Blake Whitaker ..... Sanford
Christopher Julian White ..... Matthews
Kelley Morris White ..... Greenville
Samuel Robert Finley White ..... Annapolis, MD
Meghan Dal Getty Whitt ..... Southern Pines
Jackson Dennis Wicker ..... Raleigh
William Reid Wildman ..... Spartanburg, SC
Chelsea Suzanne Wilkins ..... Lansing, MI
Amanda Helen Williams ..... Farmville
Benjamin Joseph Williams ..... Medford, NJ
Devon Diane Williams ..... Raleigh
Eric Mathew Williams ..... Durham
Jenna Marie Williams ..... Charlotte
John Arthur Williams ..... Charlotte
Mallory Ann Willink ..... Waxhaw
Elizabeth Lager Winters ..... Winston-Salem
Banks Franklin Woodruff ..... Washington, DC
Ashley Nicole Worrell ..... Charlotte
Kristin Marie Wouk ..... Pittsboro
Amanda Michelle Wright ..... Asheville
William Spencer Wright ..... Raleigh
Daniel Quentin Wybenga ..... Spartanburg, SC
Julie Ogden Yates ..... Raleigh
Justin Thomas Yedor ..... Durham
Rebecca Jean Yoder ..... Maiden
Brandon Jeffrey York ..... Wilkesboro
Mark Keith York ..... Greensboro
Andrew Kuon Hom Yu ..... Carrboro
Katherine Jean Zachrich ..... Chapel Hill
Nathaniel Gavin Zaleski ..... Norfolk, VA
Gabriel Edward Zeller ..... Greensboro
Angelina Patricia Zon ..... Shelby
Joy Whitney Zumbro ..... McDonough, GA

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2012 and have been issued a certificate by the Board.

Zabrina Breezeleaf Aleguire ..... Applied from the State of New York
Benjamin Howard Bash ..... Applied from the State of Texas
Gregory Smith Bentley ..... Applied from the District of Columbia
Jose Arturo Berlanga ..... Applied from the State of Texas
Matthew Justin Bonness ..... Applied from the District of Columbia
Charles Robert Burnett ..... Applied from the State of Georgia
Megan Frances Carroll ..... Applied from the State of New York
Robert Scott Christopher ..... Applied from the State of Georgia
Kimberly Evelyn Civins ..... Applied from the State of Georgia
Andrea Nicole Coffee ..... Applied from the State of Massachusetts
Christopher Caleb Connor ..... Applied from the State of Georgia
John Adam Cvejanovich ..... Applied from the State of Massachusetts
Eliab Solomon Erulkar ..... Applied from the State of California
Judith Maria Estevez ..... Applied from the State of New York
John Joseph Ferrante ..... Applied from the State of Massachusetts
John William Fisher ..... Applied from the State of Illinois
Rupen Ramesh Fofaria ..... Applied from the State of Illinois
Laura Medlin Forrest ..... Applied from the State of Georgia
Amy Wallas Fox ..... Applied from the State of Georgia
Daniel Ray Francis ..... Applied from the State of Missouri
Joshua David Franklin ..... Applied from the State of Colorado
Daniel Steven Fuchs ..... Applied from the State of Illinois
Michael Keith Gendill ..... Applied from the State of Colorado
Betty Glenn George ..... Applied from the State of Arizona
George Sidney Goodridge ..... Applied from the State of New York
Thomas Marshall Greenwood ..... Applied from the District of Columbia
Leon Carl Hagwood ..... Applied from the State of Mississippi
James Henderson Hall ..... Applied from the State of Mississippi
Stephen Andrew Haywood ..... Applied from the State of Colorado
Michael Towle Hosmer ..... Applied from the State of Georgia
Michael Richard Jung ..... Applied from the State of Massachusetts
Samantha Mary Keck ..... Applied from the District of Columbia
Valerie Maze Keeney ..... Applied from the State of Connecticut
Jin Ho Kim ..... Applied from the State of Georgia
Julia Ann Kim ..... Applied from the District of Columbia
Mary Kathryn King ..... Applied from the State of Georgia
John Thomas Kirtley, III ..... Applied from the State of Texas
Jeremy Raymond Langlois ..... Applied from the State of Tennessee
Michael Thomas Lesutis ..... Applied from the State of Georgia
Bradley Jason Lingo ..... Applied from the District of Columbia
James John Lonon ..... Applied from the State of Tennessee
Clarence Edward Matherson, Jr. ..... Applied from the State of Arizona
Robert Emmett McGrail ..... Applied from the District of Columbia
Richard Burns Megley ..... Applied from the State of Illinois
Cory Stuart Menees ..... Applied from the State of Georgia
Brian Von Meyerhoeffer, Jr.. ..... Applied from the District of Columbia

Fenita LeSai Moore ..... Applied from the State of Pennsylvania
Samuel Iredell Moss ..... Applied from the State of Georgia
John D. Ormond ..... Applied from the State of Texas
Lucas Schuyler Osborn ..... Applied from the State of Texas
Michael Earl Phillips ..... Applied from the State of Mississippi
Valerie Bennett Queen ..... Applied from the State of New York
Garry James Rhoden ..... Applied from the State of Tennessee
Thomas Frank Richardson ..... Applied from the State of Georgia
John Garland Rigney ..... Applied from the State of Georgia
Philip Wayne Romohr ..... Applied from the State of Massachusetts
Lucien Malone Roughton, Jr.. ..... Applied from the State of Illinois
Mark Stephen Royster ..... Applied from the State of Pennsylvania
Susan Antonioni Royster ..... Applied from the State of Pennsylvania
Salvatore Louis Schiappa, III ..... Applied from the State of Georgia
Andrew Ian Shaw ..... Applied from the State of Massachusetts
Brandon M. Shelton ..... Applied from the State of Indiana
Michael James Shumaker ..... Applied from the State of Georgia
Frederick Thomas Smith ..... Applied from the State of Georgia
Heather Shirley Smith ..... Applied from the State of Georgia
Gordon Oceola Stafford, Jr.. ..... Applied from the State of Texas
Edward Tracy Stark ..... Applied from the State of Mississippi
Susan Chapin Tarnower ..... Applied from the State of Georgia
Kathryn Frances Taylor ..... Applied from the State of Illinois
Richard Francis Topping, Jr. ..... Applied from the State of Massachusetts
Matthew Thomas Tulchin ..... Applied from the State of New York
Christine Gentili Vance ..... Applied from the State of Pennsylvania
Lisa Brooke Weinstein ..... Applied from the State of Illinois
Brian Gregory Welsh ..... Applied from the State of Pennsylvania
Kathie Marie Young ..... Applied from the State of Oklahoma
John Michael Zuck ..... Applied from the State of Tennessee

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2013 and have been issued a certificate by the Board.

Chris Dianne Agosto Carreiro ..... Wendell
Meeren Suresh Amin ..... Washington, DC
Ahaji Kirk Amos ..... Raleigh
Cerretta Geornell Amos ..... Durham
Jacob Thompson Arthur ..... Raleigh
Jessica Molly McKenzie Arthur ..... Wilmington
Charles Hamilton Ayres ..... Hampstead
Adam Crittenden Bach ..... Greenville, SC
Joseph Alan Baker ..... Greensboro
Ashley Louise Banks ..... Clemmons
Jaron Antwan Barbee ..... Durham
Matthew John Barton ..... Charlotte
Nicholas Edward Benjamin ..... Marshall
Brooke Alexandra Berry ..... Fort Mill, SC
Chantel Andrews Best ..... Kinston
Reta Emma Bezak ..... Greensboro
Kathy Rouse Blackburn ..... Chapel Hill
Rashad Lawbrucliff Blossom ..... Charlotte
Angelyn Marie Bohland ..... Raleigh
Peter Elijah Bosman ..... Chapel Hill
Venus Dimarlo Boston ..... Plymouth
Tia Nicole Bowman ..... Cary
Lorin Ashley Boyd ..... Columbia, SC
Jessica Marie Goldie Brahce ..... Charlotte
Willis Smith Brantley ..... Raleigh
Kyle Michael Britton ..... Charlotte
Robert Lawrence Brooks ..... Durham
Rebecca Ann Brophy ..... Raleigh
Sarah Elizabeth Brown ..... Oriental
Shelley Campen Brown ..... Durham
Christopher Todd Browning ..... Charlotte
Mary Elizabeth Bruins ..... Cornelius
Kara Marie Murphy Brunk ..... Raleigh
James Franklin Buchanan ..... Cocoa, FL
Charla Mae Burill ..... Cary
Matthew Robert Burkert ..... Durham
Jolee Marsha Calaban ..... Charlotte
Jazmin Gabrielle Caldwell ..... Charlotte
Sara Girma Campbell ..... Charlotte
Evan William Carney ..... Charlotte
Jennifer Shine Carroll ..... Cary
Virginia Snider Carter ..... Wilmington
Mallory Brady Cash ..... Morgantown, WV
Kelly Victoria Chase ..... Clayton
Elizabeth Ellen Clarke ..... Durham
Oksana Kukharets Cody ..... Cary

Anna Laura Collier ..... Raleigh
Craig Mitchell Cooley ..... Cary
John Vernon Steensen Crangle ..... Greenville, SC
Cassandra Lauren Crawford ..... High Point
Steven Frederick Critzer ..... Matthews
Chaneen Marie Cummings-Kouassi ..... Raleigh
Andrew Joseph Darcy ..... Toms River
Sarah Elizabeth Davidson-Palmer ..... Durham
Mark Thomas Davis ..... Mooresville
Timothy Andrew Davis ..... Baltimore, MD
Laura Ashley Dean ..... Mint Hill
Meredith Jillian DeCamp ..... Raleigh
Sarah Brooke Deitz ..... Raleigh
Andrew Ralph Dempster, Jr. ..... Fayetteville
Hector Esteban Diaz ..... Raleigh
Frederick D. Douglas ..... Charlotte
Ashley Marie Duncan ..... Dallas
Rebecca Anne Edwards ..... Cary
Joshua Ryan Ehrich ..... Raleigh
Annie Doris Ellison ..... Durham
Chelsie Lynne Embler ..... Asheboro
Jose Luis Estrada ..... Charlotte
Ingrid Linetta Eubanks ..... Morrisville
Jennifer Marie Evans ..... Raleigh
Jonathan Bradford Falk ..... Goldsboro
Rachel E. Faultersack ..... Chapel Hill
Casey Nichole Ferri ..... Charlotte
Chad Andrew Fights ..... Charlotte
Matthew Dominick Flammia ..... Raleigh
Aisha Oni Forte ..... Cary
Scott Andrew Frechette ..... Charlotte
Jessica Rhea Gallagher ..... Brevard
Brian Joseph Gallimore ..... Asheboro
Chelsea Brooke Glenn ..... Charlotte
Milligan Jackson Grinstead Goldsmith ..... Durham
Mason Anderson Goldsmith, Jr. ..... Greenville, SC
David Matthew Gordon ..... Charlotte
Carolyn Ashley Gore ..... Whiteville
Beth Ann Grassette ..... Bethany, CT
Julia Thomas Gravely ..... Martinsville, VA
Thomas Richard Green ..... Greensboro
Gabrielle Nicole Hall ..... Davidson
Joel Grant Hancock, Jr. ..... Harkers Island
Carissa Rene Hanson ..... Winston-Salem
William Carroll Harrison ..... Fayetteville
William Henry Harrison ..... New Orleans, LA
Lucienne Maria Hartmann ..... Macon, GA
Cindi Boswell Hastings ..... Charlotte
Kathryn Wray Hauch ..... Atlanta, GA
Matthew Allen Hawkins ..... Charlotte

James Michael John Herriott ..... Raleigh
Jennifer Lauren Hester..... Charlotte
Thomas Matthew Hogge ..... Pageland, SC
Caitlin Nobles Horne..... Charlotte
Robert Edward Ward Horner ..... Columbia, SC
Jennifer Michelle Houti..... Brooklyn, NY
Laura Renee Howard..... Raleigh
Wesley Keith Howell..... Greenville
Amelia Marie Hummel ..... Charlotte
Walter Todd Hutchinson ..... Charlotte
Jason Gassan Idilbi..... Charlotte
Caroline Elizabeth Igou ..... Charlotte
Christopher Randall Inklebarger ..... Charlotte
Lloyd George Jackson, III..... Charlotte
William Paul Jacobson ..... Matthews
William Russell Johnston..... Providence
Emily Christine Jones ..... Charlotte
Matthew Jay Kappel ..... Greenville, SC
Julie Kate Keeney ..... Waterloo, SC
Ryan Edward Kehoe..... Charlotte
Matthew Sean Kelly..... Charlotte
Joan Adele Keston ..... Wilmington
Stephanie Marie Killian..... Salisbury
Alexander Johnson King..... Charlotte
Julia Anne Kirby..... Charlotte
John Bradford Knott..... Raleigh
Brandy Elizabeth Koontz-Stockert..... Mocksville
Andrew Karl Kukorowski ..... Raleigh
Kathy LaMotte..... Asheville
Jody Scott Lanier ..... Arden
Jacob Charles Larsen ..... Whitsett
John Hamilton Lawrence..... Chattanooga, TN
Joshua Leo Lawson ..... Raleigh
Brian Allen Lemon..... Morrisville
Felicia Logan ..... Blythewood, SC
Danielle Jaqcalene Long ..... Rocky Mount
Samuel Alexander Long, Jr.. ..... Charlotte
Josue Efrain Lopez ..... High Point
Latoya Janine Love..... Charlotte
Alston Frank Ludwig..... Asheville
Kirk Robert Lundell..... Matthews
Kristen Nicole Mackintosh ..... Avon, OH
David Charles Malatesta, Jr.. ..... Tunnersville, NJ
Lee Irvin Mandell ..... Hendersonville
Elizabeth Ashley Marsh ..... Durham
David Erik Martin ..... Laveen, AZ
Johnathon Rex Marvel ..... Charlotte
Brandon Wayne Massengill ..... Raleigh
Nicholas Rafael Mayor..... Dothan, AL
Anouck Aymonne McCall ..... Arlington, VA

Amy Marie McClain ..... Raleigh
John Michael McCormick ..... Chesapeake, VA
Thomas William McGee, III ..... Columbia SC
Priscilla Romaine McKoy ..... Raleigh
Kelly Miller McLain ..... Moncure
Linda Bertling Meade ..... Asheville
Sheena Marie Meader ..... Seattle, WA
Megan Paige Medley ..... Horse Shoe
Jo Custer Melnyk ..... Washington, DC
Richard William Melnyk ..... Washington, DC
Leah Gaines Messick ..... Statesville
Jonathan Holloman Metcalf ..... Charlotte
George Benjamin Milam ..... Chapel Hill
Adam Todd Millendorf ..... Monroe
Jena Coley Minton ..... Greensboro
Megan Leslie Mitchell ..... Cheverly, MD
Sofia Nikolaevna Mochegova ..... Durham
Justin William Moore ..... Huntersville
Peter Barrett Morris ..... Charlotte
Tracy LeeAnn Moss ..... Concord
Amanda Joy Muehlhausen ..... Charlotte
Ngonidzaishe David Mufuka ..... Charlotte
Lauren Elizabeth Nelson ..... Vass
Gina Marie Nilson ..... Spring Lake
Austin Hood Olive ..... Charlotte
James Michael O'Neill ..... Cary
Ryan Jay Ostrow ..... Charlotte
Carrie Lynn Oxendine ..... Apex
Tatiana Florendia Pantels ..... Charlotte
Anna-Karina Parker ..... Gaffney, SC
Eden Patricia Pearson ..... Charlotte
Jennifer Lynn Perez ..... Durham
Katherine Julia Perretta ..... Raleigh
Matthew Zachary Phelan ..... Birmingham, AL
Jackson Michael Pitts ..... Asheville
Zachary James Plummer ..... Charlotte
Sara Kathryn Pohlman ..... Durham
Barrett Warren Price ..... Matthews
Jennifer Danae Probasco ..... Raleigh
Danielle Marie Purifoy ..... Durham
Sadia Aslam Rahman ..... Greenville
Cory L. Randolph ..... Cary
Lauren Ashley Reaves ..... Charlotte
Amanda Grace Rice ..... Midlothian, VA
Creecy Wales Silver Richardson ..... Raleigh
Crystal Monique Richardson ..... Charlotte
Mary Elizabeth Stewart Robertson ..... Raleigh
Rachel Dawsey Rogers ..... Greenville, SC
Nina Caroline Roque ..... Cary
Erin Elizabeth Russell ..... Wilmington

Mary Lynn Ryerson ..... Chapel Hill
Anne Stewart Salter ..... Virginia Beach, VA
Courtney Nelson Sanford ..... Rockville, MD
Emmagene Sansing ..... Raleigh
Suzanne Bryson Sasser ..... Greensboro
Molly Milton Schertzinger ..... Greenville
Jared Matthew Schmidt ..... Huntersville
Edward Jonathon Scibilia ..... Charlotte
Shawvinik Juwaun Seegars ..... Matthews
Lawrence Joseph Shaheen, Jr. ..... Charlotte
Shannel Robyn Sharma ..... Winston-Salem
Raymond David Shen ..... Chapel Hill
Nickolas Blake Sherrill ..... Raleigh
Peter Daniel Siddoway ..... Raleigh
Cynthia Lorene Simmons ..... Mocksville
Adinna Augur Smith ..... Barnardsville
Nathaniel Ryan Smith ..... Charlotte
Allen Robert Souza ..... Raleigh
Brittany Shaunte' Speas ..... Tobaccoville
Darren Joseph Spreen ..... Charlotte
Leslie Ann Stamper ..... Charlotte
Whitney Deanna Stanley ..... Raleigh
Ashley Elizabeth Stapleton ..... Cornelius
Robert Samuel Stitcher, II ..... Moore, SC
Crystal Renee' Sumner ..... Lasker
Martha Jean Svoboda ..... Wake Forest
Charles Carr Taylor ..... Topsail Beach
Edward Winslow Taylor ..... Winston-Salem
William Lynn Tedford ..... Attica, NY
Melissa Rochelle Thirer-Hayward ..... Raleigh
Joseph Patrick Thompson ..... Alamance
Robert Clarke Toms, IV ..... Charlotte
Otha Bernard Townsend ..... Charlotte
Crystal Annette Valdez ..... Raleigh
Robert Augustino Valentini ..... Charlotte
Lauren Elizabeth Van Rees ..... New Bern
Valeria VanTilburg ..... Apex
Karen Louise Vaughn ..... Mooresville
Andrew Mark Walsh ..... Charlotte
Madelaine Mindy Wang ..... Winston-Salem
Ashley Letitia Watlington ..... Charlotte
Carolyn Marie Watts ..... Charlotte
Lace Leilani Wayman ..... Alexandria, VA
Amy Lynn Weber ..... Miami Beach, FL
Donald Howard Wells, Jr. ..... Winston-Salem
Lauren Frances Wicker ..... Salisbury
Joseph Guy Wilkerson ..... Wilmington
Jamie Lee Williams ..... Charlotte
Reginaldo Enrique Williams, Jr. ..... Raeford
Tia Shauntelle Willis ..... Durham

Erin Kennedy Witcher ..... Raleigh
Hannah Woolf ..... Raleigh
John Larrimore Wright ..... Billings, MT
Owen Scott Zingraff ..... Charlotte

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in July 2013 and have been issued a certificate by the Board.

Deana Marie Adamson ..... Charlotte
Rory Padraic Agan ..... Enfield, NH
Ashley Anne Alexander ..... Durham
Ava Rawan Alim ..... Charlotte
Gregory Evan Allen ..... Charlotte
Robert Grant Allison ..... Raleigh
Thomas Christopher Allmond ..... Macon, GA
Timothy Lee Allsup ..... Pittsboro
Marcus Pierce Almond ..... Statesville
Michael Okabe Andersen ..... Charlotte
Chelsea Elizabeth Anderson ..... Durham
David Eric Anderson ..... Wilmington
Alyssa Virginia Andrew ..... Charlotte
Bonnie Ellen Ansley ..... Raleigh
Constance Sloan Apple ..... Pleasant Garden
Kathleen Warner Asquith ..... Chapel Hill
Shanae Romaine Auguste ..... Charlotte
Jeffrey Larkin Austin ..... Chapel Hill
Hannah Blanche Autry ..... Lexington, KY
Jonathan Christian Avery ..... Durham
Nadia Nadim Aziz ..... Clemson, SC
George Gordon Bailey, III ..... Raleigh
Kelsey Elizabeth Baird ..... Charlotte
Katharine Amanda Baker ..... Chapel Hill
Ashley Truett Banks ..... Raleigh
Stephanie Allyn Barlow ..... Raleigh
Elizabeth Lyn Barnard ..... Greensboro
James Alan Bartow, Jr. ..... Chapel Hill
Jillian Jones Baucom ..... Cary
Brandon Paul Andrell Bauduin ..... Morrisville
Chaz Michael Beasley ..... Conover
Derek Randall Belcher ..... Havelock
Thomas Christopher Bell ..... Leland
Jimmie Ike Bellamy, Jr. ..... Tabor City
Kristin Leigh Belton ..... Whitsett
Salma Benkabbou ..... Charlotte
Lincoln Grey Bennett ..... Greensboro
Jordan Arthur Benton ..... Charlotte
James Bernier, Jr. ..... Cary
Tracy Ann Berry ..... Cameron

Rita Yur'yevna Beznos ..... Durham
Amit Bhagwandass ..... Roanoke Rapids
Chelsea Michele Binder ..... Charlotte
Susanna Stepp Birdsong ..... Washington, DC
Joseph Grant Blackwell ..... Charlotte
Andrew Wharton Blair ..... Raleigh
Naiema Iman Blanchard ..... Glen Allen, VA
Amelia Fleming Blankenship ..... Charlotte
Joan Michele Blazich ..... Holly Springs
Michelle Valeri Bleda ..... Charlotte
Jonathan Matthew Bogues ..... Durham
Candace Lillie Bond ..... Durham
Brandon Kenneth Boone ..... Baltimore, MD
Martha Carmen Bordogna ..... Spartanburg, SC
Sarah Catherine Boshears ..... Mebane
Tony Sami Botros ..... Cary
Mark Edward Bowers ..... Carrboro
Michael Tennyson Bowers ..... Tega Cay, SC
Alexander Michael Bowling ..... Wake Forest
Kathryn Chrisana Ryan Bowman ..... Cary
Kevin Matthew Boxberger ..... Durham
Ryan Savage Boyce ..... Cary
Sage Ashley Boyd ..... New Market, MD
Clayton Cale Bradley ..... Charlotte
Kathleen DeLaney Bradshaw ..... Greensboro
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Trevor David Brandt ..... Wake Forest
Kathryn Ann Brausch ..... Charlotte
Kyle Hamilton Brazile ..... Durham
William Patrick Breslin ..... Delray Beach, FL
Nicole Marie Briggeman ..... Raleigh
Jesse Earl Bright ..... Raleigh
Joel Brett Fenson Bronstein ..... Chapel Hill
Andrew Crowther Brooks ..... Boone
Stuart Long Brooks ..... Greenville
Andrew David Brown ..... Raleigh
Ann Louise Brown ..... Charlotte
Brandon Scott Brown ..... Charlotte
Meghan Reece Brown ..... Sanford
Timothy Pennell Broyhill ..... Winston-Salem
Dylan Halley Bruce ..... Burlington
Etta Elizabeth Buckman ..... Raleigh
Grant Elliot Buckner ..... Greensboro
Lindsey Alexander Bullard ..... Raleigh
Brandi Brown Jones Bullock ..... Durham
Ashlee Lynn Burgess ..... Locust
Jessica Taylor Burgess ..... Raleigh
Susan Ellen Burgin ..... Greensboro
Erin Kathleen Burke ..... Raleigh
George Maurice Burnette, Jr. ..... Raleigh

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Blair Lane Byrum ..... Matthews
Thomas Watson Cadwallader ..... Durham
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Taylor Brooks Callicutt ..... Asheboro
Morgan Eileen Canady ..... Greensboro
Damian Anthony Cannon ..... Raleigh
Brittany Paige Capps ..... Wilmington
Stacey Lenora Carless ..... Raleigh
Keith William Carney ..... Raleigh
Jennings Bradford Carpenter ..... Charlotte
James Carroll ..... Fort Mill, SC
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Joseph Edward Caruth ..... Raleigh
Kenneth Ronald Casteel, Jr. ..... Charlotte
Reid Harding Cater ..... Hillsborough
Stephanie Carolyne Cavano ..... Charlotte
Matthew Phillip Ceradini ..... Raleigh
Clinton Harrison Chandler ..... Raleigh
Chelsea Michelle Chapman ..... Kings Mountain
James Robert Chapman, Jr. ..... Charolotte
Angelica Marie Chavis ..... Pembroke
Laetitia Lisane Cheltenham ..... Rolesville
Mary Bridget Chesson ..... Chapel Hill
William Franklin Childers, Jr. ..... Columbia, SC
Joseph Franklin Chilton ..... Brasstown
Yolanda Chitohwa ..... Charlotte
Grace Eun-Young Cho ..... Washington, DC
Nicholas George Christie ..... Durham
Kathleen Louise Chuchra-Zbytniuk ..... Pinebluff
Susan Christie Ciaravella ..... Asheville
Kaitlin Marie Clardy ..... Charlotte
Holden Blake Clark ..... Gastonia
George Warlick Clark, II ..... Iron Station
Louis Penn Clarke ..... Charlotte
Bonnie Jean Claxton ..... Sylva
James Patrick Clayton ..... Raleigh
Brian Timothy Clifford ..... Greensboro
Noah L. Coakley ..... Columbia, SC
Kimberly Nicole Cochran ..... Charlotte
Allison Annette Cohan ..... Raleigh
Katherine Rebecca Cohen ..... Washington, DC
Brandon Jarrett Cole ..... Charlotte
Brandon Scott Coleman ..... Washington, DC
William Livingston Coleman ..... Charlotte
Ashley Nicole Collins ..... Jacksonville, FL
Sarah Wilson Collins ..... Raleigh
Brian Keith Combs ..... Cornelius
Vivian Riner Connell ..... Chapel Hill

Ameshia Al-Esther Cooper ..... Durham
Benjamin Neal Cooper ..... Rutherfordton
Clark Christopher Cooper ..... Cary
Micah Lindsay Cooper ..... Rutherfordton
Steven Dennis Corriveau ..... Raleigh
Clay Reid Costner ..... Kings Moutain
Philip Lee Cotey ..... Alexandria, VA
Alexandra Lee Couch ..... Raleigh
Alexander Carter Covington ..... Charlotte
Tiffany Grant Cox ..... Raleigh
Baniecia Verniece Eulease Craig ..... Charlotte
Adria Rue Crannell ..... Charlotte
Ashley Nycole Craven ..... Rock Hill, SC
Robert Kader Crawford ..... Belmont
Davis Whitaker Creef ..... Winston-Salem
Christina Diane Cress ..... Raleigh
Brian Jamison Crews ..... Durham
Jennifer Ann Crissman ..... Greensboro
Melanie Renee Cronin ..... Charlotte
Jonathan Leo Crook ..... Raleigh
Carson Edward Crooms ..... Raleigh
Danelle Elizabeth Cummings ..... Cary
Rebecca Garrett Cyrus ..... Charlotte
Jack Frank Dafoe ..... Carrboro
Helen Patterson Dagenhart ..... Kernersville
Rachel Elizabeth Daly ..... Greensboro
Hans Peter Dara ..... Wake Forest
William Richardson Daughtrey, III ..... Charlotte
Harrison Alexander Davis ..... Charlotte
Megan Kyle Davis ..... Stanley
Robert Paul Davis ..... Columbia, SC
Hilary Carol Delbridge ..... Durham
Charles Joseph DelPapa ..... Raleigh
Deaven Laine DeMarco ..... Concord
Sarah Elizabeth Demarest ..... Charlotte
Aisha Japera Dennis ..... Columbia, SC
Scott D. Dennis ..... Durham
Anthony Paul DeRosa ..... Cary
Thomas Scott DeVita ..... Washington, DC
Brett Austin DeWitt ..... Gibsonville
Christopher Lee Dietzel ..... Durham
Tara Nicole DiJohn ..... Burlington
David Curry Dill ..... Greenville, SC
Darcel Sihara Dillard ..... Durham
Janison Anne Dillon ..... Thomasville
Sarah Kathryn Dixon ..... Greensboro
Rebecca Lynn Dobucki ..... Ann Arbor, MI
Daniel Jordan Dore ..... Durham
Anna Elisabeth Dowdy ..... Monroe
Wilfred Herman Drath ..... Greensboro

Jordan Marie Duhe ..... Wilmington
James Andrew Dunham ..... Raleigh
Candice Cline DuVernois ..... Charlotte
David Warren Earley ..... Astoria, NY
Margaret Ann Eason ..... Chapel HIll
Emily Rose Edwards ..... Charlotte
Katherine Michelle Edwards ..... Cary
Asa Covington Edwards, IV ..... Charlotte
Erika Lynn Eisenoff ..... Chapel Hill
Paul DeVere Elledge ..... Greensboro
Lauren Elizabeth Ellis ..... Raleigh
Elliot Matthew Engstrom ..... Charlotte
Courtney Danielle Enlow ..... Alexandria, VA
Katie Marie Ertmer ..... Durham
Roberto Jesus Espinosa ..... Charlotte
Laura Maria Esseesse ..... Melbourne, FL
Cassidy Breann Estes-Rogers ..... Charlotte
Jennifer Lynn Estleford ..... Charlotte
Melissa Catherine Evett ..... Raleigh
Yolanda Fair ..... Durham
Randall Wayne Faircloth ..... Stedman
Nicholas John Farina ..... Charlotte
Dylan Alexander Farmer ..... Chapel Hill
Ramona Farzad ..... Raleigh
Sara Fathi-Nejad ..... Durham
Jason Vincent Federmack ..... Winston-Salem
Kelsey Lynn Feeheley ..... Chapel Hill
Sacha Anne Feinman ..... Raleigh
Ashley Louise Felton ..... Raleigh
Michael Anthony Fiala ..... Fayetteville
Ashley Christin Fillippeli ..... Kinston
Johnnie Lee Finch, Jr. ..... Hertford
Jared Andrew Fink ..... Charlotte
Adam David Fisher ..... Durham
Brandon Phillip Fisher ..... Charlotte
Megan Elizabeth Fisher ..... Durham
Suzanne Kathleen Fitzgerald ..... Morrisville
Rebecca Cauley Fitzpatrick ..... Durham
James William Flaherty ..... Asheville
James Antwone Floyd ..... Wake Forest
Jordan Jeffrey Fly ..... Raleigh
Chelsea Dianne Forbes ..... Raeford
Colleen Elizabeth Forcina ..... Charlotte
John William Forneris ..... Charlotte
Katherine Mathias Foss ..... Charlotte
Kristen Faye Fowler ..... Charlotte
Charity S. Franklin ..... Virginia Beach, VA
Joseph Benjamin Franklin ..... Washington, DC
Cecilia Bernice Franks ..... Pittsboro
James Brandon Freeman ..... Asheville

Jeremy Lev Freifeld ..... Durham
Shoshana Elise Fried ..... Chapel Hill
Laura Gail Friedman ..... Gainesville, FL
Hunter Everett Fritz ..... Winston-Salem
Kyle Andrew Frost ..... Manlius, NY
Lauren Michelle Frye ..... Durham
Ashley Nicole Gallego ..... Raleigh
Sara Anne Garske ..... Cheyenne, WY
Paige Madeline Gentry ..... Washington, DC
Timothy Barrand George ..... Charlotte
Ivy Demetria Gibson ..... Washington, DC
Jennifer Diane Gilbert ..... Charlotte
Grant Allen Gildehaus ..... Charlotte
Amanda Lee Gladin-Kramer ..... Durham
Danielle Nicole Godfrey ..... Greensboro
Douglas Blake Godwin ..... Wilson
Julia Paradise Goff ..... Charlotte
Danielle Nicole Gonderinger ..... Charlotte
Karen Henderson Good ..... Charlotte
Stephanie Elizabeth Goodbar ..... Lynchburg, VA
Michael Alan Goode ..... Raleigh
Dorothy Marie Gooding ..... Kinston
Keith Harris Gordon ..... Durham
James Walker Gorsuch ..... Burlington
Martha Louise Goss ..... Salisbury
Steven Leonard Gourley ..... Richmond, VA
Deven Shavon Gray ..... Durham
Amanda Lais Gray Williams ..... Charlotte
William Bowman Green ..... Wilmington
Wesley Douglas Greenwell ..... Charlotte
Dylan W. Greenwood ..... Winston-Salem
Denaa Jade Ciara Griffin ..... Durham
Karen Anne Griffin ..... Greenville
Kevin Slate Griffin ..... Raleigh
Micha LeNee' Griffin ..... Julian
Michael Tilman Grigg ..... Mint Hill
Julie Christine Grimley ..... Raleigh
Bethany Zimmerman Groeber ..... Charlotte
Katarzyna Monika Grzechnik ..... Jacksonville
William Benjamin Guappone ..... Jacksonville, FL
Russell Reeve Guilfoile ..... Raleigh
Chris William Haaf ..... Winston-Salem
William Pierce Haar ..... Myrtle Beach, SC
Brian Christpher Habib ..... Charlotte
Mallory Elizabeth Haddon ..... Raleigh
Cecelia Marie Hagan ..... Venice, FL
John Joseph Haggerty ..... Carrboro
Andrew Richard Hand ..... Moore, SC
Ashley Michele Hansen ..... Wilmington
Stephen E. Hanthorn ..... Burke, VA

Robert Paul Harrell ..... Laurinburg
Ariel Elisa Harris ..... Clayton
Daniel Allen Harris ..... Greensboro
Darlene Elaysah Harris ..... Waxhaw
Jonathan Ernest Harris ..... Winston-Salem
Kevin Patrick Harrison ..... Winston-Salem
Kathryn Elizabeth Hatcher ..... Burlington
Jane Richardson Hauser ..... Durham
Joshua Michael Hayes ..... Tarboro
Kaitlin Elisabeth Hayes ..... Tarboro
John Benbury Haywood ..... Raleigh
Christopher John Heaney ..... Brunswick, GA
Michael Floyd Hedgepeth ..... Charlotte
Jessica Ashley Helbling ..... Charlotte
Fleet Helms ..... Morrisville
Marissa Marriott Henderson ..... Norfolk, VA
Barry Keith Henline ..... Garner
Charles Jeffrey Henry, II ..... Charlotte
Randy Hawkins Herman ..... Durham
John Heron, IV ..... Mt. Pleasant, SC
Barbara Lissette Herrera ..... Chapel Hill
Johnna Zoe Herron ..... Misenheimer
Daniel Aaron Hervig ..... Washington, DC
Christopher Nelson Hewitt ..... Greensboro
Sye Thomas Hickey ..... Charlotte
Hunter Mitchell Hickman ..... Charlotte
Charles Leslie Hicks, III ..... Raleigh
Zachary Alan Higbee ..... Charlotte
Elizabeth Anne Hill ..... Columbia, SC
Nathan Alexander Hill ..... Charlotte
Spencer Lee Hill ..... Greensboro
Adam Clay Hilton ..... Cornelius
Preston Brooks Hilton ..... Leland
Adam Tyler Hinson ..... Raleigh
Daniel Ross Hinson ..... Greenville
Charles Henry Hiser, IV ..... Greensboro
Katherine Allison Hite ..... Charlotte
Amanda Powell Hodierne ..... Greensboro
Catherine Claire Hoffmann ..... Lexington
Catherine Adele Hofmann ..... Raleigh
Brian Patrick Hogan ..... Oakland, CA
John Boyd Hoke ..... Charlotte
Eddie Murillo Holder ..... Winston-Salem
Zachary S. Holeve ..... Charlotte
Brett Christopher Holladay ..... Charlotte
Kristi Michelle Hollar ..... Oak Ridge
Tiffany Kay Holloman ..... Chapel Hill
Evan Michael Holst ..... Greensboro
Larry Bryan Holt ..... Greenville
Tyrel James Hooker ..... Chapel Hill

Lillian Angela Hornes ..... Durham
Jere'l D'Vonn Hough ..... Indian Trail
Matthew Thomas Houston ..... Winston-Salem
Shawna Elaine Howard ..... Charlotte
Elizabeth Elaine Howe ..... Cornelius
Arthur Lincoln Howson, III ..... Greenville, SC
Eimon Thet Htun ..... Chapel Hill
Randel Scott Hudson ..... Rock Hill, SC
Brandon James Huffman ..... Safety Harbor, FL
Benjamin Scott Hunter ..... Warrenton
David Alexander Johns Hunter ..... Durham
Jessica Painter Huskey ..... Jacksonville
Amber Dawn Hutcherson ..... Gretna, VA
Michael Hennessy Hutson ..... Charlotte
William Vince Hyatt ..... Candler
Melissa Mary Hyland ..... Huntersville
Ihuoma Igboanugo ..... Raleigh
Zachary Mark Illig ..... Asheboro
Kevin David Israel ..... Durham
Kelvin Jacobs ..... Parkton
Lindsey Danielle Jacobs ..... Charlotte
Kathryn Barge Jagoda ..... Raleigh
Jeffrey Edward James ..... Chapel Hill
Laurie Lynn Janus ..... Wilmington
Bradley Peter Jarvis ..... Randleman
Nathan Joseph Jarvis ..... Charlotte
John Scott Jenkins ..... Gastonia
Meagan Elizabeth Jennette ..... Goldsboro
Marissa Kristine Jensen ..... Raleigh
Rachel Kelsey Umstead Jernigan ..... Chapel Hill
Mickey Lee Jett ..... Charlotte
Leo John ..... Raleigh
Aaron Thomas Johnson ..... Durham
Barrett Thomas Johnson ..... Raleigh
Frederick Peter Johnson ..... Raleigh
Shaquana Andrea Johnson ..... Raleigh
Lee Best Johnson, Jr. ..... Fayetteville
Alexander Wayne Jones ..... Reidsville
Andrew Richard Jones ..... Wilmington
Andrew Sean Jones ..... Jefferson
Derek Alan Jones ..... Drexel
Jowanda Enid-Cerue Jones ..... Holly Springs
LaKisha S. Jones ..... Charlotte
Zephyr Jost ..... Asheville
Vanja Jusufhodzic ..... Charlotte
Ryan James Kaat ..... Kernersville
Frances Mary Kammeraad ..... Charlotte
Ross Kelley ..... Charlotte
Aryn Jayne Kelly ..... Charlotte
Dionne Maria Kelly ..... Winterville

Graciela Raquel Kelly ..... Franklin
Thomas Aquinas Kelly, Jr. ..... Franklin
Zachary Samuel Kelton ..... Winston-Salem
Catherine Terrell Williamson Kennedy ..... New Bern
James Kennedy ..... Winston-Salem
Kristen Michelle Kennedy ..... Clayton
Adam Gates Kerr ..... Greensboro
Hillary Margaret Kies ..... Concord
Christopher M. Kieser ..... Greensboro
Sarah Lowry Kihneman ..... Hickory
Minar Kim ..... Charlotte
Katherine Margaret King ..... Raleigh
William Todd King ..... Winston-Salem
Christopher Gordon Klingman ..... Youngsville
Kori Marie Klustaitis ..... Durham
Jacquelyn Doris Knapp ..... Shawnee, KS
Lea H. Ko ..... Leesville, SC
Gerald Thomas Koinis ..... Oxford
Jessica Diane Kondziola ..... Southern Pines
Henry Kopf ..... Cary
Aleksandra Elzbieta Kozlowska ..... Chapel Hill
Barbara Louise Krause ..... Boone
Halley Jane Kueffer ..... Chapel Hill
Philip Ryan Kuhn ..... Charlotte
Jay Kyler ..... Winston-Salem
Sarah Angela Kyriakedes ..... Canton, OH
Joseph Patrick Laizure ..... Durham
Ashish Gansham Lakhiani ..... Fayetteville
Craig Alan LaMontagne ..... Winston-Salem
Adam Samuel Lapidas ..... Burlington ,MA
Tomasi Leshuan Larry ..... Durham
Mackenzie Jane Lawson ..... Charlotte
Benjamin Philip Leader ..... Rock Hill SC
Anton Mikhailovich Lebedev ..... Chapel Hill
Nathaniel Tyler Lemons ..... Belmont
Randall Clair Lenhart, Jr. ..... Norfolk, VA
Sabrina Octavia-Ann Leshore ..... Charlotte
William Thompson Leslie ..... Charlotte
Alyssa Michelle Levine ..... Waxhaw
Michael Jason Levine ..... Chattanooga, TN
Brian Elton Lewis ..... Sanford
Gwendolyn Williams Lewis ..... Greensboro
Stephen John Liadis ..... Charlotte
Elizabeth Paige Ligon ..... Wendell
Patrick Shuler Lineberry ..... Durham
Brent Steven Liner ..... Wheeling, WV
Scott Matthew Lippert ..... Durham
Herman Moore Little ..... Raleigh
Brian James Litwak ..... Kingston, NH
Meghan Elizabeth Lock ..... Garner

Daniel Locklear ..... Lumberton
Lewis Matthew Tramel Lohr ..... Raleigh
Harry Lorello ..... Goldsboro
Davis Wayne Love ..... Spartanburg, SC
Bryce R. Lowder ..... Raleigh
Emily Forrest Lowder ..... Charlotte
Mignon Arrington Lunsford ..... Birmingham, AL
Marc Daniel Macenko ..... Durham
Steven Patrick MacGilvray ..... Greenville
Adam James Mallon ..... Apex
Ian Andrew Mae ..... Durham
Debra Black Manduley ..... Raleigh
Shahram John Mangouri ..... Davidson
Brendan Patrick Manning ..... Charlotte
Alexandra Danielle Manno ..... Mooresville
Matthew David Mariani ..... Raleigh
Courtney Sloane Marlowe ..... Taylorsville
Collier Robinson Marsh ..... Cary
Christopher Dene Marshall ..... Charlotte
Charles Keith Marshall, Jr. ..... Charlotte
Kimberly Marie Marston ..... McLeansville
Jon Lee Martin ..... Cleveland
Joshua David Martin ..... Oakland Park, FL
Farris Martini ..... Durham
Stephanie Nicole Mason ..... Charlotte
Jonathan William Massell ..... Greensboro
Simon John McPherson Massie ..... Charlotte
Madeline Irene Masters ..... Raleigh
Reginald Maurice Mathis ..... Winston-Salem
Andrea Elaine Matt ..... Raleigh
Kathryn Elizabeth Maultsby ..... Greensboro
Emily Muriel May ..... Charlotte
David Seth Maya ..... Charlotte
Margaret Ann McCall ..... Winston-Salem
Roger Anthony McCalman ..... Charlotte
Kendra Lynne McCardle ..... Arden
David Michael McCleary ..... Charlotte
Ellen Rose McDaniel ..... Greenwood, SC
Robert James McDowell ..... Asheville
Frances Monet McDuffie ..... Laurinburg
Susan Christina McGill ..... Charlotte
Dustin James McIntee ..... Asheville
Deborah Ruth McKain ..... Raleigh
Douglas Edward McKay ..... Charlotte
Ashley Marie McKenna ..... Belmont
William Crum McKinney ..... Greenville, SC
Candace McRavin McKnight ..... Raleigh
Carol H. McLean ..... Garner
Elizabeth Foye McLean ..... Morrisville
Carrie Virginia McMillan ..... Raleigh

Timothy William Mearns ..... Greensboro
Jessica Amanda Medlock ..... Raleigh
Matthew Carl Meinig ..... Knightdale
Scott Allen Mello ..... Clayton
Jessica Elizabeth Mendez ..... Raleigh
Melodie Marie Menzer ..... Gainesville, FL
Morgan Leigh Messick ..... Burlington
Tabitha Lee Messick ..... Durham
Jennifer Meeks Mickle ..... Greensboro
Justine Camille Mikaloff ..... Raleigh
Nick John Miller ..... Matthews
William Christopher Miller ..... Charlotte
Michael Dinesh Miranda ..... Winston-Salem
Mujtaba Aziz Mohammed ..... Charlotte
Kristyn Grace Monaghan ..... Durham
Melissa Renee Monroe ..... Gastonia
Theresa Ann Monteleone ..... Holly Springs
Kassandra McHale Moore ..... Irmo, SC
Jeffrey Ryan Moreland ..... Durham
Jeffrey Keiran Morgan ..... Washington, DC
Tiffany Paige Morgan ..... Raleigh
Ian William Morris ..... Charlotte
Ryan Alexander Morrison ..... Charlotte
Me'Chel Nicol Morrow ..... Raleigh
Amanda Marie Moss ..... Rockingham
Megean Collins Moyer ..... Marshville
Abbey Lynn Mrkus ..... Charlotte
Dana Rachael Mullen ..... Columbia, SC
Stephanie Anne Murad ..... Greenville
Meryl Mayor Murtagh ..... Wilmington
Roman Petrovich Mykulyanets ..... Mooresville
Pikiswa Joan Doris Ndebele ..... Charlotte
Whitney Chioma Nebolisa ..... Fayetteville
Shawn Patrick Nee ..... Columbus, OH
Katherine Leigh-Hill Needham ..... Huntersville
Elizabeth Ann Nemes ..... Cuyahoga Falls, OH
Andrew Michael Newman ..... Greensboro
Elizabeth Anne Newman ..... Asheville
Mark William Newman ..... Charlotte
Michelle Caroline Newman ..... Mooresville
Anne Hope Newton ..... Concord
Peter Carl Nordberg ..... Durham
Lee Elizabeth Norelli ..... Charlotte
Robert Bryan Norris, Jr. ..... Charlotte
Gabriela Manero Nostro ..... Sneads Ferry
Zachary Thomas Oakes ..... Mount Holly
John Michael O'Beirne ..... Raleigh
Lindsey Ogden ..... Raleigh
Nkechinyere Nnenna Olu ..... Raleigh
Michael Joseph Onufer ..... Leland

Jenna Marie Onusko ..... Raleigh
Nicole Mary Orr ..... Apex
Sarah Diane Ort ..... Asheville
Nicholas Joseph Ortolano, III ..... Durham
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Zachary Alexander Padget ..... Raleigh
Lorin Gabriel Page ..... Hendersonville
Panagiotis Antonio Papadopoulos ..... Arlington, VA
Shuchi Parikh ..... Washington, DC
Brittany Leighann Parish ..... Wilmington
Adam Chase Parker ..... Chapel Hill
Kelly Anne Parkison ..... Charlotte
Damon Rashad Parrish ..... Raleigh
Robert Johnson Parrott, Jr. ..... Raleigh
Amish Ashwinkumar Patel ..... Morrisville
Sahaj Rohit Patel ..... Charlotte
Ashley Decell Payne ..... Durham
Shannon Michelle Pearce ..... Lexington
Agata Anna Pelka ..... Raleigh
Johnathan Chance Pennington ..... Charlotte
Michele Lee Pennington ..... Apex
Victoria Morgan Peterson ..... Burnsville
John Donnell Petree ..... Winston-Salem
Heather Lynn Petrovich ..... Pittsburgh, PA
David Cole Phelps ..... Creswell
Adam Joshua Seth Phillips ..... Chapel Hill
Andrew Douglas Phillips ..... Charlotte
Kristopher George Phillips ..... Charlotte
Barbara Phillips-Bute ..... Durham
Allen Wayne Pierce ..... Charlotte
Whitney DeMain Pierce ..... Greensboro
Rachel Ann Pignatiello ..... Waxhaw
Brittany Katherine Pinkham ..... Gilford, NH
Ashley Marie Pinner ..... Willow Spring
Margaret Jane Pishko ..... Raleigh
Sara Harrington Player ..... Columbia, SC
Virginia Scales Pleasants ..... Winston-Salem
Andrea Chiz Plyler ..... Chapel Hill
Leesa Michelle Poag ..... Raleigh
Daniel Keith Porter ..... Durham
Jeffrey Loren Poulsen ..... Charlotte
Philip Michael Powell ..... Oxford
Tommi Elizabeth Powell ..... Cary
David Burke Powers ..... Kitty Hawk
Anastasia M. Prendergast ..... Black Mountain
John Daniel Price ..... Charlotte
Marisa Therese Price ..... Raleigh
Rebecca Jane Price ..... Sanford
Jacob Darriel Pryor ..... Anderson, SC
Nicole Antonietta Puleio ..... Matthews

Devone Daquon Punter ..... Wake Forest
Tyler Cullen Radtke ..... Durham
Bennett Davidson Rainey ..... Davidson
Kenzie Marie Rakes ..... Raleigh
Rachelle Ramirez ..... Durham
Neil Alexander Rankin ..... Greensboro
Bryan Wesley Ray ..... Burlington
Nithin Busa Reddy ..... Raleigh
Samantha Claire Reichle ..... Durham
Aaron Kameron Reinhardt ..... Charlotte
Peter Morrison Reinsel ..... Charlotte
Jamie Nicole Richardson ..... Wilmington
Andrew William Rinehart ..... Winston-Salem
Mary Frances Ritten ..... Goldsboro
Kernisha LaSaint Padilla Rivera ..... Charlotte
David William Roadcap ..... Mebane
Daniel Ray Roberts ..... Cary
Erin Lee Roberts ..... Charlotte
Anneke Dalton Robinson ..... Rocky Mount
Wilbur Harold Robinson, III ..... Durham
David Francis Roche ..... Millington, MD
Andrew Leigh Rodenbough ..... Greensboro
Courtney Collins Rogers ..... Charlotte
Juan Carlos Rojas ..... Raleigh
William Timothy Rose ..... Fort Myers, FL
Lauren Emily Slifkin Rosen ..... Chapel Hill
Tiffany Nicholle Ross ..... Raeford
Melody Brooke Rowell ..... Chapel Hill
Joseph Samuel Ruffino ..... Woodbridge, VA
David Scott Rugani ..... Charlotte
Brian Everett Russ ..... Charlotte
Samantha Raylene Russ ..... Fayetteville
Nicholas Charles Russell ..... Charlotte
Jessica Archer Sammons ..... Raleigh
Michael Pierce Sandwith ..... Raleigh
Sarah Anna Santos ..... Charlottesville, VA
Rachel Elizabeth Sasser ..... La Grange
Benton Grey Sawrey ..... Smithfield
Shimon Diaz Sayed ..... Charlotte
Shiann Rose Schmidt ..... Fayetteville
Kevin Gerald Schroeder ..... Raleigh
Robert Livingston Schupp ..... Raleigh
Jessica Lillian Scism ..... Sanford
Elyse Katheen Scofield ..... Lynchburg, VA
Steven Andrew Scoggan ..... Durham
William MacKay Scott ..... Pittsboro
Jeffrey Jermaine Sellers ..... Iron Station
Jason Colin Senges ..... Rockingham
Kristin Thompson Seum ..... Arlington, VA
William Peter Shanahan, III ..... Cape Carteret

Michael Cameron Shearman ..... Charlotte
Leah Marie Shellberg ..... Winston-Salem
Wesley Ryan Shelley ..... Cary
Amanda Michelle Sherrod Serina ..... Sims
Kaitlin Ashley Shimansky ..... Greensboro
David Willis Shineman, II ..... York, SC
Andrew Robert Shores ..... Durham
Carl Meredith Short, III ..... Raleigh
Daniel Kohle Siegel ..... Carrboro
Hila Silverstein ..... Apex
Jennifer Susan Silvius ..... Charlotte
Mark Joseph Simmons ..... Charlotte
Angel Lee Simpson ..... Raleigh
Jonathan Tyler Sink ..... Raleigh
Drew R. Slabaugh ..... Huntersville
Katherine Alice Slager ..... Raleigh
Laura Nicole Sloan ..... Chapel Hill
James Daniel Small ..... Wake Forest
Emma Jean Smiley ..... Rockingham
Blake Alan Smith ..... Charlotte
David Andrew Smith ..... Greensboro
Kelly Kathryn Smith ..... Greensboro
Megan Ashley Smith ..... Jackson, MI
Michelle Diane Smith ..... Kannapolis
Parker Elizabeth Smith ..... Hendersonville
William Jeffrey Smithers ..... Belmont
Christopher James Smyly ..... Hendersonville
Jake Andrew Snider ..... Greensboro
Tiffany Andrea Solberg ..... Charlotte
Alexis Ione Solheim ..... Raleigh
Anatoliy Valeryavich Solodyankin ..... Mint-Hill
Nicholas Arthur Southwell ..... Charlottesville, VA
Joseph Vincent Spagnola ..... Chapel Hill
Jason Edward Spain ..... Henderson
Margaret Grace Sparger ..... Asheville
Meghan Rebekah Spears ..... Raleigh
Katie Ann Spidalieri ..... Solon, OH
Asher Paris Spiller ..... Durham
Nicholas Adam Spivey ..... Greensboro
Telfair Elizabeth Stakias ..... Greensboro
Neal Weller Stanifer ..... Charlotte
Jamie Nicole Stankewicz ..... Arlington, VA
Julie Nicole Stanton ..... Burlington
Eric Jason Starr ..... Charlotte
Natasha Ranae Staton ..... Monroe
Janet Elisabeth Steddum ..... Raleigh
Michelle Ann Stinnett ..... Vass
Corey Freeman Stokes ..... Charlotte
Sarah Elizabeth Street ..... Indian Trail
Candace Nichole Strickland ..... Charlotte

Gabriel Jonathan Stultz ..... Venice, FL
Stephen Wade Vaughn Styons ..... Holly Springs
Scott Suhoza ..... Atlanta, GA
William George Sullivan ..... Asheville
Tory Ian Summey ..... Charlotte
Jonathan Martin Sumrell ..... Richmond, VA
Bradley Sexton Surles ..... Charlotte
Cassandra Ann Swartz-Dixon ..... Charlotte
Daniel William Sweeney, III ..... Havre de Grace, MD
Anna Lee Sweigart ..... Winston-Salem
Anna Marguerite Szamosi ..... Raleigh
Dharmi Bhupendra Tailor ..... Morrisville
Simon Demetri Teleshuk ..... Graham
Jordan Douglas Temple ..... Charlotte
Ryan Francis Tennant ..... Mt. Pleasant, SC
Jessica Beauvais Thaller ..... Raleigh
Elizabeth Angel Thames ..... Charlotte
Brooklin Leigh Thebeau ..... Charlotte
Michelle Elizabeth Theret ..... Raleigh
Aubree Christina Thomas ..... Stokesdale
Jason Anthony Thomas ..... Shelby
Rachelle Harley Thompson ..... Cary
Lawrence Edward Tickle ..... Zebulon
Lien Kieu Thi To ..... Raleigh
Catherine Nicole Toler ..... Asheville
Nicolas Evan Tosco ..... Charlotte
Eboni Monique' Townsend ..... Charlotte
Randall Scott Trebat, Jr. ..... Raeford
Matthew Ryan Triplett ..... Winston-Salem
Jessica Kearns Trone ..... Charlotte
Andrew Daniel Tucker ..... Pleasant Garden
Brandon Lee Bronson Turner ..... Charlotte
Casey Lee Turner ..... Cary
Jennifer Michelle Turner ..... Candler
Tiffany Sue Tyler ..... Asheville
Leslie Katherine Underwood ..... Four Oaks
Maria Elizabeth Usher ..... Charlotte
Mark Jennings Vaders ..... Winston-Salem
Tamara Mary Van Pala ..... Garner
William Brittian Van Trigt ..... Raleigh
David Scott Van Vliet ..... Charlotte
Scarlett Maria VanStory ..... Raleigh
Christopher Bryan Venters ..... Newport
Ashton Elizabeth Vetas ..... Charlotte
Jennifer Marie Villarino ..... Greensboro
Lauren Ashley Vineyard ..... Raleigh
Kathleen Lynne Vogel ..... Statesville
Robert Cameron Waddell ..... North Wilkesboro
Sarah Ann Waldron ..... Cornelius
Ian Michael Walker ..... Kernersville

Mary Skyler Walker ..... Lexington, KY
Michelle Lynne Wallace ..... Charlotte
Robert Daniel Wallace ..... Charlotte
Margaret Louise Walters ..... Wilmington
Joshua Tyler Walthall ..... Wake Forest
Vinston Devon Walton ..... Cary
William Dexter Walton ..... Cary
Jacob David Ward ..... Lake Waccamaw
Nathan Sawyer Warfel ..... Hope Mills
George Anthony Wayne, II ..... Raleigh
Matthew Bennett Weaver ..... Rock Hill, SC
Jason Richard Weber ..... Winston-Salem
Robert Jackson Webster ..... Elon
Andrew J. Weiner ..... Asheboro
Ashley Elizabeth Wellman ..... Columbia, SC
Allan Richard Wenck ..... Cary
Maren Tallent Werts ..... Cornelius
Kristin Whalen ..... Charlotte
Britney Jarnae Whitaker ..... Temple Hills, MD
Adam Lee White ..... Greensboro
Patrick Thomas White ..... Charleston, WV
Davis Arjuna Whitfield-Cargile ..... Beaufort, SC
Jeffrey Ryan Whitley ..... Durham
Justin Paul Wier ..... Cary
Matthew Steven Wigton ..... Winston-Salem
Matthew Ian Wilcut ..... Greensboro
Nicole Rachelle Wiley ..... Sanford
Daniel Thomas Wilkes ..... Chattanooga
David Isaac Williams ..... Raleigh
Nikia Janay Williams ..... Durham
Olivia Alexandra Williams ..... Morganton
Rebecca Marie Williams ..... Garner
Judson Nye Williamson ..... Chapel Hill
Erica Michelle Willis ..... Charlotte
Huntington MacCallum Willis ..... Raleigh
Lindsay Woodard Willis ..... Raleigh
Gregory Wilson ..... Havertown, PA
Jonathan Gray Wilson ..... Durham
Nathan Thomas Schaal Wilson ..... Chapel Hill
Sarah Beth Withers ..... Greenville
Jenifer Rose Wolfe ..... Carrboro
Christopher Trent Womble ..... Cary
Caroline Kell Wray ..... Winston-Salem
Christopher Fitzgerald Wrenn, Jr. ..... Louisburg
Brandon Ryan Wright ..... Raleigh
Steven Bruce Wright ..... Wilmington
Wendy Porscha Wright ..... Charlotte
Kristin Lynn Yahnke ..... Holly Ridge
Rebecca Yimei Yang ..... Morganton
Mitchell Etheldred Yelverton ..... Raleigh

Paul Anthony Yokabitus..... Raleigh
Jonathan Clark York..... Kingsport, TN
Christopher Charles Ziegler..... Charlotte
Katherine Julia Zimmerman.....Astoria, NY
Caitlynne Elizabeth Zolzer..... Mooresville

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2013 and have been issued a certificate by the Board.

Bernard Mitchell Alter ..... Applied from the State of New York
Kevin George Anderson .....Applied from the State of Maine
Estella Abena Gyasiwa Antwi .....Applied from the State of Georgia
Rana Minwer Badwan .....Applied from the State of Illinois
Mark Robert Batkin ..... Applied from the District of Columbia
Geoffrey Kres Beach ..... Applied from the District of Columbia
Jonathan Marvin Bell ..... Applied from the State of Texas
Kristin Comer Belyew .....Applied from the State of Illinois
Carolee Berasi .....Applied from the State of Georgia
Randall Harold Borkus .....Applied from the State of Illinois
Amy Mikolajczyk Callow ..... Applied from the State of New York
Robert Aaron Caplen ..... Applied from the District of Columbia
Robert Payne Cave, Jr. ..... Applied from the State of Tennessee
Miles Robert Chatain ..... Applied from the State of New York
Richard Jay Cohen ..... Applied from the State of New York
Mary Ellen Coleman ..... Applied from the State of Tennessee
Mary Kathryn Davis .....Applied from the State of Georgia
Angele Nicollette Frazier Dixon ..... Applied from the State of New York
Michael Louis Dunn ..... Applied from the State of New York
Anthony Bradley Eben .....Applied from the State of Illinois
Stephanie Lynne Elliott ..... Applied from the State of New York
Judy Culhane Faubert ..... Applied from the District of Columbia
Charles Edward Feuss ..... Applied from the State of Minnesota
Betsey Ann Flack .....Applied from the State of Georgia
Rebecca Lynn Fox ..... Applied from the State of New York
Jennifer Leigh Marler Frank .....Applied from the State of Georgia
Seth Michael Friedman .....Applied from the State of Georgia
Lauren Ann Gill ..... Applied from the State of New York
Mary Elizabeth Gill .....Applied from the State of Illinois
Kerry Lee Glasoe-Grant ..... Applied from the State of Washington
Theodore Nicholas Goanos .....Applied from the State of Illinois
Christopher Michael Gorman ..... Applied from the State of Colorado
Stacy Smith Gray .....Applied from the State of Georgia
Desa Onika Calder Greene ..... Applied from the State of New York
Joseph D. Hammond ..... Applied from the State of New York
Patrick Preston Hansen ..... Applied from the District of Columbia
Dawn A. Hanzlik-Hexemer ..... Applied from the State of New York
Thomas Foster Haselden ..... Applied from the District of Columbia

Richard Andrew Hutchinson..... Applied from the State of Tennessee
Eric Lloyd Iverson ..... Applied from the State of New York
Georgianna Jardine ..... Applied from the District of Columbia
Jeffrey Norman Jensen .....Applied from the State of Wisconsin
Bradley Todd Kamlet..... Applied from the District of Columbia
Jack Alan Kaplan ..... Applied from the State of Kansas
Peter Graham Koback ..... Applied from the District of Columbia
Laura Elise Krabill ..... Applied from the State of Pennsylvania
Jessica Frank Lang ..... Applied from the District of Columbia
Michael Emory Large ..... Applied from the State of Tennessee
Nathan Pierre Jose Lebioda ..... Applied from the State of New York
John Kerrington Lewis..... Applied from the State of Pennsylvania
Philip Keith Lichtman.....Applied from the State of Georgia
Jessica Lee Lipson ..... Applied from the State of New York
Barbara Anne Lubin ..... Applied from the State of New York
Jessica Lynn Macari..... Applied from the State of New York
David Ross MacKusick.....Applied from the State of Georgia
Regina Mary Mahoney..... Applied from the State of New York
Jennifer Lustig McBee..... Applied from the State of Nevada
Garfield Garrison McClure ..... Applied from the State of New York
Melinda Sue McCorkle ..... Applied from the State of Colorado
Brian Donald McKay .....Applied from the State of Illinois
Thomas Leslie McMasters ..... Applied from the State of Minnesota
Michelle Lynn McMullen-Tack .....Applied from the State of Illinois
Charles Sanders McNew..... Applied from the State of New York
Patrick Michael Megaro..... Applied from the State of New York
Rachel Ann Miles .....Applied from the State of Georgia
Mariam Parisa Mokri..... Applied from the State of Minnesota
Matthew Donald Montaigne .....Applied from the State of Georgia
Kelly Frances Moser..... Applied from the State of Washington
Robert Allen Mullins.....Applied from the State of Georgia
Pamela Krambuhl Nelson .....Applied from the State of Illinois
Tina Lorraine Nicholson ..... Applied from the State of Texas
David Matthew Noonan ..... Applied from the State of Missouri
Allison M. O'Horo ..... Applied from the State of Pennsylvania
Charles Gregory Ragsdale .....Applied from the State of Georgia
Greg Allan Ribreau ..... Applied from the State of New York
Valerie Pearsall Roberts..... Applied from the State of New York
Aaron James Rogers.....Applied from the State of Iowa
Danny Ray Scott, Jr. ..... Applied from the State of Texas
Neely Manoj Shah.....Applied from the State of Massachusetts
Dean Patrick Smith..... Applied from the State of New York
Neil Barnes Snead..... Applied from the State of Mississippi
Holly R. Stevens.....Applied from the State of Illinois
Rachel Lewis Taicher ..... Applied from the State of Pennsylvania
Elizabeth Teira ..... Applied from the State of New York
Marla Tun.....Applied from the State of Illinois
John Thomas Tyler .....Applied from the State of Georgia
Alisa Mahree Van Cott..... Applied from the District of Columbia
Michael Cornell Wallace, Sr. ..... Applied from the District of Columbia

LICENSED ATTORNEYS

Anne Carlson Warren ..... Applied from the State of Missouri
Glenn R. Weiser..... Applied from the State of Pennsylvania
Rebecca Lee Wiggs ..... Applied from the State of Mississippi
Sara Cadwallader Willingham ..... Applied from the State of Tennessee
Justin Arthur Wood.....Applied from the State of Georgia
Kevin Harris Zolot..... Applied from the State of New York

LICENSED ATTORNEYS

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2014 and have been issued a certificate by the Board.

Amanda Suzanne Abbott ..... Henderson
Matthew Adams Abee ..... Columbia, SC
Charles Christopher Adkins ..... Huntersville
Autumn Rose Agans ..... Linden
David Michael Ahlers ..... Hickory
Jabeen Saeed Ahmad ..... Cary
Megan Marie Albaugh ..... Fayetteville
Kaushal Ashokkumar Amin ..... Raleigh
Adam Edward Anderson ..... Moravian Falls
Laura Kaiser Anderson ..... Charlotte
Robert Matthew Anderson ..... Charlotte
Tiffany Angela Marie Anderson ..... Charlotte
William Thaddeus Anderson ..... Raleigh
Robert Jackson Andrews ..... Washington, DC
Brett Michael Anthony ..... Clayton
Eric Milton Applefield ..... Charlotte
Brandon Dale Ashburn ..... Charlotte
Jane Hoffman Atmatzidis ..... Durham
Patrick Joseph Austin ..... Virginia Beach, VA
Allison Elaine Avent ..... Greensboro
Laura Elizabeth Azarelo ..... Garner
Lauren Elizabeth Bailey ..... Charlotte
Jonathan Cameron Bain ..... Kinston
Jillian Winston Ballard ..... Black Mountain
Erica Anita Barker ..... Bloomingdale, NJ
Lani Michelle Barnes ..... Mooresville
Matthew Warren Barnes ..... Raleigh
Brittany A Barrient ..... New York, NY
Edward McKinley Bartholomew ..... Louisburg
Buki Fatima Baruwa ..... Charlotte
Jackson Columbus Bebber ..... Arden
Matthew Jordan Beck ..... Willow Spring
Cristina Maria Becker Ellis ..... Charlotte
Jeramick Lakelly Bell ..... Greensboro
Christine Linda Bergman ..... Greensboro
Emilia Irene Beskind ..... Durham
Patrick Lee Blair ..... Oak Ridge
Russell P. Blaise ..... Charlotte
Fernando Antonio Bleichner ..... Charlotte
Erin Christina Blondel ..... Durham
Jocelyn Bolton-Wilson ..... Durham
Ashley Nicole Bonomini ..... Charlotte
Gary James Bowers ..... Lexington
Hilary Homenko Bowman ..... Chapel Hill
James Fain Brandhorst, III ..... Wilmington
Anna Catherine Bright ..... Charlotte

Anna Jane Brinkley ..... Raleigh
Kevin L. Brockenbrough ..... Raleigh
Brittany Kierra Brown ..... Raleigh
Susan Kasek Brown ..... Greensboro
Chad M. Buckingham ..... Charlotte
Kathryn Grainger Buckner ..... Greensboro
Charlotte Belan Buell ..... Charlotte
Kate Lauren Bullock ..... Lumberton
Tyler Lynne Burgess ..... Alexandria, VA
Sarah Katherine Burris ..... Charlotte
Hayne Beatrous Caliva ..... Fort Bragg
Brian Allen Calub ..... Charlotte
Darren Monic Caputo ..... St. Petersburg, FL
Melissa Gurney Cassell ..... Rock Hill, SC
Eric Daniel Chapman ..... Blacksburg, VA
Melanie Wells Clayton ..... Raleigh
Sean Michael Clayton ..... Charlotte
Daniel John Colaizzi ..... Charlotte
Edward Bates Cole ..... Jacksonville, FL
Bethany Amanda Corbin ..... Mooresville
Robert Cyril Cratch ..... Greensboro
James Atherton Craven ..... Winston-Salem
Benjamin Michael Crissman ..... Greensboro
Thadeus Barnabus Culley ..... Hillsborough
Jessica Ketchem Culver ..... Greensboro
Benjamin Nelson Dangerfield ..... Greenville, SC
Andrea Vera Daniel-Canegata ..... Raleigh
Michelle Davila ..... Jacksonville
Rohit Deedwania ..... Raleigh
Michael David Dennis ..... Raleigh
Buck Denton ..... Richmond, VA
James Thomas Devine ..... Cherryville
Evan DeWandler ..... Asheville
Aurora L. Diaz ..... Durham
Stephen Charles Dimpsey ..... Raleigh
Kathy E. Dixon ..... Statesville
Zenobia Sulayman Isha Drammeh ..... Aurora, CO
Paul Moore Dubbeling ..... Hillsbrough
Laura Beach Dugan ..... Charlotte
Karen Lee Ann Dula ..... Charlotte
Dara Diana Duncan ..... Charlotte
Sally Elizabeth Duncan ..... Greensboro
Jordan Tyler Dupuis ..... Huntersville
Lindsey Ann Easterling ..... Charlotte
David Easwaran ..... Charlotte
Howard Jamaal Edwards ..... Shelby
Rebecca Dorothy Clippinger Eng ..... Asheboro
Dwight Austin Ensley ..... Greensboro
Jennifer Anne Errington ..... Charlotte
Evan Alexander Erwin ..... Jacksonville

Jacqueline Valdes Erwin ..... Jacksonville
Jesse Matty Eshkol ..... Charlotte
Tabitha Ann Etheridge ..... Whiteville
Meisha Shantay Evans ..... Chapel Hill
Elizabeth Page Everett ..... Baton Rouge, LA
Jared Richard Fawley ..... Charlotte
Amanda Caroline Feder ..... Greensboro
John Scott Feder ..... Greensboro
Andrew Steven Felts ..... Winston-Salem
Willie Ray Fennell ..... Greensboro
Nicholas Adam Fernez ..... Wilmington
Michael Patrick Fischer ..... Concord
Courtney Miranda Flowers ..... Raleigh
Josheda Lou Forrester ..... Raleigh
David Branch Fox ..... Wilmington
Alexander Comly French ..... Charlotte
Marilyn LaTanya Fuller ..... Gibsonville
Alexia Linnetta Furlow ..... Raleigh
Charles Parson Gaylor ..... Goldsboro
Charles Sidney Gibson, III ..... Charlotte
Eleanor Bickford Perry Gilbert ..... Raleigh
Dustin Michael Gill ..... Hillsborough
Robert Samuel Gilligan ..... Waynesville
William Miller Gilmore ..... Raleigh
Carolyn Giordano ..... Charlotte
Christian Kaunas Glista ..... Charlotte
Brian Nelson Godfrey ..... Whispering Pines
Scott Bailey Graber ..... Arlington, VA
Marisa Nicole Grant ..... Raleigh
Natalie Elizabeth Gray ..... Asheville
Elisa Nicole Greenwood ..... Asheville
Shauna Alyse Guyton ..... Apex
Brandy Leigh Hagler ..... Charlotte
Hellina Yirga Hailu ..... Morrisville
Issa Addae Hall ..... Charlotte
Heather Michelle Hammond ..... Chapel Hill
Jacob Witt Harper ..... Wake Forest
Taylor Hastings ..... Chapel Hill
Ryan David Hatley ..... Badin
Stephen Thomas Hegedus ..... Mount Holly
Jessica Brickell Helms ..... Raleigh
Ryan James Henry ..... Charlotte
Benjamin David Hicks ..... Charlotte
Katherine Corley Hill ..... Waynesboro, GA
Susan Kathleen Hill ..... Kure Beach
Marvin Gilbert Hobson ..... Pfafftown
Deborah Leigh Finch Holtzman ..... Henderson
Lauren Ashley Hoogland ..... Charlotte
Michael Seth Horowitz ..... Winston-Salem
Lisa Marie Steets Hostetler ..... Columbia, SC

Malvina Jadwiga Hryniewicz ..... Arlington, VA
Anthony Louis Huber ..... Huntersville
David Abraham Hudson ..... Asheboro
Erika Michelle Hunter ..... Greensboro
Alissa Dorrell Hussey ..... Plantation, FL
Jennifer Renee Imediegwu ..... Clayton
Elizabeth Jeanne Ireland ..... Charlotte
Elisa Lynn Jarrin ..... Spartanburg, SC
Helena LeeAnn Jedziniak ..... Greenville, SC
Clayton Allen Jipping ..... Greensboro
Chloe Forkner Johnson ..... Raleigh
Joan Capodice Johnson ..... Wilmington
Kelly Cordell Johnson ..... Charlotte
Klaus Ryan Johnson ..... Durham
Krystal Sade Johnson ..... Concord
Levi R. Johnson ..... Durham
Nicole Leigh Johnson ..... Charlotte
Joseph Saunders Johnston ..... Fallston, MD
Brittany L. Jones ..... Noblesville, IN
Jonathan Christopher Jones ..... Charlotte
Porschia L. Jones-Clarke ..... Charlotte
Elizabeth Crawford Josephs ..... Durham
Suphian Kalokoh ..... Waxhaw
Gideon Aaron Kaplan ..... Raleigh
Anna Leah Kegley ..... Gastonia
Rachel Coleman Kellam ..... Charlotte
Robert Edward Keller ..... Charlotte
Jeffrey Masaaki Kelly ..... Raleigh
Caitlin Leigh Kenny ..... Charlotte
Ashley Anne Kevitt ..... Brevard
Chavi Satya Khanna ..... Raleigh
Vernon Rio Kidd ..... Charlotte
Joshua James Kinard ..... Durham
Charles Howard King ..... Charlotte
Ryan Kristian Konrady ..... Charlotte
Rachel Virginia Langlois ..... Apex
Joshua Adam Lanier ..... Raleigh
Katlyn Lee Lantz ..... Greensboro
Kelly Nicole Lantz ..... Winston-Salem
Javan Anthony Lapp ..... Fletcher
Daniel Brian Larson ..... Charlotte
George Vernon Laughrun ..... Charlotte
Brian Thomas Lawler ..... Greenville, SC
Christopher Harrison Lee ..... Wilmington, DE
Kyu-Eun Lee ..... Cary
Mary Hee Eun Lee ..... Cary
Charles Edward Lifford, Jr. ..... Gastonia
Rebecca Anne Lindensmith ..... Charlotte
Shannon Lee Lockamy ..... Charlotte
Charity D'Layne Loftis ..... Timberlake

Jenna R. Long ..... Chapel Hill
Jonathan Edward Lovejoy ..... Raleigh
Eric Nicholas Maddox ..... Deland, FL
Christian Hans Mahn ..... Gastonia
Steven Arthur Mange ..... Raleigh
Joel Winston Mann ..... Charlotte
John Paul Manzo ..... Pinehurst
Nichele Lynette Marks ..... Charlotte
Jennifer Nicole Marshall ..... Sneads Ferry
David Justin Mason ..... Raleigh
Victoria Skippar Mathias ..... Charlotte
James Christopher Matthews ..... Dalton, GA
Laurel Cole Maynard ..... Charlotte
Tyler Daniel Mays ..... Matthews
Tyrone Rudolph McClean ..... Ayden
Colin Andrew McCormick ..... Arden
Jacob McDonald ..... Weaverville
Andrew Scott McDuffy ..... Hendersonville
Megan Paige McGee ..... Charlotte
Catherine Anne McKee ..... Chapel Hill
Spenser Elizabeth McNeill ..... Rockingham
Dawn Lee Mitchell ..... Clemmons
Matthew Rocco Mollozzi ..... Charlotte
Brandon Adam Montgomery ..... Charlotte
Martin Ekim Moore ..... Cockeysville, MD
Tracy Demetrica Moore ..... Goldsboro
Stephanie Michelle Moser ..... Jacksonville
Curtina Camille NeSmith ..... Charlotte
Joseph Albert Nett ..... Chapel Hill
Paolo Malachi Newman ..... Charlotte
Russell Scott Newton ..... Charlotte
Eric Reed Noble ..... Charlotte
Colin Patrick O'Dawe ..... Virginia Beach, VA
Lauren Elizabeth Offord ..... Raleigh
Ilona Ori ..... Durham
Chelsea Pauline Overs ..... Charlotte
John Steven Pegg ..... Raleigh
Douglas Eugene Penner ..... Virginia Beach, VA
Andrew Darrell Penny ..... Wilmington
Adam Peoples ..... Asheville
Seth Ryan Percy ..... Cary
Melanie Cassandra Phillips ..... Raleigh
Jason Andrew Pikler ..... Greensboro
Frederick Davis Poisson, III ..... Wadesboro
Shaun A. Pollenz ..... Raleigh
Andrew Ryan Price ..... Charlotte
Alexis Carlice Pugh ..... Charlotte
Courtney Blake Purser ..... Charlotte
Joseph Philip Putnam-Evans ..... Chapel Hill
Justin Dewindt Ramey ..... Charlotte

Derrick S. Raphael ..... Spring Lake
Daniel Michael Reach ..... Charlotte
Emily Elizabeth Reardon ..... Durham
Eleanor Marcotte Redhage ..... Tarboro
Logan Ellen Reilly ..... Burgaw
Ryan Skinner Renfrow ..... Harkers Island
Anna Elizabeth Pate Richardson ..... Morganton
Janie Renae Richardson ..... St. Clairsville, OH
David Michael Rief ..... Trenton
Ashley Rose Riggleman ..... Raleigh
Thomas Olyn Robbins ..... Raleigh
Nancy Lee Roberts ..... Columbia, SC
Brandon Alexander Robinson ..... Durham
Carlo L. Rodes ..... Charlotte
Andrew James Rogers ..... Morrisville
Lauren Kay Roland ..... Fayetteville
Courtney Tara Roller ..... High Point
Jennifer Butler Routh ..... Columbia, SC
Evan Russell Rowe ..... Chapel Hill
Nathan Selvin Rubenson ..... Los Angeles, CA
Katryna Bevis Salisbury ..... Fountain Inn, SC
Jonathan E. Schulz ..... Charlotte
Katherine Marie Scott ..... Washington, DC
Michael David Scott ..... Charlotte
Neal Jay Sharkey ..... Stallings
Grayson Mead Shephard ..... Charlotte
David Bruce Sherman ..... Charlotte
Nolan P. Shutler ..... Chapel Hill
Amanda C. Sidora ..... Charlotte
Peter William Simon ..... Statesville
Larry Gene Simonds ..... Gastonia
Ashley Martina Brown Singleton ..... El Paso, TX
Brent Benjamin Smith ..... Asheville
Holly Christine Smith ..... Hamlet
Shepard Renn Smith ..... Wilson
Bradford Lee Sneeden ..... Raleigh
James Kelly Somers ..... Oak Island
Allison Ann Somuk ..... Swansboro
Jeremy Scott Spears ..... Durham
Deyaska Scenteria Spencer ..... Columbia, SC
Eric Straub Spengler ..... Charlotte
Tanja Franziska Springsteen ..... Raleigh
Matthew Hydrick Stabler ..... Columbia, SC
James David Stacy ..... Charlotte
Michelle Lynn Stalnaker ..... Charlotte
William Taylor Stanley ..... Columbia, SC
Kathy Sherita Stewart ..... Atlanta, GA
Nancy Van Zile Stewart ..... Greensboro
Christian Edward Stoffan ..... North Muskegon, MI
Treze Justin Stokes ..... Charlotte

Jacob Richard Stump ..... Orlando, FL
John William Sulau ..... Greenville, SC
Stacy Hwang Swinney ..... Chapel Hill
Albert Kent Tatum ..... Durham
Brenna Michelle Taylor ..... Charlotte
Julieanne Dorn Taylor ..... Charlotte
Don R. Terry ..... Simpsonville, SC
Lindsey Ann Thomas ..... Charlotte
Ward Benjamin Thompson ..... Charlotte
Daniel Christopher Toton ..... Raleigh
Kathryn Whisenhunt Townsend ..... Greenville
Son Thai Tran ..... Charlotte
Tracy D. Turner ..... Raleigh
Matthew Brady Tynan ..... Chapel Hill
Brian Wendell Tyson ..... Charlotte
Chris van Heerden ..... Charlotte
Karen Vasko ..... Charlotte
Tearra Jerie Vaughn ..... Swansea, IL
Jose David Vega ..... Charlotte
Lakai Cheryll Vinson ..... Richmond, VA
Jonathan Michael Vollinger ..... Austin, TX
Anastase Andre Vonsiatsky ..... Charlotte
Kathryn J. Walker ..... Arlington
Katie Allison Walsh ..... Charlotte
Michael Bates Walsh ..... Charlotte
Cleat Walters ..... Charlotte
Matthew Thomas Wareham ..... Raleigh
Andrew Thad Warren ..... Wilkesboro
Nastasia Watkins ..... Mebane
Daniel Kevin Watson ..... Winston-Salem
Elizabeth Lauren Watson ..... Cary
Jack Wiley Westall, III ..... Asheville
Willie Joseph White ..... Clemmons
Robert Douglas Whitney ..... Chapel Hill
Gunnar Robert Wieboldt ..... Chapel Hill
Nickeyea Wilkinson ..... Suffolk, VA
Gregory Reynald Williams ..... Raleigh
Jenna Marie Williams ..... Edenton
Leigh Anne Williams ..... Charlotte
Benjamin Napier Williamson, IV ..... Raleigh
Shannon Rebecca Leigh Williamson ..... Hillsborough
Mark Anthony Wilson ..... Hickory
Michael Glenn Wilson ..... Hickory
Charles Norman Wittmack ..... Charlotte
Daniel Robert Wohlberg ..... Huntersville
Landis Leroy Wood ..... Charlotte
Lawrence D. Wooden ..... Charlotte
Richard Daren Yan ..... Naples, FL
Achim Zahren ..... Huntersville
Victoria Lynne Zwickel ..... Raleigh

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in July 2014 and have been issued a certificate by the Board.

Benjamin Holland Able ..... Atlanta. GA
Dean Joseph Achterman ..... Wake Forest
Laura Eleanor Ackerman ..... Durham
Daniel Peter Adducci ..... Raleigh
Atolani Sylvester Akinkuotu ..... Winston-Salem
Jennifer Jo Aldrich ..... Little Mountain, SC
Amber Michele Donta Allen ..... Raleigh
Chad Trevor Anderson ..... Hendersonville
Kristin Clarice Andrews ..... Durham
Patrick Ryan Anstead ..... Fayetteville
Shannon Marie Arata ..... Durham
Michael Anthony Arena ..... Clayton, MO
Ryan MacKenzie Arens ..... Jamestown
Cindy Emilia Arevalo ..... Durham
Jessica Gale Armentrout ..... Thomasville
Robert Charles Armstrong ..... Cary
Seth Matthew Ascher ..... Balsam Grove
Emery Denny Ashley. Jr. ..... Smithfield
Christian Ross Ayers ..... Charlotte
Erica Lynn Backus ..... Charlotte
Philip Sean Baetjer ..... Charlotte
Brittany DeAnn Bailey ..... Durham
James Freeman Bailey ..... Advance
John Austin Baker ..... Indian Land, SC
Sherifatu Bassir Bangura ..... Durham
Adam Patterson Banks ..... Raleigh
Holly Sanders Bannerman ..... Wake Forest
Anna Kathleen Barefoot ..... Concord
Christopher Clayton Barnes ..... Rocky Mount
Neil Marion Barnes ..... Pittsboro
Sarah Elizabeth Barnes ..... Raleigh
Milton D. Barnette ..... Farmville
Lacey Joanna Beam ..... Kings Mountain
Emily Jeanette Beeson ..... Greensboro
Jonathan Mark Beigle ..... Lynhburg, VA
Traci Y. Belk ..... Rock Hill. SC
David Ryan Bell ..... Durham
Cameron Bentley Scott Belton ..... Charlotte
Daniel Bruce Blackburn ..... Purlear
Alexis Kelly Berkowitz Blackford ..... Cornelius
Erin Bernay Blackwell ..... Owings Mills. MD
William Horton Blake ..... Durham
Kyle Martin Blodgett ..... Greenville
Jamie Lea Blundell ..... Asheville
Brittany P. Boatman ..... Greensboro
Jennifer Anne Bobowski ..... Winston-Salem

Abbey Kristine Boggs ..... New York, NY
Chelsey Jeffers Boggs ..... Chapin, SC
Lauren Elizabeth Bohdan ..... Port Murray, NJ
Robert William Boneau ..... Wilmington
Linda Elise Boss ..... Charlotte
Yallana Onesia Boston-McGee ..... Durham
Kate Lynn Bostrom ..... Charleston, SC
Natalia Maria Botella ..... Charlotte
Thomas J. Bouchette ..... Murrells Inlet, SC
Charles Scott Bowen ..... Charlotte
Walter Lee Bowers, Jr. ..... Harrisburg
Elizabeth Maureen Bowling ..... Charlotte
Sarah Elizabeth Bowman ..... Fletcher
Douglas DeWitt Boyette ..... Raleigh
David Vincent Brennan ..... Charlotte
Molly Erin Duffy Brewer ..... Raleigh
Erin Michelle Briley ..... Durham
Joseph Tyler Britton ..... Zebulon
Jack Thomas Brock ..... Winterville
Nicholas Scott Brod ..... Jacksonville
Ross Joseph Bromberger ..... Apex
Megan Elizabeth Brothers ..... Currituck
Andrew Miles Brower ..... Staley
Alexander Erwin Brown ..... Charlotte
Anitra Kathleen Brown ..... Raleigh
Anthony Todd Brown, Jr. ..... Charlotte
Maria Joy Brown ..... Durham
Mary Claire Brown ..... Charlotte
Samantha Lee Brown ..... Charlotte
Thomas Kenneth Brown ..... Olney, MD
Catherine Ellen Bruce ..... Chapel Hill
Zoe Amelia Bruck ..... New Orleans, LA
Maria Elizabeth Bruner ..... Greenville
Alexandria Necole Bryant ..... Raleigh
Thailer A. Buari ..... Winston-Salem
Elizabeth Carroll Buckley ..... Durham
Matthew Earl Buckner ..... Durham
Seth Richard Bullard ..... Charlotte
John Michael Bunge ..... Charlotte
Carl Jeffress Burchette ..... Chapel Hill
Robert Keith Burrow ..... Charlotte
Benjamin Thomas Buskirk ..... Raleigh
Amanda Marie Buyrn ..... Raleigh
Alex Grant Cabe ..... Waynesville
Jourdan Marie Cabe ..... Durham
Amanda Catherine Cairns ..... Raleigh
Tyler Alan Caldwell ..... Dallas, TX
Ashley Murchison Cameron ..... Mount Holly
Colin Andrew Campbell ..... Montgomery, AL
Douglas Raymond Campen ..... Rockingham

Eric Meade Cannon ..... Chapel Hill
Bryan Lewis Cantley ..... Raleigh
Brendan Alexander Cappiello ..... Charlotte
Draper J. Carlile ..... Charlotte
Rachel Kelly Carlson ..... Fletcher
Brett Austin Carpenter ..... Raleigh
Anthony Thomas Carreri ..... Charlotte
Isabel Wysor Carson ..... Asheville
Kelly Nelson Carson ..... Arlington, VA
Benjamin Denton Carter ..... Rocky Mount
Courtney Lynn Carter ..... Charlotte
Evan Coleman Carter ..... Charlotte
Sydney Rae Carter ..... Wilson
Candace Cain Casey ..... Winston-Salem
Alicia Marie Cassis ..... Clarksburg, MD
Avery Devin Catlin ..... Charlottesville, VA
Galo Virgilio Centenera ..... Virginia Beach, VA
Andrew Jason Chamberlain ..... Charlotte
Katherine Theresa Chanas ..... Winston-Salem
Eleanor Marie Chandler ..... Raleigh
Roby Chatterji ..... Raleigh
Andrew Brooks Cheek ..... Charlotte
Richard Blake Cheek ..... North Wilkesboro
Marcus Anthony Ronald Childress ..... Alexandria, VA
Allan L. Chua ..... Charlotte
Michelle Leigh Church ..... Clayton
Travis David Cianciulli ..... Raleigh
Sarah Noelle Cibik ..... Raleigh
Corey Ross Clapper ..... Raleigh
Kinna Nicole Clark ..... Durham
Rebecca Fackler Clarkson ..... Charlotte
Catherine Gray Clodfelter ..... Charlotte
Anna Jordan Cobb ..... Chapel Hill
Jessika Barnett Coe ..... Apex
Diane Patricia Collopy ..... Cary
Sarah Hill Colwell ..... Chapel Hill
Mariamarta Tye Conrad ..... Coats
Justin David Cook ..... Arlington. VA
Scott Mckee Cook ..... Greensboro
Thomas Perrin Cooke ..... Washington, DC
Haley Ann Cooper ..... Salemburg
Sarah Anne Core ..... Four Oaks
Katherine Hope Corpening ..... Wilmington
Brittni Nicole Cortright ..... Charlotte
Guy E. Cousins ..... Charlotte
Erin Sloan Cowan ..... Greensboro
Ron L. Cowart ..... Hayesville
Taylor Hampton Crabtree ..... Chattanooga, TN
Elspeth Gray Crawford ..... Charlotte
Jasmine Alexis Crawford ..... Elizabeth City

Margaret Hester Cromer ..... Durham
James David Crowder ..... Graham
Emma Fox Cullen ..... Raleigh
Vanessa Marie Curtis ..... Smithfield
Caitlin Basile Cutchin ..... Washington, DC
Melissa Rene Dahl ..... Charlotte
Molly Augusta Daniel-Springs ..... Charlotte
Kenneth Brian Dantinne ..... Kannapolis
Meredith Elizabeth Darlington ..... Durham
Debolina Das ..... Raleigh
Hannah Michal Davies ..... Rutherfordton
Brittany Elizabeth Davis ..... Raleigh
Charles Eugene Davis ..... Durham
Jacob Anton Davis ..... Raleigh
Kayla Leann Davis ..... Fayetteville
Tyrone Anthony Davis, II ..... Winston-Salem
Valyce Madonna Davis ..... Chapel Hill
Roy Arnold Dawson ..... Newport
James Tucker Deal ..... Boone
Tiyesha N. DeCosta ..... Charlotte
Stephen Simpson DeGrow ..... Winston-Salem
Kristen Lee DelForge ..... Raleigh
Lauren Anne Demanovich ..... Zebulon
Jeremy Randall Demmitt ..... Greensboro
Caroline Brittany Denning ..... Durham
David Holt Denninger ..... Winston-Salem
Christina M. Dennis ..... Greenville
Kevin Louis Denny ..... Summerfield
Lee Dillon Denton ..... Winston-Salem
Jonathan Allen deShetler ..... Charlotte
Tasneem Amin Dharamsi ..... Virginia Beach, VA
Joanna Lee Dick ..... New Middletown, OH
William Bonner Yeats Dickey ..... Fayetteville
Daniel Joseph DiMaria ..... Fayetteville
Jonathan Scott Dixon ..... Greenville
Monica Handa Dongre ..... Huntersville
John James Dougherty ..... Durham
George Walker Douglas, Jr. ..... Winston-Salem
James Clayton Douglas ..... Raleigh
Katherine Marie Dowell ..... Raleigh
William Parker Dozier ..... Raleigh
Christopher Eric Draughn ..... Charlotte
Megan Elise Driggers ..... Alexandria, VA
Daniel Patrick Driscoll ..... Charlotte
Margaret Brooks Duke ..... Raleigh
Ross David Duncklee ..... Cary
Chad Michael Dunn ..... Franklinton
Stephen Michael Dunn ..... Clayton
Julian W. DuRant ..... Myrtle Beach, SC
John Michael Durnovich ..... Charlotte

Esther Tabitha Earbin ..... Carrboro
Rebecca Dixon Eden ..... Raleigh
Eric Patrick Edgerton ..... Asheville
Whitney Rae Edmondson ..... Newton
Blaine Ashby Edwards ..... Charlotte
Christopher Scott Edwards ..... Clarkton
Valonne Givens Ehrhardt ..... Sneads Ferry
Marshall H. Ellis ..... Raleigh
Naomi Louise Ellis ..... Raleigh
Belal Elrahal ..... Eden
John Nile Emmrich ..... Charlotte
Lindsey Elizabeth Engels ..... Charlotte
Kolby Kenneth Epley ..... Winston-Salem
Andrew Davis Evans ..... Raleigh
John Richard Evans ..... Greensboro
Jonathan James Evans ..... Durham
Adam Michael Everett ..... Raleigh
Ryan Clifford Fairchild ..... Wilmington
Olivia Fitzgerald Fajen ..... Greensboro
Stephanie Kien Faris ..... Pittsboro
Jason Daniel Farley ..... Raleigh
Chance Michael Farr ..... Fort Mill, SC
Shane Von Farr ..... Glen Alpine
Sarah Barnes Farris ..... Raleigh
Michael Stanley Fausnight ..... Cary
Elizabeth Jane Feagans ..... Charlotte
Piper Rachelle Ferguson ..... Kill Devil Hills
Rebecca Allison Fiss ..... Matthews
Kevin Michael Flanigan ..... Pittsburgh, PA
Jennifer Lynn Fleet ..... Charlotte
Walter Andrew Fletcher ..... Durham
Rebecca Ord Fortune ..... Chapel Hill
Anita May Foss ..... Charlotte
Templin Moore Frame ..... Cornelius
Victoria Channing Franklin ..... Sanford
Clayton Gill Frazier ..... Raleigh
Catherine Short Frederick ..... Morrisville
Breanna Shaleise Freeman ..... Raleigh
Megan Rorie Frers ..... Charlotte
Ama S. Frimpong ..... Winston-Salem
Michael Robert Frongello ..... Apex
Lindsey Suzanne Frye ..... Charlotte
Lev Dmitriyevich Gabrilovich ..... Chapel Hill
Sean Patrick Gannaway ..... Winston-Salem
Tyler Raymond Ganzel ..... Seneca, SC
Lucas David Garber ..... Charlotte
Rebekah Pritchett Garcia ..... Wilmington
Jennifer Kathryn Garey ..... Apex
Amber Lyn Garland ..... Charlotte
Stuart Kingsland Gaylord-Scott ..... Durham

Charles Anton George ..... Aiken, SC
Indranil Ghosh ..... Durham
Tiffany LeAnn Gidley ..... Raleigh
Gael Gilles ..... Fort Mill, SC
Janessa Sara Goldstein ..... Wilmington
James Frederick Goodwin ..... Winston-Salem
Robert Mitchell Goolsby ..... Raleigh
Michael Norris Gossett ..... Griffin, GA
Michael Philip Goudreault ..... Mooresville
Charlene Marie Gourlay ..... Charlotte
Kathryn Lillian Graham ..... Durham
Carla Mae Gray ..... Chapel Hill
Lauren-Kelly Devine Greenbacker ..... Washington, DC
Laura Katherine Greene ..... Wilmington
Jonathan Lee Greer ..... Denver
Caroline Cowan Gregory ..... Fayetteville
Jordan Marie Griffin ..... Monroe
Bryan Howard Grossman ..... Raleigh
Eva Glenn Gullick ..... Raleigh
Robert Curtis Gunst ..... Marvin
Nina Gupta ..... Fayetteville
Kathryn Elizabeth Guyette ..... Charlotte
Harper Story Gwatney ..... Raleigh
Michael Roger Haigler ..... Charlotte
Adam Lain Hall ..... King
Destin Chase Hall ..... Charlotte
Joshua Edward Hall ..... Hope Mills
Amberley Gibbs Hammer ..... Currituck
Craig Gardner Harasimowicz ..... Charlotte
Andrew Dunaway Hargrove ..... Raleigh
Lauren Averill Harkey ..... Charlotte
James Ray Harrell ..... Winston-Salem
Nathan Graham Harrill ..... Greensboro
Elaine Marie Hartman ..... Raleigh
Phillip Michael Hausman ..... Raleigh
Hailey Erin Hawkins ..... Charlotte
Megan Alicia Hawn ..... Maiden
Nicole Katherine Haynes ..... Charlotte
Joel Newman Heimbach ..... Raleigh
Robert Charles Henderson ..... Winston-Salem
Timothy Arthur Henderson ..... Raleigh
Christopher Morgan Hensley ..... Cary
Clifford Ray Herndon ..... Rockingham
Kathryn Pierce Herndon ..... Kings Mountain
Matthew Patrick Herr ..... Durham
William David Hester ..... Winston-Salem
Alice Catherine Hicks ..... Charlotte
Samuel James Hightower, III ..... Morganton
Molly Amanda Hilburn-Holte ..... Raleigh
Blakely Elizabeth Hildebrand ..... Durham

Laura Elizabeth Hill ..... Greensboro
Lydia Rebecca Hill ..... Charlotte
Lindsey Nicole Hills ..... Charlotte
Sarah Jane Hink ..... Raleigh
Chassidy Nicole Hinton ..... Raleigh
Alexandra Jacqueline Hirsch ..... Charlotte
Lisa Walker Hodges ..... Raleigh
Scott Ryan Holder ..... Durham
Ross Spencer Holland ..... Winston-Salem
Mary Ann J. Hollocker ..... Hendersonville
Benjamin Tyler Holt ..... Durham
John Alexander Hooks ..... Whiteville
Mallory Gilliam Horne ..... High Point
Devlin Kyle Horton ..... Greenville
Cory Houston Howard ..... Winston-Salem
Jaimey Alexandra Howard ..... Durham
Rachel Pearl Hsiao ..... Lillington
Palmer Eugene Huffstetler ..... Lincolnton
Donald Glenn Huggins ..... Fuquay-Varina
Amber Windley Hughes ..... Kinston
Kathryn Rebecca Hughes ..... Winston-Salem
Timothy Robert Hultzman ..... Washington, DC
Jeffery Allen Hux ..... Hickory
Mary Candace Immen ..... Raleigh
Amanda Daou Isaac ..... Charlotte
Kenneth Dean Isaacs ..... Boone
Karmina Joyce Ishak ..... Raleigh
Daniel Patrick Iten ..... Charlotte
Jeremy Kyle Jackson ..... Raleigh
Nathan Andrew James ..... Raleigh
Keith Alexander Jaworski ..... Raleigh
Philip Andrew Jefferay ..... Raleigh
Walter Ingram Jenkins ..... Biscoe
Kenneth Wayne Jennings ..... Raleigh
Jonathan Mack Jerkins ..... Raleigh
Margaret Hayes Jernigan ..... Raleigh
Gabriel Hernan Jimenez Medina ..... Wake Forest
David Alexander Jimerfield ..... Cary
Caroline Mary Johnson ..... Ambler, PA
Lisa Janice Johnson ..... Port Saint Lucie, FL
Sarah Katherine Johnson ..... Charlotte
Jenny Lynn Joliet ..... Noblesville, IN
James Robert Jolley ..... Greensboro
Jacqueline Michel Jones ..... Charlotte
Kaitlyn Griffin Jones ..... High Point
Leah Marie Jones ..... Dunn
Samuel Irving Jones ..... Hickory
Whitney Elaine Jones ..... Charlotte
Ashton Leigh Jordan ..... Matthews
Ryan Alexander Joyce ..... Winston-Salem

Zachary Ross Joyner ..... Kittrell
Anna Pishko Kalarites ..... Raleigh
Holly Shane Kamm ..... Charlotte
Daniel K. Keeney ..... Four Oaks
Donald Grayson Kelly ..... Coral Gables, FL
Jasmine Latrice Kelly ..... Charlotte
Mary Scott Kennedy ..... Charlotte
Ryan Anthony Kennedy ..... Clear Lake, IA
Victoria Therese Kepes ..... Sullivans Island, SC
Matthew James Kerr ..... Charlotte
Seaira Rose Kersch ..... Charlotte
Joseph Porter Kesler ..... Salisbury
Danielle E. Kestnbaum ..... Raleigh
Sarah Ann Kim ..... Concord
Amanda Elizabeth Haege Kincaid ..... Greensboro
Allison Reeves King ..... Charleston, SC
Amanda Marie King ..... Advance
Mary Fletcher Sherrill King ..... Raleigh
Michael Bryan King ..... Mount Olive
Steven Austin King ..... Atlanta, GA
Yanneka Franchesca King ..... Raleigh
Alyssa Erin Kisby ..... Dallas
Daniel Joseph Knight ..... Raleigh
Tammy Haley Kom ..... Chapel Hill
Charlotte Caroline Grier Kraich ..... Charlotte
Sperethoula Feredinos Kroustalis ..... Greensboro
Mario Allen Krueger ..... Havelock
Rachel Ann Krumholtz ..... Charlotte
Megan Elizabeth Kunz ..... Kernersville
Georgia Blair Stephenson Kuplic ..... Chapel Hill
Elizabeth Alspaugh Kyser ..... Winston-Salem
Stephanie Marie Laboy ..... Charlotte
David Thomas Lambeth, III ..... Burlington
Peter Ryburn Lamm ..... Greensboro
Charles Kenneth Lane ..... Greensboro
James Andrew Lanier ..... Swansboro
Matthew Trexler Lanning ..... Charlotte
Patrick Donovan Lawler ..... Cary
LeeAnne Nickole Lawrence ..... Edenton
Madeline Grace Lea ..... Hurdle Mills
James Cameron Lee ..... Raleigh
Nicholas Hayes Lee ..... Charlotte
Sarah McLean Levy ..... Gastonia
Brett Alan Lewis ..... Elizabeth City
Logan Winder Liles ..... Zebulon
James Benjamin Limehouse ..... Winston-Salem
Charles David Lingerfelt ..... Morrisville
Thomas Ching-Heng Liu ..... Chapel Hill
Allen Crosby Livingston ..... Charlotte
Sean Miles Lobar ..... Raleigh

Sarah Catherine Loehr ..... Charlotte
Daniel N. Logan ..... Winston-Salem
Torrey Kay Lomas ..... Matthews
Brittany Erin Long ..... Fletcher
Kevin Boyd Long ..... Charlotte
John Jeffrey Long, Jr. ..... Huntersville
Jacob Adam Lopes ..... Raleigh
Anna Elizabeth Love ..... Zebulon
Wade Hampton Love ..... Stanfield
Michael Allen Lovejoy ..... Raleigh
James F. Lucarello ..... Charlotte
Jasmine Koren Lucas ..... Carthage
Katrice Lashawn Lyles ..... Boiling Springs, SC
John Born Lyman ..... Washington, DC
Anuradha Madan ..... Chapel Hill
Munashe Magarira ..... Charlotte
John Andrew Malcomb ..... Waxhaw
Chad Jayson Malmberg ..... Waxhaw
Emily Victoria Malone ..... Cornelius
Courtney Elizabeth Mann ..... Charlotte
Peyton Daniel Mansure ..... Greensboro
Luis Fernando Maradiaga ..... Chapel Hill
Blake Edward Marcus ..... Hendersonville
Ashley Michelle Markham ..... Dayton, OH
Mary C. Markle ..... Charlotte
Thomas Hamilton Markle ..... Charlotte
William Thomas Marks ..... Columbus, OH
Karey Bearden Marren ..... Columbus, GA
Aaron Alan Marshall ..... Charlotte
Edward James Marshall ..... Charlotte
Kayla Jane Marshall ..... Louisa, VA
Emily Ann Martin ..... Chesapeake, VA
Haley Danelle Martin ..... Charlotte
Michael Derek Martin ..... Raleigh
Sarah Katherine Steagall Martin ..... Wingate
Eric Richard Martinson ..... Raleigh
Molly Fraser Martinson ..... Raleigh
Kayla Faye Scott McCann Marty ..... Charlotte
William Fitzhugh Massengale ..... Chapel Hill
Emily Kate Mather ..... Raleigh
Audra Blaine Matney ..... Tazewell, VA
Caroline Elaine Mauch ..... Greensboro
Justin Garrett May ..... Raleigh
Ashley Morgan McAlarney ..... Concord
Scott Edward McAllister ..... Charlotte
Rebecca Caitlin McCarter ..... Raleigh
Teresa L. McCollum ..... Charlotte
Catherine Ann McCormick ..... Matthews
Shawndria Monique McCoy ..... Knightdale
Deborah Ann McDermott ..... Durham

Charles Franklin McDowell ..... Raleigh
Kasey Richard McGee ..... Durham
Ramona Heather McGee ..... Winston-Salem
Colin Richardson McGrath ..... Raleigh
John Franklin McGraw ..... Raleigh
David Benjamin McKaig ..... Knightdale
Madeline Renard McKeller ..... Washington, DC
Terrence M. McKelvey ..... Charlotte
Franklin Stuart McKinney ..... Murphy
Charles Stevens McLaurin ..... Charlotte
James Richardson McLeod ..... Reidsville
Anna Elizabeth McNeill ..... Raleigh
Eliu Felipe Mendez ..... Raleigh
Samuel Clinton Merritt ..... Charlotte
Barbara Margaretanne Meskill ..... Charlotte
Richard Louis Metcalf ..... Greensboro
Keith Brentten Metz ..... Charlotte
Janelle Elene Mikac ..... Jacksonville
Ali Beth Miller ..... Charlotte
Jonathan Robert Miller ..... New York, NY
Shalonda Renee Miller ..... Charlotte
Adam Parker Mincher ..... Oxford
Michael Joseph Minnick ..... Greensboro
Catherine Elizabeth Mitchell ..... Charlotte
William Edward Mitchell ..... Greensboro
Jocelyn Ranelle Mitnaul ..... Goldsboro
Brittany Nicole Mixon ..... Raleigh
Brandon R. Moen ..... Charlotte
Camille Palacio Mollozzi ..... Charlotte
Brandon Michael Monette ..... Solvay, NY
Iara Quadros Montoro ..... Lexington, KY
Elizabeth Thornberry Moore ..... Whitsett
Matthew Grant Moore ..... Davidson
Stephen Abbott Moore ..... Charlotte
Daniel Ryan Moose ..... Raleigh
Obed Benjamin Morales ..... Apex
Colleen Hart Moran ..... Hampstead
Emily Zimmer Moree ..... Wilmington
Rashad Lateef Morgan ..... Durham
Thomas Spencer Morrow ..... Summerfield
Joseph Hale Mosher ..... Charlotte
Saiyani Thomas Mukombe ..... Durham
Samantha Johlman Mul ..... Charlotte
Daniel Nicholas Mullins ..... Chapel Hill
Satie Rachael Munn ..... Raleigh
Michael David Murphy ..... Raleigh
Sarah Nicole Murray ..... Raleigh
Seanna J. Murray ..... Charlotte
John Jefferson Nail ..... Charlotte
Michael Dana Nash ..... Browns Summit

Elena Nesch ..... Durham
Brett M. Neve ..... Chapel Hill
Erin Kathleen Nevitt ..... Boone
Caleb Hill Newman ..... Huntersville
Rachel Pullen Nicholas ..... Durham
Daniel Eric Nisenson ..... Charlotte
Monica Bice Noble ..... Raleigh
Cassidy M. Nolan ..... Durham
Sarah Rebecca Norris ..... Raleigh
Ana Sofia Nunez ..... Coral Gables, FL
Jillian Freda Nyhof ..... Charlotte
Carlon Matthews Ocel ..... Alexandria, VA
Seiko Okada ..... Carrboro
Maura Kathleen O'Keefe ..... Chapel Hill
Philip Andrew Olivier ..... Raleigh
Ukachukwu Frederick Onuoha ..... Raleigh
Amelia Christine O'Rourke-Owens ..... Durham
Nikolas Rafael Ortega ..... Moravian Falls
Jenalee Osier ..... Pineville
Susan Alexandra Overby ..... Raleigh
Joseph William Owen ..... Wilmington
Kathleen Marie Oxley ..... Charlotte
William Gabriel Pagan ..... Durham
Shannon Lark Page ..... Raleigh
Matthew Moore Pagett ..... Raleigh
Elizabeth Merrick Turner Parrott ..... Raleigh
Jeanelle Sierra Katherine Patel ..... Raleigh
Minisha Bhupendra Patel ..... High Point
Ann Claire Butler Patterson ..... Raleigh
Brandon Burcham Patton ..... Boone
Donald Russell Pender ..... Durham
John Michael Perna ..... Cary
Courtney Brandon Peters ..... Raleigh
Sandra Petersson ..... Charlotte
Justin Paul Philbeck ..... Winston-Salem
Catherine Alice Phillips ..... Cary
Mandalin Saige Phillips ..... Charlotte
Jeffrey Joseph Philogene ..... Charlotte
Robert Bryson Pike, II ..... Nashville
Andrew Garrison Pinto ..... Greensboro
Dulce Maria Plaza ..... Charlotte
Zachary Justin Poole ..... Salisbury
Ryan Raymond Alonzo Potts, III ..... Charlotte
Kaitlin Dawn Powers ..... Charlotte
Lauren Elyse Powers ..... Charlotte
Trevor Pettit Presler ..... Durham
Jessica Elizabeth Price ..... Monroe
Kayla Nicole Price ..... Clinton
Daniel Josiah Prichard ..... Chapel Hill
Asia Jamar Prince ..... Durham

Thomas Martin Prince ..... Charlotte
Stephen Caleb Pritchard ..... Greensboro
Lachelle Holmes Pulliam ..... Charlotte
James Alexander Pully ..... Raleigh
Kelsey Jo Queen ..... Charlotte
Kelly Elizabeth Quick ..... Durham
Ryan James Radford ..... Winston-Salem
Jacob Howell Raehn ..... Columbia, SC
Brenna Maria Ragghianti ..... Greensboro
Shannon Brock Ralich ..... Cary
Jonathan William Rash ..... Charlotte
Emily Anne Ray ..... Charlotte
Megan Corkrean Ray ..... Jacksonville, FL
Christopher Cowden Wardlaw Rayburn ..... Charlotte
Patrick Anthony Reale ..... Charlotte
Andrew Davidson Realon ..... Raleigh
John Edgar Reece ..... Winston-Salem
Melissa Lee Reed ..... Apex
Thomas James Reichert ..... Ocean View, DE
Justin Matthew Reimer ..... Raleigh
Christopher Mark Reinhard ..... Raleigh
Katie Melissa Reynolds ..... Durham
Rebecca Kathleen Reynolds ..... Charlotte
Chad Eric Rhoades ..... Clemmons
Giles Camlin Rhodenhiser ..... Durham
Howard Burgoyne Rhodes ..... Hillsborough
Adrianne Lee Ribar ..... Rougemont
Christina Renee Rice ..... Charlotte
Cara Denise Richards ..... Cary
Ian Samuel Richardson ..... Raleigh
Heidi Autumn Ricker ..... Falls Church, VA
Ethridge Brittin Ricks ..... Charlotte
Jonathan Leo Friney Ries ..... Charlotte
Chad Wesley Riggsbee ..... Pittsboro
Christian Matthew Robin ..... Washington, DC
Porsha Martina Robinson ..... Chapel Hill
Daron Lynn Robinson, Jr. ..... Mount Holly
Jeffrey Lawrence Roether ..... Morrisville
Emily Robinson Rojas ..... Chapel Hill
Erica Gerard Romain ..... Matthews
Steven Thomas Romeyn ..... Wilmington
Lindsay Elizabeth Romine ..... Cary
Lianna M. Rossman ..... Charlotte
Alexander Paul Rothschild ..... Winston-Salem
Tiffany Nichole Roulhac ..... Fayetteville
Kathryn Elizabeth Ruark ..... Chapel Hill
Virginia Lynnelle Runion ..... Campbell, CA
Rebecca Fay Rushton ..... Raleigh
Christopher Collins Russell ..... Chadbourn
Kelly Saliba Ryan ..... Reston, VA

Bianca Sahni ..... Charlotte
Katelyn May Sally ..... Charlotte
Alexander Westwood Saunders ..... Raleigh
Elisabeth Noel Sawyer ..... Raleigh
Mandy Elizabeth Schuller ..... Belmont
Andrew Joyce Scott ..... Greensboro
John Robert Sechrist ..... Charlotte
Bobby Daniel Sessoms ..... Charlotte
Michael Blair Shapiro ..... Raleigh
Ruth Ann Sheehan ..... Raleigh
Troy Shelton ..... Raleigh
Amanda Loreen Sherin ..... Morrisville
Bryan Stewart Sherrick ..... Youngsville
Jungwon Shin ..... Charlotte
Edwin Innes Shoaf ..... Thomasville
Kendall Lee Short ..... Durham
Grier Mclaughlin Simmons ..... Raleigh
Janisha Monet Elaine Simpson ..... Elizabeth City
Jesse Haynes Pate Skene ..... Chapel Hill
Jennifer Ann Skinner ..... Midland. GA
Kyle Abraham Smalling ..... Raleigh
Monique Elizabeth Smart ..... Winston-Salem
Marcus Alan Smetka ..... Sanford
Hillary Smith ..... Chapel Hill
Jason Jon Smith ..... Raleigh
Kenneth Jordan Smith ..... Raleigh
Lindsay Vance Smith ..... Charlotte
Morgan Ann Smith ..... Clemmons
Sherrie Canzonieri Smith ..... Charlotte
William Dixon Snukals ..... Raleigh
Demitra Marie Sourlis ..... Charlotte
Anthea Eldyne Spires ..... Cary
Cameron Brewbaker Stanton ..... Garner
Alexander Edward Stark ..... Raleigh
Adam Hilton Steele ..... Holly Springs
Charlotte Rebecca Stewart ..... Chapel Hill
Laraque Rashead Stewart ..... Durham
Adam Leonard Stoddard ..... Charlotte
Andrew Jameson Stormer ..... Raleigh
Daniel Graham Strickland ..... Washington, DC
Cassandra Victoria Strunk ..... Belmont
Alexandra Elizabeth Suarez ..... Morrisville
Samantha Blair Surles ..... Four Oaks
Justin Lanier Sutton ..... Durham
Melissa Elizabeth Swaby ..... Morrisville
Erin Marissa Swinney ..... Durham
Kayla Kathlynn Sykes ..... Charlotte
Andrew Tyson Tamer ..... Charlotte
Allison Pell Tanner ..... Charlotte
Candace Faith Wright Tanner ..... Fort Mill. SC

Christian Rose Taylor ..... Cary
Heather Michelle Taylor ..... Raleigh
Michael Grady Taylor ..... Chapel Hill
Zachary Haviland Thayer ..... Durham
Christian Bennett Thomas ..... Winston-Salem
Jessica Lee Thompson ..... Reidsville
Mary Quince Thompson ..... Charlotte
Samantha Lee Thompson ..... Bryn Mawr, PA
Emily Patricia Thornton ..... Winston-Salem
Thomas Jay Thurman ..... Charlotte
Garrett Daniel Tillman ..... Charlotte
Anna Hartzog Tison ..... Raleigh
Anne Marie Tosco ..... Durham
John Wesley Toth ..... Asheville
Christopher McCurry Towery ..... Columbia, SC
John Murphy Townsend ..... Greensboro
Daniel Kerwin Tracey ..... Raleigh
Bradley Charles Trahan ..... Raleigh
Alexandra Marie Tronolone ..... Raleigh
Elizabeth Lea Troutman ..... Greensboro
Douglas Chi-Wei Tsao ..... Winston-Salem
Joseph Dempsey Turrentine ..... Elkin
Laura M. Twichell ..... Indian Trail
Rebecca Huffman Ugolick ..... Raleigh
Lisa Anne Underwood ..... Raleigh
Zachary Michael Underwood ..... Raleigh
Emily Ann Unnasch ..... Raleigh
David Charles Unwin ..... Raleigh
Emily Jo Urch ..... Kill Devil Hills
Caitlin Elizabeth Vamvakaris ..... Cornelius
Lily Blair Rivers Van Patten ..... Raleigh
Corinne Dee Varriale ..... Waxhaw
Allison Leigh Vaughn ..... Lancaster, SC
Timothy Matthew Victory ..... Raleigh
Matthew M. Villmer ..... Charlotte
Jennifer Erin Vogel ..... Asheville
Christopher John Waivers ..... Raleigh
Kevin Michael Walker ..... Loveland, OH
Patrick Matthew Wallace ..... Winston-Salem
Charles Edward Walsh ..... Raleigh
Hedao Wang ..... Durham
Merrill Elizabeth Ward ..... Asheboro
Bridget Villacorta Warren ..... Tallahassee, FL
Justice Donald Warren ..... Raleigh
Porsha Larhea Washington ..... Charlotte
James Joseph Waters ..... Charlotte
Lindsay Alana Watson ..... Raleigh
Brandon Michael Weaver ..... Raleigh
Robert Weinbach ..... Charlotte
Philip Louis Weinstein ..... Apex

Lisanne Faith Welsh ..... Monroe
Christopher William West ..... Cary
Robert William Weston ..... Carrboro
Shakimah N Whitaker ..... Winston-Salem
Dewey Carson White ..... Raleigh
Khalilah Rebecca White ..... Durham
Sara Elizabeth White ..... Winston-Salem
William Anthony Whitehead ..... Wilson
Danielle Marie Whitt ..... Jacksonville ,FL
Hannah M. Whitten ..... Chase City, VA
Will Nathan Widman ..... Winston-Salem
Sandra Kay Wilburn ..... Cary
Catherine Ann Williams ..... Charlotte
David Gerald Williams ..... Raleigh
David Harrison Williams ..... Indian Trail
Jeremy Richard Williams ..... Raleigh
Robert Hershey Williams ..... Columbia, SC
Ronald Dwight Williams ..... Raleigh
Whitney Seara Williams ..... Durham
Dana Jackson Wilson ..... Winston-Salem
Kathryn Anne Wilson ..... Washington, DC
William Charles Wilson ..... Winston-Salem
Kaleb Daniel Wingate ..... Waynesville
William Douglas Winn ..... Winston-Salem
Leslie Gayle Wise ..... Charlotte
William McLauchlin Wiseman ..... Danville, VA
Aimee Lyndsey Wisyanski ..... Hampstead
Amanda Rittenhouse Witzke ..... Holly Springs
Jordan Nicole Wolfe ..... Durham
Alice Kathleen Womack ..... Raleigh
Brian Christopher Wood ..... Springfield, VA
Erin Elizabeth Woodrum ..... Winston-Salem
William Benjamin Woody ..... Burlington
Brandee Nicole Woolard ..... Cary
Luke Foster Woollard ..... Chapel Hill
Virginia Marie Wooten ..... East Bend
Hilary Ann Workman ..... Oak Island
Tiasha Wray ..... Charlotte
Caitlin Heather Wright ..... Matthews
Jeffrey Adam Wright ..... Durham
David Michael Yopp ..... Raleigh
Chrisy Han Yun ..... Durham
Christopher Letton Zachodzki ..... Charlotte
Benjamin Mark Zich ..... Hickory
Agnieszka Teresa Zmuda ..... Raleigh

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2014 and have been issued a certificate by the Board.

Robert Allen Almony ..... Applied from the State of Missouri
Jennifer Renee Webb Arnold ..... Applied from the State of Tennessee
Andrew Henry Aurand ..... Applied from the State of Pennsylvania
Jennifer Hay Baringer ..... Applied from the State of Ohio
Gaines Spencer Beard, Jr. ..... Applied from the State of Mississippi
Carrie Ann Becker ..... Applied from the State of Ohio
Donna Jean Boggs ..... Applied from the State of Massachusetts
Elisabeth Cheatham Bond ..... Applied from the State of Georgia
Becky Lynn Bowen ..... Applied from the State of North Dakota
Julie Marion Bradlow ..... Applied from the State of Illinois
Robert Dorman Bradshaw ..... Applied from the State of Tennessee
Laura Sauriol Burton ..... Applied from the State of Georgia
Amy Lynn Butler ..... Applied from the State of Ohio
Phillip Arnold Carey Jr. ..... Applied from the State of Tennessee
Nisha Chandak ..... Applied from the State of New York
Kevin Andrew Christmas ..... Applied from the State of Pennsylvania
Melissa Renae Clark ..... Applied from the State of Pennsylvania
Vivian Lam Coates ..... Applied from the State of Massachusetts
James E. Coleman ..... Applied from the District of Columbia
Michael Neal Cope ..... Applied from the State of Tennessee
Eddy Alvin Corn ..... Applied from the State of Georgia
Charles Shane Crase ..... Applied from the State of Ohio
Dean Andrew Dellinger ..... Applied from the State of Georgia
Sara A. DePasquale ..... Applied from the State of Maine
Beverly J. Doneker ..... Applied from the State of Pennsylvania
James Kevin Dougherty ..... Applied from the State of New York
Zachary David Dubey ..... Applied from the State of New York
Michael Oliver Eckard ..... Applied from the State of Georgia
Faye Dian English ..... Applied from the State of Ohio
Garret David Evers ..... Applied from the State of New York
Brian D. Flagler ..... Applied from the State of Georgia
Michael E. Foley ..... Applied from the State of Massachusetts
Albert A. Foster ..... Applied from the District of Columbia
Kyle F. Fraccaro ..... Applied from the State of Illinois
David Michael Franceschelli ..... Applied from the State of Ohio
Brett Douglass Fulton ..... Applied from the State of Arizona
Kara O'Conner Gansmann ..... Applied from the State of Texas
Jason Delmon Gardner ..... Applied from the State of Georgia
Wesley Peter Gelb ..... Applied from the District of Columbia
John J. Gelshenen, Jr. ..... Applied from the State of Wisconsin
Eleftherea Venetsanos Goanos ..... Applied from the State of Illinois
Gwendolyn Jeanette Godfrey ..... Applied from the State of Georgia
Ana Maria Gomez ..... Applied from the State of Minnesota
Rebekah Goncarovs Grafton ..... Applied from the State of Massachusetts
Zulema Fayette Green ..... Applied from the State of Georgia
Shaul Chaim Greenwald ..... Applied from the State of New York

Jerry Todd Hannant ..... Applied from the State of Arizona
Weller Hensell Harris, Jr.. ..... Applied from the State of Georgia
Thomas Thomas Henslee..... Applied from the State of Texas
Frederick W. Hoethke ..... Applied from the State of Tennessee
Nina Christine Hogan..... Applied from the State of Pennsylvania
Shireen Hormozdi..... Applied from the State of Georgia
Alexander Stuart Benedict Horn ..... Applied from the State of Massachusetts
Heidi M. Hosmer..... Applied from the State of Georgia
Franklin McDevin Huggins..... Applied from the State of Texas
Michael Aubrey Kaeding..... Applied from the State of Georgia
Michael Todd Kafka..... Applied from the State of Arizona
Rebecca Ann Keith ..... Applied from the State of Mississippi
Mark Joel Kolber..... Applied from the State of Colorado
Smita G. Korrapati..... Applied from the State of New York
Joseph P. Lattimore ..... Applied from the State of Massachusetts
Larry Steven Leshin..... Applied from the State of Texas
Sara Pritchard Lieberman..... Applied from the State of Massachusetts
Laura Dee Mahr..... Applied from the State of Oregon
Joseph Martinez..... Applied from the State of Illinois
Luis Guarionex Martinez ..... Applied from the State of New York
Matthew Werner Matson..... Applied from the State of Georgia
Andrew Eric McAdams ..... Applied from the State of Utah
Brandon Timothy McCarthy..... Applied from the State of Illinois
Dawn E. McFadden ..... Applied from the State of Ohio
Jasmine S. McGhee..... Applied from the District of Columbia
Michael John Messinger..... Applied from the State of New York
Kenneth Jude Miles ..... Applied from the State of New York
Richard Glen Miller ..... Applied from the State of Oklahoma
Joel Brandon Moore..... Applied from the State of Texas
Rebecca Naomi Morrow ..... Applied from the State of Washington
Alcides Enrique Mulgrave..... Applied from the State of New York
Kimberlee S. Parker..... Applied from the State of New York
Heather Nicole Parlier ..... Applied from the State of New York
Robert J. Passarelli..... Applied from the State of New York
Jacqueline Louise Quay ..... Applied from the State of Georgia
Michael Leon Reeves..... Applied from the State of New York
Dana Sue Rewoldt ..... Applied from the State of Iowa
Monique Lyn Ribando ..... Applied from the State of New York
Kristine Michelle Ricketts ..... Applied from the State of Pennsylvania
Jacob Joseph Roberts ..... Applied from the State of Texas
James David Rogers ..... Applied from the State of Georgia
David Michael Ruff..... Applied from the State of New York
Diana A. Saffa-Hoethke..... Applied from the State of Tennessee
Corey Matthew Santos..... Applied from the State of Massachusetts
Katherine Carter Santos..... Applied from the State of Massachusetts
Lisa Marie Sassone ..... Applied from the State of New York
Kerry Anne Schmid..... Applied from the State of Nebraska
Darryl Wayne Shorter..... Applied from the State of Pennsylvania
Sven Eric Skillrud..... Applied from the State of Wisconsin
Benjamin William Smith ..... Applied from the State of Missouri

Christopher Glenn Smith ..... Applied from the State of Texas
Michael James Stewart ..... Applied from the State of Tennessee
Brian Neil Stretcher..... Applied from the State of Ohio
Christopher Robert Strianese ..... Applied from the State of New York
Brian Christopher Sullivan ..... Applied from the State of New York
Daniel T. Swanson ..... Applied from the State of Tennessee
Amy Lynn Thome..... Applied from the State of Florida
Joanna C. Wade..... Applied from the State of Illinois
Christina Marie Wenzel ..... Applied from the District of Columbia
Natasha Danielle Wilhite..... Applied from the State of Georgia
Alexander Royce Wilschke..... Applied from the State of Colorado
David Scott Wolpa ..... Applied from the State of Illinois
Seth Morgan Wood ..... Applied from the District of Columbia

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2015 and have been issued a certificate by the Board.

Michelle Nicole Abbott ..... Mooresville
Patrick Todd Apple ..... Pleasant Garden
Rebecca Lopes Aul ..... Fayetteville
Peter Dale Austin ..... Cary
Helen Somerville Baddour ..... Raleigh
Wilmoth Henry Baker, IV ..... Tallahassee, FL
Laura Smith Beacham ..... Cary
Crystal Carrerou Beard ..... Wilson
Alyn Berry Beauregard ..... San Diego, CA
Margaret Ann Bettenhausen ..... East Lansing, MI
Brittany Bussian Birch ..... Durham
Adrian Darius Boddie ..... Charlotte
Megan Nichole Boger ..... Kannapolis
Jennifer Maguire Bogue ..... Raleigh
Callen Joy Ring Bolick ..... Apex
Laura King Boneau ..... Wilmington
Cortney Ann Bonvillain ..... Cary
Vincent Borden ..... Weaverville
Glenna Elaine-Lookadoo Boston ..... Durham
Lauren Joy Bowen ..... Carrboro
John B. Bradley ..... Creedmoor
Kindra Lynn Bradley ..... Mebane
Virginia Ann Broome ..... Mint Hill
Loryn Ashley Buckner ..... Winston-Salem
Emily Ann Bullock ..... Charlotte
Dorinda Parkola Burton ..... Virginia Beach, VA
Richard Brian Campbell ..... Suffolk, VA
Emily Lynn Cantrell ..... Charlotte
Ashley Lynn Carter ..... Mebane
John Rodney Caudill ..... North Wilkesboro
Cheyenne N. Chambers ..... Indian Trail
David McCotter Chambers ..... Raleigh
J. Wesley Chancey ..... Asheville
Jennifer Ryan Claud-White ..... Charlotte
James Scott Coates ..... Weaverville
Adthea Juanita Collins ..... Rockingham
Jonathan George Connor ..... Knoxville, TN
Laura Carolyn Cook ..... Charlotte
Chelsea Jean Corey ..... Brooklyn, NY
Elliott Leigh Coward ..... Atlanta, GA
Heather Groves Cox ..... Charlotte
Kelly Anne Crecco ..... Durham
Shawntae Renee Crews ..... Charlotte
Gregory John Crowder ..... Durham
Sheena Dasani ..... Durham
Candace Leiann Davis ..... Asheville

Ticora Elaine Davis ..... Charlotte
Todd Edward Davis ..... Greensboro
Jill Marie Dawkins ..... Arden
Ronard Clark Dixon, Jr.. ..... Charlotte
Samantha Marie Dorsey ..... Augusta, GA
Briana Chelsey Dudas ..... Weehawken, NJ
Lyndsey Patricia Duell ..... Charlotte
William Michael Duncan ..... Columbia, SC
Amanda Christina Dure ..... Washington, DC
Luka Duric ..... Salisbury
Rebeca E. Echevarria ..... Charlotte
Phillip Anthony Elkins ..... Southern Pines
Annie Elizabeth Ellis ..... Johnson City, TN
Pamela Patrice Entzel ..... Durham
Erica Marie Erickson ..... Pisgah Forest
Harold Jean Robert Eustache ..... Winston-Salem
Irene Eustathiou ..... Morrisville
Connie Lee Evans ..... Henderson
Elizabeth Ivy Evans ..... Beulaville
Emily Anne Everest ..... Wellington, FL
Lauren Brittany Eversole ..... Oak Island
Amber Jacqueline Ferrell ..... Charlotte
Michael Frazier Frantz ..... Charlotte
Jessica Mackenzie French ..... Hickory
Rebekah Faye Frushtick ..... Huntersville
Gillian Roberts Fleischer Gaeta ..... Durham
James Van Cleave Gambrell ..... Charlotte
April Renee Geer ..... Charlotte
June Marie Gerken ..... Leland
Jason Everett Gillis ..... Elizabeth City
David Paul Ginzer ..... Tequesta, FL
Brittany Morgan Gordon ..... Saint Albans, WV
Kelli Elizabeth Gordon ..... Raleigh
Marisa Caitlin Graham ..... Mooresville
Morgan Wittman Gramann ..... Durham
Cyrus Quinn Griswold ..... Pittsboro
Ashley Nicole Gwyn ..... Greensboro
Nicholas Richard Hablenko ..... Durham
Thomas Brooks Haislip ..... Sanford
Berenice Tessa Hale ..... Durham
Amber Jamelle Hardy ..... Raleigh
Benjamin David Harris ..... Charlotte
William Paul Harris ..... Charlotte
Kenneth Neil Hart ..... Charlotte
Adam Hauser ..... Greensboro
Gregory Russell Haver ..... Charlotte
Brandon Everett Heffinger ..... Charlotte
Tracey Lavelle Henderson ..... Fayetteville
Iyanna Johnson Henry ..... Chapel Hill
Martha Beatrice Hernandez ..... Raleigh

Honore Niyigena Hishamunda ..... Charlotte
Paul Gilbert Hogle ..... Durham
Julia Helen Horrocks ..... Asheville
Amanda Geary Huegerich ..... Chapel Hill
Anna Murphy Hughes ..... Greensboro
Timothy Griffith Hughes ..... Charlotte
Sara M.F. Hurn ..... Charlotte
Jacob Salman Husain ..... Charlotte
Elijah Arron Thomas Huston ..... Wilmington
Tony Pham Huynh ..... Greensboro
Erin Jane Illman ..... Charlotte
Yuliya Olegovna Ilnitskaya ..... Charlotte
Jordan Rene Israel ..... Canton
Evlyn Elisabeth Jackson ..... Asheville
Lauren Anne Jeffries ..... Greensboro
Edward Aubin Jesson ..... Fort Lauderdale, FL
Kelly Rains Jesson ..... Fort Lauderdale, FL
Harry Carl Johnson ..... Raleigh
Hilary R. Johnson ..... Charlotte
Emily Jane Tucker Kirby ..... Cary
Timothy Paul Koller ..... Hertford
Kate Kovats ..... Tallahassee, FL
Christopher William Lachey ..... Monroe
Kamay Melissa Lafalaise ..... Washington, DC
Tiffany Renee Lail ..... Winston-Salem
David Marsh Lambert ..... Winston-Salem
Wesley Benjamin Lambert ..... Greenville, SC
David James Lampert ..... Raleigh
Catherine Rogers Laney ..... Harrison, NY
Gordon Zasha Langer ..... Hendersonville
Christopher Adam Lanier ..... Chapel Hill
Blake Henry Larsen ..... Sanford
Ashley Katherine Bryant Lawrence ..... New Bern
Donna Elaine Lee ..... Indian Trail
Gabrielle Ann Lewis ..... Chapel Hill
Neal Howard Lewis ..... Johnson City, TN
Sergey Joseph Litvak ..... Winston-Salem
Melissa Leila Louzri ..... Mouldin, SC
Katelyn Rose Love ..... Raleigh
Laura Byrd Luffman ..... Greensboro
Allison Margaret Mabbs ..... Columbia, SC
Allan James MacQuarrie ..... Charlotte
Elisabeth Frances Madden ..... Royal Oak, MI
Justin Michael Mann ..... Raleigh
Pedro Jose Mantilla ..... Raleigh
Thomas Christopher Markou ..... Charlotte
Gabriel L. Mathless ..... Charlotte
James Donald Matthis ..... Clinton
Tucker Wells McCarthy ..... Charlotte
Blaire David McClanahan ..... Greensboro

Angelica Noel McDonald ..... Raeford
Amber Khan McKay ..... Kernersville
Maria Cheyenne McLendon ..... Asheville
John Frank McLeod, IV ..... Columbia, SC
Daniel Joseph Melo ..... Charlotte
Emmanuel Mensah-Acquaye ..... Charlotte
Breanne Virginia Mercer ..... Charlotte
Nicole Jeanette Merritt ..... Concord
Samantha R. Miller ..... Gastonia
Amy Patricia Minardo ..... Greensboro
Maria Abigail Minis ..... Kitty Hawk
Candace Allison Mitchell ..... Charlotte
Ryan Daniel Moffitt ..... Burlington
Rachel Ann Molinoski ..... Raleigh
Jonathan Wilson Moody ..... Supply
Craig Michael Morgan ..... Charlotte
Kaitlyn Stavish Muchmore ..... Raleigh
Kahran Angelica Marcia Myers ..... Charlotte
Tara Elizabeth Nauful ..... Charleston, SC
Tessa Marie Neal ..... South Boston, VA
Andrew Michael Neville ..... Henrico, VA
William Clifford Nichols ..... Clayton
Thomas Newton Nickles ..... Charlotte
Jessica Lynn Norton ..... Maxton
Susan Park ..... Centreville, VA
Gabrielle Leigh Paschall ..... Asheville
Tyler Bates Peacock ..... Libertyville, IL
Andrew Edward Pearce ..... Raleigh
Brennan Walsh Pendergast ..... Charlotte
Galina Petrova Petrova ..... Greensboro
Jacob Patrick Phelps ..... Asheville
Anne Hamilton Phillips ..... Greensboro
Allison Springer Powell ..... Greensboro
Mindy R. Powers ..... Charlotte
Trina Lynette Pridgeon ..... Kent, WA
Jessica Ra ..... Raleigh
George Louis Raad, Jr. ..... Charlotte
Elham Rabiei ..... Brentwood, TN
Kristin Michelle Racine ..... Charlotte
Wesley Joel Rainer ..... Sheffield, AL
Travis William Reed ..... Lakeland, FL
Zachary Slate Rivenbark ..... Fayetteville
Kristan Bruce Rivers ..... Jackson, MS
Adrainne Denise Roberts ..... Winston-Salem
Carol Elizabeth Tillman Robin ..... Raleigh
Walter Harry Rodriguez ..... Clinton
Myles Palmer Rogers ..... Charlotte
Holly Elizabeth Safi ..... Durham
Shashi Sathiraju ..... Matthews
Robert Charles Servatius ..... Charlotte

Eli Parker Sevcik-Timberg ..... New York, NY
Paul Henry Shaner, III ..... Winston-Salem
Danielle Lauren Shapiro ..... Ormond Beach, FL
Teresa Welch Shields ..... Zebulon
Kevin Richard Sholette ..... Charlotte
John Paul Simkovich ..... Myrtle Beach, SC
Chynna Teaira Smith ..... Raleigh
Crystal P. Smith ..... Raleigh
Rachel Marie Smith ..... Charlotte
Toby B. Smith ..... Trinity
Matthew John Snider ..... Chapel Hill
Opeyemi Victoria Sowemimo ..... Raleigh
Rachel Margaret Spears ..... Eastover
Thomas Cullen Stafford ..... Raleigh
Ashley Kanupp Stallings ..... Benson
Jordan Taylor Stallings ..... Chapin, SC
Meghan Marie Starnes ..... Charlotte
Daniel Scott Stephens ..... Hubert
Tyler James Stiles ..... Mount Holly
John Lanigan Storrs ..... Greensboro
Kristi Nicole Strawbridge ..... New Bern
Molly McElreth Stuart ..... Raleigh
Justin Davis Sykes ..... Arlington, VA
Pearry Lee Tarwasokono ..... Raleigh
Douglas Bradley Thie ..... Charlotte
Elizabeth Marguerite Thomas ..... Wheeling, WV
Constance Dionne Thompson ..... Winston-Salem
Christina Hollister Trent ..... Raleigh
Leigh Robin Trigilio ..... Greensboro
Joseph Trunzo ..... Charlotte
Elizabeth Anne Vance ..... Winston-Salem
Travis Wayne Vance ..... Charlotte
Ada Gabriela Vicuna ..... Huntersville
Andrew Lawrence Vining ..... Matthews
Wayne Scott Wallace ..... Raleigh
Stephen Reed Warren, II ..... Goldsboro
Tara Dawn Warwick ..... Durham
Erica Shae Weatherford ..... Reidsville
Katie Rae Webb ..... Torrance, CA
Daniel Joseph Weber ..... Greensboro
Noah James Webster ..... Charlotte
Howard Mackey Wellons ..... Gastonia
Casey Evans Wentz ..... Cary
Robert August Wessels, III ..... Hickory
Lance S. White ..... Indian Trail
Nathan Adam White ..... Sumter, SC
Elizabeth Summers Wilkinson ..... Raleigh
Noble Adam Williamson ..... Charlotte
Anne Katherine Wilson ..... Charlotte
Jennifer M. Yahl ..... Charlotte

Sarah Ivey Young ..... Advance
Jonathan Steven Zucker..... Durham

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in July 2015 and have been issued a certificate by the Board.

Joshua Ryan Adams ..... Winston-Salem
Jada Ileana Akers..... Raleigh
Angela Anne Alcala..... Matthews
James Robert Alexander..... Charlotte
Noah Glen Allen..... Charlotte
Ryan Patrick Ames ..... Charlotte
Lucy Meryl Anderson ..... Midland
Scott David Anderson ..... Durham
Alexandria Louise Andresen ..... Charlotte
Scott Andron .....Ft. Lauderdale, FL
Erika Nicole Angles..... Winston-Salem
Christie Lynn Anthony ..... Raleigh
Brianne Leigh Appnel..... Charlotte
Kimberly R. Arch ..... Raleigh
Chad Alan Archer .....Denver
Tricia Virginia Argentine .....Bryson City
Marcia Eason Armstrong..... Four Oaks
Leah Michelle Arnold ..... New Bern
Max Edward Ashworth ..... Fuquay-Varina
Vera Caralyne Attaway..... Raleigh
Brandon Paul Atwood..... Fayetteville
Elizabeth Ann Austin..... Raleigh
James Anthony Azarelo .....Morrisville
Ariston Cassandra Ann Bailey .....Woodbridge, VA
Candra Kali Baizan ..... Tampa, FL
Eric Thomas Baker.....High Point
Jessica Marie Baldwin..... New Kent, VA
Courtney Leigh Ballard ..... Charlotte
Jonathan Nicholas Barber ..... Concord
Rebecca Mayhew Barbour..... Clayton
Truman Andrew Barker ..... Thomasville
David Robert Barnes ..... Raleigh
Derek Martin Bast..... Charlotte
Zachary James Beasley .....Currituck
Daniel Beaulieu..... Durham
John Nault Beck..... Norwalk, CT
Michael Becker ..... Charlotte
Joshua Dane Bell .....Dallas
Alisha Shanel Benjamin ..... Raleigh
Daniel Christopher Bensley..... Raleigh
Frederick Evan Benz..... Durham
Adam Andrew Berkland..... Durham
Caitlin Marie Bernstein .....Carrboro

Karen Komosa Bestman ..... Salisbury
Ian Andrew Biggs ..... Greensboro
Jonathan Paul Billak ..... Charlotte
Elizabeth Neal Binion ..... Charlotte
William Henry Blackton ..... Cary
Zachary Romone Blackwell ..... Durham
Hilary Schronce Blackwood ..... Mt. Holly
Nicole Elizabeth Bleuer ..... Holly Springs
Glen Barker Blumhardt ..... Chapel Hill
Kerry Marie Boehm ..... Ormond Beach, FL
Emily Bogart ..... Charlotte
Nicholas Boggs ..... Durham
Cecelia Christina Borkowski ..... Sneads Ferry
John Mark Boschini ..... Greensboro
Alexander Munday Boston ..... Winston-Salem
Kendall Murray Bourdon ..... Charlotte
Brittany Shaw Bowab ..... Charlotte
Tamara Bailey Bowles ..... Cary
Marla Spector Bowman ..... Wilson
William Michael Boyer ..... Greensboro
Chadwick Ellis Boykin ..... Raleigh
Daniel Alan Brader ..... Raleigh
Seth Paul Bradley ..... Charlotte
Ellen Anne Bragg ..... Monroe
Megan Edana Bramhall ..... Fuquay-Varina
Thomas Douglas Bridges ..... Shelby
Benjamin Dorian Brodish ..... Raleigh
Carrie Leigh Browder ..... Raleigh
Jennifer Kim Brown ..... Greensboro
Terry Martin Brown, Jr. ..... Charlotte
Tyler Gray Bruce ..... Pickens, SC
Amanda Culbreth Bryan ..... Hillsborough
Melissa Colleen Bryson ..... Charlotte
Dylan John Cyrus Buffum ..... Durham
Jaimee Alexandria Yvonne Bullock ..... Pollocksville
Hailey Madison Bunce ..... Stedman
Laura Elizabeth Burkett ..... Raleigh
Natalie Marie Burns ..... Raleigh
Mark Anthony Burts, II ..... Fletcher
Cory Robert Busker ..... Charlotte
William Medearis Butler ..... Charlotte
Tamara Louise Bynum ..... Durham
Ryan Patrick Callahan ..... Peoria, IL
Lauren Suzanne Campbell ..... Sanford
Timothy Michael Cannady ..... Charlotte
Weiting Cao ..... Raleigh
John Kevill Cargill ..... Raleigh
Jonathan Alexander Carnes ..... Rolesville
Whitley Jene' Carpenter ..... Raleigh
Brittany Michelle Cartner ..... Charlotte

Dylan James Castellino ..... Chapel Hill
Christopher Robin Castro-Rappl ..... Raleigh
Kristopher Lee Caudle ..... Raleigh
David Blake Caulder ..... Rutherfordton
Lisa Jean Chadderdon ..... Charlotte
Tien Kang Cheng ..... Philadelphia, PA
Faith Chinedu Chima ..... Fayetteville
Daniel Kwang Hyong Choo ..... Durham
Brady Joseph Ciepcielinski ..... Charlotte
Justin Anthony Ckezepis ..... Cornelius
Jaqueline Cobb ..... Raleigh
Matthew William Cockman ..... Graham
Ashley Michele Coghill ..... Raleigh
Daniel Walker Cole ..... Chapel Hill
Michael Aaron Coletta ..... Siler City
Amanda Marie Colley ..... Charlotte
Patrick Thomas Collins ..... Greensboro
Douglas Bower Colvard ..... Apex
Brittany Rolfe Constance ..... Arlington, VA
Chad William Cooper ..... Rutherfordton
Bryan Alan Corbett ..... Huntersville
Kathryn Jane Corey ..... Greensboro
Blake Mathew Courlang ..... Carrboro
Kayla Kristina Cox ..... Charlotte
Paul Mason Cox ..... Sanford
Brentley Dean Cronquist ..... Baltimore, MD
Lindsay Moore Curtis ..... Raleigh
Blinn Lawrence Cushman ..... Greensboro
Katherine Doering Custis ..... Knightdale
Alexandra Elizabeth Davis ..... Raleigh
Justin Gates Davis ..... Davidson
Kali Dawn Davis ..... Clayton
Nicholas Allan Davis ..... Cornelius
Joshua Paul Dearman ..... Statesville
Cameron deBrun ..... Charlotte
Celene Delice ..... Charlotte
Sjaan Liles Demmink ..... Raleigh
Damjan Petar Denoble ..... Durham
Kristen Denise Dewar ..... Charlotte
Gabriel Jesus Diaz ..... Cary
LaRita Lynn Dingle ..... Summerton, SC
Richard Howell Dingus ..... Durham
Andrew Louis Dinkelacker ..... Charlotte
Michael Anthony D'Ippolito ..... Raleigh
Kimberly Nicole Dixon ..... Raleigh
Emily Caroline Doll ..... Coluimbia, SC
Margaret Claire Donnelly ..... Charlotte
Rita Beard Dorry ..... Raleigh
Pearce Shoaf Dougan ..... Lexington
Marc Conrad Downing ..... Raleigh

Brent James Ducharme ..... Durham
Kathryn Elizabeth Duffy ..... Fort Mill, SC
Timothy M. Dugan ..... Wilmington
Whitney Leigh Duhaime ..... North Liberty, IA
Jason Linwood Duke ..... Coats
Michael Colin Dunn ..... Carrboro
Aimee Alexandra Durant ..... Wallingford, CT
Joseph Porter Durham, III ..... Charlotte
Christopher Sinnott Dwight ..... Weldon
Amber Michelle Eades ..... Newton
Tony Kenneth Eaves ..... Durham
Raymond Lewis Echevarria ..... Roxboro
Rory Christopher Eddings ..... Goldsboro
Erin Baker Edgar ..... Raleigh
Kaitlin Marie Ek ..... Lincoln, NE
Rabee Robert Imad El-Jaouhari ..... Raleigh
Christopher Nelson Ellis ..... Chapel Hill
David Scott Emery ..... Winston-Salem
Michael Jay Emrey ..... Charlotte
Elsa Olivia Eriksen ..... Charlotte
Martin Grant Erskine ..... Greensboro
Natalia Alexandra Escobar ..... New York, NY
Cameron Wayne Eubanks ..... Miami, FL
Richard Kyle Evans ..... Raleigh
Damon Andrew Fargis ..... Huntersville
Annalise Hope Farris ..... Denver
Jeffrey Ryan Favitta ..... Charlotte
Sarah Fearon-Maradey ..... Durham
Vanessa Ann Fede ..... Charlotte
Aaron T. Fennell ..... Raleigh
M. Joseph John Ravindra Fernando ..... Charlotte
Stephen Alexander Fernando ..... Charlotte
Michael David Burnside Ferretti ..... Winston-Salem
Ellen Bunzey Fichtelman ..... Denver
Franchesco Donovan Fickey Martinez ..... Stella
Brandi Lee Finn ..... Mooresville
Ryan Arden Fisher ..... Chapel Hill
David Robert Fitzgerald ..... Raleigh
Veronica Stanton Fleury ..... Greenville, SC
Martin Anthony Folliard ..... Durham
Richard MacDonald Forbes ..... Charlotte
Ashley Holloway Foxx ..... Morrisville
Stephanie Morris Frantz ..... Concord
Elizabeth Jill Frawley ..... Charles Town, WV
Erin Catherine Frazer ..... Simpsonville, SC
Harrison Bridger Freedland ..... Wilmington
Eric Altman Frick ..... Charlotte
Kevin James Friley ..... Charlotte
Shelley Berlee Fullwood ..... Durham
Jordan Leigh Funke ..... Alexandria, VA

Lauren Elizabeth Fussell ..... Raleigh
James Cunningham Gallagher..... Charlotte
Jessica Ryan Galletta ..... Raleigh
Alysja Soeryani Garansi..... Charlotte
Tyler Wayne Gardner..... Clyde
Ashley Kristine Gengler ..... Holly Springs
Christopher Wells Genheimer..... Colfax
Andrew James Gibbons ..... Raleigh
Robert Daniel Gibson..... Salisbury
Kennedy Joseph Gilly, III ..... Raleigh
Emily Damsgaard Gladden..... Raleigh
Deanna Justine Glickman..... Hope Mills
Aaron Michael Goforth ..... Cary
Caitlin Murray Goforth..... Raleigh
Jack Charles Goins..... Fort Mill, SC
Lorie Ann Goins..... Raleigh
David Benjamin Goldberg ..... Alexandria VA
Airrelle Kamilah Gonzalez..... Charlotte
Cynthia Maria Gonzalez..... State Road
Sherita Nicole Gooding..... Kinston
Kristin Leigh Gordon..... Farmville
Sean Michael Graham ..... Myrtle Beach, SC
Alexander Michael Graziano..... Raleigh
Jonathan David Green..... Birmingham, AL
Megan Davis Greene..... Raleigh
Jessica Lauren Gregory..... Winston-Salem
Christopher Jeffrey Grice ..... Durham
Ray Jeremy Griffis ..... Graham
Mary Katherine Grob..... Charlotte
Barton Bradford Grover..... Kill Devil Hills
Ashley Lauren Guerra ..... Raleigh
Hannah Ruth Guerrier..... Huntersville
Katherine D. Hagen ..... Sneads Ferry
Charles Brandon Hagerman..... Charlotte
Caitlin Spivey Hale ..... Mooresville
Carla A. Halle ..... Charlotte
Jacqueline Christine Handel..... Wake Forest
Ioannis P. Haralambous ..... Ft. Mill, SC
Bradley Mark Harper..... Durham
David Warren Harper ..... Sylva
William Edwin Harrington..... Marshville
John Everett Harris ..... Arlington, VA
Meredith Daniels Harris..... Greensboro
Nathaniel Charles Harris ..... Summerfield
Samuel Batiste Hartzell..... Raleigh
Kristopher Nowlin Hawkins..... Kings Mountain
Dawn Elizabeth Hawks-Lee..... Raleigh
Heather Michelle Hays..... Charlotte
Teresa Gail Heath..... Deep Run
William Glen Heedy..... Asheville

Daniel Paul Hemme ..... New Bern
Kelsey Elizabeth Hendrickson ..... Greensboro
Mary Rebecca Hendrix ..... Mocksville
Simeon Mark Henkle ..... Greensboro
Andrew Jeffrey Henson ..... Chapel Hill
Clay Sutton Hester ..... Wilmington
Heather Marie Hillaker ..... Baton Rouge, LA
Natalie Suzanne Hilmandolar ..... Kernersville
Anthony Thomas Hinman ..... Holly Springs
Benjamin Phillip Hintze ..... Winston-Salem
Tyler Payton Hite ..... Deep Gap
John Hodnette ..... Eufaula, AL
Madeleine Lott Hogue ..... Jacksonville, FL
Brooke Allison Holliday ..... Charlotte
Rebecca Frances Holljes ..... Raleigh
Daniel Joseph Holt ..... Clarksburg, MD
Leslie Caroline Hood ..... Raleigh
Dana Marie Horlick ..... Greensboro
Katelyn Anna Horne ..... Charlotte
Dianna Sarah Angelique Houenou ..... Durham
Christine Grace Houston ..... Charlotte
Lauren Blanchard Huddleston ..... Jonesborough, TN
Valerie Mason Hughes ..... Arlington, VA
Christian Koester Hunt ..... Charlotte
Julia M. Hurley ..... Southport, CT
Taylor Jo Hutchens ..... East Bend
Bryan Michael Huxhold ..... Charlotte
Lauren Lewis Ikpe ..... Raleigh
Adrianna Victoria Ingram ..... Cameron
Neal Andrew Inman ..... Raleigh
Lucy Anne Ireland ..... Chapel Hill
Ryan Matthew Ivey ..... Winston-Salem
Teta Lishell Jackson ..... Raleigh
Jaweria Yasin Jamal ..... Durham
Morgan Blair James ..... Matthews
Phillip Breeden Jefferson ..... Midlothian, VA
Chase Rasheal Johnson ..... Cary
Devon Rose Johnson ..... Greensboro
Jared Alexander Johnson ..... Charlotte
Taylor Anneliese Johnson ..... Raleigh
Erich E. Johnston ..... Charlotte
Brandon Kenneth Jones ..... Greensboro
Cecelia Dianne Mileur Jones ..... Ahoskie
Eliana Luz Jones ..... Goldsboro
Jason Robert Jones ..... Carrboro
James Karl Jordan ..... Salisbury
Jennifer Elizabeth Joyner ..... Concord
Seth Patrick Kandl ..... Durham
Laura Elizabeth Kastner ..... Chapel Hill
Nestoras D. Katsoudas ..... Winston-Salem

Melinda Jean Keck ..... Concord
Alexander Carr Kelly ..... Winston-Salem
Kathryn Wheeler Kendall ..... Free Union, VA
Kristen J. Kenley ..... Charlotte
Katelin Lorine Sue Kennedy ..... Clemmons
Robin Lynne Kester ..... Greensboro
Sarah Laffan Kettles ..... Reidsville
Abby Christin King ..... Clayton
Chelsea Victoria King ..... Prospect, KY
Winston Scott Kirby ..... Raleigh
Julian Christ Kisner ..... Raleigh
Walter Evans Kistler, IV ..... Morehead City
Lorna Ashley Knick ..... Chapel Hill
Mark Alan Kochuk ..... Morrisville
Brandon M. Kohr ..... Fort Mill, SC
Anthony Joseph Konkol ..... Owings Mill, MD
Miles Matthew Kosanovich ..... Charlotte
Stella Anna Kreilkamp ..... Durham
Gintaras Kazys Krulikas ..... Weaverville
Patrick Andrew Kuchyt ..... Raleigh
Kathleen Marie Kurdys ..... Raleigh
Gabriel Alexander Kussin ..... Chapel Hill
Quinn Kathryn Ladd ..... Erie, PA
Brian Patrick Lagesse ..... Durham
Justin Foster Lalor ..... Hendersonville
Katherine McLean Lamberth ..... Charlotte
Todd Christian Landreth ..... Leland
Jeffrey Brett Lane ..... Greensboro
Seth T. Lawrence ..... Chapel Hill
Karrah Griffin Leary ..... Signal Mountain, TN
Colin William Ledoux ..... Charlotte
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Jennifer Marie Little ..... Chapel Hill
Micheal Leray Littlejohn ..... Columbia, SC
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Benay Helene Lizarazu ..... Charlotte

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Shawn Michael Lloyd ..... Ulla
Kathleen Amanda Lockwood ..... Lexington
Elizabeth Irene Long ..... Greensboro
Richard Brandyn Longo ..... Charlotte
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Elizabeth J. Lyons ..... Salisbury
Victor Ian Macam ..... Fuquay-Varina
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Craig Alexander Martin ..... Eden
Ellis Wilson Martin ..... Winston-Salem
Jonathan Wesley Martin ..... Sanford
Katelyn Alyssa Martin ..... Matthews
Luke Stephen Martin ..... Hiddenite
Shawnda Marie Martin ..... Knightdale
William Heath Martin ..... Durham
Caroline Harding Massagee ..... Raleigh
Lucy K. Massagee ..... Hendersonville
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Lacy Jane Mau-McDowell ..... Raleigh
Jon Christopher Mayhugh ..... Winston-Salem
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Michael James McFarland ..... Raleigh
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Dixon McCommon McKay ..... Chapel Hill
Timothy Lawder McKeever ..... Washington, DC
Joseph Williams McLean ..... Raleigh

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Michael Ward Mewborn ..... Swansboro
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Haniya Hasan Mir ..... Durham
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John Chase Mobley ..... Charlotte
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Kyle Steven Navarro ..... Charlotte
Ian Alexander Neal ..... Charlotte
Sarah Katherine Neal ..... Charlotte
William Spencer Newsome ..... Rockwell
Hannah Morgan Nicholes ..... Morganton
Zoe Elizabeth Niesel ..... Winston-Salem
Ryan Hunter Niland ..... Kernersville
Jasmina Nogo ..... Durham
Anna-Catherine Norwood ..... Cherryville
Jennifer Lauren Nusbaum ..... Apex
Christopher Michael O'Brien ..... Charlotte
Mary Flanagan O'Connor ..... Durham
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Beth Ada Onyenwoke ..... Raleigh
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Anna Elizabeth Orr ..... Chapel Hill
Ajulo E. Othow ..... Oxford
Richard Roger Ottinger ..... Dunn
Graham Matthew Owen ..... Charlotte
Joseph Duffy Palmer ..... Durham
Hima Bindhu Pamarthi ..... Knightdale
Emily Colona Pappas ..... Apex

Daniel Anthony Parisi ..... Chapel Hill
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Anderson McCray Shackelford ..... Wilson
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA
v.
ADRIAN TAREL EPPS

No. 44A14

Filed 10 April 2015

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. ___, 752 S.E.2d 733 (2014), finding no error after appeal of a judgment entered on 25 September 2012 by Judge Hugh B. Lewis in Superior Court, Gaston County. Heard in the Supreme Court on 18 November 2014.

Roy Cooper, *Attorney General*, *by Amar Majmundar*, *Special Deputy Attorney General*, *for the State.*

Michael E. Casterline for defendant-appellant.

PER CURIAM.

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
DANNY ROBBIE HEMBREE, JR.

No. 86A12

Filed 10 April 2015

Evidence—other crimes or bad acts—murder—photographs of burnt body—victim's good character—perjury

The trial court erred in a first-degree murder case by allowing admission of an excessive amount of the Saldana murder evidence under Rule 404(b), including more than a dozen photographs of her burnt body; by allowing a witness to testify about Saldana's good character; and by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury. The cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial. Defendant's conviction and sentence were vacated and remanded for a new trial.

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

Justice NEWBY dissenting.

Chief Justice MARTIN joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Beverly T. Beal on 18 November 2011 in Superior Court, Gaston County, upon a jury verdict finding defendant guilty of first-degree murder. On 25 April 2013, while defendant's direct appeal was still pending, defendant filed a motion for appropriate relief with this Court pursuant to N.C.G.S. § 15A-1418. Heard in the Supreme Court on 14 October 2013.

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

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

HUDSON, Justice.

Defendant Danny Robbie Hembree, Jr. was indicted on 14 December 2009 for the first-degree murders of Heather Marie Catterton, Randi Dean Saldana, and Deborah Denise Ratchford. The trial court denied the State's motion to join the Catterton and Saldana trials and defendant was first tried capitally for the Catterton murder, which is the matter at issue in this appeal. On 8 November 2011, the jury found defendant guilty of first-degree murder. After a capital sentencing proceeding, the same jury found two aggravating circumstances, both statutory. The first was that defendant had previously been convicted of violent felonies; the second was that Catterton's death occurred during a "course of conduct" involving violence to others. Despite finding fourteen mitigating circumstances, the jury recommended, and the trial court entered, a sentence of death. Defendant now appeals his conviction and sentence to this Court as a matter of right.

Defendant contends that the cumulative effect of several errors in the proceedings below denied him a fair trial. We agree. "Although none of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002). Accordingly, we vacate the conviction and sentence and remand for a new trial.

FACTUAL BACKGROUND

Defendant spent the latter half of 17 October 2009 drinking alcohol and buying and smoking crack cocaine with Heather Catterton, Catterton's friend Sommer Heffner, and Heffner's boyfriend Michael Moore. At the time of her death, Heather Catterton was seventeen years old. Defendant was dating Heather's older sister, Nicole. Both Heather and Nicole had sex with men in order to obtain drugs.

In the late afternoon, defendant picked up Heffner and Moore outside a shop on Route 321 in Gastonia, North Carolina. After stopping at defendant's mother's house for approximately half an hour, the three continued to the house where Catterton lived with her father.

Eventually, the four left Catterton's house and drove in defendant's car to a store on Route 321. For the first of several times that evening, a dealer walked up to defendant's car and sold defendant crack cocaine through the opened car window. After the initial purchase was made, the group went to the trailer home of one of defendant's friends, where they all smoked defendant's cocaine. Over the next several hours, the four went from place to place purchasing and using more crack cocaine,

drinking alcohol, having sex, and searching for money for more drugs and alcohol.

Eventually, with defendant driving, the others left Moore, who was still heavily intoxicated, at a convenience store. The remaining three in the car—defendant, Catterton, and Heffner—then drove to a local neighborhood where defendant purchased yet more crack cocaine. Defendant dropped Heffner off at Moore's mother's house at approximately 1:00 a.m. on 18 October. Catterton stayed with defendant and was not seen alive again.

Catterton's body was found in a culvert in York County, South Carolina several days later on 29 October 2009, dressed in a sweatshirt and socks, but otherwise nude. The remainder of her clothing and a crack pipe were recovered nearby two days later.

Approximately two weeks later, on 15 November 2009, a second body was discovered on a dirt road in York County. Two women were riding horses near King's Mountain National Military Park when one of them saw a "burn spot" on the side of the road. As they investigated, one woman saw what she first believed was a mannequin, but soon found was a body. Her friend called the police, who later confirmed via DNA testing that this was the burned body of Randi Dean Saldana.

DEFENDANT'S CONFESSIONS

Late on 4 December 2009, defendant was arrested in Gaston County for a series of armed robberies. Over the next several hours on 5 December, defendant was interviewed by officers from both North and South Carolina. At least twice, defendant was given *Miranda* warnings and then stated that he was willing to answer questions from police. He confirmed repeatedly that he was not under the influence of drugs or alcohol. While at the police station, defendant was given food, soda, and coffee, and was allowed to rest. These interviews were recorded electronically, transcribed, and later presented to the jury in redacted form. Defendant also signed a written confession, reviewed that confession with police, and directed police where to make changes in the text. During these interviews, defendant confessed to several crimes, including the murders of Heather Catterton, Randi Saldana, and Deborah Ratchford.

Among other accounts, defendant told police that he killed Heather Catterton in his mother's laundry room at approximately 4:30 in the morning on 18 October 2009. According to these statements, after Heffner was gone, defendant told Catterton that "her lighter was out," but that he had more lighters in a cabinet in the basement, and if "she'd

come down there . . . we'd smoke some dope." He then followed her, used "some kind of cord" to strangle her from behind, and pulled her to the floor. Next he covered her mouth and nose with his hands "for like 10 or 15 minutes," then put a plastic Walmart bag over her face, and finally stood on her throat with his bare feet. Defendant told police that when these actions still failed to kill her, he punched her in the chest and her heart stopped beating.

Defendant stated that he then stored Catterton's body in a closet for several hours, until he disposed of it at approximately 6:00 p.m. that day. At that point, he wrapped the body in a blanket, drove it across the border to South Carolina, and dumped it near a creek along Robinson Yelton Road. Defendant said he later disposed of the blanket by throwing it in a dumpster and discarded the clothing by throwing it away near a creek. Defendant gave conflicting statements regarding his motive for the killing. At one point, he told police that he killed Heather Catterton for virtually no reason, but because he "[j]ust wanted to." At other times, he told them he killed her to help her escape a hard life that involved prostitution, beatings, and drugs.

During these same interviews, defendant also confessed to four other murders, two of which he said occurred in Florida. As for the other two homicides, defendant told police that he killed Randi Saldana several weeks after killing Catterton. In addition, defendant confessed to the August 1992 murder of Deborah Ratchford. Evidence about the Ratchford murder was not admitted at the Catterton trial.

Regarding the two women defendant claimed he killed in Florida, defendant refused throughout the interviews to provide details, but eventually did provide some information. Defendant told police that both women were white prostitutes, that he did not recall their names, and that their bodies were buried on Merritt Island in Brevard County. However, his statements about these murders conflicted regarding other important details. At one point, he told police that he committed the murders in 1992; at another, he said he killed them in 2009.

Four days later, on 9 December 2009, defendant recanted his confessions to the Ratchford murder and the two Florida murders. At trial, defendant also denied intentionally killing Catterton and Saldana.

PROCEDURAL HISTORY

Pretrial Proceedings

Defendant was indicted on 14 December 2009 for the murders of Heather Catterton, Randi Saldana, and Deborah Ratchford; he entered

pleas of not guilty. The State moved to join the Catterton and Saldana murders for trial, but the trial court denied this motion. Thus unable to try the two cases together, the State elected to try the Catterton murder first and sought to present evidence of the Saldana and Ratchford murders under Rule of Evidence 404(b).

The trial court conducted two hearings, one that started on 6 July 2011, and a second that started on 8 August 2011, to determine what evidence the State could present under this Rule. The July hearing focused on the forecast Saldana evidence. The trial court found several similarities between the Saldana and Catterton murders, including that both decedents were white females who engaged in prostitution, that both had died in defendant's mother's house within a "matter of weeks," that the physical evidence in both cases was consistent to show that both bodies were temporarily stored in defendant's mother's basement closet, and that defendant had disposed of both bodies in York County, South Carolina. Based on these factual similarities, the trial court concluded that much of the Saldana evidence could be presented under Rule 404(b) to show that defendant acted with a common plan, scheme, or design.[1] The trial court also rejected defendant's objection based on Rule of Evidence 403, and concluded that the probative value of the Saldana evidence would not be outweighed by the risks of unfair prejudice, delay, or confusion.

The August hearing focused on the evidence the State sought to present regarding the Ratchford murder. The trial court considered the State's forecast and found several important differences between the two cases, including the remoteness in time between the occurrences, the differences in the causes of death, the dissimilar alleged motives, and the role of a third party in Ratchford's death but not Catterton's. Based on these differences, the trial court concluded that evidence of the Ratchford murder was inadmissible under both Rule 404(b) and Rule 403.

Trial

Opening arguments at the trial for Heather Catterton's murder were delivered on 18 October 2011, and on the same day, the State began to present its case-in-chief. The State's first witnesses testified about the

1. The trial court specifically allowed the State to introduce several photographs showing Saldana's burnt body at the site where defendant had dumped it in South Carolina. The trial court did, however, exclude others on the basis that they were merely duplicative of those the State would be allowed to present.

discovery of Catterton's body and the events leading up to her death, and the State focused throughout the trial on the substance of defendant's confessions. By the second day of trial, however, over defendant's continuing objection, the State began also to focus heavily on evidence regarding the death of Randi Saldana. For example, on the second day of trial, a witness described finding the burnt body of Randi Saldana and testifying that it "felt like human flesh." The day after that, the State called Saldana's sister to testify about Saldana's good character and their close relationship. In all, the State presented twelve witnesses who testified about the Saldana death; this presentation spanned seven of the eight days on which the State presented evidence.

The State concedes that "[i]t is true that there was more evidence presented concerning the Saldana murder than there was for the murder of Heather Catterton—at least in part because there simply existed more evidence about the Saldana murder." The State argues that no authority prohibits it from "presenting Rule 404(b) evidence just because that evidence is worse for defendant than the evidence of the offense for which he is being tried."

Throughout the trial, the State presented at least sixteen photos of Randi Saldana, including more than a dozen photographs of Saldana's charred corpse. The trial court did, however, give repeated instructions to consider the Saldana evidence only insofar as it showed a common plan, scheme, or design involving both deaths.

The State also presented the testimony of medical experts. Anna Schandl, M.D., testified that she had conducted Catterton's autopsy, and that Catterton tested positive for an amount of cocaine which could potentially have been lethal. She also testified that there was no bruising or external trauma around Catterton's neck, but stated that this finding did not necessarily rule out defendant's account that he had strangled Catterton with a cord, pulled her to the floor, stood on her neck for several minutes, and suffocated her with a plastic bag. Ultimately, in her final autopsy report, Dr. Schandl indicated that the cause of Catterton's death was "undetermined."

In contrast with that of the Catterton experts, the testimony regarding the cause of Randi Saldana's death was more certain. The State's sole rebuttal witness was Nicholas Batalis, M.D., who conducted the autopsy on Randi Saldana and described the condition of Saldana's body in some detail, including multiple bruises on her neck and a fracture of her thyroid cartilage. In line with defendant's confession, Dr. Batalis concluded that Saldana had been killed by strangulation.

The defense evidence focused on discrediting the confessions defendant made on 5 December 2009 and then recanted. Defendant took the stand in his own defense to provide a different account of the night Catterton died. According to defendant, once Sommer Heffner left that evening, he and Catterton continued to smoke crack cocaine and have sex at his mother's house. Defendant claimed that they then went to bed, and Catterton was dead when he woke in the morning. Regarding Randi Saldana, he testified that he was performing oral sex on Saldana while squeezing her throat with one hand to intensify her orgasm. He claimed that her death accidentally resulted from his attempt at erotic asphyxiation.

Defendant also attempted to explain why he would falsely confess to multiple offenses, including several murders. Defendant testified that he had been arrested for a series of armed robberies, and that with his previous record, he could face a sentence of almost one hundred years. Defendant claimed that he believed confessing to the other offenses would grant him leverage with prosecutors on the robbery charges, but that he would not be convicted based on his (allegedly false) confessions once the police actually investigated his claims. In short, defendant testified that he falsely confessed in an attempt to "play[ ] the system."

The defense also presented evidence to contradict defendant's earlier claim that he had killed two women in Florida in either 1992 or 2009 and buried their bodies on Merritt Island. Detective Hensley testified that he relayed that information to authorities in Florida, who came to Gastonia to speak with defendant. A Florida detective testified, however, that no bodies were ever found at that location, that no unsolved murders matched the crimes defendant described, and that police were unable to verify many other details of defendant's statement.

Defense evidence also included the testimony of two medical experts regarding Catterton's cause of death. Forensic toxicologist Andrew Mason, Ph.D., testified that he had reviewed Catterton's toxicology reports and autopsy findings, and that the concentrations of cocaine and cocaine metabolites in her blood might have been, but were not necessarily, the cause of her death. In contrast, defense expert Donald Jason, M.D., a licensed medical doctor and associate professor, was the only expert at trial who offered a conclusion regarding the most likely cause of Heather Catterton's death. He reviewed the autopsy materials prepared by the State's expert, Dr. Schandl, and similarly concluded that Catterton's body had no significant bruises or wounds. He noted that Catterton "did not have any trauma that would be consistent with being cause of death" and concluded "that the most probable cause of death is cocaine toxicity."

Both the State and the defense offered closing arguments on 7 November 2011. The defense emphasized the lack of certainty regarding the cause of Heather Catterton's death and the inconsistencies between the physical evidence and defendant's 5 December 2009 statements to police. The State emphasized the substance of defendant's confessions, the fact that forensic evidence did not preclude defendant's claim that he had suffocated Catterton with a plastic shopping bag, defendant's history of manipulating others, and that two women, Catterton and Saldana, had been killed.

The next day, 8 November 2011, the jury found defendant guilty of first-degree murder. On 18 November, after a capital sentencing proceeding, the jury found two aggravating circumstances and fourteen mitigating circumstances, and recommended a sentence of death, which the court imposed. Defendant appealed to this Court.

ANALYSIS

Defendant argues that the trial court committed several errors, the cumulative effect of which deprived him of a fair trial. We agree. We hold that the trial court committed three errors: first, by allowing admission of an excessive amount of the Saldana murder evidence under Evidence Rule 404(b), including more than a dozen photographs of her burnt body; second, by allowing Saldana's sister, Shellie Nations, to testify about Saldana's good character; and third, by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury. In light of the cumulative effect of these three errors, "we are unable to conclude that defendant was not unfairly prejudiced." *State v. Rogers*, 355 N.C. 420, 465, 562 S.E.2d 859, 886 (2002) (citation omitted). Accordingly, we vacate the conviction and sentence, and remand to the trial court for a new trial.

The Saldana Evidence

Defendant argues that the trial court erred by admitting too much evidence of the Saldana murder, including evidence that showed only differences between the offenses, in violation of Rules of Evidence 404(b) and 403. Our standard of review for this issue contemplates a two-part inquiry:

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and

> whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Rule 404(b) provides in relevant part that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2014). Because this Rule disallows the introduction of evidence only when the evidence would be used for a specific forbidden purpose, we have long described Rule 404(b) as a " 'general rule of inclusion.' " *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (emphasis omitted)). In general, Rule 404(b) allows the admission of any evidence, " 'as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.' " *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159 (quoting *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995)). However, this Rule is "constrained by the requirements of similarity and temporal proximity;" accordingly, while similarities between the charged crime and the 404(b) crime need not "rise to the level of the unique and bizarre," there must be "some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* at 131, 726 S.E.2d at 159 (citations and internal quotation marks omitted).

Here, the trial court determined, and repeatedly instructed the jury, that the evidence of the Saldana murder could be considered only for the limited purpose of determining whether "there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case," the Catterton murder. Therefore, under our standard of review, we must examine whether the findings of fact supported the legal conclusion to admit the evidence for this purpose, and whether those findings of fact were themselves supported by competent evidence.

At a two-day hearing conducted in July 2011, the trial court received evidence and heard arguments regarding the admissibility of the Saldana

evidence at trial. In addition to police reports, the trial court had before it the autopsy reports for Catterton and Saldana, as well as defendant's statements to the police. At the end of the hearing, the trial court made the following findings of fact orally:

> The defendant is charged in this case with the murder of Heather Catterton. This offense is alleged to have occurred on or about October 17th or 18th, 2009. The defendant made a statement to law enforcement officers on December 5, 2009 and made statements about this matter at various times and places from that date for several days thereafter. . . . The defendant's statements include multiple statements about the killing of Randi Saldana. The death of Randi Saldana is placed as having occurred on or about November 11, 2009, a matter of weeks after the homicide which is the subject of this case. In his . . . written statement, the defendant said, "I also killed Randi Saldana. I killed her because it was business. I was killing two birds with one stone."
>
> The physical evidence accumulated before and after the statement of the defendant is substantial. The killings occurred in the residence of the defendant. The physical evidence is consistent to show that the bodies of each of these women was temporarily placed in a cabinet or closet in the house in the basement area of [defendant's mother's house]. . . .
>
> Both bodies were subsequently removed by the defendant and taken to South Carolina and disposed of in remote locations and clothing of the two individuals was disposed of by being deposited in other remote locations. Both bodies were found at the same place at which the evidence tends to show the defendant placed or disposed of the bodies. The Catterton remains were found on October 29, 2009 in York County. The Saldana remains were found November 15, 2009 in York County. . . .
>
> Autopsies were conducted by the Medical University of South Carolina in each case. In regard to the Catterton autopsy, the cause of death was undetermined by the examining physicians and the manner of death was undetermined as reflected in that report. . . .

> In regard to the Saldana [case], that autopsy which was performed 11-17-09, results in a finding of [cause of] death of strangulation, manner of death homicide. Internal and external examination results are part of that report. Final diagnosis is strangulation. Fracture of the thyroid cartilage is indicated and soft tissue injury to the neck. The Saldana body was burned before it was discovered.
>
> The defendant described his actions in regard to the Catterton killing and her actions in the house. As to both he describes the drug use and the communal use of drugs by the defendant and each of the victims and others before the killings.
>
> . . . .
>
> As to the victims, they are both white females. They both apparently were prostitutes. Each of them was an acquaintance of the defendant, not a stranger. Both of them were acquaintances with whom he had shared sexual relationships and drug use along with others. In regard to what is involved, the what is the . . . homicide in both cases. . . .
>
> The proximity in time of these cases is close. It is not a temporal extended time, a matter of weeks. Why, in regard to motive, there does seem to be a similarity in regard to what the defendant says his reasons were and that was because of his contention they were having sex with black men. . . .
>
> The evidence apart from the autopsies is sufficient to show a method employed by the defendant. . . . Both would be manual violence as opposed to a blade or a firearm or a drowning. Both of them involve a manual killing. The similarities in the pattern of events on each occasion shows a plan or design.

Based on these findings, the trial court concluded that the evidence was admissible under Rule 404(b). The trial court emphasized: "I want to be clear about this. The same similarities and the method of disposing of the bodies and garments all show the plan, design and scheme aspect of this rule."

We hold that the trial court properly admitted evidence of the Saldana murder under Rule 404(b). Competent evidence—particularly

the autopsy reports and defendant's 5 December 2009 statement to the police—supported the trial court's oral findings of fact, and these findings of fact supported the trial court's conclusion that the Saldana evidence could be used to show a common plan or design. Because this evidence was probative of more than defendant's propensity to commit murder, namely that the Catterton murder was part of a common plan, design, or course of conduct, we conclude that Rule 404(b) did not preclude the admission of evidence concerning the Saldana murder.

This conclusion, however, is not the end of our inquiry. Though Rule 404(b) is a "general rule of inclusion," *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 122, Rule 403 supplies an independent limitation on the ability of trial courts to admit evidence under that Rule. Rule 403 provides in full:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (2014). Once a trial court has weighed the likely probative and prejudicial value of evidence a party has sought to admit over an objection, we review only for abuse of discretion. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. This standard is deferential, and we will disturb the trial court's decision only when it crosses the line from potentially reasoned to necessarily arbitrary. *See, e.g.*, *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74-75 (2002), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003).

In conducting this analysis, we note the particular dangers presented by Rule 404(b) evidence. The United States Supreme Court long ago described how such evidence can be misused, especially by allowing the jury to convict the accused for a crime not actually before it. *See Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 218, 93 L. Ed. 168, 174 (1948) ("The inquiry [into character] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (footnote omitted)). Our own, more recent decisions have recognized the same risks. *See, e.g.*, *State v. Carpenter*, 361 N.C. 382, 387-88, 646 S.E.2d 105, 109 (2007) ("When evidence of a prior crime is introduced, the natural and inevitable tendency for a judge or jury is to give excessive weight to the vicious record of crime thus exhibited

and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." (citations and internal quotation marks omitted)). Accordingly, because of this " 'dangerous tendency . . . to mislead and raise a legally spurious presumption of guilt' " we have required that such evidence " 'be subjected to strict scrutiny by the courts.' " *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 122 (quoting *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986)). Here, those dangers were particularly acute, and so our scrutiny in this capital case must be particularly careful.

Defendant does not argue that he was not present when Heather Catterton died, nor does he contest that he hid, then later disposed of, her body and that of Randi Saldana. The principal contested issue of fact at trial was the cause of Heather Catterton's death. None of the expert witnesses was able definitively to determine the cause of her death. None identified any internal or external trauma to Catterton's chest or neck; in contrast, three testified that her death may have resulted from cocaine toxicity. Indeed, one defense expert specifically concluded that Catterton "did not have any trauma that would be consistent with being [the] cause of death" and that "the most probable cause of death is cocaine toxicity." Given this forensic uncertainty, the Saldana evidence likely weighed heavily in the jury's deliberations.

We also note the nature and extent of the evidence presented concerning the Saldana murder. The State began to present this evidence on only the second day of the guilt-innocence phase of the trial and continued to present it on seven of the eight days it offered evidence, up to the day before closing arguments. In addition, because Saldana's body had been burned while Catterton's had not, much of this evidence concerned a key difference between the two deaths, rather than a similarity as anticipated under Rule 404(b). One of the State's first witnesses testified what it felt like to touch Saldana's body, and the jury viewed over a dozen photographs depicting Saldana's scorched remains. Our own review of the photographs confirms their stark and unsettling nature.

Our review has uncovered no North Carolina case in which it is clear that the State relied so extensively, both in its case-in-chief and in rebuttal, on Rule 404(b) evidence about a victim for whose murder the accused was not currently being tried. To the contrary, we have granted relief when the circumstances reveal a distinct risk that the jury may have been led to convict based on evidence of an offense not then before it. In *State v. Al-Bayyinah*, for example, we awarded a new trial in a capital case when Rule 404(b) evidence focused on earlier robberies "that

were factually dissimilar to the robbery and murder charged" in that case. 356 N.C. at 155, 567 S.E.2d at 123 (citing *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993)). *But see generally State v. Peterson*, 361 N.C. 587, 652 S.E.2d 216 (2007) (allowing a large amount of 404(b) evidence), *cert. denied*, 552 U.S. 1271, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (same). We have also identified cases addressing similar scenarios in other states, and we find them instructive.

Most similar is the 2000 decision in *Flowers v. State*, a capital case from Mississippi. *See generally* 773 So. 2d 309 (Miss. 2000). There, the defendant was on trial for one murder, although he had also been charged with three other homicides likely committed at the same time. *See id.* at 313. As here, a motion to consolidate the cases for trial was denied. *Id.* And, as here, the State sought to use Rule 404(b) to introduce copious evidence of the other three murders, including graphic photographic evidence, effectively proceeding as if the motion to try the offenses together had been allowed. *See id.* at 318-21. Based on this error, and its cumulative effect when considered with other errors, the Mississippi Supreme Court reversed the trial court's judgment and remanded for a new trial. *Id.* at 317, 334. In doing so, the appellate court remarked with palpable derision on the State's tactic of using evidence of an incendiary separate offense to arouse the passions of the jury:

> It is the "necessity" by the State to use the other evidence of three killings in order to tell a coherent story that is the key to its admissibility. The case at bar is not one of those cases so interconnected that mention of the other three murders is necessary to tell the whole story. Certainly it is not to the extent employed by the prosecution in the case at bar. Here, however, a pattern of trial tactic commenced at the beginning of trial and was continued by the prosecutor throughout the guilt phase of the proceedings including closing argument. If the evidence relating to the other three murders was relevant to any one of the acceptable purposes listed in Miss. R. Evid. 404(b), a description of the crime scene may have been helpful. However, the numerous additional descriptions of the other victims and photographs could do nothing but inflame the jury.

Id. at 324. If anything, the differences between Catterton's death and Saldana's death, and the lack of an obvious connection between the offenses, render the evidence of Saldana's death even less "necessary"

than the 404(b) evidence in *Flowers*. Accordingly, the concerns in Flowers about inflaming the jury pertain here as well.

In this context—in which Heather Catterton's cause of death was uncertain, and the Rule 404(b) evidence was so emotionally charged—we conclude that the decision to allow the State to present so much evidence about the Saldana murder stretched beyond the trial court's broad discretion. While the State possesses considerable leeway in presenting even "gory, gruesome, horrible or revolting" photographs of homicide victims, *State v. Chapman*, 359 N.C. 328, 350, 611 S.E.2d 794, 812 (2005) (citations and quotation marks omitted), that leeway ends where the additional photographs "add nothing in the way of probative value but tend solely to inflame the jurors," *State v. Roache*, 358 N.C. 243, 285, 595 S.E.2d 381, 409 (2004) (citations and quotation marks omitted). Accordingly, we hold that the trial court erred in allowing the admission of an excessive amount of evidence about Saldana, particularly photographic evidence, when the probative value of the sum total of that evidence was substantially outweighed by the risks that it would confuse the issues before the jury, or lead the jury to convict defendant based on evidence of a crime not actually before it.

Shellie Nations's Testimony

The second relevant error concerns the testimony of Randi Saldana's sister, Shellie Nations. More specifically, defendant argues that the trial court erred by allowing Nations to testify, over defendant's objection, about Randi Saldana's good character. Defendant contends that this testimony was inadmissible because it was irrelevant to the crime charged—the murder of Heather Catterton—and because any probative value the testimony might have had was substantially outweighed by the danger of unfair prejudice. We agree.

It is axiomatic that only relevant evidence is admissible at trial, while irrelevant evidence is inadmissible. *See*, *e.g.*, *State v. Berry*, 356 N.C. 490, 504, 573 S.E.2d 132, 143 (2002). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2014). Evidence of a victim's character, or of the effect of the victim's death on others, is only rarely relevant when making a determination of guilt. *See State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004) ("[U]nless admissible under Rule 404(a)(2). . . . character evidence of a victim is usually irrelevant during the guilt-innocence portion of a capital trial, as is victim-impact evidence." (citing N.C. R.

Civ. P. 404(a)(2), *State v. Abraham*, 338 N.C. 315, 352-53, 451 S.E.2d 131, 151 (1994), and *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983))). It follows *a fortiori* that evidence concerning the character of a victim of a separate crime will be relevant in even fewer circumstances. Furthermore, even when evidence is admissible because it satisfies the low bar of logical relevance, that evidence must still be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403. Here, the trial court admitted, over defendant's objection, Shelly Nations's testimony about Saldana's good character. Nations testified during direct examination as follows:

> [by the State] Q. Do you know someone or did you know someone by the name of Randi Saldana?
>
> A. Yes, ma'am.
>
> Q. And what was the relationship that you had with Miss Saldana?
>
> A. That was my sister.
>
> Q. Was she a younger sister or was an older sister?
>
> A. She was a year younger.
>
> Q. A year younger? Describe what Randi was like.
>
> A. She was very free spirit, charismatic. She had a heart of gold.
>
> [Defense counsel]: I'm going to object, your Honor. [The trial court then overruled the objection but offered a limiting instruction.]
>
> . . . .
>
> [by the State] Q. Okay. You indicated that she was charismatic and had a heart of gold.
>
> A. Yeah. Randi, she was the type of person if you asked her for something and you needed it, the way we were raised is you gave it, you know, and you gave it with good intentions. She never really wanted to hurt anyone with the intentions of hurting them, you know. She was the type of person if she knew that—if she had known that she had hurt your feelings, she would come back and she would freely apologize and admit to her wrong in that, you know, for the most part. Randi and I were raised

> together our whole lives and I can't even count on one hand the arguments my sister and I had. She was just the type of person, she would express her feelings, and, you know, she just—she was a good person.

We hold that the trial court erred by allowing this testimony. It is difficult to discern any probative value that testimony about Randi Saldana's good character could have had to the issue of whether defendant caused the death of Heather Catterton. *See Abraham*, 338 N.C. at 352-53, 451 S.E.2d at 151 (" 'Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.' " (quoting N.C. R. Evid. 404 official commentary)). The State appears to concede this point and argues instead that any error was harmless because "[t]he bottom line is that there is little likelihood that Nations' testimony concerning Saldana's character made any difference in this case whatsoever." In light of this complete lack of relevance, we hold that the trial court should not have allowed this evidence over defendant's objection based on Rule 403.

Improper Statements Made During the State's Closing Argument

The third relevant error concerns statements made by the State during closing arguments at the guilt-innocence phase of the trial. More specifically, defendant argues that the State made multiple improper statements, including several that impermissibly accused defense counsel of suborning perjury. We agree.

During closing arguments, prosecutors are barred by statute from "becom[ing] abusive, inject[ing their] personal experiences, [and] express[ing their] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant." N.C.G.S. § 15A-1230 (2014). Within those confines, however, we have long recognized that " 'generally, 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. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (brackets omitted) (quoting *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008)) (internal quotation marks omitted), *cert. denied*, __ U.S. __, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012). This latitude is reflected in our deferential standards of review. When opposing counsel objects during a closing argument, we review

for abuse of discretion. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003). When there is no objection, we review for gross impropriety. *Phillips*, 365 N.C. at 143, 711 S.E.2d at 150. In all cases, we view the remarks "in context and in light of the overall factual circumstances to which they refer." *Id.* at 135, 711 S.E.2d at 145 (citations and quotation marks omitted).

Judicial deference, however, is not unlimited. In particular, "we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation." *Rogers*, 355 N.C. at 462, 562 S.E.2d at 885 (citations omitted); *see also State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." (citations and internal quotation marks omitted)). Despite this prohibition, several statements made during the course of the State's closing argument had just this effect.

Shortly after beginning its closing argument, the State suggested that defendant had manipulated his attorneys into misleading the jury. The prosecutor argued:

> He [defendant] has manipulated his attorneys. Don't let him manipulate you. Don't let him work the system again. . . . [Y]ou heard video confessions of how he killed Heather Catterton and Randi Saldana. And then the defense started, they started putting up these smoke screens, started to try to confuse you.

While this particular statement was borderline, and may have referred to defendant himself rather than defense counsel, the intimations became more direct as the argument progressed. Just a few minutes later, the State argued:

> [A]t no point, no point in the last 18 months since this has been pending trial, has he ever recanted killing Heather or Randi. Never. Not until two years later when he could look at everything, when he can study the evidence, when he can get legal advi[c]e from his attorneys, does he come up with this elaborate tale as to what took place.

Almost immediately, the State emphasized this point a second time:

> Two years later, after he gives all these confessions to the police and says exactly how he killed Heather and

> Randi Saldana . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story.

In response to this third statement, defense counsel objected and the trial court sustained the objection; however, the trial judge offered no corrective instruction, but instead told the jury only that he would "sustain the objection as to the argument and odd comment." Despite this ruling and judicial admonition, the prosecutor continued in a similar vein. In conclusion, the prosecutor argued:

> Think back to December 5th of 2009 when he knew nothing, when he had no legal advice; consistently, voluntarily told the police everything, and it was consistent with what the evidence showed. . . . For hours you watched this man confess to killing Heather and Randi Saldana, and now, after 18 months to two years, the defense begins and they put up smoke screens and they tried to confuse you? . . . We've got two women dead, and he killed them. I ask that you find the defendant guilty, first-degree murder, of killing Heather Catterton. Thank you.

In context, the import of these arguments is clear: The State argued to the jury, not only that defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel. Whether or not defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys. Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*.

CONCLUSION

Defendant has identified three errors that occurred during his capital trial for the murder of Heather Catterton. Regardless of whether any single error would have been prejudicial in isolation, we conclude that the cumulative effect of these three errors deprived defendant of a fair trial. Accordingly, we vacate defendant's conviction and sentence, and remand for a new trial. Because of our disposition of this case, we conclude it is unnecessary to address defendant's motion for appropriate relief; we therefore dismiss defendant's MAR as moot.

NEW TRIAL.

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

Justice NEWBY dissenting.

At trial the State presented not one, but two, videotaped confessions by defendant, a third video of defendant at the crime scene explaining the details of the murder to police, and an abundance of corroborating physical evidence to support the confessions. In court defendant recanted his prior statements and testified that he fabricated the murder confessions to avoid longer prison sentences on several robbery charges. After hearing evidence and weighing the credibility of the witnesses, in less than four hours of deliberation, the jury found defendant guilty of first-degree murder. Despite overwhelming evidence of his guilt, the majority unconvincingly asserts that defendant's claims of error were prejudicial requiring a new trial even under the deferential standard of review applicable to each submitted claim. Accordingly, I respectfully dissent.

The majority points to three alleged errors at trial: (1) the admission of victim character testimony from Randi Saldana's sister, Shelly Nations; (2) the admission of too much evidence of defendant's murder of Saldana under North Carolina Rule of Evidence 404(b), particularly the number of photographs of Saldana's burned body; and (3) several comments made by the prosecutor during closing argument. I agree with the majority that the trial court impermissibly admitted Nations's testimony; however, the conflicting evidence of Saldana's lifestyle of drug use and prostitution rendered any effect of that testimony negligible. The remaining allegations do not establish error, much less prejudicial error.

In this case the pivotal question decided by the jury was the credibility of defendant's numerous and detailed incriminatory statements to police against his conflicting testimony at trial. The State's evidence included two separate videotaped interviews with detectives in which defendant confessed to choking to death both Heather Catterton and Randi Saldana. The State also presented a video of defendant showing detectives where he disposed of Catterton's clothing and belongings following her murder and a video of defendant giving detectives a detailed walk-through of his mother's home, where the two murders occurred. The scientific evidence was inconclusive. Seeking to undermine his pretrial assertions, defendant testified at trial that he initially confessed to the two murders in the hope of receiving leniency on several pending robbery charges. Defendant further testified that Catterton died in his mother's home from a drug overdose and that Saldana died in the same home from voluntary, sex-related asphyxiation, both within a month of each other. His initial confessions and his later conflicting

trial testimony regarding the deaths of Catterton and Saldana could not have both been true.

The majority correctly holds that the trial court properly admitted evidence of Saldana's murder under North Carolina Rules of Evidence 404(b) to show defendant acted with a common scheme, plan, or design. Defendant repeatedly confessed that he strangled Saldana and suffocated Catterton. Saldana's autopsy report confirmed that she was strangled to death, while Catterton's cause of death remained inconclusive. In response, the State presented Rule 404(b) evidence of Saldana's murder by strangulation to prove that defendant, as he confessed, also intentionally suffocated Catterton. Saldana's murder undoubtedly satisfies the Rule 404(b) criteria: Defendant confessed to both murders during the same interviews with police; both victims were young, white female prostitutes who exchanged sex with defendant for drugs; their circles of acquaintances overlapped significantly; both had sex with defendant in the same trailer; both died in his mother's house; both of the victims' bodies were temporarily stored in the basement of the home where they died and later dumped in rural areas of York County, South Carolina; defendant admitted that he killed both by either strangulation or suffocation; and lastly, both victims died within a month of each other. *See State v. Howell*, 343 N.C. 229, 236, 470 S.E.2d 38, 42 (1996) (upholding the admission of 404(b) evidence to prove the defendant's identity, common plan, and lack of mistake when both victims were black prostitutes and both were picked up by the defendant in the same area, taken to the defendant's bus at night, and bound, one with wire and the other with duct tape).

Notwithstanding the conclusion that the evidence was admissible under 404(b), the majority holds that the trial court abused its discretion under North Carolina Rule of Evidence 403 in admitting "an excessive amount" of the 404(b) evidence. To justify reversal, a trial court's ruling on a Rule 403 determination must be "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). The majority classifies the trial court's decision as necessarily arbitrary, but gives no guidance to the trial court upon retrial on where to draw the line, how much evidence is too much, or what particular evidence is prohibited.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R.

Evid. 403. In the context of the Rule 403 balancing test, the prosecution is entitled to put on its case and should not be penalized because the acts a defendant is accused of committing are particularly gruesome. The United States Supreme Court has noted:

> When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.

Old Chief v. United States, 519 U.S. 172, 187-88, 117 S. Ct. 644, 653-54, 136 L. Ed. 2d 574, 592 (1997). This "persuasive power of the concrete and particular" is especially important in capital cases in which grisly details arise quite frequently. *Id.* at 187, 117 S. Ct. at 653, 136 L. Ed. 2d at 592. The more relevant the State's evidence is, the more likely it is to persuade the jury of a defendant's guilt of the particular crime charged. Rule 403 does not prohibit probative evidence simply because it strongly influences the jury's verdict or the State relies on it heavily at trial.

The majority ignores the highly probative nature of the Saldana 404(b) evidence and then fails to identify any unfair prejudice that substantially outweighs its probative value. Against defendant's assertions that he contrived the portion of his videotaped confessions describing how he killed Catterton and Saldana, the Saldana 404(b) evidence serves to establish that Saldana was in fact strangled. The physical evidence of Saldana's murder corroborates defendant's confession that he killed her and, considering the striking similarities in the two murders, discredits defendant's recantation of his confession to the Catterton murder. Defendant entwined details of the two murders throughout his taped confessions, making the Saldana 404(b) evidence an unavoidable and significant part of the State's case-in-chief. Further, many of the State's witnesses were familiar with both murders and testified as to their knowledge. Nonetheless, ignoring the interrelationship of the two murder investigations, the majority believes the highly probative 404(b) evidence is unfairly prejudicial in part simply because the State referenced it on seven of the eight days it presented evidence at trial. Without any support from our case law, the majority creates a vague,

unworkable rule that limits admissible evidence under Rule 403 and discourages the State from relying on probative evidence. In so concluding, the majority fails to adhere to the deferential standard of review for abuse of discretion.

Whether photographic evidence "is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each . . . lies within the discretion of the trial court." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527 (citation omitted). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Id.* at 284, 372 S.E.2d at 526 (citations omitted). "When a photograph add[s] nothing to the State's case, then its probative value is nil, and nothing remains but its tendency to prejudice." *Id.* at 286, 372 S.E.2d at 527 (internal citations and quotation marks omitted). "This Court has rarely held the use of photographic evidence to be unfairly prejudicial . . . ." *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990).

The majority states in conclusory fashion that the trial court erred in admitting some of the photographs of Saldana's body because those photographs add nothing of probative value under Rule 403. A careful analysis of the photographs refutes this conclusion. Of the fifteen photographs at issue, the first three photographs (Exhibits 45, 46, and 47) depicted Saldana's burned body lying substantially covered in debris in a wooded area. Two of those photographs were taken from a distance and from different angles. The third photograph was a close-up of the body. The witness who first found the body used these three photographs to show the rural nature of the area and the body's appearance upon its discovery. This testimony corroborated defendant's videotaped confession regarding his disposal of Saldana's body.

The State submitted the next six photographs to illustrate the testimony of a sheriff's deputy who responded to the call that a body had been found. Four of those photographs were of Saldana's body: Exhibit 50 shows a close-up of the wire found wrapped around Saldana's legs, which defendant confessed to using; Exhibits 51 and 52 further show the wire wrapped around Saldana's legs, and Exhibit 53 shows Saldana's burned right arm and hand. Though unpleasant to view, these photographs were highly probative in connecting the physical evidence of Saldana's body's condition to defendant's detailed confession, particularly that he wrapped a lamp cord around Saldana's legs.

The remaining ten photographs in question, used to clarify testimony from the coroner and Saldana's sister, showed Saldana's body after it had been cleaned of debris and prepared for autopsy on the coroner's examining table. Before the coroner testified, the trial court considered, and excluded upon defendant's objection, two of these photographs—Exhibits 60 and 61—as unnecessarily cumulative. Exhibits 57, 58, 59, 62, and 63 aided the coroner's testimony to show the victim's neck injuries and corroborated defendant's videotaped confession that he choked Saldana to death. Exhibits 58, 59, 62, and 63, though graphic, showed the victim's head and torso injuries from different viewpoints. The last photograph focused on the injury to the victim's forehead as described by defendant in his videotaped confession and trial testimony. Three photographs, Exhibits 54, 55, and 56, served to identify the victim by focusing on unique tattoos located on relatively undamaged parts of her body. These depictions were not gruesome and did not present a high risk of prejudice. Saldana's sister described the tattoos, referring to these three photographs during her testimony. These highly probative, standard autopsy photographs, though unsettling, confirm the victim's identity and the condition of her body, allowing the triers of fact to assess the veracity of defendant's confessions and the similarities in the victims' conditions.

These fifteen photographs of the body helped identify the victim and corroborated defendant's pretrial confessions that he strangled, burned, and bound Saldana, and disposed of the body in a rural, wooded area. This Court defers to a trial court's exercise of discretion in allowing such photographs. In *State v. Robinson* we upheld the trial court's admission of twenty-three photographs, eleven of which showed a victim's burned body, his autopsy, or the burned car containing the victim. 327 N.C. at 355, 395 S.E.2d at 407. We concluded that the photographs were not needlessly repetitive, that competent testimony accompanied each photograph, and that each portrayed " 'somewhat different scenes.' " *Id.* at 358, 395 S.E.2d at 409 (quoting *State v. Dollar*, 292 N.C. 344, 355, 233 S.E.2d 521, 527 (1977)). *Compare State v. Waring*, 364 N.C. 443, 497, 701 S.E.2d 615, 649 (2010) (finding no abuse of discretion when the trial court admitted eighteen autopsy photographs because the photographs "were not unnecessarily repetitive, were not unduly gruesome or inflammatory, and illustrated [witness and defendant testimony]"), *cert. denied*, ___ U.S. ___, 132 S. Ct. 132, 181 L. Ed. 2d 53 (2001), *with Hennis*, 323 N.C. at 282, 372 S.E.2d at 525 (finding prejudicial error when, *inter alia*, thirty-five images measuring three feet, ten inches by five feet, six inches showing three murder victims' decomposing bodies and repetitive photographs of the same neck injury on all three bodies were projected on

the wall directly above the defendant's head). Under a straightforward application of our precedent, the trial court did not abuse its discretion in admitting the fifteen photographs here, each serving a different illustrative purpose.

In its last finding of error, the majority insists the State made inappropriate statements to the jury in its closing argument. "It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). "Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *Id.* (citations omitted). We review for abuse of discretion objections made to a party's closing argument, *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 320 (2003), but "the impropriety of the argument must be gross indeed" for us to hold that the trial court abused its discretion by not "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) (citation and quotation marks omitted).

The majority contends that it was grossly improper for the trial court not to intervene unilaterally when the State, in the majority's view, accused defense counsel of suborning perjury and defendant of being a liar. The majority's mischaracterization ignores our deferential standard of review and disregards defendant's and defense counsel's own declarations. While I agree with the majority that the State strayed too far in its closing argument by saying that "defendant, along with his two attorneys, c[a]me together to try and create some sort of story," the trial court properly sustained defendant's objection to those remarks. Nowhere does the State argue that defendant's attorneys told him to lie in his testimony.

Defendant's major premise here was that his trial testimony was true and that his videotaped confessions were false. In its closing argument, the State submitted that defendant came up with "this elaborate tale as to what took place" after "get[ting] legal advi[c]e from his attorneys." There is nothing grossly improper in the State suggesting that defense counsel provided legal advice to defendant or that defendant contemplated recanting his confessions after his attorneys informed him of the legal consequences of confessing to the murders. Furthermore, defendant himself testified to being manipulative and untruthful. On cross-examination, defendant freely admitted to

manipulating the justice system during the over twenty-five years he had been in and out of prison:

> Q [from the State]. You manipulated the system?
>
> A. Well, I mean, I choose to call it working the system. Manipulation is, you know, in the eye of the beholder. I don't know. I just work the system. I do whatever is best for me. If you want to call it manipulation, then that's fine, I guess.

Defense counsel reinforced defendant's admission during closing argument: "[Defendant is] manipulative, he lies, he tells things to get things. . . . His family says he lies. . . . He lies to bolster himself." Perhaps the one fact both sides agreed on throughout the trial was that defendant was not always truthful. The majority concludes, contrary to precedent, that the trial court erred in allowing the State to agree with the assertions repeatedly made by defendant and his counsel to this effect. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410 ("Counsel is permitted to argue the facts which have been presented . . . .").

The majority has identified three potential errors over the course of a five-week trial and summarily concludes that these alleged errors when considered together prejudiced defendant's trial. The identification of alleged errors, however, is not reversible per se; defendant must demonstrate that "there is a reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2013). *See State v. Badgett*, 361 N.C. 234, 248, 644 S.E.2d 206, 215, *cert. denied*, 552 U.S. 997, 128 S. Ct. 502, 169 L. Ed. 2d 351 (2007) (concluding admission of the defendant's prior conviction was harmless when the "defendant has failed to demonstrate any reasonable possibility that the jury would have reached a different result had the evidence been excluded"); *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) ("Even assuming error *arguendo*, defendant has failed to meet his burden of showing that a reasonable possibility exists, that had the evidence . . . not been admitted, a different result would have been reached at his trial.").

As stated earlier, I agree the trial court erred by admitting Nations's victim character testimony but the conflicting evidence of Saldana's lifestyle of drug use and prostitution negated any effect of that testimony. Thus, defendant must show the two additional alleged errors, the admission of "an excessive amount" of 404(b) evidence and several comments by the prosecutor during closing argument, created a "reasonable possibility" of changing the jury's verdict. Regarding the 404(b) evidence,

the trial court continually instructed the jury, often multiple times a day, that the evidence

> is offered, and you may consider it, for the purpose of showing that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case, and you may not consider it for any other purpose in regard to the trial of this case.

The trial court repeatedly and consistently urged the jury to use the evidence only as instructed throughout the trial:

> [L]et me put it this way: Evidence has been received tending to show that Randi Saldana died under circumstances that have some similarity to the charge against the defendant in the case that we are trying, and the case we're trying is the one which he is charged with the murder of Heather Catterton. Now, this evidence was received, and will be received and considered by you, solely for the purpose of showing that the defendant had existing in his mind a plan, scheme, system, or design involving the crime charged in this case.
>
> . . . .
>
> I want you to understand that if you believe this evidence, you may consider it but only for the limited purpose for which it has been received or may be received subsequently. You may not consider such evidence about the Saldana matter for any other purpose.
>
> . . . . .
>
> Now, members of the jury, at this point I'm going to give you an instruction that's just simply the same instruction I gave you before. That information previously received through the evidence, testimony in regard to Randi Saldana, has a limited purpose . . . .
>
> . . . .
>
> This evidence has been received solely for the purpose of showing any of the following: That the defendant had a motive for the commission of the crime charged in this case; that the defendant had the intent which is a necessary element of the crime charged in this case; that there existed in the mind of the defendant a plan, scheme,

> system, or design involving the crime charged in this case; that the defendant had the opportunity to commit the crime in this case; or the absence of accident in this case.
>
> The state contends, and the defendant denies, that the evidence on this matter shows these things in regard to the offense charged, that is, the murder of Heather Catterton. It is for you to decide what, in fact, the evidence does show. If you believe this evidence, you may consider it, but only for the limited purposes for which it has been received.

Similarly, during closing argument, when defendant objected to the prosecutor's statement, the trial court "sustain[ed] the objection as to the argument and the odd comment."

Most importantly, here there is overwhelming evidence of defendant's guilt, including the multiple detailed confessions to the murder he provided shortly after his arrest. An abundance of corroborating physical evidence supported defendant's confessions. Defendant's only defense was that he had fabricated his confessions. The jury took little time, less than four hours, to reject defendant's recantation and find him guilty. Defendant has failed to carry his burden of showing any reasonable possibility that the jury would have reached a different result absent the alleged errors.

The trial court determines the competency of evidence, including witness testimony, while the jury weighs the credibility of the evidence presented. *State v. Witherspoon*, 210 N.C. 647, 649, 188 S.E. 111, 112 (1936) (citation omitted). Here the jury found credible defendant's taped confessions, not his trial testimony. Defendant has failed to show that absent the alleged errors the trial's outcome would have been different. This Court should uphold the jury's determination of defendant's guilt. Accordingly, I respectfully dissent.

Chief Justice MARTIN joins in this dissenting opinion.

TERRY WAYNE WOOD
v.
JEREMY NUNNERY, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, AND FIREMEN'S INSURANCE COMPANY OF WASHINGTON, D.C.

No. 100PA14

Filed 10 April 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 757 S.E.2d 526 (2014), affirming an order entered on 11 February 2013 by Judge Edwin G. Wilson, Jr. in Superior Court, Forsyth County. On 11 June 2014, the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 12 January 2015.

Maynard & Harris, Attorneys at Law, PLLC, by C. Douglas Maynard, Jr., for plaintiff-appellant/appellee.

Van Laningham Duncan PLLC, by L. Cooper Harrell; Smith Moore Leatherwood LLP, by James G. Exum, Jr.; and Bennett & Guthrie, PLLC, by Rodney A. Guthrie and Roberta King Latham, for defendant-appellant/appellee Jeremy Nunnery.

Brown Moore & Associates, PLLC, by Jon R. Moore; and White & Stradley, PLLC, by J. David Stradley, for North Carolina Advocates for Justice, amicus curiae.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers, for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. MARTIN

[368 N.C. 31 (2015)]

STATE OF NORTH CAROLINA
v.
TONY LINWOOD MARTIN, JR.

No. 203A14

Filed 10 April 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 762 S.E.2d 1 (2014), finding no error in part and vacating and remanding in part a judgment entered on 22 March 2013 by Judge J. Carlton Cole in Superior Court, Halifax County. Heard in the Supreme Court on 16 February 2015.

Roy Cooper, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellant.

Ben G. Irons II 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 consideration of defendant's remaining issues on appeal.

REVERSED AND REMANDED.

STATE v. EDGERTON

[368 N.C. 32 (2015)]

STATE OF NORTH CAROLINA
v.
HOWARD JUNIOR EDGERTON

No. 204A14

Filed 10 April 2015

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. ___, 759 S.E.2d 669 (2014), vacating a judgment entered on 21 March 2013 by Judge Gary M. Gavenus in Superior Court, Rutherford County, and remanding for a new trial. Heard in the Supreme Court on 24 February 2015.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Michael E. Casterline 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 consideration of defendant's remaining issues on appeal.

REVERSED AND REMANDED.

KIKER v. WINFIELD

[368 N.C. 33 (2015)]

WALLACE SCOTT KIKER
v.
CEDRIC JELANI WINFIELD

No. 225A14

Filed 10 April 2015

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. ___, 759 S.E.2d 372 (2014), vacating and remanding an order entered on 18 November 2013 by Judge James M. Webb in Superior Court, Harnett County. Heard in the Supreme Court on 17 March 2015.

Bain, Buzzard & McRae, LLP, by Robert A. Buzzard and Elisa B. Jernigan, for plaintiff-appellant.

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellee.

PER CURIAM.

AFFIRMED.

POOLE v. UNIV. OF N.C., CHAPEL HILL

[368 N.C. 34 (2015)]

CARL H. POOLE, EMPLOYEE
v.
UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, EMPLOYER

SELF-INSURED
(CORVEL MANAGEMENT SERVICES, THIRD-PARTY ADMINISTRATOR)

No. 296A14

Filed 10 April 2015

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. ___, 762 S.E.2d 223 (2014), affirming an opinion and award filed on 27 August 2013 by the North Carolina Industrial Commission. Heard in the Supreme Court on 17 March 2015.

Law Offices of Martin J Horn, PLLC, by Martin J Horn, for plaintiff-appellee.

Roy Cooper, Attorney General, by Cathy Hinton Pope, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

AFFIRMED.

WARD v. CARMONA

[368 N.C. 35 (2015)]

SHEENA MOODY WARD, PLAINTIFF
v.
LUIS ENRIQUE CARMONA, DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
JUSTIN MICHAEL WARD, THIRD-PARTY DEFENDANT

No. 518PA13

Filed 10 April 2015

1. Negligence—traffic accident at intersection—conflicting evidence

There was sufficient evidence from which a jury could impute negligence to both drivers in a car wreck in which one made a left turn. There was conflicting evidence as to when the driver making the left turn entered the intersection, whether he should have seen the other driver, and the color of the traffic light when the other driver entered the intersection. The jury was in the best position to weigh the evidence.

2. Negligence—traffic accident at intersection—left turn—prior case distinguished

The Court of Appeals did not create a new theory of motor vehicle negligence inconsistent with existing law when it stated, in a traffic accident case involving a left turn at a traffic light, that drivers must maintain a reasonable lookout even with a green light. This case involved a left turn; N.C.G.S. § 20-158(b)(2)(a) permits right turns on red, and *Cicogna v. Holder*, 345 N.C. 488, involved a driver proceeding straight into an intersection on a green light.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 752 S.E.2d 260 (2013), affirming the trial court's judgment entered on 6 August 2012 and an order entered on 9 August 2012, both by Judge Christine M. Walczyk in District Court, Wake County. Heard in the Supreme Court on 9 September 2014.

E. Gregory Stott for plaintiff-appellant and third-party defendant-appellant.

Brown, Crump, Vanore & Tierney, L.L.P., by Orlando L. Rodriguez, for defendant/third-party plaintiff-appellee.

BEASLEY, Justice.

We consider whether the Court of Appeals erred in affirming[1] the trial court's denial of plaintiff's claim for damages when a jury found defendant and third-party defendant were both negligent in the operation of their vehicles and whether the Court of Appeals created a new theory of motor vehicle law. Because there was sufficient evidence from which the jury could have found both defendant and third-party defendant negligent, the Court of Appeals properly affirmed the trial court's denial of plaintiff's claim and dismissal of plaintiff and third-party defendant's motion for a new trial. We affirm.

This action arose out of an automobile collision in which plaintiff's son, third-party defendant, Justin Michael Ward (hereinafter "Ward"), operated a 1991 Mercedes owned by his mother, plaintiff Sheena Moody Ward on 5 January 2011 at approximately 6:00 p.m.[2] At the time, Ward traveled east on Spring Forest Road in Raleigh, North Carolina. At the same time, defendant, Luis Enrique Carmona (hereinafter "defendant"), operated a 1999 Plymouth van traveling west on Spring Forest Road. These two vehicles collided in the intersection of Spring Forest Road and Departure Drive. Plaintiff filed suit on 15 March 2011 against defendant seeking damages for his alleged negligence. On 26 May 2011, defendant filed an answer and third-party complaint, naming Ward as a third-party defendant.

Ward testified to the following during trial. He stated that he intended to make a left turn at a traffic light at the intersection of Departure Drive and Spring Forest Road. Ward stated in his testimony that as he approached the intersection of Spring Forest Road and Departure Drive, the traffic light was green. To determine whether it was safe to make a left turn, he testified that he came to a complete stop at some point at or in the intersection. After Ward waited at the traffic light for several seconds, the traffic light changed to red. Ward testified his view of oncoming traffic was unobstructed. When he attempted to turn left, Ward knew the traffic light was red. As Ward attempted to complete a left turn onto Departure Drive, Ward's vehicle and defendant's vehicle collided in the intersection.

There were inconsistencies in defendant's testimony regarding the color of the traffic light when he proceeded through the intersection. On direct and cross-examination, defendant repeatedly testified that

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1. We use the term "affirm" noting that the Court of Appeals used "no error" in its opinion.

2. Although we recognize that plaintiff owned the 1991 Mercedes, for ease of reading, we refer to the vehicle as Ward's vehicle.

the light was green as he entered the intersection; however, on cross-examination, at the request of plaintiff's attorney, defendant read his response to a previous interrogatory in which he stated that the light "turned yellow when [he] was approximately eight (8) feet away" from the intersection. Additionally, several exhibits offered by defendant were admitted into evidence. A jury found both defendant and Ward negligent and denied plaintiff any relief. As a result, the trial court ordered that plaintiff recover nothing in a 6 August 2012 amended judgment. The trial court also denied plaintiff and Ward's motion for a new trial. Plaintiff and Ward both appealed the judgment and the order denying their motion for a new trial to the Court of Appeals.

In its opinion, the Court of Appeals affirmed the trial court's order denying the motion for a new trial, concluding that there was sufficient evidence for a jury to find both defendant and Ward negligent. *Ward v. Carmona*, ___ N.C. App. ___, 752 S.E.2d 260, 2013 WL 5629388 at *10 (2013) (unpublished). Plaintiff and Ward petitioned this Court for discretionary review which was allowed on 6 March 2014.

This appeal raises two issues: (1) whether the jury's verdict finding that both defendant and Ward negligently operated their vehicles was contrary to the greater weight of the evidence and, therefore, erroneous as a matter of law, and (2) whether the opinion of the Court of Appeals created a new theory of motor vehicular negligence. We answer these questions in the negative.

[1] The Court of Appeals correctly upheld the jury's verdict finding both defendant and Ward negligent in the operation of their respective vehicles. To prove negligence, a plaintiff must show: "First that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff . . . and, second that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961)(citation omitted).

The function of the jury is to weigh the evidence and determine the credibility of any witnesses. *Strum v. Greenville Timberline, LLC*, 186 N.C. App. 662, 667, 652 S.E.2d 307, 310 (2007) (citing *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 664 (1997)); *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965) (per curiam) (Jurors are the sole judges of the witnesses' credibility and have a right to believe all,

part, or none of the testimony.). The testimonial and demonstrative evidence presented by defendant and Ward created issues of fact that were submitted to and decided by the jury as the finder of fact. The jury found both defendant and Ward negligent.

Plaintiff argues that there was no competent evidence to support the jury's finding that both drivers were negligent in the operation of their vehicles. By hearing the testimony and viewing the exhibits admitted at trial, however, the jury was in the best position to weigh the evidence. Ultimately, the issue of whether Ward or defendant or both were negligent is a decision for the jury. As to Ward, evidence was conflicting regarding when he entered the intersection and whether he should have seen the other driver. As to defendant, evidence was conflicting on the color of the light when he entered the intersection. Considering the evidence presented by both parties, including the testimonies of Ward and defendant, we hold that there was sufficient evidence from which a jury could impute negligence to both defendant and Ward in the operation of their vehicles.

[2] Additionally, plaintiff incorrectly argues that the Court of Appeals created a new theory of motor vehicle negligence inconsistent with North Carolina motor vehicle law. Specifically, plaintiff argues that the holding in *Cicogna v. Holder* controls and that the judgment and rulings of the trial court are inconsistent with *Cicogna*. 345 N.C. 488, 480 S.E.2d 636 (1997).

In its opinion, in the case *sub judice*, the Court of Appeals stated

> Drivers approaching an intersection have a duty "to maintain a lookout and to exercise reasonable care under the circumstances." *Hyder v. Asheville Storage Battery Co.*, 242 N.C. 553, 557, 89 S.E.2d 124, 128 (1955). Failure to do so "is likely to endanger the safety of persons and property." N.C. Gen. Stat. § 20-4.23(a)(2) (2011).
>
> When drivers approach a green traffic signal at an intersection they must keep "a reasonable lookout for vehicles in or approaching the intersection at excessive speed." *Hyder*, 242 N.C. at 557, 89 S.E.2d at 128. They have a duty to "anticipate and expect the presence of others." *Id.* Drivers "cannot go forward blindly even in reliance on traffic signals." *Id.* Furthermore, "[a]ny person who undertakes to drive a motor vehicle upon a highway must exercise reasonable care to ascertain that such movement can be made in safety before he turns to the right or

> left from a direct line." *Wiggins v. Ponder*, 259 N.C. 277, 279, 130 S.E.2d 402, 404 (1963) (emphasis added); see also N.C. Gen. Stat. § 20-154(a) (2011).

Ward, 2013 WL 5629388 at *4. We emphasize that this analysis by the Court of Appeals must not be interpreted to contradict N.C.G.S. § 20-158 or impose a duty not intended by the statute. That statute provides, in relevant part, that "[w]hen a traffic signal is emitting a steady red circular light controlling traffic approaching an intersection, an approaching vehicle facing the red light shall come to a stop and shall not enter the intersection." N.C.G.S. § 20-158(b)(2)(a) (2014).

Plaintiff is correct in stating that N.C.G.S. § 20-158(b)(2)(a) permits vehicles approaching an intersection with a red circular light to make a right turn; however, this statutory provision allows a driver to make a right turn on red only if the intersection is clear. *Id.* § 20-158(b)(2)(b) (2014). Here Ward was attempting to make or complete a left turn on a red circular light. If Ward entered the intersection while the circular light was green and the light turned red, he was permitted to complete his turn to exit the intersection and avoid blocking traffic as long as he "maintain[ed] a lookout" and "exercise[d] reasonable care under the circumstances." *Hyder*, 242 N.C. at 557, 89 S.E.2d at 128. If Ward had not yet entered the intersection when the light turned red, he had a duty to stop.

In *Cicogna*, this Court held that when the plaintiff had not been "put . . . on notice" that the defendant would not obey the traffic light, the trial court should not have given a contributory negligence instruction to the jury. 345 N.C. at 489, 480 S.E.2d at 637. There, while operating her vehicle, the plaintiff stopped for a red traffic signal. *Id.* at 489, 480 S.E.2d at 636. When the traffic signal facing her turned green, the plaintiff started into the intersection, at which time the defendant struck her vehicle from the left. Id. The plaintiff testified that "she looked both ways and did not see the defendant's vehicle although he was 'right there.' " *Id.* The defendant did not introduce any evidence at trial. 345 N.C. at 489, 480 S.E.2d at 637. The trial court submitted the issue of contributory negligence to the jury despite the plaintiff's objection. *Id.* The jury found in favor of the defendant, and the plaintiff appealed. *Id.* This Court held that contributory negligence should not have been submitted to the jury because there was "no evidence in this case that there was anything that would have put the plaintiff on notice that the defendant would not obey the traffic light." *Id.*

Plaintiff argues here that no evidence indicated Ward was on notice that defendant would proceed through the intersection. But plaintiff's reliance on *Cicogna* is misplaced.

The undisputed evidence presented in *Cicogna* showed that the plaintiff had a green traffic light and proceeded straight into the intersection as allowed under North Carolina law. The defendant approached from the plaintiff's left. These important distinctions show *Cicogna* is not controlling. Therefore, contrary to plaintiff's assertions in this case, the Court of Appeals does not create a new theory of motor vehicle negligence inconsistent with North Carolina statutes and case law.

We hold that the Court of Appeals correctly affirmed the trial court's judgment denying plaintiff's claim for damages and the trial court's order denying plaintiff and Ward's motion for a new trial.

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
LARRY STUBBS

No. 568A03-2

Filed 10 April 2015

Jurisdiction—subject matter jurisdiction—appeal of order granting motion for appropriate relief—Court of Appeals had jurisdiction to review

Where the trial court granted defendant's motion for appropriate relief (MAR), the Court of Appeals had subject matter jurisdiction to hear the State's appeal. The General Statutes give the Court of Appeals jurisdiction to issue writs to supervise the state's trial courts, N.C.G.S. § 7A-32(c), and they also specify that appeals relating to MARs may be taken by writ of certiorari, N.C.G.S. § 15A-1422(c). The language in the Rules of Appellate Procedure that a writ of certiorari may be issued to review an order of a trial court "denying" a MAR does not limit the jurisdiction of the Court of Appeals as established by the General Statutes.

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. ___, 754 S.E.2d 174

(2014), reversing and remanding an order granting defendant's motion for appropriate relief entered on 5 December 2012 by Judge Gregory A. Weeks in Superior Court, Cumberland County. Heard in the Supreme Court on 13 January 2015.

Roy Cooper, *Attorney General*, *by Daniel P. O'Brien*, *Special Deputy Attorney General*, *for the State.*

Sarah Jessica Farber for defendant-appellant.

HUDSON, Justice.

In this case we are tasked with determining if the Court of Appeals has subject matter jurisdiction to review the State's appeal from a trial court's ruling on a motion for appropriate relief ("MAR") when the defendant has been granted relief in the trial court. We hold that it does.

In 1973 defendant pleaded guilty to second-degree burglary and assault with intent to commit rape. On the second-degree burglary charge, the trial court sentenced defendant to imprisonment for "his natural life." In 2011 defendant filed a *pro se* MAR in the Superior Court in Cumberland County asking the trial court to set aside his sentence on the burglary charge as cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution. Defendant argued that because of "significant changes" in the sentencing laws, his sentence should now be considered grossly disproportionate.[1] The trial court ordered a hearing and appointed counsel for defendant. After the hearing, the trial court entered an order granting defendant's motion for appropriate relief, vacating the 1973 judgment in the second-degree burglary case, and resentencing defendant to a term of thirty years. Giving credit for time served, the trial court ordered that defendant be immediately released. The State filed a petition for writ of certiorari to review the trial court's order, and by an order dated 13 December 2012, the Court of Appeals allowed the petition, thereby agreeing to hear the case.

After hearing the matter, a panel of the Court of Appeals agreed with the State, ultimately reversing the trial court's order and remanding to the trial court for reinstatement of the original 1973 judgment and commitment. ___ N.C. App. ___, ___, 754 S.E.2d 174, 182 (2014).

1. Under the new Structured Sentencing Act, N.C.G.S. §§ 15A-1340.10 to -1340.23, effective 1 October 1994, defendant would have been sentenced to a maximum of thirty-one and forty-seven months of imprisonment.

Procedurally, the Court of Appeals tackled two challenging questions, resulting in a lead opinion, a concurring opinion, and a dissenting opinion. First, the panel hearing the case considered whether it was bound by the decision of a prior petition panel (which allowed certiorari) that the Court of Appeals had subject matter jurisdiction over the appeal. *Id.* at ___, 754 S.E.2d at 177 n.2. The lead opinion concluded that the panel was bound by that prior determination, citing to *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion [against] reviewing the trial court's order when a preceding panel had earlier decided to the contrary." (first alteration in original)). *Id.* at ___, 754 S.E.2d at 177 n.2. The concurring and dissenting opinions disagreed with the lead opinion on that point, believing that each panel of the Court of Appeals has the authority and ability to address subject matter jurisdiction anew. *Id.* at ___, 754 S.E.2d at 182-88. Second, the Court of Appeals addressed whether it had subject matter jurisdiction to review the State's appeal from a trial court's decision on a defendant's MAR when the defendant prevailed in the trial court. The lead opinion was silent on the matter (believing the panel bound by the prior petition panel's determination), *id.* at ___, 754 S.E.2d at 177 n.2; the concurring opinion believed that the court did have jurisdiction, *id.* at ___, 754 S.E.2d at 183; and the dissent would have held that the court did not have subject matter jurisdiction over such an appeal, *id.* at ___, 754 S.E.2d at 185. Defendant filed a notice of appeal based on the dissenting opinion, which addressed only the issue of subject matter jurisdiction.

The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: "The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A-32(c) (2014). More specifically, and also relevant here, the General Assembly has specified when appeals relating to MARs may be taken:

> (c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
>
> (2) If an appeal is pending when the ruling is entered, in that appeal.
>
> (3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

Id. § 15A-1422(c) (2014). Here, given the timing, appeal of the MAR would fall under subdivision (c)(3): by writ of certiorari. Notably, subsection 15A-1422(c) does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails. Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id.* § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

As noted by the parties and the Court of Appeals, the Rules of Appellate Procedure are also in play here. *See id.* ("The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law."). Appellate Rule 21 states in relevant part:

> *Review of the Judgments and Orders of Trial Tribunals.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (second emphasis added). Defendant argues that because of this Rule, the State may not appeal an order of a trial court *granting* a motion for appropriate relief. We disagree. As stated plainly

in Rule 1 of the Rules of Appellate Procedure, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." *Id.* at R. 1(c). Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.

As for whether a second panel of the Court of Appeals can revisit a determination of subject matter jurisdiction after a previous panel has already done so, we simply note that here, both panels did have subject matter jurisdiction.

Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BEASLEY and Justice ERVIN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA
v.
JOSE GUSTAVO GALAVIZ-TORRES

No. 249PA14

Filed 11 June 2015

1. Drugs—possession and transportation offenses—jury instructions—actual knowledge of identity of drugs

In defendant's trial resulting in his convictions for trafficking in at least 400 grams of cocaine by possession, trafficking in at least 400 grams of cocaine by transportation, and possession of cocaine with the intent to sell or deliver, the trial court did not err by failing to adequately instruct the jury that the State had to prove beyond a reasonable doubt that defendant actually knew that he had possessed and transported cocaine. Because defendant did not contend that he did not know the true identity of what he possessed, the trial court was not required to give the additional instruction that the jury must find that "defendant knew that what he possessed was cocaine."

2. Drugs—possession and transportation offenses—jury instructions—actual knowledge of identity of drugs—plain error review

In defendant's trial resulting in his convictions for trafficking in at least 400 grams of cocaine by possession, trafficking in at least 400 grams of cocaine by transportation, and possession of cocaine with the intent to sell or deliver, the trial court did not commit plain error by failing to adequately instruct the jury that the State had to prove beyond a reasonable doubt that defendant actually knew that he had possessed and transported cocaine. The State presented considerable evidence that defendant actually knew that he possessed and transported cocaine, and therefore the Supreme Court could not conclude that any error had a probable impact on the jury's verdict.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 17 (2014), reversing judgments entered on 24 May 2013 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 19 March 2015.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding for defendant-appellee.

ERVIN, Justice.

Defendant Jose Gustavo Galaviz-Torres was convicted of one count of trafficking in at least 400 grams of cocaine by possession, one count of trafficking in at least 400 grams of cocaine by transportation, and one count of possession of cocaine with the intent to sell or deliver. A unanimous panel of the Court of Appeals reversed defendant's convictions and awarded defendant a new trial. We now reverse the Court of Appeals' decision.

In March 2012, officers of the Charlotte-Mecklenburg Police Department and the Drug Enforcement Administration began a joint investigation into defendant's activities based on information that had been received from a confidential informant indicating that defendant was trafficking in cocaine. On 26 March 2012, investigating officers arranged for the confidential informant to purchase approximately two

kilograms of cocaine from defendant in a Taco Bell parking lot. After defendant arrived at the parking lot driving a gray van,[1] the informant met with defendant, observed that the drugs to be purchased were in the vehicle, and contacted Special Agent Jorge Alamillo of the Drug Enforcement Administration, who gave the signal that defendant should be arrested. During a search of the van, investigating officers found a gift bag next to the driver's seat containing three packages of cocaine, the largest of which held a kilogram of that substance.

After having been advised of his *Miranda* rights, defendant told investigating officers that he had procured the cocaine from an individual named Gavilan, that he paid $32,000 for a kilogram of cocaine, and that cocaine could be found at his residence.[2] In addition, defendant took investigating officers to the location at which he claimed to have obtained the cocaine found in the van, although a search of the premises in question did not result in the discovery of any controlled substances. Finally, defendant admitted to investigating officers that he had previously sold or delivered nine ounces of cocaine in Gastonia and that, on the day of his arrest, he was supposed to make $2,000 for delivering the cocaine that had been seized from the vehicle that he was driving.

On 2 April 2012, defendant was indicted for trafficking in at least 400 grams of cocaine by possession, trafficking in at least 400 grams of cocaine by transportation, and possession of cocaine with the intent to sell or deliver. The charges against defendant came on for trial at the 20 May 2013 criminal session of the Superior Court, Mecklenburg County, before the trial court and a jury. At trial, defendant testified that he had arrived at the Taco Bell on the date in question to deliver ladders at the request of a man for whom he had performed construction work in the past. Defendant claimed that he had borrowed the van that he was driving, that he did not know that the van contained cocaine, and that the cocaine seized from the van did not belong to him. In addition, defendant denied having made any statements to investigating officers admitting that he had been transporting cocaine on the day in question or that he had been paid to transport cocaine in the past. Although defendant did acknowledge having told investigating officers that there was

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1. The van that defendant was operating at the time that he arrived at the Taco Bell parking lot was not the van in which defendant had left his residence in Gastonia earlier that day. As defendant drove from Gastonia to Charlotte, he was stopped by investigating officers. Although a drug dog alerted on a portion of the van that defendant was driving, a search of that vehicle did not reveal the presence of any controlled substances.

2. Investigating officers recovered cocaine during a subsequent search of defendant's Gastonia residence.

cocaine at his house, he denied being the owner of the cocaine that was found there.

At the conclusion of the trial, the trial court instructed the jury that, to convict defendant of possession of cocaine with the intent to sell or deliver, the jury had to be satisfied beyond a reasonable doubt:

> First, that the Defendant knowingly possessed cocaine. . . . A person possesses cocaine when he is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of that substance.
>
> And second, that the Defendant intended to deliver -- intended to sell or deliver the cocaine.

Similarly, the trial court instructed the jury that, to convict defendant of trafficking in at least 400 grams of cocaine by possession, the jury must be satisfied beyond a reasonable doubt:

> First, that the Defendant knowingly possessed cocaine. A person possesses cocaine if he is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of that substance.
>
> And second, that the amount of cocaine which the Defendant possessed was 400 grams or more.

Finally, the trial court instructed the jury that, to convict defendant of trafficking in at least 400 grams of cocaine by transportation, the jury had to be satisfied beyond a reasonable doubt:

> First, that the Defendant knowingly transported cocaine from one place to another.
>
> And second, that the amount of cocaine which the Defendant transported was 400 grams or more.

Although the trial court instructed the jury concerning the concepts of actual and constructive possession, the court clearly indicated that both forms of possession required the jury to find beyond a reasonable doubt that the alleged possessor had to be "aware of its presence" and exercise control over it. The trial court further instructed the jury that close proximity to the substance that defendant was charged with possessing did "not by itself permit an inference that the Defendant was aware of its presence" or had the power or intent to control its disposition or use.

Defendant's trial counsel did not object to any of the trial court's instructions or request that any additional instructions be given.

On 24 May 2013, the jury returned a verdict finding defendant guilty as charged. After consolidating defendant's convictions for possession of cocaine with the intent to sell or deliver and trafficking in at least 400 grams of cocaine by possession for judgment, the trial court entered a judgment sentencing defendant to a term of 175 to 222 months imprisonment and requiring defendant to pay a $250,000 fine. In addition, the trial court entered a judgment sentencing defendant to a consecutive term of 175 to 222 months imprisonment and the payment of a $250,000 fine based upon his conviction for trafficking in at least 400 grams of cocaine by transportation. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

On appeal, defendant argued that the trial court had committed plain error by failing to adequately instruct the jury that the State had to prove beyond a reasonable doubt that he knew that he had possessed and transported cocaine. S*tate v. Galaviz-Torres*, ___ N.C. App. ___, 763 S.E.2d 17, 2014 WL 2993850, at *2 (2014) (unpublished). In reversing the trial court's judgments and awarding defendant a new trial, the Court of Appeals held, in reliance on its prior decision in *State v. Coleman*, ___ N.C. App. ___, 742 S.E.2d 346, *disc. rev. denied*, 367 N.C. 271, 752 S.E.2d 466 (2013), that the trial court was required to instruct the jury in accordance with footnote four to North Carolina Pattern Jury Instructions – Criminal 260.17 (drug trafficking by possession) [N.C.P.I. Crim. 260.17] and Criminal 260.30 (drug trafficking by transportation) [N.C.P.I. Crim. 260.30] because defendant contended at trial that he did not know that he possessed a controlled substance. *Galaviz-Torre*s, 2014 WL 2993850, at *3-4. The Court of Appeals further concluded that the failure to give the instructions in footnote four in this case constituted plain error, *id.* at *5, despite the presence of defendant's " 'overwhelming and uncontroverted evidence of guilt.' " *Id.* at *4 (quoting Coleman, ___ N.C. App. at ___, 742 S.E.2d at 352). We reverse the decision of the Court of Appeals.

[1] "Felonious possession of a controlled substance has two essential elements. The substance must be possessed and the substance must be knowingly possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (citation and quotation marks omitted). A presumption that the defendant has the required guilty knowledge exists in the event that the State makes a prima facie showing that the defendant has committed a crime, such as trafficking by possession, trafficking by transportation, or possession with the intent to sell or deliver, that lacks a specific intent element. *See State v. Elliott*, 232 N.C. 377, 378, 61 S.E.2d

93, 95 (1950). However, when the defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes "a determinative issue of fact" about which the trial court must instruct the jury. *State v. Boone*, 310 N.C. 284, 294, 311 S.E.2d 552, 559 (1984), *overruled on other grounds by State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 573-74 (2012); *see also State v. Noble*s, 329 N.C. 239, 244, 404 S.E.2d 668, 671 (1991) (stating that, "when the defendant introduces evidence of lack of guilty knowledge the court must charge on it"); *Elliott*, 232 N.C. at 378-79, 61 S.E.2d at 95 (same). As a result, given that defendant denied having knowingly possessed the cocaine found in the van that he was driving, the ultimate issue raised by the State's challenge to the Court of Appeals' decision is whether the trial court's instructions, which consisted of a recitation of N.C.P.I. Crim. 260.17 and N.C.P.I. Crim. 260.30 without the material contained in footnote four, adequately informed the jury that, in order to convict defendant of the offenses with which he had been charged, it must find beyond a reasonable doubt that defendant actually knew that he had cocaine in his possession.

In *Boone*, the defendant was convicted of possessing a controlled substance after investigating officers discovered marijuana inside a duffel bag found in the trunk of the defendant's car. 310 N.C. at 285-86, 311 S.E.2d at 554. At trial, the defendant admitted that he knew that a duffel bag had been placed in the trunk of his car. However, the defendant denied that he owned the duffel bag or had any knowledge of its contents. *Id.* at 293-94, 311 S.E.2d at 558-59. At the conclusion of all of the evidence, the trial court instructed the jury:

> "Now, Ladies and Gentlemen of the Jury, I charge that for you to find the defendant guilty of possessing marijuana, a controlled substance with the intent to sell and/or deliver it, the State must prove two things beyond a reasonable doubt. First, that the defendant knowingly possessed marijuana. *And the defendant, in that connection, the defendant knew or had reason to know that what he possessed was marijuana and marijuana is a controlled substance.*"

Id. at 291, 311 S.E.2d at 557 (emphasis added by court.). After noting that the instruction delivered by the trial court had been taken from the relevant pattern jury instruction, we held that the instruction in question was inconsistent with the applicable law on the grounds that "actual knowledge of the presence of the narcotic on the part of a defendant is an essential ingredient of the offense of possession of narcotics." *Id.* at

291, 293, 311 S.E.2d at 557-58 (citations omitted). As a result, we held "that the trial court erred in instructing the jury that defendant could be found guilty of possessing marijuana if he had reason to know that what he possessed was marijuana" and noted that "the court should have instructed the jury that the defendant is guilty only in the event he knew the marijuana was in the trunk of his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty." *Id.* at 294, 311 S.E.2d at 559 (citing *Elliott*, 232 N.C. at 379, 61 S.E.2d at 95).

In reliance upon *Boone*, footnote four to N.C.P.I. Crim. 260.17 states that, "[i]f the defendant contends that he did not know the true identity of what he possessed, add this language to the first sentence: 'and the defendant knew that what he possessed was (name substance).' "[3] 3 N.C.P.I. – Crim. 260.17 n.4 (June 2012). As modified by the language found in footnote four, the pattern instruction applicable to the offense of trafficking in cocaine by possession would read, in pertinent part, that:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed cocaine *and the defendant knew that what he possessed was cocaine*. A person possesses cocaine if he is aware of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.

3 N.C.P.I. Crim. 260.17, at 1-2 & n.4 (emphasis added) (footnote call number omitted). In this case, defendant contended before the Court of Appeals and contends before this Court that the trial court should have added language from footnote four to its instructions given the existence of evidence tending to show that he was unaware that the gift bag was in the van or that the gift bag contained cocaine.

Although defendant argues that the guilty knowledge requirement is not satisfied when the record shows that he acknowledged possessing a particular substance without knowing the identity of that substance

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3. Similarly, footnote four to N.C.P.I. Crim. 260.30, which relates to the offense of trafficking in certain controlled substances by transportation, provides that the jury should be instructed in appropriate cases that "the defendant knew what he transported was" a controlled substance. 3 N.C.P.I. – Crim. 260.30 n.4 (June 2012). The textual discussion concerning the manner in which the jury should be instructed in a case involving a trafficking by possession charge applies equally to a case in which the defendant has been charged with trafficking in a controlled substance by transportation.

or possessed a particular container while remaining ignorant of its contents and that, in such circumstances, the language contained in footnote four should be included in the trial court's instructions to the jury, the present case does not involve either of these sets of circumstances. In this case, defendant did not either deny knowledge of the contents of the gift bag in which the cocaine was found or admit that he possessed a particular substance while denying any knowledge of the substance's identity. Instead, defendant simply denied having had any knowledge that the van that he was driving contained either the gift bag or cocaine. As a result, since defendant did not "contend[ ] that he did not know the true identity of what he possessed," *id.* n.4, the prerequisite for giving the instruction in question simply did not exist in this case. As a result, the trial court did not err by failing to deliver the additional instruction contained in footnote four to N.C.P.I Crim. 260.17 and N.C.P.I. Crim. 260.30 in this case.

In reaching a contrary conclusion, the Court of Appeals determined that it was required to decide this issue in defendant's favor based on its previous decision in *State v. Coleman*. In *Coleman*, investigating officers found a box containing marijuana and heroin in the trunk of a vehicle driven by the defendant. ___ N.C. App. at ___, 742 S.E.2d at 347. Although he readily admitted that he knew that the box was in the vehicle's trunk, the defendant told investigating officers following his arrest for trafficking in heroin[4] that he believed that the box contained marijuana and cocaine instead of marijuana and heroin. *Id.* at ___, 742 S.E.2d at 349. As was the case in the present proceeding, the trial court in Coleman instructed the jury using N.C.P.I. Crim. 260.17 and N.C.P.I. Crim. 260.30 without including the language contained in footnote four. *Id.* at ___, 742 S.E.2d at 351.

On appeal, the principal issue before the Court of Appeals was whether the defendant's statements to investigating officers that he believed that the box contained marijuana and cocaine rather than marijuana and heroin amounted to a contention that he did not know that the box contained heroin, thereby making the extent of the defendant's guilty knowledge a material issue for the jury's consideration.[5] *Id.* at ___, 742 S.E.2d at 350. In its opinion, the Court of Appeals concluded

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4. According to the Court of Appeals, the defendant in *Coleman* was never charged with having committed any marijuana-related offense.

5. As the State has pointed out in its brief before this Court, the State made no attempt to persuade the Court of Appeals in *Coleman* that the trial court did not err by failing to instruct the jury in accordance with footnote four.

that the trial court had erred by failing to include the language in footnote four in its jury instructions, *id.* at ___, 742 S.E.2d at 350, and held that, in light of the facts contained in the record, the trial court's failure to include that language in its jury instructions constituted plain error, *id.* at ___, 742 S.E.2d at 350-52.

In view of the substantial difference between the facts at issue here and those at issue in *Coleman*, we conclude that the Court of Appeals erred by determining that the decision in *Coleman* controlled the outcome in this case. On the one hand, the defendant in *Coleman* admitted that he knew of the box that contained marijuana and heroin. However, while he admitted that he thought that the box contained cocaine in addition to marijuana, he said that he did not believe that the box contained heroin. In this case, defendant denied any knowledge of either the gift bag located in the van that he was driving or its contents. In the factual situation before the Court in *Coleman*, the instruction in footnote four served the purpose of informing the jury that, in order to convict, it must find that the defendant "knowingly possessed" a controlled substance (that is, the defendant was "aware of its presence") and that the defendant "knew that what he possessed was" the drug in question. In other words, the instruction in footnote four made it clear to the jury that, for the defendant to be guilty, he had to both knowingly possess a substance and know that the substance that he possessed was the substance that he was charged with possessing. In this case, on the other hand, defendant denied any knowledge that he possessed any container or controlled substance at all. Thus, the basic pattern instruction given here, which required the jury to find that defendant "knowingly possessed" the drug,—that he was in fact "aware of its presence" and had the ability to exercise control over it—adequately informed the jury of the determination that it must make in light of the position that defendant asserted. For that reason, the trial court's instructions here, unlike the instructions delivered in *Coleman*, adequately addressed the issue that the jury had to decide to determine defendant's guilt or innocence.[6] As a result, the trial court did not err, much less commit plain error, by failing to instruct the jury in accordance with footnote four to N.C.P.I. Crim. 260.17 and N.C.P.I. Crim. 260.30 in this case.

[2] In addition, even if defendant had been correct in contending that the trial court erred by failing to instruct the jury in accordance with

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6. The Court of Appeals distinguished *Coleman* on the same basis in *State v. Beam*, ___ N.C. App. ___, ___, 753 S.E.2d 232, 233, d*isc. rev. denied*, 367 N.C. 496, 757 S.E.2d 904 (2014), and reached a result consistent with the analysis set out in the text of this opinion in *State v. Lopez*, 176 N.C. App. 538, 545-46, 626 S.E.2d 736, 742 (2006).

footnote four, any such error would not have risen to the level of plain error given the record developed at trial in this case.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotations marks omitted); *see also State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 321 (2015) (noting that plain error "is reserved for the exceptional case" and "requires a defendant to show that the prejudicial error was one that seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" (alteration in original) (citation and internal quotation marks omitted)). In its plain error analysis, the Court of Appeals, which considered itself bound by *Coleman*, stated that "[the] Court [in *Coleman*] held that the trial court's errors amounted to plain error and awarded a new trial even assuming arguendo that the 'entire record reveals overwhelming and uncontroverted evidence of guilt.' " *Galaviz-Torres*, 2014 WL 2993850, at *4 (quoting *Coleman*, __ N.C. App. at __, 742 S.E.2d at 352). However, the Court of Appeals in *Coleman* never determined that the evidence that had been presented against the defendant was "overwhelming and uncontroverted." Instead, the Court of Appeals in *Coleman* concluded that the defendant was entitled to plain error relief because the issue of whether he knew that the substance that he possessed was heroin was both sharply controverted and critical to the outcome reached at trial. *Coleman*, ___ N.C. App. at ___, 742 S.E.2d at 352. Instead of being "uncontroverted" and "overwhelmingly" in the State's favor, the evidence in *Coleman* reflected that the defendant told the investigating officers shortly after he was taken into custody that he did not know that the box contained heroin in addition to marijuana. Moreover, the State failed to elicit any direct evidence suggesting that the defendant's contention was untruthful. Finally, the prosecutor mistakenly argued to the jury that, even if the defendant "suspected" that the box contained heroin, "that is enough" to show the requisite guilty knowledge. ___ N.C. App. at ___, 742 S.E.2d at 352. As a result, given the presence of substantial evidence tending to show that the defendant did not possess the requisite guilty knowledge, coupled with the prosecutor's legally erroneous jury argument, the Court of Appeals concluded that the trial court's failure to instruct the jury in accordance with footnote four had a probable impact

on the jury's verdict and necessitated an award of appellate relief. *Id.* at ___, 742 S.E.2d at 352.

In the present case, by contrast, the State elicited a considerable amount of evidence indicating that defendant actually knew that he had possessed and transported cocaine. Among other things, the State presented evidence that defendant admitted that the substance found in the gift bag was cocaine and that he took investigating officers to the place where he had obtained the cocaine in question. Given that the record contained ample evidence tending to contradict defendant's claim that he did not know that he possessed or transported any controlled substance, we cannot say that any error that the trial court might have committed by failing to include the language in footnote four in its jury instructions had a probable impact on the jury's decision to convict defendant. The Court of Appeals' decision to the contrary rested on both a misreading of *Coleman* and a misapplication of the applicable standard of review.

Thus, we conclude that the trial court did not err, much less commit plain error, by failing to instruct the jury in accordance with the language in footnote four to N.C.P.I. Crim. 260.17 and N.C.P.I. Crim. 260.30 given that defendant's defense at trial did not implicate the concerns addressed by the language in that footnote. Instead, the language of the basic pattern instructions contained in N.C.P.I. Crim. 260.17 and N.C.P.I. Crim. 260.30 amply addressed the legal issues arising from defendant's contentions at trial. As a result, the decision of the Court of Appeals is reversed.

REVERSED.

TOWN OF MIDLAND v. WAYNE

[368 N.C. 55 (2015)]

TOWN OF MIDLAND
v.
DARRYL KEITH WAYNE, Trustee, or any successors in trust, under the Darryl Keith Wayne Revocable Trust Agreement, and any Amendments thereto, dated February 23, 2007

No. 458PA13

Filed 11 June 2015

1. Eminent Domain—contiguous properties—development plan—unity of ownership—vested right to complete subdivision

In a condemnation action, the owners of the undeveloped portions of a subdivision had a vested right to complete the subdivision in accordance with the pre-approved development plan. The owners—the named defendant and the limited liability company—owned contiguous properties subject to the vested, unified development plan, and Darryl Wayne had at least a modicum of interest in both properties. Therefore, the unity of ownership requirement was satisfied for the purpose of determining compensation.

2. Eminent Domain—vested right to complete subdivision—not separate property interest—enhanced value

In a condemnation action, the property owners' vested right to complete the subdivision was not a separate property interest from the real estate. Instead, it was a quality that enhanced the value of the property before the taking.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 748 S.E.2d 35 (2013), affirming in part and reversing in part orders entered on 23 March 2012 and 7 June 2012 by Judge C. W. Bragg in Superior Court, Cabarrus County, and remanding for additional proceedings. Heard in the Supreme Court on 10 September 2014.

Hartsell & Williams, P.A., by Andrew T. Cornelius and Brittany M. Love, for plaintiff-appellee.

Vandeventer Black LLP, by Norman W. Shearin, David P. Ferrell, and Ashley P. Holmes, for defendant-appellant.

NEWBY, Justice.

In this condemnation action we decide the existence of a vested right to develop a subdivision and the effect of that vested right on the questions of unity of ownership and damages. We hold that the owners of the undeveloped portions of the subdivision have a vested right to complete the subdivision in accordance with the pre-approved plan. Having a vested right to complete the subdivision means both owners of the remaining undeveloped property, the named defendant and the limited liability company, have interests affected by the condemnation of a portion of the subdivision, satisfying the unity of ownership requirement. The measure of damages is the difference between the value of the property before the taking and the value immediately afterwards. The vested right enhances the value of the property before the taking but is not a separate element of damages. Accordingly, we modify and affirm in part and reverse in part the decision of the Court of Appeals.

Defendant's predecessor in title, Darryl Keith Wayne ("Wayne"), owned two tracts of land totaling ninety acres ("Wayne Tracts").[1] Park Creek, LLC ("the LCC"), the majority of which is owned by Wayne, held the adjacent one hundred sixty acres. Together, Wayne and the LLC submitted a Customized Development Plan ("the 1997 plan") for a multiphase, two hundred fifty acre residential subdivision known as Park Creek ("Park Creek"). The Cabarrus County Planning and Zoning Commission approved the 1997 plan provided that the development met certain requirements. These requirements specified minimum lot sizes and established a certain percentage of the "high-income," two hundred home subdivision as open space. Wayne and the LLC developed the first two phases using some of the land owned by the LLC, installing water lines and other infrastructure designed and constructed to service the future phases as well. On or after 23 February 2007, Wayne conveyed his property to defendant, his revocable trust of which he is the trustee ("defendant"). By 2009 the first two development phases of Park Creek were substantially completed, representing roughly fifty percent of the subdivision, at a cost of approximately $4.6 million dollars. Most of the lots in the first two phases had been sold. At that time, the future phases of the subdivision, including one tract of about forty acres owned by the LLC ("LLC Tract") and the Wayne Tracts, remained mostly undeveloped. Since its inception defendant and the LLC have maintained the 1997 plan as required by the Town, and the legal effectiveness of the 1997 plan has never lapsed.

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1. The Wayne Tracts consist of a 74.75 acre parcel and a 15.11 acre parcel. The condemned three-acre easement crosses both parcels.

In February 2009 in Superior Court, Cabarrus County, the Town of Midland filed two separate condemnation actions against defendant, condemning three acres of the Wayne Tracts for a right-of-way and easement "to construct and operate a natural gas pipeline for the transmission and distribution of natural gas," "to construct and operate a fiber optic line," and "to obtain a temporary construction easement in order to construct the pipeline" ("the easement"). As required by statute, the Town deposited its estimated value and asked for a determination of just compensation. The Town did not name the LLC as a party or identify its tract in the condemnation actions, presumably because the easement did not cross any portion of the LLC property. Likewise, the Town did not specify the taking of the vested right to complete the subdivision as approved. The Town's condemnation actions contemplated taking only the three acres necessary for the easement.

Defendant filed an answer to each complaint, claiming the amount offered by the Town was insufficient and asking for a determination of just compensation.[2] In October 2011 defendant moved to consolidate the two actions for purposes of hearing all issues other than compensation. Defendant also moved to amend his answers to include additional issues for adjudication, particularly those addressing "the scope of the land affected by the taking and the Town's inverse condemnation of certain areas of [his] property outside the temporary and permanent easement areas."

The same day that defendant moved to consolidate the actions, the LLC moved to intervene in the actions, asserting that the easement affected the LLC Tract as well. The LLC stated that since its undeveloped land was part of Park Creek, "[t]he Court's determination of the area affected by the taking and disposition of [this action] may, as a practical matter, impair or impede [the LLC's] ability to protect its interest in the Subdivision rights in parcels of land which lie upon the Subdivision."[3]

On 27 October 2011, the trial court found that the two affected Wayne Tracts are adjacent to the LLC Tract and that Wayne "is the Trustee of Defendant and also the principal or exclusive owner of [the] LLC." The

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2. As permitted under the condemnation statutes, *see* N.C.G.S. § 40A-48 (2013), in June 2011 three commissioners determined that defendant should receive $220,000, representing just compensation for the property taken. The Town disagreed with the commissioners and requested a jury determination of value. Defendant also desires to have a jury decide just compensation.

3. The LLC also owns several unsold lots in the developed portion of Park Creek. The effect of the condemnation, if any, on the unsold developed lots is not a part of these proceedings.

trial court, however, denied the LLC's motion to intervene as untimely. The trial court noted that the LLC "can separately and adequately protect its interest by pursuing any separate action that may be available to it."[4] In the same order the trial court also consolidated the two condemnation actions for certain purposes[5] and allowed defendant to amend his answers: (1) "to assert a counterclaim to seek compensation for an inverse condemnation resulting from [the Town's] actions in connection with the pipeline outside the boundaries of the property described in the declaration of taking," and (2) to request that the court treat the Wayne tracts "as a single parcel with 'other adjoining parcels owned by Defendant or individuals or related entities to Defendant.' "

In his amended answers dated 1 November 2011, defendant counterclaimed that, while constructing the natural gas pipeline and fiber optic line, the Town's contractor transported equipment and maintained construction staging areas outside the easement boundaries without his consent. Defendant claimed that, as a result, "the Town has physically damaged and inversely condemned the Wayne Tracts outside and beyond the easement areas." Defendant reiterated his request that plaintiff pay him "just compensation for the taking of the Wayne Tracts." Additionally, defendant "reserve[d] the right to have the parcels to be condemned . . . and any other adjoining parcels owned by Defendant or individuals or related entities to Defendant treated as a single parcel for purposes of determining just compensation."

At the hearing for determination of issues under N.C.G.S. § 40A-47, defendant presented evidence that the easement's far-reaching effect, though perhaps unforeseen, decreases the net developable area of the subdivision property and impairs vital flexibility in its development. Defendant's expert asserted that the easement reduces road frontage on some lots, diminishes lot yield, adversely affects street designs and water line placement, shrinks or eliminates vegetative buffers, and reduces overall residential density. The expert noted that the easement mandates certain grade restrictions and includes other requirements such as buffer zones and set-offs. For example, before the easement

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4. It appears that the LLC attempted to assign its claim for damages to defendant. Later, the LLC initiated a separate action. In two separate orders dated 21 March 2012 and 1 June 2012, the trial court concluded that the LLC impermissibly assigned its claim for damages, thereby violating the intent and spirit of the trial court's denial of the motion to intervene. The trial court later granted a motion to consolidate the Town's condemnation actions against defendant and the action initiated by the LLC for the sake of judicial economy due to common questions of law and fact and the "virtually identical" issues involved.

5. Hereinafter, the consolidated condemnation actions are referred to in the singular.

took effect, any lots developed could extend onto a pre-existing utility easement; however, the new easement prevents development over itself, and its grading restrictions prevent the development of land used for the pre-existing utility easement as well. Moreover, according to defendant, the grading restrictions adversely affect the predetermined road network within the subdivision. Likewise, construction of the pipeline within the easement eliminated an existing buffer of mature woodlands, forcing defendant to plant a new vegetative buffer and further reducing the remaining developable land. The permanent effects of the easement, defendant argued, have made it economically unfeasible for him to develop the Wayne Tracts in accordance with the 1997 plan, will cause him to incur additional development costs, and will reduce the overall value of the remaining undeveloped lots in the subdivision.

In an order dated 21 March 2012, the trial court concluded as a matter of law that the Town had inversely condemned a portion of the Wayne Tracts situated outside the easement by maintaining staging areas during construction. In the same order the trial court found that "the Cabarrus County Planning & Zoning Commission approved a Customized Development Plan for the Subdivision which included the Wayne Tracts," and subsequently, "Wayne has maintained the Plan as required by Cabarrus County." Based on defendant's evidence, the trial court found "that the impact of the gas pipeline easements would reduce the developable area of the Wayne Tracts, reduce road frontage for some lots, reduce lot yield, reduce flexibility in development, including adversely affecting street designs and locations, reduce or eliminate some vegetative buffers, and reduce residential density." As a result, "[t]he installation of the gas pipeline . . . reduced the net developable area available in the Wayne Tracts," making "it no longer economically feasible for Wayne to develop the Wayne Tracts in accordance with the Plan." The trial court further concluded that the easement "substantially interfere[d] with the elemental property rights in the Wayne Tracts, and thereby diminished the fair market value of the entire Wayne Tracts." As a matter of law, the trial court stated that "[t]he decrease in developable land and loss of density resulting from [the easement] has had a significant adverse impact on Wayne's rights to develop the Subdivision in accordance with the Plan." Moreover, on the date the easement was taken, "the Plan was valid, remained in effect, and recognized by Cabarrus County." Therefore, the trial court concluded as a matter of law that the easement "resulted in a regulatory taking of the Wayne Tracts."

In a separate order issued the same day the trial court denied defendant's request that the Wayne Tracts and the adjacent property

owned by the LLC be considered as one unified tract. The trial court determined that establishing a unified tract for the purpose of assessing condemnation damages requires " 'some unity of ownership . . . when separate parcels of land are involved.' " Relying on our decision in *Board of Transportation v. Martin*, 296 N.C. 20, 28, 249 S.E.2d 390, 396 (1978), the trial court noted that " 'a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages.' " The trial court determined as a matter of law that *Martin* controls here "where Wayne owns the Wayne Tracts and Park Creek, LLC, in which Mr. Wayne is majority owner, owns the adjoining land." Therefore, no unity of ownership existed between the Wayne Tracts and the LLC Tract, limiting the area affected by the taking for purposes of compensation to the Wayne Tracts.

Defendant successfully moved the trial court to amend its orders to recognize that he based his unity of ownership argument on his vested right to develop land "upon the valid approval . . . of . . . a phased development plan, giving land owners the right to undertake and complete the development and use of said property under the terms and conditions of the . . . plan" and on his common law vested rights to develop his land based on his "substantial expenditures of money, time, labor or energy in a good faith reliance on a government approved land use." In its amended order the trial court found that it was "no longer economically feasible for Wayne to construct roads on the Wayne Tracts in accordance with the Plan," thus depriving him of "all practical uses of the Wayne Tracts." The Town's condemnation action, according to the trial court, has "had a significant adverse impact on Wayne's statutory and common law vested rights to develop the Subdivision in accordance with the Plan" and has resulted "in a regulatory taking of the Wayne Tracts." Nonetheless, the trial court once more found that, despite defendant's vested rights, the decision in *Martin* precludes finding unity of ownership between defendant and the LLC.

Before the damages phase of the trial began, both defendant and the Town entered interlocutory notices of appeal. *Town of Midland v. Wayne*, ___ N.C. App. ___, ___, 748 S.E.2d 35, 38 (2013). The Town appealed the trial court's ruling that maintaining the construction staging areas resulted in an inverse condemnation and that a separate and complete taking of the Wayne Tracts occurred. Defendant cross-appealed the trial court's conclusion that "no unity of ownership existed as to the contiguous tracts of land owned by Wayne and Park Creek, LLC."

First, addressing the Town's appeal, the Court of Appeals affirmed the trial court's conclusion that the construction staging areas located outside the easement constituted a temporary inverse taking, *id.* at ___, 748 S.E.2d at 38-39, and the Town has not sought further review of this issue. Thus, the decision of the Court of Appeals as to this issue is final.

Then, the Court of Appeals reversed the trial court's conclusion that the Town's condemnation action constituted a "regulatory" or separate and complete taking of the Wayne Tracts. *Id.* at ___, 748 S.E.2d at 39-40. The Court of Appeals first observed the absence of findings in the trial court's order to support its conclusion that the eighty-seven acres of the Wayne Tracts remaining outside the easement retain "no 'practical use . . . or reasonable value.' " *Id.* at ___, 748 S.E.2d at 39-40. Noting that " 'a taking does not occur simply because government action deprives an owner of previously available property rights,' " *id.* at ___, 748 S.E.2d at 39, the Court of Appeals concluded that the trial court erred in finding a separate and complete taking of the Wayne Tracts because the trial court's findings suggested that "the Wayne Tracts could still be developed for residential use, though not in accordance with the 1997 Plan," *id.* at ___, 748 S.E.2d at 40 (citing *Finch v. City of Durham N.C.*, 325 N.C. 352, 364, 366, 384 S.E.2d 8, 15, 16 (1989)).

Next, the Court of Appeals addressed defendant's argument "based on the trial court's findings that defendant had a 'vested right' in the 1997 Plan." *Id.* at ___, 748 S.E.2d at 40. Pointing to the Town's complaints which identified specific portions of the Wayne Tracts as the " 'property [it] sought to acquire,' " as required by N.C.G.S. § 40A-20, the Court of Appeals determined that "where a condemner has taken a portion of a tract, 'evidence regarding the adverse effects of the condemnation on the remaining property is admissible, but such effects are not separate items of damages.' " *Wayne*, *id.* at ___, 748 S.E.2d at 40 (quoting *Bd. of Transp. v. Jones*, 297 N.C. 436, 439, 255 S.E.2d 185, 187-88 (1979) (citation and internal quotation marks omitted)). Rather than requiring "separate" damages for the loss of defendant's "vested rights," the Court of Appeals reasoned the compensation awarded in exchange for the easement may account for any "diminution in [market] value of the Wayne Tracts." *Id.* at ___, 748 S.E.2d at 40 ("Defendant is not entitled to additional compensation, beyond the diminution in value as provided in N.C. Gen. Stat. § 40A-64, based on the loss of the right to develop the property in a certain way.").

The Court of Appeals lastly addressed defendant's unity of ownership argument. Relying on our decision in *Martin*, the Court of Appeals affirmed the trial court's conclusion that no unity of ownership existed

between the Wayne Tracts and the LLC Tract for the purpose of determining compensation. *Wayne*, *id.* at ___, 748 S.E.2d at 41. In so holding, the Court of Appeals noted that defendant, "*individually*, has no interest in the tract owned by Park Creek, LLC," but "merely owns an interest in the limited liability company which owns the tract." *Id.* at ___, 748 S.E.2d at 41. Because defendant has secured the advantages of the LLC as a liability shield, the Court of Appeals concluded that he cannot now request that the court disregard it. *Id.* at ___, 748 S.E.2d at 41-42. Ultimately, given its analysis, the Court of Appeals found a determination of the existence of a vested right to be unnecessary. *Id.* at ___ n.2, 748 S.E.2d at 40 n.2.

We allowed defendant's petition for discretionary review. *Town of Midland v. Wayne*, 367 N.C. 292, 753 S.E.2d 664 (2014). On appeal, defendant reasserts that a taking of his vested right to develop the remainder of Park Creek under the 1997 plan has occurred, requiring the Town to identify it in the complaint and compensate for the vested right as an additional, separate element of damages. Moreover, defendant argues that the vested right to develop these contiguous parcels according to that plan satisfies the unity of ownership required between the Wayne Tracts and the LLC Tract. The Town first responds that defendant failed to meet the criteria for a statutory vested right under N.C.G.S. § 153A-344.1 because the statute terminated any such vested right in defendant two years after approval of the 1997 plan, unless specifically extended by the county. *See* N.C.G.S. § 153A-344.1(d)(1)-(2) (2013). The Town further contends that defendant failed to establish a common law vested right because substantial expenditures had not been made on the undeveloped tracts of the subdivision. As to whether the Town must identify and compensate for any interference with a vested right, the Town argues that the complaints sufficiently identify the property rights and tracts of land affected by the taking. Finally, the Town asserts the Court of Appeals correctly held that there was no unity of ownership as to the Wayne Tracts and the LLC Tract.

"[T]he power of eminent domain[ ] is one of the prerogatives of a sovereign state. . . . Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006) (citations and quotation marks omitted). *See* N.C. Const. art. I, § 19 ("No person shall be . . . deprived of his . . . property, but by the law of the land."); *see also* U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Due process requires that the

property right taken and the owner of the right be identified in the condemnation complaint. *See Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) (noting the government's duty to make just compensation to the owner of the property appropriated). Just compensation means "that persons being required to provide land for public projects are put in the same financial position as prior to the taking." *Dep't of Transp. v. Rowe*, 353 N.C. 671, 679, 549 S.E.2d 203, 210 (2001) (citations omitted), *cert. denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002).

"If there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken." N.C.G.S. § 40A-64(b) (2013); *see also Fowler*, 361 N.C. at 5, 637 S.E.2d at 889 (defining just compensation in condemnation proceedings instituted by the Department of Transportation as the difference between the "before value" and the "after value" (citing N.C.G.S. § 136-112(1) (2005))).[6] In weighing before and after values, a determination of the property's remaining fair market value considers the property's worth in light of its " 'availability for all valuable uses.' " *Fowler*, 361 N.C. at 6, 637 S.E.2d at 890 (quoting *State v. Johnson*, 282 N.C. 1, 14, 191 S.E.2d 641, 651 (1972) (citation and quotation marks omitted)).

[1] We must first determine the property interest affected by the condemnation action, identifying the property right taken and its owner. After hearing evidence, the trial court determined that defendant had a vested right to develop the property under the 1997 plan. We agree. While the trial court found a vested right based on both a common law and statutory analysis, we confine our review to the common law.

At common law, government may not deprive a landowner of his right to continue with an approved use of his land when, in good faith and in reliance upon valid governmental approval, he makes substantial expenditures or incurs significant contractual obligations towards that approved use. *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). "Once [a developer] makes substantial expenditures in good-faith reliance on the approval, he has a vested right to carry out

6. The valuation approach used in subdivision 40A-64(b)(i) is known as the "before and after method." While subdivision 40A-64(b)(ii) allows valuation to be computed based on "the fair market value of the property taken," it appears, here, that the before and after method will result in the greater recovery.

the project as approved." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 112, 388 S.E.2d 538, 544-45 (1990) (citing *Smith*, 276 N.C. at 48, 170 S.E.2d at 904). "[A] determination of the 'vested rights' issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures." *Godfrey v. Zoning Bd. of Adjust.*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) (citations omitted).

The trial court's findings of fact sufficiently support its conclusion that the Town's condemnation action interfered with defendant's vested right to develop the future phases of the subdivision under the 1997 plan. Defendant's approved, multiphase residential development plan—a preliminary planning followed by phased implementation—is consistent with the inherent nature of residential development. Defendant reasonably and in good faith relied on that plan because it has never lapsed in legal effect. *See River Birch*, 326 N.C. at 111, 388 S.E.2d at 544 ("[T]he preliminary plan is a formal document that constitutes the most critical step in the subdivision approval process."); *Dep't of Transp. v. Nelson Co.*, 127 N.C. App. 365, 368-69, 489 S.E.2d 449, 451 (1997) (acknowledging the unity of use component inherent in the multiphase commercial development process). As found by the trial court, defendant in good faith reliance made substantial expenditures of money, time, and labor based on the 1997 plan, thus supporting his common law vested right to develop the subdivision in accordance with the plan. The Town's argument that the expenditures were directed primarily to the developed first two phases of Park Creek fails to recognize the unified nature of the 1997 plan and the benefit of the expenditures to the entire subdivision.

This vested right determination also informs our decision as to which parties are affected by the taking. We agree with defendant's argument that the common law vested right to develop the contiguous parcels according to the 1997 plan helps satisfy the unity of ownership required between the Wayne Tracts and LLC Tract. Under section 40A-67, "all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract" for the purpose of determining just compensation in an eminent domain proceeding. N.C.G.S. § 40A-67 (2013). Three factors generally determine whether contiguous tracts of land should be considered as a whole: (1) "unity of ownership" between the parcels; (2) "unity of use" between the parcels; and (3) "physical unity" between the parcels. *Barnes*, 250 N.C. at 384, 109 S.E.2d at 224-25. " 'Under certain circumstances the presence of all these unities is not essential.' " *Martin*, 296 N.C. at 25, 249 S.E.2d at 394 (quoting *Barnes*,

250 N.C. at 384, 109 S.E.2d at 225). Though some unity of ownership is required, a party need not " 'have the same quantity or quality of interest or estate in all parts of the tract.' " *Id.* Among the three factors, the one " 'given greatest emphasis' " and most often found " 'controlling in determining whether land is a single tract is unity of use.' " *Martin*, 296 N.C. at 25-26, 249 S.E.2d at 394 (quoting *Barnes*, 250 N.C. at 384-85, 109 S.E.2d at 225); *see Nelson*, 127 N.C. App. at 368, 489 S.E.2d at 451 (concluding that, if a completed, commercially developed office park would be considered an "integrated economic unit," a partially completed office park meets that requirement as well). The connecting parcels must "be presently, actually, and permanently used in such a manner that the enjoyment of the parcel taken is reasonably and substantially necessary to the enjoyment of the remaining parcel." *Martin*, 296 N.C. at 29, 249 S.E.2d at 396.

Here the undeveloped tracts of Park Creek are contiguous, satisfying the "physical unity" requirement. Most importantly, as we have said, is "unity of use." Not only are the Wayne Tracts and LLC Tract part of the same subdivision, they are subject to the same vested right to be developed pursuant to the 1997 plan. Defendant and the LLC each have an identifiable interest in the lands of the other; the Wayne Tracts and the LLC Tract are indispensable parts of the unified project. Consequently, the easement area taken is "reasonably and substantially necessary to the enjoyment" of both the Wayne Tracts and the LLC Tract. *Id.* The unity of use is controlling and being a part of a vested development plan is the strongest evidence of unity of use. Nonetheless, a modicum of unity of ownership must also be present. *Cf. City of Winston-Salem N.C. v. Yarbrough*, 117 N.C. App. 340, 345, 451 S.E.2d 358, 362 (1994), *cert. denied*, 340 N.C. 110, 456 S.E.2d 311 (1995) (concluding that unity of ownership exists between a husband and a wife, each owning separate tracts, because of the inchoate dower interest of the wife in the husband's property). Given the significance of the joint vested right to develop Park Creek, we hold that the unity of ownership is satisfied here, where Wayne is the trustee of his revocable trust owning the Wayne Tracts and has the controlling interest in the LLC.

The Court of Appeals and the trial court relied heavily on *Martin* to conclude that unity of ownership did not exist between defendant and the LLC. Each court believed *Martin* involved one tract owned by an individual and an adjacent tract owned by a corporation of which the individual was the sole shareholder. The facts and holding of *Martin*, however, are far more nuanced than that analysis implies. First, title to the adjacent property sought to be included in the condemnation in *Martin* was not titled in the corporation but in a distinct, unrelated

entity, a bankruptcy trustee. *Martin*, 296 N.C. at 29-30, 249 S.E.2d at 396-97. Further, and most importantly, there was no unity of use; the adjacent parcel was not a part of an approved development project. Though the owner in *Martin* may have intended some future development of the undeveloped parcel in conjunction with the adjacent developed tract, unlike here, that site had not received an approved, unified development plan encompassing the entire property. *Id.* at 30, 249 S.E.2d at 397.

[2] Finally, we consider the measure of damages. Defendant argues, and the trial court determined, that the loss of the vested right is a separate "property interest" for which he is entitled to compensation. We do not agree. The vested right is not a property interest separate from the real estate to which it attaches; it is, instead, a unique quality of that land which enhances the value. Generally, an undeveloped parcel of land for which development has been approved is significantly more valuable than the same parcel without the development rights. As such, it is an important feature of the condemned land and not a separate, compensable property right.

According to defendant and the trial court, the Town's condemnation undermines defendant's vested right to implement an approved plan to develop the future phases of the subdivision in harmony with the already completed development. Defendant incurred substantial expense in good faith reliance on the 1997 plan, including, *inter alia*, installation of infrastructure, preparation of plats and surveys, and marketing the subdivision. The significant adverse effects of the easement and resulting losses in developable area, residential density and flexibility in the development, and the shifting of shared costs prevent defendant from completing the 1997 plan in accordance with his vested right.

Nonetheless, the statute establishes that the measure of damages is simply the difference between the value immediately before the taking and that immediately afterwards. N.C.G.S. § 40A-64(b). The fact that the property is subject to the vested right to be developed under the 1997 plan will be the significant factor in determining the value before the taking. During the damages stage of trial, the jury may believe the evidence presented, as did the trial court, that the condemnation has virtually eliminated the use of the property as a residential subdivision. If so, the jury's ultimate valuation will reflect the value of the property before the taking as an approved residential development and the value after the taking as acreage without that significant benefit. Regardless, the remaining undeveloped portion of Park Creek retains some value. Thus, the statutory before and after method will provide defendant and

the LLC just compensation for the taking, including any loss of the ability to develop the subdivision under their vested right.

In sum, we hold that defendant and the LLC have a vested right to complete Park Creek pursuant to the 1997 plan. Since defendant and the LLC own contiguous properties which are subject to a vested, unified development plan adversely affected by the condemnation, and Wayne has a modicum of interest in both, unity of ownership exists. The Court of Appeals' decision as to the lack of unity of ownership is reversed. Regarding the measure of damages, loss of a vested right is not a separate element of recovery but a quality of the property. The value of the property before the taking will reflect the enhancement resulting from the vested right as the value afterward will reflect the diminution or destruction of the right. As to this issue, the Court of Appeals' decision is modified and affirmed.

Accordingly, the decision of the Court of Appeals is modified and affirmed in part and reversed in part. This matter is remanded to the Court of Appeals for further remand to the Superior Court, Cabarrus County, to determine at trial the damages arising from the condemnation and for further proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

JORGE TOVAR-MAURICIO, EDEMIAS DELEON MORALES, MARIO M. TOVAR, RANULFO DELEON VASQUEZ, BERNABE FRANCISCO CALIXTO, TOMAS MARTINEZ GUERRERO AND GABRIEL DOMINGUEZ-CONTRERA, EMPLOYEES

v.

T.R. DRISCOLL, INC., EMPLOYER,

GENERAL CASUALTY INSURANCE COMPANY AND CAROLINAS ROOFING AND SHEET METAL CONTRACTORS SELF-INSURED FUND, CARRIERS

No. 9A14

Filed 11 June 2015

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. ___, 768 S.E.2d 550 (2014), affirming an opinion and award filed on 21 December 2012 by the North Carolina Industrial Commission. On 18 December 2014, the Supreme Court allowed petitions for discretionary review of additional issues filed by defendants General Casualty Insurance Company and Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund. Heard in the Supreme Court on 21 April 2015.

Diener Law, P.A., by Amanda Gladin-Kramer, Russell W. Johnson, and Richard A. Diener, for plaintiff-appellees.

Orbock Ruark & Dillard, PC, by Roger L. Dillard, Jr. and Jessica E. Lyles, for defendant-appellee T.R. Driscoll, Inc.

Teague Campbell Dennis & Gorham, LLP, by Brian M. Love and George H. Pender, for defendant-appellant/appellee General Casualty Insurance Company.

Goodman McGuffey Lindsey & Johnson, LLP, by Adam E. Whitten and Michael A. Cannon, for defendant-appellant/appellee Carolinas Roofing and Sheet Metal Contractors Self-Insured Fund.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MORGAN v. MORGAN

[368 N.C.69 (2015)]

DAVID M. MORGAN, EMPLOYEE
v.
MORGAN MOTOR COMPANY OF ALBEMARLE, EMPLOYER

BRENTWOOD SERVICES, INC., SERVICING AGENT FOR THE
NORTH CAROLINA AUTO DEALERS ASSOCIATION SELF-INSURER'S FUND

No. 21A14

Filed 11 June 2015

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. ___, 752 S.E.2d 677 (2013), affirming an opinion and award filed on 27 August 2012 by the North Carolina Industrial Commission. Heard in the Supreme Court on 22 April 2015.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson and Fred D. Poisson, Jr., for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce A. Hamilton and Carla M. Cobb, for defendant-appellees.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
GREGORY ELDER

No. 41A14

Filed 11 June 2015

Search and Seizure—warrantless search—residence—civil domestic violence protective order

The trial court erred in a manufacturing a controlled substance, maintaining a place to keep controlled substances, and possession of drug paraphernalia case by denying defendant's motion to suppress evidence discovered during the search of his residence. N.C.G.S. § 50B-3(a)(13) does not authorize the district court to order a search of defendant's residence under a civil domestic violence protective order. The search of defendant's home, conducted without a warrant or any articulable exception to the warrant requirement, violated defendant's fundamental rights protected by the Federal and State Constitutions.

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. ___, 753 S.E.2d 504 (2014), vacating a judgment entered on 17 December 2012 by Judge Linwood O. Foust in Superior Court, Mecklenburg County, and remanding for entry of an order allowing defendant's motion to suppress. Heard in the Supreme Court on 12 January 2015.

Roy Cooper, *Attorney General*, *by Ward Zimmerman*, *Special Deputy Attorney General*, *for the State-appellant.*

Michele Goldman for defendant-appellee.

NEWBY, Justice.

In this case we must determine whether N.C.G.S. § 50B-3 authorized the district court to order a search of defendant's person, vehicle, and residence pursuant to an ex parte civil Domestic Violence Order of Protection ("DVPO") and whether the ensuing search violated defendant's constitutional rights. Because the district court exceeded its statutory authority by ordering the search, and because the warrantless search lacked a basis in probable cause and no exigent circumstances were present, we modify and affirm the decision of the Court of Appeals.

On 23 September 2010, at the request of defendant's then-wife, the district court entered an ex parte DVPO against defendant under N.C.G.S. § 50B-3. In the DVPO the district court found that:

> [d]efendant threatened to get some gasoline and torch their son's pre-school, her house and her sister's house. He also stated that "I'm gonna get you all," and that "you won't [expletive deleted] stop me, the police won't [expletive deleted] stop me." He has a history of substance abuse and mental illness. He has also made threats to anyone attempting to go into the marital residence.

Concluding, *inter alia*, that defendant had committed acts of domestic violence in the past and that he continued to present a danger of future violence, the court ordered defendant to surrender his firearms, ammunition, and gun permits, as provided in N.C.G.S. § 50B-3.1. Relying on subdivision 50B-3(a)(13), which authorizes the court to order "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child," the court further ordered in the DVPO that "[a]ny Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." Notably, the court made no findings or conclusions that probable cause existed to search defendant's property or that defendant even owned or possessed a weapon.

After several attempts, officers served the DVPO on defendant at his residence three days after it was issued. Officers knocked on defendant's door for fifteen minutes before he came outside. Defendant then closed the front door of the house and locked the door. An officer took defendant's keys from his pocket, and officers entered the house to execute the search for weapons ordered in the DVPO. Before the search began, officers arrested and handcuffed defendant under a valid arrest warrant for communicating threats. Once inside defendant's home officers smelled marijuana and followed the odor to the basement, where they found a marijuana growing operation. Defendant was charged with manufacturing a controlled substance, maintaining a place to keep controlled substances, and possession of drug paraphernalia.

On 8 October 2012, defendant filed a pretrial motion to suppress the evidence discovered during the search of his residence. He contended that the district court did not have statutory authority to order a search under the DVPO and that the search violated his constitutional rights because "the police had neither reasonable suspicion nor probable cause to search his home and no exceptions to the fourth amendment existed."

The Superior Court, Mecklenburg County denied defendant's motion to suppress, and defendant pled guilty to all three charges, reserving his right to appeal the denial of his motion to suppress.

A divided panel of the Court of Appeals reversed the superior court's ruling, vacated the judgment entered upon defendant's guilty plea, and remanded for entry of an order allowing the motion to suppress. *State v. Elder*, ___ N.C. App. ___, ___, 753 S.E.2d 504, 513 (2014). The majority held, *inter alia*, that the relevant DVPO statutes, when read *in pari materia*, do not authorize the district court to order a general search of defendant's person, vehicle, and residence for weapons. *Id.* at ___, 753 S.E.2d at 510. The Court of Appeals further held that the ex parte DVPO was not a de facto search warrant because it contained no findings of probable cause and that no exigent circumstances justified a warrantless search; moreover, the majority found that no exigent circumstances existed to justify a "protective sweep" of the home. *Id.* at ___, 753 S.E.2d at 510-12. Therefore, the search violated defendant's rights under the Federal and State Constitutions. *Id.* The dissent argued that section 50B-3, when read broadly, authorizes the district court to order a search for weapons under a DVPO. ___ N.C. App. at ___, 753 S.E.2d at 513 (Bryant, J., dissenting). The State filed a notice of appeal based on the dissenting opinion.

Our General Assembly enacted the Domestic Violence Act, N.C.G.S. Chapter 50B, "to respond to 'the serious and invisible problem' of domestic violence." *Augur v. Augur*, 356 N.C. 582, 591, 573 S.E.2d 125, 132 (2002) (citation omitted). Subsection 50B-3(a) states that if a court finds a defendant committed an act of domestic violence, the court must grant a DVPO "restraining the defendant from further acts of domestic violence." N.C.G.S. § 50B-3(a) (2013). The statute then lists thirteen types of relief that the court may order in a DVPO. *Id.* The first twelve are specific prohibitions or requirements imposed on a party to the DVPO. The last type of relief is a catch-all provision that authorizes the court to order "*any* additional prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C.G.S. § 50B-3(a)(13) (emphasis added).

We disagree with the State's contention that the General Assembly intended a broad interpretation of the word "any." The plain language of section 50B-3 does not authorize courts to order law enforcement to search a defendant's person, vehicle, or residence under a DVPO. *See Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." (citations omitted)).

The word "any" in the catch-all provision modifies "additional prohibitions or requirements," N.C.G.S. § 50B-3(a)(13), and this provision follows a list of twelve other *prohibitions or requirements* that the judge may impose *on a party* to a DVPO, *id.* § 50B-3(a)(1)-(12). For example, the court may prohibit a party from harassing the other party or from purchasing a firearm, and it may require a party to provide housing for his or her spouse and children, to pay spousal and child support, or to complete an abuser treatment program. *Id.* § 50B-3(a)(3), (6), (7), (9), (11), (12). It follows, then, that the catch-all provision limits the court to ordering a party to act or refrain from acting; the provision does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence.

Not only is this interpretation demanded by the plain language of the statute, but it is consistent with the protections provided by the Federal and State Constitutions. *See Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 206 (noting that when possible, courts should interpret statutes in a manner consistent with our constitutions), *appeal dismissed*, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974). The Federal and State Constitutions protect fundamental rights by limiting the power of the government. Yet under the State's broad interpretation here, district courts would have seemingly unfettered discretion to order a broad range of remedies in a DVPO so long as the judge believes they are necessary for the protection of any party or child. This interpretation contravenes the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV, XIV. Though Article I, Section 20 of the North Carolina Constitution contains different language, it provides the same protection against unreasonable searches and seizures. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984) (citation omitted). Subject to a few well-delineated exceptions, the constitutions prohibit officers from invading the home without a valid warrant based on probable cause. *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979) (noting that warrant not required when exigent circumstances and probable cause exist); *State v. Little*, 270 N.C. 234, 238, 154 S.E.2d 61, 65 (1967) (recognizing consent as an exception to the warrant requirement). The United States Supreme Court has explained:

> An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case.

Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 621-22, 109 S. Ct. 1402, 1415-16, 103 L. Ed. 2d 639, 663 (1989) (citations omitted).

A search unsupported by a warrant or probable cause can be constitutional when the " 'special needs' " of the State, " 'beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168, 97 L. Ed. 2d 709, 717 (1987) (citation omitted). The United States Supreme Court has limited this exception to circumstances in which "the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by" requiring a warrant and probable cause. *Skinner*, 489 U.S. at 624, 109 S. Ct. at 1417, 103 L. Ed. 2d at 664 (special need to assure railroad employees operating trains are not under influence of drugs or alcohol); *see also*, *e.g.*, *Griffin*, 483 U.S. at 873-74, 107 S. Ct. at 3168, 97 L. Ed. 2d at 717-18 (special need to supervise and search probationers); *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, 734 (1985) (special need to deter drug use in public schools).

While domestic violence is certainly a significant problem and the State's interest in protecting victims from domestic violence is vital, the facts of this case do not justify a departure from the usual warrant and probable cause requirements. Defendant's fundamental right to privacy was paramount because his home is "protected by the highest constitutional threshold." *State v. Grice*, 367 N.C. 753, 760, 767 S.E.2d 312, 318 (2015). Moreover, it was not impracticable for officers to obtain a search warrant if they had a reasonable basis to believe defendant possessed weapons that posed an imminent danger. An ex parte DVPO that contains no indication that weapons are present simply does not implicate the same concerns as other cases in which the Supreme Court has found a special need to circumvent the warrant and probable cause requirements. Therefore, by requiring officers to conduct a search of

defendant's home under sole authority of a civil DVPO without a warrant or probable cause, the district court's order violated defendant's constitutional rights.

Accordingly, we hold that in interpreting the statute according to its specific terms, as well as in a manner consistent with the Federal and State Constitutions, N.C.G.S. § 50B-3(a)(13) does not authorize the district court to order a search of defendant's residence under a civil DVPO. Furthermore, the search of defendant's home, conducted without a warrant or any articulable exception to the warrant requirement, violated defendant's fundamental rights protected by the Federal and State Constitutions. Therefore, the superior court should have granted defendant's motion to suppress, and the decision of the Court of Appeals is modified and affirmed.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
TIYOUN JIMEK JACKSON

No. 183A14

Filed 11 June 2015

Search and Seizure—initial investigatory stop—neighborhood known for drugs

The unchallenged findings of fact made by the trial court sufficiently established that a Greensboro police officer had reasonable suspicion to conduct a brief investigatory stop of defendant. Being mindful of the dangers of making the simple act of walking in one's own neighborhood a possible indication of criminal activity, the Supreme Court noted that defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations, and that defendant and another man twice split up and walked in opposite directions upon seeing a marked police vehicle approach.

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. ___, 758 S.E.2d 39 (2014), reversing an order entered on 10 January 2013 by Judge Christopher W.

Bragg and vacating a judgment entered on 7 January 2013 by Judge A. Robinson Hassell, both in Superior Court, Guilford County. Heard in the Supreme Court on 19 March 2015.

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

Staples S. Hughes, *Appellate Defender*, *by Constance E. Widenhouse*, *Assistant Appellate Defender*, *for defendant-appellee.*

HUDSON, Justice.

Defendant Tiyoun Jimek Jackson was stopped and searched on 9 April 2012 by Officer Timothy Brown of the Greensboro Police Department outside a shop known for drug activity. Based on evidence obtained as a result of this stop, defendant was indicted for possession of a firearm by a felon, possession of a firearm with an altered serial number, and conspiracy to possess with intent to sell or deliver marijuana. Defendant moved to suppress the evidence obtained as a result of the initial stop on the basis that Officer Brown lacked reasonable suspicion to conduct an investigatory stop of defendant. The trial court denied this motion and the Court of Appeals reversed. Because we conclude that the trial court's unchallenged findings of fact establish that Officer Brown possessed reasonable suspicion to stop defendant, we now reverse the decision of the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

On the evening of 9 April 2012, Officer Timothy Brown was assigned to patrol the area of Greensboro surrounding Kim's Mart, a shop known to police, including Officer Brown personally, as the site of frequent hand-to-hand drug transactions. At approximately 9:00 p.m., as Officer Brown approached the store in his marked patrol vehicle, he witnessed defendant standing near the store's newspaper dispenser with another individual named Curtis Benton. Upon seeing the police vehicle, defendant and Benton dispersed, with defendant walking east into Kim's Mart and Benton walking in the opposite direction to the west.

Officer Brown continued down the road past Kim's Mart, made a U-turn, and started back toward Kim's Mart. As he approached the store a second time, he saw that defendant and Benton had returned and were again standing in front of Kim's Mart, approximately twenty feet from where Officer Brown first saw them. For a second time, defendant and Benton separated and began walking away from each other in opposite

directions. As defendant walked by Officer Brown's patrol car, Officer Brown stopped defendant to ask him about drug activity; he then told defendant to place his hands on the car so he could frisk defendant for weapons. Officer Brown then asked defendant for consent to search his person, and defendant agreed. As Officer Brown was patting down defendant, defendant placed a loaded handgun on the hood of the patrol car and told Brown that he had found the weapon in the woods two weeks earlier. Officer Brown placed defendant under arrest and handcuffed him. A separate search of Benton yielded marijuana packaged in a number of small plastic bags.

Based on the evidence obtained from the stops of defendant and Benton, including the handgun seized from defendant and the marijuana and plastic bags seized from Benton, defendant was indicted on 11 June 2012 for possession of a firearm by a felon, possession of a firearm with an altered serial number, and conspiracy to possess with intent to sell or deliver marijuana. Defendant moved to suppress the evidence obtained as a result of the original seizure on the basis that Officer Brown lacked reasonable suspicion to conduct an investigatory stop of defendant. The trial court denied this motion in an order dated 5 December 2012. On 7 January 2013, defendant pleaded guilty to the offenses for which he was indicted while reserving his right to appeal the denial of his motion to suppress. In a divided opinion, the Court of Appeals reversed the trial court, holding that the facts and circumstances did not establish reasonable suspicion for Officer Brown to conduct an investigatory stop of defendant. *State v. Jackson*, ___ N.C. App. ___, ___, 758 S.E.2d 39, 46 (2014). The State appealed to this Court as a matter of right.

ANALYSIS

The sole issue presented in this appeal is whether the unchallenged facts found by the trial court sufficiently establish reasonable suspicion for the initial investigatory stop of defendant. Because we conclude that they do, we reverse the decision of the Court of Appeals.

As a general matter, "[b]oth the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV and N.C. Const. art. I, § 20). However, the United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 1884-85 (1968). As that Court has recently described, reasonable suspicion

requires specific, articulable facts indicating present, ongoing criminal activity and will not allow a stop based on a mere inchoate suspicion or "hunch":

> The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity. The reasonable suspicion necessary to justify such a stop is dependent upon both the content of information possessed by [the officer] and its degree of reliability. The standard takes into account the totality of the circumstances—the whole picture. Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.

Navarette v. California, ___ U.S. ___, ___, 134 S. Ct. 1683, 1687 (2014) (citations and internal quotation marks omitted). This same standard—reasonable suspicion—applies under the North Carolina Constitution. *See*, *e.g.*, *Otto*, 366 N.C. at 136-37, 726 S.E.2d at 827 (noting that traffic stops, as a type of brief investigatory seizure, are analyzed under the North Carolina Constitution using the reasonable suspicion standard). Therefore, when a criminal defendant files a motion to suppress challenging an initial investigatory stop, the trial court can deny that motion only if it concludes, after considering the totality of the circumstances known to the officer, that the officer possessed reasonable suspicion to justify the challenged stop.

When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: " 'The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law.' " *Id.* at 136, 726 S.E.2d at 827 (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011)). At the Court of Appeals, defendant challenged only finding of fact number five on the basis that it was not supported by competent evidence. The Court of Appeals agreed that finding number five was unsupported, and the State does not challenge that determination here. Therefore, we review de novo whether the unchallenged findings of fact are sufficient to establish that Officer Brown had reasonable suspicion to conduct a brief investigatory stop of defendant.

After holding a hearing regarding defendant's motion to suppress, the trial court entered a written order, dated 5 December 2012, which included the following relevant findings of fact:

> 1. Timothy D. Brown is and has been an officer for the Greensboro Police Department since August 15, 2009.
>
> 2. Officer Brown based on training and experience is familiar with marijuana and other narcotic drugs.
>
> . . . .
>
> 4. Prior to April 9, 2012, Officer Brown had on two occasions contact with the defendant, Tiyoun Jimek Jackson.
>
> . . . .
>
> 11. On April 9, 2012, Officer Brown was assigned and was patrolling zone 450 in a marked patrol car.
>
> 12. Officer Brown at approximately 9:00 pm was patrolling in the vicinity of Kim's Mart located at 2200 Phillips Avenue.
>
> 13. Based on Officer Brown's experience as a Greensboro Police Officer he knows that the immediate area outside of Kim's Mart has been the location of hundreds of narcotic investigations some resulting in arrests.
>
> 14. Officer Brown has personally made drug arrests in the immediate area of Kim's Mart.
>
> 15. Officer Brown is personally aware that hand-to-hand drug transactions have taken place on the sidewalk and street directly adjacent to Kim's Mart as well as inside Kim's Mart.
>
> 16. At approximately 9:00 pm on April 9, 2012 Officer Brown saw the defendant . . . and Curtis M. Benton standing near the newspaper dispenser outside of Kim's Mart.
>
> . . . .
>
> 19. The defendant . . . and Curtis M. Benton upon spotting Officer Brown in his marked patrol car stopped talking and dispersed.
>
> 20. The defendant . . . went to the East and walked into Kim's Mart and Curtis M. Benton walked away, in the opposite direction, to the West.

> 21. Officer Brown testified that his training and experience indicate that upon the approach of a law enforcement officer, two individuals engaged in a drug transaction will separate and walk away in opposite directions.
>
> 22. Officer Brown continued past Kim's Mart and down Phillips Avenue.
>
> 23. After losing sight of the defendant . . . and Curtis M. Benton, Officer Brown made a u-turn and headed back up Phillips Avenue toward Kim's Mart.
>
> 24. As Officer Brown again approached Kim's Mart, the defendant . . . and Curtis M. Benton were again standing in front of Kim's Mart approximately 20 feet from where Officer Brown saw them originally.
>
> 25. Officer Brown pulled into the parking lot at Kim's Mart.
>
> 26. As Officer Brown was pulling into the parking lot at Kim's Mart, the defendant . . . and Curtis M. Benton again separated and began walking away in opposite directions.

We conclude that these facts are sufficient, considering the totality of the circumstances, to create reasonable suspicion to justify the initial investigatory stop of defendant.

In making this determination, we are mindful of the dangers identified by defendant in his brief and at oral argument of making the simple act of walking in one's own neighborhood a possible indication of criminal activity. Here, defendant was walking in, and "the stop occurred in[,] a 'high crime area' [which is] among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) (citation omitted). However, we do not hold that those circumstances, standing alone, suffice to establish the existence of reasonable suspicion. Here, in contrast, the trial court based its conclusion on more than defendant's presence in a high crime and high drug area. The findings of fact show defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations; defendant and Benton split up and walked in opposite directions upon seeing a marked police vehicle approach; they came back very near to the same location once the patrol car passed; and they walked apart a second time upon seeing Officer Brown's return. We conclude that these facts go beyond an inchoate suspicion or hunch and provide a "particularized and objective basis for suspecting [defendant] of [involvement in] criminal activity."

Navarette, ___ U.S. at ___, 134 S. Ct. at 1687 (citations and quotation marks omitted). Accordingly, we reverse the Court of Appeals.

CONCLUSION

In sum, we conclude that the unchallenged findings of fact made by the trial court sufficiently establish that Officer Brown of the Greensboro Police Department had reasonable suspicion to conduct a brief investigatory stop of defendant. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA
v.
CURTIS MARIO BENTON

No. 207PA14

Filed 11 June 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 762 S.E.2d 1 (2014), reversing an order entered on 25 April 2013 by Judge Ronald E. Spivey, and vacating a judgment dated 6 May 2013 and entered on 15 May 2013 by Judge David L. Hall, in Superior Court, Guilford County. Heard in the Supreme Court on 19 March 2015.

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

Mark L. Hayes for defendant-appellee.

PER CURIAM.

In *State v. Jackson*, the Court of Appeals concluded in a divided opinion that the stop of the defendant in that case, Tiyoun Jimek Jackson, was not supported by reasonable suspicion. ___ N.C. App. ___, ___, 758 S.E.2d 39, 46 (2014). Based on its opinion in *Jackson*, the Court of Appeals concluded that the stop of the defendant in this companion case, Curtis Mario Benton, was also not supported by reasonable suspicion. *State v. Benton*, ___ N.C. App. ___, 762 S.E.2d 1, 2014 WL 2507700, at *1 (2014) (unpublished). On appeal to this Court, we concluded that

the stop of defendant Jackson was supported by reasonable suspicion, and we therefore reversed the decision of Court of Appeals. *State v. Jackson*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 11, 2015) (183A14). Accordingly, the decision of the Court of Appeals in *State v. Benton*, ___ N.C. App. ___, 762 S.E.2d 1 (2014) is vacated and remanded to that court for reconsideration in light of our opinion in *State v. Jackson*, ___ N.C. ___, ___ S.E.2d ___ (2015).

VACATED AND REMANDED.

TEMPLETON PROPERTIES LP, PETITIONER
v.
TOWN OF BOONE, RESPONDENT

No. 234PA14

Filed 11 June 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 759 S.E.2d 311 (2014), reversing an order entered on 7 August 2013 by Judge Shannon R. Joseph in Superior Court, Watauga County. Heard in the Supreme Court on 20 April 2015.

Brough Law Firm, by Michael B. Brough; and di Santi Watson Capua Wilson & Garrett, PLLC, by Anthony S. di Santi and Chelsea B. Garrett, for petitioner-appellant.

Parker Poe Adams & Bernstein LLP, by Benjamin R. Sullivan, for respondent-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.*, *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011); *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.

STATE v. CAMPBELL

[368 N.C. 83 (2015)]

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL

No. 252PA14

Filed 11 June 2015

1. Larceny—indictment—legal entity capable of owning property—church or other place of religious worship

The Court of Appeals erred by concluding that a larceny indictment was fatally flawed because it failed to allege that Manna Baptist Church was a legal entity capable of owning property. Alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that have held otherwise was overruled.

2. Burglary and Unlawful Breaking or Entering—felony breaking or entering—place of religious worship

The State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship. The evidence showed that defendant unlawfully broke and entered Manna Baptist Church late at night, he did not have permission to be inside the church and could not remember what he did while there, and the pastor found defendant's wallet near the place where some of the missing equipment previously had been stored.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 759 S.E.2d 380 (2014), vacating in part and reversing in part a judgment entered on 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County, and remanding for entry of a revised judgment and resentencing thereon. Heard in the Supreme Court on 22 April 2015.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

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

NEWBY, Justice.

In this case we must decide whether an indictment charging defendant with larceny is fatally flawed because it did not specifically state that a church, the alleged co-owner of the stolen property, is an entity capable of owning property, and whether the State presented sufficient evidence of defendant's intent to commit larceny to support his conviction for felonious breaking or entering a place of worship. Because the name of a church necessarily imports an entity capable of owning property, we hold that the indictment was sufficient on its face. Furthermore, we conclude that the State presented sufficient evidence of defendant's criminal intent to commit larceny. Therefore, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of any remaining issues.

On 8 October 2013, the Cleveland County Grand Jury indicted defendant for felony breaking or entering a place of worship and felony larceny after breaking or entering. The larceny indictment specifically alleged that, on 15 August 2012, defendant stole "a music receiver, microphones and sounds system wires, the personal property of Andy Stevens and Manna Baptist Church, . . . in violation of N.C.G.S. [§] 14-54.1(a)." Defendant pled not guilty.

At trial, the State's evidence showed that at the conclusion of Sunday services on 19 August 2012, Pastor Andy Stevens of Manna Baptist Church discovered that some audio equipment was missing. Pastor Stevens lives on the Manna Baptist Church property. He testified that the church doors may have been inadvertently left unlocked on 15 August, following Wednesday evening services. When the church secretary arrived the next morning, she locked the doors, and they remained locked until Sunday morning. Although there was no sign of forced entry, Pastor Stevens found defendant's wallet in the baptistry changing area at the back of the church close to where some of the missing equipment previously had been located.

A detective testified that she spoke with defendant at the Cleveland County Detention Center, where he was being held on an unrelated charge. When defendant learned the detective wished to speak with him, he said, "[T]his can't possibly be good. What have I done now that I don't remember?" Defendant then admitted to being at Manna Baptist Church the night the doors were left unlocked. He said he was on "a spiritual journey" and "had done some things," but "did not remember what he had done" in the church.

At the close of the State's evidence, the trial court denied defendant's motion to dismiss the charges based on insufficient evidence. Defendant

then testified on his own behalf. He stated that on the night in question, he was asked to leave the house in which he was living, so he packed a duffle bag with his clothes and started walking toward a friend's house. Along the way, he dumped the bag in a ditch because it was too heavy to carry. Defendant arrived at his friend's house around midnight. When his friend's girlfriend asked him to leave, he kept walking until he reached Manna Baptist Church. Defendant noticed that the door to the church was cracked open. He was thirsty from walking all night, so he entered the church with the intent to find water and sanctuary. Defendant stated that once inside, he prayed, slept, "tried to do a lot of soul searching," and drank a bottle of water, although he admitted he was "not really sure exactly what [he] did the whole time [he] was" in the church. He also testified that he "did not take anything away from the church" when he left at daybreak.

After leaving the church, defendant felt chest pains, so he called 9-1-1. Defendant testified that he was taking a host of medications at the time, including a psychotropic drug, for his heart condition, stress disorder, bipolar condition, and diabetes. An Emergency Medical Technician ("E.M.T.") responded to the call around 6:30 a.m. on Thursday. The E.M.T. testified that defendant said he had been "wandering all night," that defendant looked "disheveled" and "worn out," and that defendant's "shoes were actually worn through the soles." The E.M.T. did not see defendant carrying anything.

At the close of evidence, defendant renewed his motion to dismiss for insufficient evidence, which the trial court again denied. The jury found defendant guilty of felony larceny and felony breaking or entering a place of religious worship, and defendant appealed.

The Court of Appeals vacated defendant's larceny conviction and reversed his conviction for breaking or entering. *State v. Campbell*, ___ N.C. App. ___, ___, 759 S.E.2d 380, 382 (2014). The Court of Appeals opined that when a larceny "indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment." *Id.* at ___, 759 S.E.2d at 384. Therefore, the Court of Appeals concluded that the larceny indictment was "fatally flawed" because it failed to "allege that Manna Baptist Church is a legal entity capable of owning property." *Id.* at ___, 759 S.E.2d at 384. The Court of Appeals further concluded that the State presented insufficient evidence of defendant's intent to commit larceny, an essential element of felony breaking or entering a place of worship. *Id.* at ___, 759 S.E.2d at 384. The Court of Appeals remanded the case to the trial court for entry of judgment on misdemeanor breaking or

entering, a lesser-included offense that does not require criminal intent. *Id.* at ___, 759 S.E.2d at 387. We allowed the State's petition for discretionary review. *State v. Campbell*, 367 N.C. 792, 766 S.E.2d 635 (2014).

[1] It is well settled "that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). The purpose of the indictment is to give a defendant reasonable notice of the charge against him so that he may prepare for trial. *Id.* at 311, 283 S.E.2d at 731 (citation omitted). A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated. *See, e.g.*, *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (citation omitted).

To be valid a larceny indictment must " 'allege the ownership of the [stolen] property either in a natural person or a legal entity capable of owning (or holding) property.' " *State v. Jessup*, 279 N.C. 108, 112, 181 S.E.2d 594, 597 (1971) (citations omitted). The indictment here specifically alleges that defendant stole audio equipment belonging to "Andy Stevens and Manna Baptist Church." Because Andy Stevens is a natural person, naming him is sufficient to allege ownership of the property in him. *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 903 (1960) (" 'If the property alleged to have been stolen is that of an individual, the name of the individual, if known, should be stated . . . .' "). Defendant nevertheless contends that the indictment is fatally defective because it fails to allege that Manna Baptist Church is a corporation or other legal entity capable of owning property. We disagree.

When alleging ownership in an entity, an indictment must specify that the owner, "if not a natural person, is a corporation or otherwise a legal entity capable of owning property," unless the entity's name itself "imports an association or a corporation capable of owning property." *Id.* at 661, 111 S.E.2d at 903. In *Thornton* we held that an indictment alleging the defendant embezzled money belonging to "The Chuck Wagon" was "fatally defective" because it failed to allege "that 'The Chuck Wagon' is a corporation, and the words 'The Chuck Wagon' do not import a corporation." *Id.* at 662, 111 S.E.2d at 904. We further explained, however, that the words "corporation," "incorporated," "limited," or "company," or their abbreviated form, sufficiently identify a corporation in an indictment. *Id.* Moreover, we cited favorably a Georgia appellate court decision holding that including the word "church" in the entity's name sufficiently "import[s] a religious association" capable of owning property. 251 N.C. at 661, 111 S.E.2d at 903 (citing *Gibson v. State*, 13 Ga. App. 67, 78 S.E. 829 (1913) (mem.)). This view is consistent with

our statutes recognizing that churches are entities capable of owning property in North Carolina. *See* N.C.G.S §§ 61-2 to -5 (2013). Therefore, we hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled. *See, e.g.*, *State v. Patterson*, 194 N.C. App. 608, 614, 671 S.E.2d 357, 361 (holding that indictment naming "First Baptist Church of Robbinsville" was fatally defective), *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 383 (2009); *State v. Cathey*, 162 N.C. App. 350, 353-54, 590 S.E.2d 408, 410-11 (2004) (holding that indictment naming "Faith Temple Church of God" was fatally defective). Accordingly, the larceny indictment here is valid on its face even though it does not specify that Manna Baptist Church is an entity capable of owning property, and the Court of Appeals erred in vacating defendant's conviction for larceny on that basis.

[2] The State next contends that the Court of Appeals incorrectly reversed and remanded defendant's conviction for felony breaking or entering because of insufficient evidence of defendant's intent to commit larceny at the time of the breaking or entering. To survive a motion to dismiss for insufficient evidence, the State must present "substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense." *State v. Myrick*, 306 N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982) (citations omitted). The trial court must consider the evidence "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." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted).

Defendant was charged under N.C.G.S. § 14-54.1(a) with wrongfully breaking or entering Manna Baptist Church *with intent to commit a larceny therein*. To meet its burden, the State must offer substantial evidence that defendant broke or entered the building with the requisite criminal intent. In *State v. Bell* we explained:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the [building]. . . . However, the fact that a felony was actually committed

> after the [building] was entered is not necessarily proof of the intent requisite for the crime of [larceny]. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony . . . is not required in order to sustain a conviction of [larceny]."

285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (second alteration in original) (citations omitted).

Here evidence showed that defendant unlawfully broke and entered Manna Baptist Church late at night. *See State v. Sweezy*, 291 N.C. 366, 383, 230 S.E.2d 524, 535 (1976) ("It is well established that the mere pushing or pulling open of an unlocked door constitutes a breaking."). Defendant did not have permission to be inside the church and could not remember what he did while there, and Pastor Stevens found defendant's wallet near the place where some of the missing equipment previously had been stored. Considered in the light most favorable to the State, this evidence was sufficient to take the case to the jury on the question of defendant's intent to commit larceny when he broke and entered Manna Baptist Church. Therefore, the trial court properly denied defendant's motion to dismiss the breaking or entering charge for insufficient evidence.

Thus, we hold that the larceny indictment alleging ownership of stolen property of Manna Baptist Church sufficiently alleged ownership in a legal entity capable of owning property. We further conclude that the State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship, and the trial court properly denied defendant's motions to dismiss. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of any remaining issues on appeal.

REVERSED AND REMANDED.

IN RE J.C.

[368 N.C. 89 (2015)]

IN THE MATTER OF J.C., J.C.

No. 280A14

Filed 11 June 2015

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. ___, 760 S.E.2d 778 (2014), affirming an amended adjudication order finding neglect entered on 22 October 2013 and a disposition order entered on 15 October 2013, both by Judge Resson Faircloth in District Court, Johnston County, but remanding the adjudication order for correction of a clerical error. Heard in the Supreme Court on 16 March 2015.

Holland & O'Connor, P.L.L.C., by Jennifer S. O'Connor, for Johnston County Department of Social Services, petitioner-appellee.

Tawanda N. Foster, Appellate Counsel, Administrative Office of the Courts, Guardian ad Litem Services Division, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant-mother.

PER CURIAM.

The district court made no findings whether respondent mother was able to pay for supervised visitation once ordered. Without such findings, our appellate courts are unable to determine if the trial court abused its discretion by requiring as a condition of visitation that visits with the children be at respondent mother's expense. *See Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982) (" 'The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law.' " (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980))). We hold that insufficient findings of fact existed here to support meaningful appellate review. Accordingly, we reverse the decision of the Court of Appeals affirming the disposition order and remand this case to that court for further remand to the trial court with instructions to vacate the portion of the disposition order requiring that respondent mother's visits be "at her expense," and for entry of a new disposition order once the trial court makes the necessary findings of fact. The remaining issues addressed by the Court of Appeals are not properly

before this Court, and the decision of the Court of Appeals as to these matters remains undisturbed.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
EDDIE DANIEL BERRY

No. 315A14

Filed 11 June 2015

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. ___, 761 S.E.2d 700 (2014), finding no error in part and dismissing defendant's appeal in part from judgments entered on 28 February 2013 by Judge James E. Hardin, Jr. in Superior Court, Alamance County. Heard in the Supreme Court on 20 April 2015.

Roy Cooper, *Attorney General*, *by Sarah Y. Meacham and Mary Carla Babb*, *Assistant Attorneys General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

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

REVERSED AND REMANDED.

SANDHILL AMUSEMENTS, INC. AND GIFT SURPLUS, LLC
v.
SHERIFF OF ONSLOW COUNTY, NORTH CAROLINA, HANS J. MILLER, IN HIS OFFICIAL CAPACITY; AND DISTRICT ATTORNEY FOR THE FOURTH PROSECUTORIAL DISTRICT OF THE STATE OF NORTH CAROLINA, ERNIE LEE, IN HIS OFFICIAL CAPACITY

No. 363A14

Filed 11 June 2015

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. ___, 762 S.E.2d 666 (2014), affirming in part, vacating in part, and dismissing in part an appeal from orders entered on 4 November 2013 by Judge Jack Jenkins in Superior Court, Onslow County. Heard in the Supreme Court on 21 April 2015.

Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry and Luther D. Starling, for plaintiff-appellee Sandhill Amusements, Inc.

Hyler & Lopez, P.A., by Stephen P. Agan and George B. Hyler, Jr., for plaintiff-appellee Gift Surplus, LLC.

Turrentine Law Firm, PLLC, by S.C. Kitchen, and Lesley F. Moxley, Onslow County Attorney, for defendant-appellant Sheriff Hans J. Miller.

Edmond W. Caldwell, Jr., General Counsel for North Carolina Sheriffs' Association, amicus curiae.

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 the Superior Court, Onslow County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

CAPE FEAR RIVER WATCH, SIERRA CLUB, WATERKEEPER ALLIANCE, AND MOUNTAINTRUE (F/K/A WESTERN NORTH CAROLINA ALLIANCE), PETITIONERS
v.
NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENT
and
DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, INC., RESPONDENT-INTERVENORS

No. 373A14

Filed 11 June 2015

Appeal and Error—mootness—coal ash lagoons—superseding legislation

The Supreme Court considered whether the trial court erred by reversing a portion of a declaratory ruling issued by the North Carolina Environmental Management Commission (Commission) on 18 December 2012 relating to the application of the Commission's groundwater protection rules to coal ash lagoons. The General Assembly's enactment of Chapter 122 of the 2014 North Carolina Session Laws superseded the rule at issue with respect to coal ash lagoons located at facilities with active permits, and petitioners' appeal from the Commission's declaratory ruling was moot.

Appeal pursuant to N.C.G.S. §§ 7A-27(b)(1) and 150B-52 from an order on petition for judicial review entered on 6 March 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2) and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 16 March 2015.

Southern Environmental Law Center, by Austin D. Gerken Jr., Amelia Y. Burnette, J. Patrick Hunter, and Frank Holleman, for petitioner-appellees.

Roy Cooper, Attorney General, by Mary L. Lucasse and Jennie Wilhelm Hauser, Special Deputy Attorneys General, for respondent-appellant.

Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney III; and Hunton & Williams LLP, by Charles D. Case, Matthew F. Hanchey, Frank E. Emory, Jr., and Brent A. Rosser, for respondent-intervenor-appellants.

ERVIN, Justice.

The substantive issue before us in this case is whether the trial court erred by reversing a portion of a declaratory ruling issued by the North Carolina Environmental Management Commission (Commission) on 18 December 2012 relating to the application of the Commission's groundwater protection rules codified at Title 15A, Subchapter 2L, "Groundwater Classification and Standards," of the North Carolina Administrative Code, to coal ash lagoons. See 15A NCAC 2L .0101-.0417 (June 2014) [hereinafter Groundwater Rules]. In view of our conclusion that the General Assembly's enactment of Chapter 122 of the 2014 North Carolina Session Laws[1] supersedes the rule at issue in this appeal with respect to coal ash lagoons located at facilities with active permits, *see* Act of Aug. 20, 2014, ch. 122, 2014 5 N.C. Adv. Legis. Serv. 77 (LexisNexis) [hereinafter Chapter 122], we vacate the trial court's order and remand this case to the trial court with instructions to dismiss petitioners' appeal from the Commission's declaratory ruling on mootness grounds.

The present case stems from a dispute over the manner in which certain regulatory requirements should be applied to coal ash lagoons that received operating permits before 30 December 1983.[2] At the time at which the present proceeding was commenced, unlined coal ash lagoons existed at fourteen coal-fired electric generating facilities located in North Carolina. These coal ash lagoons contained the residue from the combustion of coal used to generate electricity. These residual materials consisted of a mixture of water, coal combustion by-products, and other waste.[3] All fourteen of the power generation facilities at issue in this case operate subject to National Pollutant Discharge Elimination System ("NPDES") permits that were originally issued by the North Carolina Department of Environment and Natural Resources ("DENR") and are subject to Groundwater Rules that have been adopted by the

1. The parties have referred to Chapter 122, in its entirety, as the "Coal Ash Management Act." However, the Coal Ash Management Act of 2014 (codified at N.C.G.S. §§ 130A-309.200 to -309.231) is a component of Chapter 122, which also amends a number of pre-existing statutory provisions.

2. According to the regulations at issue in this proceeding, facilities with coal ash lagoons that were permitted prior to 30 December 1983 are "deemed not permitted." 15A NCAC 2L .0106(e)(4).

3. The waste by-products found in the coal ash lagoons at issue in this case include arsenic, thallium, boron, sulfate, nickel, iron, chromium, manganese, and selenium, all of which are subject to groundwater concentration standards.

Commission. According to groundwater samples taken from monitoring wells located on the properties on which the coal ash lagoons are located, levels of contamination that exceed the relevant groundwater standards have been reported near some lagoons associated with the coal-fired generating facilities at issue in this proceeding.

Section .0106 of Title 15A, Subchapter 2L of the North Carolina Administrative Code describes the corrective actions required when "groundwater quality has been degraded." 15A NCAC 2L .0106 [hereinafter Rule .0106]. According to Rule .0106(c), which applies to sites that are either unpermitted or "deemed not permitted" pursuant to Rule .0106(e)(4) at which groundwater contamination exceeds authorized levels:

> Any person conducting or controlling an activity which has not been permitted by the Division and which results in an increase in the concentration of a substance in excess of the standard, other than agricultural operations, shall:
>
> (1) immediately notify the Division of the activity that has resulted in the increase and the contaminant concentration levels;
>
> (2) take immediate action to eliminate the source or sources of contamination;
>
> (3) submit a report to the Director assessing the cause, significance and extent of the violation; and
>
> (4) implement an approved corrective action plan for restoration of groundwater quality in accordance with a schedule established by the Director or his designee. In establishing a schedule the Director, or his designee shall consider any reasonable schedule proposed by the person submitting the plan.

Id. .0106(c). On 10 October 2012, Cape Fear River Watch, Sierra Club, Waterkeeper Alliance, and Western North Carolina Alliance filed a request that the Commission issue a declaratory ruling clarifying the application of the Groundwater Rules to coal ash lagoons. More specifically, petitioners requested the Commission to make the following rulings:

> a) Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take corrective action pursuant to 15A N.C. Admin. Code 2L .0106(c) when their activity results in an increase in

the concentration of a substance in excess of groundwater quality standards, whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary around the lagoon;

b) Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take immediate action to eliminate sources of contamination that cause a concentration of a substance in excess of groundwater quality standards, in advance of their separate obligation to propose and implement a corrective action plan for the restoration of groundwater quality contaminated by those sources; and

c) Operators of closed and inactive coal ash lagoons must implement corrective action as unpermitted activities pursuant to 15A N.C. Admin. Code 2L .0106(c) when they cause an increase in the concentration of a substance in excess of groundwater quality standards.

After the filing of this request for a declaratory ruling and a decision by petitioners and DENR to enter into certain stipulations relating to relevant facts, the Commission granted an intervention petition filed by Duke Energy Carolinas, LLC and Carolina Power & Light Company, an indirect subsidiary of Duke Energy Corporation, d/b/a Progress Energy Carolinas ("Duke"). After reviewing the record and hearing oral argument from counsel for the parties at a 3 December 2012 meeting, the Commission issued a declaratory ruling on 18 December 2012, concluding, in pertinent part, that:

> 16. Activities that do not meet the requirements of 2L .0106(e), including those permitted prior to December 30, 1983, are deemed unpermitted and are subject to the requirements of 2L .0106(c) applicable to persons conducting or controlling an activity (other than agricultural operations) that has not been permitted and which results in an increase in the concentration of a substance in excess of the standard.
>
> 17. The corrective action requirements in 2L .0106(c)(1) through (4) are not prioritized, and the immediate action to eliminate the source or sources of contamination requires responsible parties and the Division to follow the detailed procedures set forth in the entirety of the 2L Groundwater Rules.

> 18. The specific corrective actions enumerated in 15A NCAC 2L .0106(f)(1) through (4) that are required to be undertaken, including a site assessment and a corrective action plan for the abatement, containment or control of migration of any contaminants, require a reasonable amount of time to accomplish. The "immediate action" contemplated by 15A NCAC 2L .0106(c)(2) is action appropriate to the circumstances evaluated in the context of the 2L Groundwater Rules.

On 8 January 2013, petitioners filed a petition seeking judicial review of the Commission's declaratory ruling in Superior Court, Wake County, in which they claimed that the Commission had misconstrued the applicable regulations and erroneously failed to construe the applicable regulations in the manner contended for by petitioners in their original request for declaratory relief. After the submission of legal memoranda from the parties, the trial court heard oral argument on 26 August 2013 concerning the issues raised by petitioners' request for a declaratory ruling. On the same day, Duke submitted a supplemental brief informing the trial court about the enactment of Chapter 413 of the North Carolina Session Laws three days earlier. *See* Act of July 26, 2013, ch. 413, Sec. 46, 2013 N.C. Sess. Laws 1752, 1783-84 [hereinafter Chapter 413].[4] According to Duke, the enactment of Chapter 413 rendered moot the first of the three rulings that petitioners sought to have the trial court make. In response, petitioners submitted a supplemental brief in which they acknowledged that the first ruling that they had requested the Commission to make had been rendered moot by the enactment of Chapter 413.

On 6 March 2014, the trial court entered an order determining that portions of the Commission's decision were "plainly erroneous and inconsistent with the regulation." More specifically, the trial court found that the first request contained in petitioner's original request for a declaratory ruling had, as the parties agreed, been rendered moot by the enactment of Chapter 413;[5] reversed the Commission's decision with respect to petitioners' second request for a declaratory ruling and concluded that, in the event of a violation of the applicable groundwater rules by an unpermitted entity, "immediate action" must be taken to

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4. This legislation was signed by the Governor on 23 August 2013 and took effect on that date.

5. As a result, the appropriateness of utilizing a compliance boundary in the course of determining whether a violation of the groundwater standards has occurred is no longer in dispute between the parties.

"eliminate sources" of the contamination that caused the violation; and dismissed petitioners' claim with respect to the third request for declaratory relief set out in their original petition relating to unpermitted coal ash disposal sites on the grounds that petitioners had, in fact, prevailed on that issue before the Commission given that the Commission's "[r]uling concurs with [petitioners'] interpretation." The Commission and Duke noted an appeal to the Court of Appeals from that portion of the trial court's order relating to the second ruling requested in petitioners' petition for a declaratory ruling. On 10 October 2014, this Court on its own motion certified this case for immediate review prior to determination of this case by the Court of Appeals.[6]

On 20 August 2014, the General Assembly ratified Chapter 122, which became effective on 20 September 2014 after the Governor failed to either sign or veto it. Act of Aug. 20, 2014, ch. 122, 2014 5 N.C. Adv. Legis. Serv. 77 (LexisNexis).

> "[W]henever during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine

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6. Duke and petitioners both filed motions seeking to have this Court take judicial notice of various items of information. In its motion, Duke requested us to judicially notice certain statements made by members of the General Assembly during a 3 July 2014 session of the House of Representatives and certain news reports relating to the 2014 coal ash legislation. In their motions, petitioners asked us to judicially notice certain public records demonstrating the manner in which 15A NCAC 2L .0106(c) had been interpreted in the past and materials relating to a DENR decision imposing approximately $25 million in civil penalties and a "Proposed Groundwater Assessment Work Plan" relating to alleged groundwater violations at Duke's L.V. Sutton generating facility. In light of our determination that the issue before us at this time is moot, we conclude that the same is true of the first of petitioners' requests for judicial notice, which we also dismiss as moot. In view of the fact that "[t]estimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision," *State ex rel. N.C. Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967) (citations omitted), Duke's request for judicial notice is denied. Finally, petitioners' second motion for judicial notice, which, according to petitioners, tends to show that DENR does not consider the Groundwater Rules upon which their request for a declaratory ruling is predicated to have been superseded by the enactment of the Coal Ash Management Act, while arguably relevant to the mootness issue that forms the basis for our decision, involves documents relating to a specific enforcement action stemming from an alleged groundwater violation at a specific electric generating facility. In view of the complexity of the issues that would be raised by consideration of this filing, the fact that additional litigation may well result from the enforcement action that is reflected in the documents in question, and the fact that the parties have not had a chance to fully brief any issues that would arise from a consideration of these documents, we conclude that petitioners' second request for judicial notice should be denied as well.

> abstract propositions of law. If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action."

Messer v. Town of Chapel Hill, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (per curiam) (ellipsis in original) (citations omitted). According to the Commission and Duke, the enactment of this legislation rendered the declaratory ruling that is before us in this case moot on the grounds that provisions of the legislation in question superseded Rule .0106(c) with respect to the manner in which groundwater violations occurring at facilities subject to active NPDES permits should be addressed. We agree.

As rewritten by the General Assembly effective 20 September 2014, N.C.G.S. § 143-215.1(k), which addresses the proper response to a situation in which groundwater standard violations occur beyond a facility's compliance boundary, provides that:

> (k) Where the operation of a disposal system permitted under this section results in exceedances of the groundwater quality standards at or beyond the compliance *boundary, the Commission shall require the permittee to undertake corrective action, without regard to the date that the system was first permitted, to restore the groundwater quality by assessing the cause, significance, and extent of the violation of standards and submit the results of the investigation and a plan and proposed schedule for corrective action to the Director or the Director's designee . . . . In establishing a schedule the Director or the Director's designee shall consider any reasonable schedule proposed by the permittee.*

N.C.G.S. § 143-215.1(k) (2014), *as amended by* ch. 122, Sec. 12(a), 2014 5 N.C. Adv. Legis. Serv. at 123 (added language in italics). Although petitioners agree that the rewritten version of N.C.G.S. § 143-215.1(k) eliminates the distinction between facilities that were permitted before 30 December 1983 and facilities that were permitted after that date by providing that all permitted facilities, "without regard to the date that the system was first permitted," are subject to the corrective action requirements of Rule .0106(d), petitioners contend that the enactment of the revised version of N.C.G.S. § 143-215.1(k) does not have the effect of mooting the trial court's ruling with respect to the second issue posed in their original petition for declaratory relief given that the new statutory language does not alter the regulatory requirements applicable to

disposal sites that do not hold active permits issued pursuant to N.C.G.S. § 143-215.1.[7] We do not find petitioners' contention persuasive.

Any consideration of the validity of petitioners' response to the mootness contention advanced by the Commission and Duke must begin with an understanding that the only issue before us at this time is the correctness of the trial court's ruling with respect to the second issue set out in petitioners' original request for a declaratory ruling. In that portion of their filing, petitioners requested the Commission to determine that "[o]perators of coal ash lagoons *with NPDES permits* first issued on or before December 30, 1983, must take immediate action to eliminate sources of contamination that cause a concentration of a substance in excess of groundwater quality standards." (Emphasis added.) As a review of its plain language clearly indicates, the second request for a declaratory ruling set out in petitioners' petition related solely to facilities holding an NPDES permit. By contrast, the third request for a declaratory ruling set out in petitioners' petition applied to "[o]perators of closed and inactive coal ash lagoons." Although petitioners correctly assert that the second request set out in their petition for a declaratory ruling is only moot as applied to facilities with *active* permits, their second request for a declaratory ruling was limited to facilities with such permits. As a result, the only issue that, in petitioners' view, remains viable following the enactment of the current version of N.C.G.S. § 143-215.1(k) is not properly before the Court.

Assuming, without deciding, that the second requested ruling set out in petitioners' request for a declaratory ruling could apply to facilities that lack active permits, we believe that the issue that is currently before us is moot for an entirely different reason. The trial court's unchallenged findings of fact establish that "[t]here is no evidence of record of any closed or inactive coal ash lagoons." "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal." *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012) (alteration in original) (citation and internal quotation marks omitted). As this finding suggests, a careful examination of the uncontradicted evidence contained in the record that has been presented for our review in this case tends to show that all facilities at

7. In their brief, petitioners also argue that the provisions of Chapter 122 do not eliminate the applicability of the groundwater standards given that the former operates as a minimum set of requirements that DENR is free to supplement with more stringent regulations. However, petitioners did not press this argument at oral argument and we do not find it persuasive given the detailed instructions set out in the relevant provisions of Chapter 122 for addressing remediation-related issues.

which coal ash lagoons were located did, in fact, hold an active NPDES permit.[8] As a result, the evidence before us in this case reinforces our conclusion that this case has been rendered moot as a matter of both law and fact by virtue of the enactment of the revised version of N.C.G.S. § 143-215.1(k).

Finally, petitioners contend that we should review the correctness of the trial court's resolution of the issue posited by the second request for a declaratory ruling set out in their original petition given that this issue involves a question of extraordinary public interest. "In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) (citations omitted), *cert. denied*, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979). "Even if moot . . . this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam) (citations omitted). While the appropriate response to the environmental issues associated with the operation of coal ash lagoons is clearly a matter of significant public interest, this Court's role in the resolution of such questions is limited to determining the content of existing law and ensuring that existing law is appropriately applied to the relevant facts. At this point, the record does not contain any indication that any decision that we might make with respect to the correctness of the trial court's resolution of the second request for a declaratory ruling set out in petitioners' petition would have any practical impact. In addition, it is clear that the General Assembly has taken an active role in the proper resolution of the issues that petitioners sought to have addressed in the petition for a declaratory ruling. By adopting Chapter 122, the General Assembly sought to address the public's understandable concern about the effect of the operation of coal ash lagoons on the ground and surface waters in North Carolina. In light of these considerations, we believe that we should refrain from issuing what amounts to an advisory opinion concerning any impact of the applicable regulation on any non-permitted coal ash lagoons that may, contrary to the record evidence, actually exist. As a result, we hereby vacate the trial court's order and remand this case to the trial court

8. A list of permitted facilities, complete with the NPDES permit number applicable to each facility and the date upon which the original permit applicable to that facility had been issued, was submitted to the Commission and stipulated to by petitioners as being accurate.

with instructions to dismiss petitioners' appeal from the Commission's declaratory ruling on mootness grounds.[9]

VACATED AND REMANDED.

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

IN THE MATTER OF T.L.H.

No. 457A14

Filed 11 June 2015

Termination of Parental Rights—competency inquiry—parental guardian ad litem

The trial court did not abuse its discretion in a termination of parental rights case by failing to inquire into the issue of whether respondent mother was entitled to the appointment of a parental guardian ad litem. Sufficient evidence showing that respondent was not incompetent existed to obviate the necessity for the trial court to conduct a competence inquiry before proceeding with the termination hearing.

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. ___, 765 S.E.2d 88 (2014), reversing an order entered on 4 February 2014 by Judge Tabatha Holliday in District Court, Guilford County, and remanding this case to the trial court for further proceedings. Heard in the Supreme Court on 21 April 2015.

Mercedes O. Chut for petitioner-appellant Guilford County Department of Health and Human Services.

Parker Poe Adams & Bernstein, LLP, by Sye T. Hickey, Appellate Counsel for appellant Guardian ad Litem, on behalf of the minor child.

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9. In view of our determination that this proceeding has been rendered moot by the enactment of N.C.G.S. § 143-215.1(k) (2014), we need not address the jurisdictional and substantive challenges that have been advanced in opposition to the trial court's order on judicial review.

J. Lee Gilliam, *Assistant Appellate Defender*, *for respondent-appellee mother.*

ERVIN, Justice.

The ultimate issue before us in this case is the extent to which a trial court must inquire into a parent's competence to determine whether it is necessary to appoint a guardian *ad litem* for that parent despite the absence of any request that such a hearing be held or that a parental guardian *ad litem* be appointed. After considering this issue in light of the record developed in this case, the Court of Appeals held that the trial court abused its discretion by failing to inquire into the issue of whether respondent was entitled to the appointment of a parental guardian *ad litem* given that the information available to the trial court raised a substantial question concerning her competence. We reverse the decision of the Court of Appeals.

Respondent delivered her son, T.L.H., in April of 2013. At the hospital in which T.L.H. was born, respondent voluntarily placed the child with the Guilford County Department of Health and Human Services ("DHHS") based upon her concerns about the safety of the home that she shared with her romantic partner, Adam McNeill. Respondent's concerns stemmed from the presence of illicit drugs in the residence that she shared with Mr. McNeill and the unsafe environment created by certain unsavory individuals who frequented the home. In addition, respondent acknowledged that, even though she had been diagnosed as suffering from certain mental health problems,[1] she was not taking her prescribed psychotropic medication at that time. Nonetheless, respondent clearly indicated that, instead of relinquishing her parental rights in T.L.H., she wanted to work toward reunification with her son.

On 12 April 2013, DHHS filed a petition alleging that T.L.H. was a neglected and dependent juvenile. In its petition, DHHS alleged, among other things, that respondent "ha[d] been to the hospital on several occasions in the last year due to mental health complications" and that she "has diagnoses of schizoaffective disorder, bipolar, cannabis abuse and personality disorder." At the request of DHHS, Judge Betty Brown appointed Amy Bullock to serve as respondent's guardian *ad litem* on

1. More specifically, respondent told a social worker that she had been diagnosed as bipolar at age fifteen, that she had been diagnosed as schizophrenic in her twenties, and that she had refrained from taking the medications that had been prescribed for her to treat these conditions because they made her feel sick.

a "provisional/interim basis" in an order entered on 18 April 2013 that lacked findings of fact or conclusions of law relating to the appointment issue and did not specify whether Ms. Bullock was to act in a substitutive or assistive capacity.

After a hearing held on 16 May 2013, Judge Brown entered an adjudication and disposition order on 5 June 2013 determining that T.L.H. was a dependent juvenile, dismissing the neglect allegation without prejudice, retaining T.L.H. in DHHS custody, and establishing a case plan under which respondent would visit with T.L.H. At the time of the 16 May hearing, respondent did not have housing independent of Mr. McNeill, with whom incidents of domestic violence had occurred. However, respondent was on a Housing Authority waiting list. Respondent's sole source of income consisted of $473.00 in monthly Social Security disability benefits that had been awarded based on her diagnosed mental conditions, including bipolar disorder, schizoaffective disorder, and narcolepsy. According to court summaries that had been prepared by DHHS and T.L.H.'s guardian *ad litem* and submitted for Judge Brown's consideration:

> [Respondent] has a history of substance abuse and has diagnoses of schizophrenic, chronic paranoid type, chronically noncompliant, marijuana dependence, personality disorder, rule out borderline intellectual functioning.
>
> . . . .
>
> . . . [Respondent] is not consistent in her mental health treatment and is not currently on medication. [Respondent] does not come to visitation timely and needs guidance for basic child care.

As a result, Judge Brown found in the 5 June 2013 order that:

> 11. [Respondent] has been to the hospital on several occasions in the last year due to mental health complications. According to the hospital records, [respondent] is diagnosed with Schizoaffective Disorder, Bi-polar Disorder, Cannabis Abuse and Personality Disorder.

A permanency planning hearing, at which respondent testified, was held on 11 July 2013 before Judge Angela C. Foster. On 9 August 2013, Judge Foster entered an order finding that respondent was not in compliance with her case plan "on any level" and had not been visiting with T.L.H. on a regular basis. As a result, Judge Foster relieved DHHS from any responsibility for making further efforts to reunify respondent

with T.L.H. and determined that the permanent plan for T.L.H. would be adoption.

On 9 September 2013, DHHS filed a petition seeking to have respondent's parental rights in T.L.H. terminated[2] on the grounds that T.L.H. was a neglected juvenile, that respondent was incapable of properly providing for T.L.H.'s care and did not have an appropriate alternate child care arrangement for T.L.H., and that respondent's parental rights in another child had previously been terminated and respondent lacked the ability or willingness to establish a safe home for T.L.H. N.C.G.S. § 7B-1111(a) (1), (6), (9) (2013). Among other things, DHHS alleged that respondent's parental rights were subject to termination for incapability pursuant to N.C.G.S. § 7B-1111(a)(6) on the basis of her "narcolepsy, mental illness (including Schizophrenia, Chronic Paranoid Type, Chronically Noncompliant, Schizo-Affective Disorder, Bipolar Disorder, and level of functioning), failure to comply with mental health treatment, and long history of using illegal substances (Cannabis Dependency)." Moreover, DHHS requested that the trial court "make an inquiry as to whether [respondent] needs to have a Guardian ad Litem appointed for purposes of this proceeding."

On 18 November 2013, Judge Thomas Jarrell, Jr., conducted a pretrial hearing regarding the termination petition. Ms. Bullock, who had served as respondent's guardian *ad litem* at the adjudication and disposition hearing and at the permanency planning proceeding, was present and stood "in for Attorney Edward Branscomb as Attorney for Mother" at the pretrial hearing. Without making any specific findings concerning respondent's mental condition or the reasons underlying Ms. Bullock's initial appointment as respondent's guardian *ad litem*, Judge Jarrell determined that "Attorney Amy C. Bullock was released by operation of law effective October 1, 2013 as the mother's guardian ad litem attorney of assistance."

The termination petition came on for hearing before the trial court on 6 January 2014. Because respondent was not present when the case was called for hearing, her trial counsel unsuccessfully sought to have the termination proceeding continued. On 4 February 2014, the trial court entered an order finding that respondent's parental rights in T.L.H. were subject to termination based upon all the grounds enumerated in

2. Respondent has two other children in addition to T.L.H., neither of whom is in her custody. An aunt has been appointed guardian for a daughter born in 2000. Respondent's parental rights in a daughter born in May 2004 were terminated on 18 September 2006.

the petition and that T.L.H.'s best interests would be served by terminating respondent's parental rights.[3] Among other things, the trial court found as a fact that respondent "ha[d] been diagnosed with Bipolar Disorder, Schizophrenia, Schizo-Affective Disorder, and Narcolepsy"; that she "ha[d] a long history of failing and refusing to take her mental health medications as prescribed and recommended"; and that she "ha[d] also been diagnosed with Cannabis Dependence, has a long history of the same, tested positive for Marijuana, and failed to submit to a substance abuse assessment as requested." Respondent noted an appeal to the Court of Appeals from the trial court's termination order.

In her sole challenge to the trial court's termination order before the Court of Appeals, respondent argued that the trial court had abused its discretion by failing to conduct an inquiry concerning whether she was entitled to the appointment of a guardian a*d litem*. *In re T.L.H.*, ___ N.C. App. ___, ___, 765 S.E.2d 88, 90 (2014). A divided panel of the Court of Appeals determined that respondent's contention had merit, reversed the trial court's termination order, and remanded this case to the trial court for the purpose of determining whether respondent was, in fact, entitled to the appointment of a guardian *ad litem*. *Id.* at ___, 765 S.E.2d at 92. In dissent, Judge Robert C. Hunter argued that Judge Jarrell had, in fact, conducted an inquiry into the necessity for appointment of a parental guardian *ad litem* at the pretrial hearing, that the record did not contain any indication that respondent's mental condition had deteriorated between the pretrial hearing and the termination hearing to such an extent that the trial court abused its discretion by failing to conduct an inquiry into the extent to which she was entitled to the appointment of a guardian ad litem, and that the trial court had not abused its discretion by failing to make an inquiry into respondent's competence. *Id.* at ___, 765 S.E.2d at 93-94 (Hunter, J., dissenting). DHHS and T.L.H.'s guardian *ad litem* noted an appeal from the Court of Appeals' decision to this Court. We reverse that decision.

The statutory provisions governing a parent's entitlement to the appointment of a guardian *ad litem* in termination of parental rights proceedings have changed over time. Prior to 1 October 2005, N.C.G.S. § 7B-1101(1) provided that a parental guardian *ad litem* must be appointed "[w]here it is alleged that a parent's rights should be terminated pursuant to [N.C.G.S. §] 7B-1111(6), and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or

3. The trial court also terminated the parental rights of T.L.H.'s unknown father.

another similar cause or condition." N.C.G.S. § 7B-1101(1) (2003). From 1 October 2005 until 30 September 2013, N.C.G.S. § 7B-1101.1(c) provided that "the 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." *Id.* § 7B-1101.1(c) (2011). Under the pre-October 2013 version of N.C.G.S. § 7B-1101.1(c), the difference between the roles assumed by a guardian *ad litem*, whether substitutive or assistive, depended upon "[t]he extent of the parent's disability." *In re P.D.R.*, ___ N.C. App. ___, ___, 737 S.E.2d 152, 158 (2012). However, effective for juvenile proceedings filed or pending on or after 1 October 2013, the General Assembly amended N.C.G.S. § 7B-1101.1(c) to authorize the appointment of a parental guardian *ad litem* "for a parent who is incompetent in accordance with . . . Rule 17" of the North Carolina Rules of Civil Procedure.[4] N.C.G.S. § 7B-1101.1(c) (2013). An "incompetent adult" is defined as one "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." *Id.* § 35A-1101(7) (2013). As a result, following the enactment of the 2013 amendment to N.C.G.S. § 7B-1101.1, respondent would have only been entitled to the appointment of a guardian ad litem in the event that she was incompetent and would not have been entitled to the continued assistance of a guardian *ad litem* who had been appointed based solely on a finding of diminished capacity.

As the Court of Appeals has previously noted, "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis.*" *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49

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4. According to Rule 17(b)(2):

> In actions or special proceedings when any of the defendants are . . . incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons . . . .

N.C.G.S. § 1A-1, Rule 17(b)(2) (2003).

(2005) (citation omitted). A trial court's decision concerning whether to appoint a parental guardian *ad litem* based on the parent's incompetence is reviewed on appeal for abuse of discretion. *See State v. Turner*, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966) (observing that a trial court's competency determination "rests in the sound discretion of the trial judge in the light of his examination and observation of the particular [individual]"). A trial court's decision concerning whether to conduct an inquiry into a parent's competency is also discretionary in nature. *In re J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49. For that reason, trial court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard. *In re M.H.B.*, 192 N.C. App. 258, 261, 664 S.E.2d 583, 585 (2008) (citation omitted). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

According to both DHHS and T.L.H.'s guardian *ad litem*, Judge Jarrell did, contrary to the decision reached by the Court of Appeals, conduct an inquiry into the issue of whether respondent was incompetent at the pretrial hearing. More specifically, DHHS and T.L.H.'s guardian *ad litem* contend that Judge Jarrell could not have concluded that respondent's guardian *ad litem* "was released by operation of law effective October 1, 2013" without determining that Ms. Bullock had been appointed to serve as respondent's guardian *ad litem* on diminished capacity grounds and that respondent was not entitled to the appointment of a guardian *ad litem* for competency-related reasons. As a result, DHHS and T.L.H.'s guardian *ad litem* contend that Judge Jarrell actually determined that respondent was not incompetent and that no further inquiry into her competence prior to the termination hearing was necessary. We are not persuaded by this contention.

A careful review of the record provides no indication that Judge Jarrell conducted any inquiry into respondent's competence at the pretrial hearing. Although Judge Jarrell apparently assumed that Ms. Bullock had been appointed as respondent's guardian *ad litem* on diminished capacity grounds, Judge Brown's appointment order simply does not indicate whether Ms. Bullock was appointed to act in a substitutive or assistive capacity. In addition, given the absence of a transcript of the pretrial hearing, we have no assurance that Judge Jarrell inquired into the issue of respondent's competence during the course of that proceeding. Finally, we note that Ms. Bullock stood "in for Attorney Edward

Branscomb as Attorney for Mother" at the pretrial hearing even though N.C.G.S. § 7B-1101.1(d) precludes "the guardian ad litem [from] act[ing] as the parent's attorney," N.C.G.S. § 7B-1101.1(d) (2013), which suggests that Ms. Bullock had stopped acting as respondent's guardian *ad litem* by the time of the pretrial hearing, a development that would be consistent with the 1 October 2013 effective date of the current version of N.C.G.S. § 7B-1101.1(c). As a result, we conclude that Judge Jarrell's determination that "[Ms.] Bullock was released by operation of law effective October 1, 2013" does not tend to indicate that Judge Jarrell inquired into respondent's competence at the pretrial hearing and suggests, instead, that the provisions of the pretrial order relating to Ms. Bullock's removal as respondent's guardian *ad litem* reflected a purely ministerial act.

Although we are unable to conclude that an inquiry into respondent's competence was actually conducted during the course of this proceeding, we are equally unable to conclude that the apparent failure to conduct such an inquiry constituted an abuse of discretion. As an initial matter, we note that the standard of review applicable to claims like the one before us in this case is quite deferential. Affording substantial deference to members of the trial judiciary in instances such as this one is entirely appropriate given that the trial judge, unlike the members of a reviewing court, actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record.

Moreover, evaluation of an individual's competence involves much more than an examination of the manner in which the individual in question has been diagnosed by mental health professionals. Although the nature and extent of such diagnoses is exceedingly important to the proper resolution of a competency determination, the same can also be said of the information that members of the trial judiciary glean from the manner in which the individual behaves in the courtroom, the lucidity with which the litigant is able to express himself or herself, the extent to which the litigant's behavior and comments shed light upon his or her understanding of the situation in which he or she is involved, the extent to which the litigant is able to assist his or her counsel or address other important issues, and numerous other factors. A great deal of the information that is relevant to a competency determination is simply not available from a study of the record developed in the trial court and presented for appellate review. As a result, when the record contains an

appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence. *Cf. Artesani v. Gritton*, 252 N.C. 463, 467, 113 S.E.2d 895, 898 (1960) (stating that, "[w]hen the court hears evidence to determine competency, its factual conclusion will not be set aside on appeal if there be any evidence to support the finding," since "[t]he weight which the trial judge accords the evidence rests in his discretion").

A careful review of the record developed in the trial court compels the conclusion that sufficient evidence tending to show that respondent was not incompetent existed to obviate the necessity for the trial court to conduct a competence inquiry before proceeding with the termination hearing. Respondent exercised what appears to have been proper judgment in allowing DHHS to take custody of T.L.H. at the hospital shortly after his birth. In addition, respondent demonstrated a reasonable understanding of the proceedings that would inevitably result from that decision when she informed DHHS that she wished to preserve the right to attempt to be reunified with T.L.H. At the 11 July 2013 permanency planning hearing, respondent testified that she had obtained Zyprexa to treat her mental conditions, discussed the necessity for the use of budgeting techniques, demonstrated an understanding of her need to apply for reduced-rate or subsidized housing, and appeared to understand that, given her income limitations, she needed to use her available financial resources carefully. Respondent's testimony at the permanency planning hearing was cogent and gave no indication that she failed to understand the nature of the proceedings in which she was participating or the consequences of the decisions that she was being called upon to make. In addition, respondent signed an apartment lease in November 2013, having previously testified at the permanency planning hearing that obtaining an independent place to live would allow her to become drug-free, given that "the only reason why the drugs was ever exposed to me is because I was living in the environment around it." As a result, the record contains ample support for a determination that respondent understood that she needed to properly manage her own affairs and comprehended the steps that she needed to take in order to avoid the loss of her parental rights in T.L.H.

Acting in reliance on its decision in *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008), the Court of Appeals may have concluded that allegations that a parent has been diagnosed with significant mental health problems, standing alone, suffices to necessitate

an inquiry into the parent's competence. *In re T.L.H.*, ___ N.C. App. at ___, 765 S.E.2d at 90 (stating that "allegations of mental health problems that raise a question regarding a parent's competence require the trial court to inquire into whether a GAL need be appointed"). However, *In re N.A.L.* does not appear to us to require a trial judge to inquire into a parent's competency solely because the parent is alleged to suffer from diagnosable mental health conditions. Instead, *In re N.A.L.* held that, given the particular facts contained in the record developed in that case regarding the parent's mental health issues, an inquiry into the necessity for the appointment of a parental guardian ad litem was required. *In re N.A.L.*, 193 N.C. App. at 119, 666 S.E.2d 772. As a result, assuming that *In re N.A.L.* is, as respondent suggests, a competency rather than a diminished capacity case, *In re N.A.L.* does not stand for the proposition that a trial court must inquire into the necessity for the appointment of a parental guardian ad litem solely because the parent has diagnosable mental health problems. *See In re J.R.W.*, ___ N.C. App. ___, ___, 765 S.E.2d 116, 120 (2014) (noting the Court of Appeals' "prior holdings that evidence of mental health problems is not *per se* evidence of incompetence to participate in legal proceedings"), *disc. rev. denied*, ___ N.C. ___, 767 S.E.2d 840 (2015).[5]

Similarly, the trial court was not required to inquire into the appropriateness of the appointment of a parental guardian *ad litem* simply because DHHS sought to have respondent's parental rights in T.L.H. terminated for mental health-related grounds and requested the trial court to conduct a competency inquiry. In support of its decision to reverse the trial court's termination order and remand this case to that court for further proceedings, the Court of Appeals pointed to "the trial court's reliance on [respondent's multiple ongoing mental health conditions] to support grounds to terminate her parental rights." *In re T.L.H.*, ___ N.C. App. at ___, 765 S.E.2d at 92. Nevertheless, in the aftermath of the enactment of the 2005 amendment to the relevant provisions of Chapter 7B of the North Carolina General Statutes, an allegation that parental rights are subject to termination based upon incapability stemming, directly or indirectly, from a parent's diagnosable mental health conditions does not automatically necessitate the appointment of a parental guardian

5. The facts before the Court in this case, in which there is substantial evidence tending to show that respondent understood the nature of the proceedings in which she was involved and the steps that she needed to take to avoid losing her parental rights in T.L.H., differ substantially from those at issue in *In re N.A.L.*, in which the Court of Appeals made no mention of any evidence tending to indicate that the mother understood the situation in which she found herself, while referring to reports that the mother "repeatedly yelled and shouted profanity" toward her child. 193 N.C. App. at 116, 666 S.E.2d at 770.

ad litem. Although the sort of mental difficulties that might support the termination of a parent's parental rights on the grounds of incapability may well show that the parent is likely to be incompetent, such an inference is not necessarily correct. In other words, while the test for incompetence is whether the parent "lacks sufficient capacity to manage [her] own affairs or to make or communicate important decisions concerning [her] person, family, or property," N.C.G.S. § 35A-1101(7), the trial court is allowed to terminate a parent's parental rights for incapability if "the parent is incapable of providing for the proper care and supervision of the juvenile" due to "substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile," *id.* § 7B-1111(a)(6). The differences between the standard used in determining competence and the standard used in determining whether a parent's parental rights are subject to termination for incapability prevents us from concluding that the existence of an allegation that a parent's parental rights are subject to termination for incapability necessitates an inquiry into the parent's competence for purposes of the appointment of a substitutive guardian *ad litem*, even if the party initiating the termination proceeding suggests that such an inquiry would be appropriate.

Admittedly, the trial court noted respondent's mental health difficulties in the termination order. However, in addition to stating her mental limitations, the termination order focused upon respondent's apparent unwillingness to make the changes necessary to permit her to regain custody of T.L.H. More specifically, the termination order found that: (1) after adjudication "[t]he mother failed to maintain regular contact with [DHHS]"; (2) "the mother has been noncompliant with the recommended mental health medication regimen"; (3) "[a]lthough the juvenile has been in custody for eight months, the mother only visited the juvenile three times . . . despite having had the opportunity to attend supervised visits once a week"; (4) "[s]ince the juvenile has been in custody, the mother has made no significant progress toward correcting the conditions that led to removal"; and (5) "[t]he mother does not have the willingness to comply with mental health treatment and has declined an assessment and possible treatment for her substance abuse." As a result, the trial court's termination decision rested on considerations other than the fact that respondent appears to have suffered from one or more diagnosable mental health conditions.

We do not, of course, wish to be understood as holding that the trial court would have had no basis for inquiring into respondent's competence in light of her history of serious mental health conditions. A trial

court would have been well within the bounds of its sound discretion to conclude that respondent's lengthy history of serious mental illness raised a substantial question concerning her competence sufficient to justify further inquiry. In fact, such an inquiry in this case might well have been advisable. However, we are unable to conclude that the trial court could not have had a reasonable basis for reaching the opposite result given the coherent manner in which respondent testified at the permanency planning hearing and the other indications in the record tending to show that respondent was aware of, and able to appropriately participate in, the proceedings being conducted before the trial court. As a result, the decision of the Court of Appeals is reversed.[6]

REVERSED.

STATE OF NORTH CAROLINA
v.
FLOYD EDWARD MAY, SR.

No. 510PA13

Filed 11 June 2015

1. Appeal and Error—standard of review—jury instructions—plain error

Plain error was the correct standard of review in determining whether the trial court's instructions to a deadlocked jury were improperly coercive where the instructions were to the entire jury and defendant failed to object. *State v. Wilson*, 363 N.C. 478, relied on by defendant, was distinguished. Applying the plain error standard, the trial court's instructions did not result in an unconstitutional coercion.

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6. The Court of Appeals further determined that Judge Brown erred by failing to delineate the role to be served by respondent's guardian *ad litem*, *In re T.L.H.*, ___ N.C. App. at ___, 765 S.E.2d at 92, and that Judge Jarrell erred by failing to conduct a hearing to determine the role respondent's guardian *ad litem* had filled before removing respondent's guardian *ad litem*, *id.* at ___, 765 S.E.2d at 90. However, respondent did not seek review of or advance any argument challenging either Judge Brown's 18 April 2013 guardian *ad litem* appointment order or Judge Jarrell's 18 November 2013 pretrial order before the Court of Appeals. As a result, since respondent did not properly preserve any challenge to the lawfulness of either of these orders before the Court of Appeals, the Court of Appeals' determinations regarding those orders are reversed as well. *See* N.C. R. App. P. 10.

2. Criminal Law—deadlocked jury—instructions—no plain error

Where the trial court in three separate instructions repeatedly emphasized to deadlocked jurors the importance of their individual convictions, while giving instructions that substantially tracked the language of N.C.G.S. § 15A-1235(b), the court's instruction to continue deliberations for thirty minutes and the isolated mention of a retrial did not rise to the level of being so fundamentally erroneous as to constitute plain error.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 749 S.E.2d 483 (2013), finding error in a judgment entered on 19 April 2012 by Judge Howard E. Manning in Superior Court, Alamance County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 17 November 2014.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Katherine Jane Allen*, *Assistant Appellate Defender*, *for defendant-appellee.*

EDMUNDS, Justice.

In this case, we consider the correct standard of review to apply when determining whether the trial court's instructions to the jury were improperly coercive, violating Article I, Section 24 of the North Carolina Constitution. We conclude that because defendant failed to object to the pertinent instructions, any error was not preserved and is subject to plain error review. Applying this standard, we hold the trial court's instructions did not result in an unconstitutional coercion of a deadlocked jury. Accordingly, we reverse the decision of the Court of Appeals.

Until early 2011, defendant Floyd Edward May, Sr., an adult male in his mid-sixties, lived with his son, Mike; Mike's wife, Shannon; and their two daughters, T.M. and B.M. Thereafter, defendant began living with a woman in a nearby mobile home but continued to visit his son's family. T.M. was eleven years old and in fifth grade when she testified about her encounters with defendant, whom she called "Pa-Pa." In the summer of 2011, T.M. entered her sister's room, where defendant was lying on a bed, watching television. T.M. related that, while the door was closed,

"Pa-Pa moved [her] shorts to the side and put his wee-wee in [her] moo-moo." When asked, she explained that the term "wee-wee" referred to a penis and "moo-moo" referred to a vagina. She added that defendant also put his "wee-wee" in her mouth during this encounter. Afterwards, T.M. went to the bathroom and felt a burning sensation when she urinated. She did not immediately tell anyone what had happened.

T.M. further testified that, during another occasion that summer, she was in a backyard playhouse with defendant, where they would sometimes watch television together. She saw defendant begin to "play" with his "wee-wee" by "moving it up and down." He then "just started sticking his wee-wee in my moo-moo." Although she felt pain and again experienced burning when she had to urinate, she told no one.

Finally, T.M. testified about defendant's actions in a swimming pool behind her home on 15 July 2011. While she was swimming with defendant, he moved her "bathing suit to the side and put his wee-wee in [her] moo-moo." Her stomach began to hurt "real bad" and she left the pool to tell her mother Shannon about the pain. T.M. also described the incident and asked if she could get pregnant. Shannon telephoned her husband Mike to tell him what she had heard and then took T.M. to a hospital. When Mike confronted defendant about the incident in the pool, defendant responded, "I didn't do that."

Shannon first took T.M. to Alamance Regional Medical Center, where T.M. was examined by Jade Sung, M.D. Dr. Sung began by interviewing T.M., who told her that her Pa-Pa had vaginally penetrated her in the swimming pool. Dr. Sung then conducted an external examination of T.M.'s abdomen and genitalia. The examination revealed no bruising of T.M.'s inner thigh, no contusions on the external genitalia, and no lacerations, tears, rips, or cuts, although Dr. Sung noted some irritation and inflammation around T.M.'s cervix. Based on the examination, Dr. Sung was unable to confirm or deny T.M.'s allegations and characterized the results of the examination as "unremarkable."

T.M. was referred to The University of North Carolina Hospitals in Chapel Hill for further examination, where, on 16 July 2011, she was seen by Rebecca Wheeler, R.N., a specialist in pediatric sexual assault examinations. T.M. told Nurse Wheeler that her "Pa-Pa did something to me yesterday. . . . He put his thing in my moo-moo." T.M. also indicated that she had been experiencing discomfort in her mid-abdominal area since the day before. Nurse Wheeler indicated that her exam of T.M. showed a normal hymen and no bleeding or lacerations, adding that ninety-five percent of children who have been sexually assaulted have no visible injury.

On 8 September 2011, T.M. was taken to Crossroads, a child advocacy center in Burlington, North Carolina, where she was seen by Dana Hagele, M.D., a board certified pediatrician. T.M. indicated to Dr. Hagele that she had visited two hospitals previously because "Pa-Pa did some nasty stuff to [her]." T.M. recounted the details of defendant's actions until she became visibly upset and no longer wanted to talk about it "so it gets out of [her] head." Dr. Hagele conducted a "head-to-toe physical" examination of T.M., including a genital inspection, the results of which were "completely unremarkable."

On 31 October 2011, defendant was indicted for one count of first-degree statutory rape and one count of indecent liberties with a child. The charge of rape arose from events alleged to have occurred in T.M.'s sister's bedroom, while the charge of indecent liberties arose from events alleged to have occurred in the backyard playhouse. The court dismissed the indecent liberties count at the close of all the evidence and we do not address it further. On 3 January 2012, defendant was indicted for an additional count of first-degree statutory rape and for first-degree sex offense with a child. The charge of first-degree sex offense arose from defendant's alleged act of fellatio in T.M.'s sister's bedroom, while the charge of statutory rape arose from events alleged to have occurred in the swimming pool.

Defendant's trial began on 16 April 2012. After all the evidence was presented and the parties completed their arguments, the trial court instructed the jury, which began its deliberations at 11:06 a.m. on 19 April. After taking a lunch break and resuming deliberations, at 2:24 p.m. the jurors sent a note to the court indicating "we are deadlocked." In response, the judge instructed the jurors to continue with their deliberations. He emphasized:

> In the course of your deliberations, each of you should not hesitate to re-examine your views and change your opinion if it is erroneous. But I repeat, none of you should surrender your honest conviction as to the weight or sufficiency of the evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

The court received another note from the jury at 3:00 p.m. stating that "it is 10-2 and we are hopelessly deadlocked." The trial court again instructed the jury, stating:

> I'm going to ask you to resume your deliberations for another half an hour. I'm not going to stretch it any farther

> past that, but I'm going to ask you to give it your best shot. And it's your choice, not mine, but I'm not going to hot bond you, and we're not going to make you to stay until 5 o'clock, but I'm going to ask you to go back and try again, remembering the instructions I gave you. And at 3:30 I'm going to ask you to come out, unless you've hit, hit the button and reached the decision prior to that. And that's your choice.
>
> I mean, I can't tell you what to do. I appreciate your note letting me know, but I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will. That's not my call either. That doesn't belong to me.
>
> I'll ask you just to give us another half hour an hour [sic] and continue to deliberate with a view towards reaching an agreement if it can be done without violence to your individual judgment. As I said earlier, none of you should change your opinion if you, you know, if you feel like that's what your conscience dictates, you stick by it.
>
> So with that, I'm going to ask you to go back and continue.

Thirty minutes later, the jury returned a verdict finding defendant guilty of one count of first-degree statutory rape, but failing to reach a unanimous verdict on the remaining two counts. After questioning the foreman and the other jurors, the trial court declared a mistrial as to the two counts on which the jury deadlocked. The trial court imposed an active sentence of 230 to 285 months of imprisonment for the statutory rape conviction.

Defendant appealed to the Court of Appeals, which reversed his conviction. *State v. May*, ___ N.C. App. ___, 749 S.E.2d 483 (2013). Although defendant raised several issues in his appeal, the Court of Appeals ordered a new trial based on its conclusion that the trial court's 3:00 p.m. instructions to the jury violated N.C.G.S. § 5A-1235(c), which sets out procedures a trial court may follow when a jury indicates that it is deadlocked. *Id.* at ___, 749 S.E.2d at 487. The Court of Appeals further concluded that the error resulted in an unconstitutional coercion of a deadlocked jury, *id.* at ___, 749 S.E.2d at 493, in violation of Article I, Section 24, which states that no criminal defendant shall be convicted but upon a unanimous verdict, N.C. Const. art. I, § 24.

That court then considered the appropriate standard of review of the trial court's error. Although defendant did not object to the charge when it was given, the Court of Appeals cited our decision in *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009), for the proposition that this constitutional violation need not be preserved at trial. *May*, ___ N.C. App. at ___, 749 S.E.2d at 489. Accordingly, the Court of Appeals concluded that the State had the burden of proving that the error was harmless beyond a reasonable doubt. *Id.* at ___, 749 S.E.2d at 490. The Court of Appeals then found that the State had not met this burden because no physical evidence suggested defendant's guilt and because the trial court mentioned the time and expense associated with the trial and a possible retrial in the challenged instruction. *Id.* at ___, 749 S.E.2d at 490. Accordingly, the Court of Appeals ordered a new trial.

The State petitioned for discretionary review, raising only the issue whether the Court of Appeals had erred in holding that the State had the burden of proving that the purported error in the trial court's instructions was harmless beyond a reasonable doubt. Although the Court of Appeals considered other issues raised by defendant that might arise on retrial, it found no error in any of them and defendant did not petition for discretionary review. We allowed the State's petition.

[1] This Court has condemned coercive instructions, noting that they may suggest to holdout jurors that they "should surrender their well-founded convictions . . . in deference to the views of the majority," resulting in a majority verdict instead of one that is in fact unanimous. *See State v. McKissick*, 268 N.C. 411, 415, 150 S.E.2d 767, 770-71 (1966) (citation omitted). The State argues that the trial court's instructions were not coercive and did not violate defendant's right to a unanimous verdict. Before discussing the merits of defendant's successful contention below that the instructions were coercive, we consider the proper standard of review to apply when the alleged error was not preserved. We begin with defendant's contention that the instructions violated the Constitution of North Carolina. As noted above, defendant did not raise a contemporaneous objection when the instruction was given, but he argues that this issue is deemed preserved and no objection was necessary.

Defendant relies on *State v. Wilson*, in which the jury notified the court that a problem existed with the foreperson. 363 N.C. at 479-80, 681 S.E.2d at 327. Without objection by counsel for either party, the trial judge conducted several discussions with the foreperson while the other empaneled jurors were absent from the courtroom. *Id.* at 480-82, 681 S.E.2d at 327-28. The defendant argued that this procedure violated his right under the Constitution of North Carolina to a unanimous verdict.

We agreed and held that "where the trial court instructed a single juror in violation of defendant's right to a unanimous jury verdict under Article I, Section 24, the error is deemed preserved for appeal notwithstanding defendant's failure to object." *Id.* at 486, 681 S.E.2d at 331.

However, *Wilson* is distinguishable from the case at bar. Unlike the defendant in *Wilson*, who focused on instructions given to less than the full jury, defendant here argues that the instruction in question, given to the entire panel, was coercive. The Court of Appeals agreed, holding that the rule in *Wilson* applied to coercive instructions. *May*, ___ N.C. App. at ___, 749 S.E.2d at 489. However, this Court carefully constrained the breadth of the holding in *Wilson* so that not all violations of Article I, Section 24 are deemed preserved. This Court specified in *Wilson* that when a violation of Article I, Section 24 involves an instruction to less than all the jurors, that error is preserved as a matter of law. *Wilson*, 363 N.C. at 486, 681 S.E.2d at 331. The pertinent cases cited in *Wilson* to support the determination that the error relating to a unanimous jury verdict was deemed preserved also involve circumstances in which the entire jury panel did not receive the instructions at issue. *See State v. Nelson*, 341 N.C. 695, 698-700, 462 S.E.2d 225, 226-27 (1995); *State v. Ashe*, 314 N.C. 28, 33-36, 39, 331 S.E.2d 652, 655-57, 659 (1985). In contrast, the violation of Article I, Section 24 alleged here involves the content of instructions given to the entire jury panel. Because this alleged error does not fit within the constraints explicitly set out in *Wilson*, that case is inapposite. Thus, we apply the general rule that "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 (citing *Ashe*, 314 N.C. at 39, 331 S.E.2d at 659). Nevertheless, because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error. *State v. Cummings*, 352 N.C. 600, 612-13, 536 S.E.2d 36, 47 (2000) (quoting *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000) ("[W]e have previously decided that plain error analysis applies only to instructions to the jury and evidentiary matters.")), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

A somewhat similar rule applies to contentions that an instruction to a jury violated a statute. In addition to his constitutional argument, defendant contended to the Court of Appeals that the trial judge's 3:00 p.m. instruction violated N.C.G.S. § 15A-1235 and that defendant's failure to object on statutory grounds was preserved as a matter of law. However, we see that in *State v. Aikens*, just as in the case at bar, the defendant alleged that a supplemental jury instruction failed to comply

with N.C.G.S. § 15A-1235 and coerced a jury verdict in violation of Article I, Section 24. 342 N.C. 567, 467 S.E.2d 99 (1996). In considering this claim, we reviewed our holding in *State v. Ashe* and determined that when a trial court is alleged to have violated a mandatory statute, the issue is preserved as a matter of law, but when a trial court is alleged to have violated a permissive statute, we review for plain error if the issue has not been preserved. *Aikens*, 342 N.C. at 577-78, 467 S.E.2d at 106; *see also State v. Bussey*, 321 N.C. 92, 95, 361 S.E.2d 564, 566 (1987). Because subsections 15A-1235(b) and (c) are permissive, we conclude that the appropriate standard of review of defendant's statutory claim is also plain error review.

Under plain error review, a defendant must demonstrate that the trial court committed "a fundamental error." *See State v. Tow*e, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). We find fundamental error only after reviewing the record in its totality and determining that the prejudice to the defendant "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citation omitted); *see also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error exists only in exceptional cases in which the error is "one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 321 (2015) (internal quotation marks omitted) (citation omitted) (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). As part of our plain error analysis, in determining whether a trial court's instructions led to a coerced jury verdict in violation of Article I, Section 24 of our constitution, "we must analyze the trial court's actions in light of the totality of the circumstances facing the trial court at the time it acted." *State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992) (citing *Bussey*, 321 N.C. at 96, 361 S.E.2d at 566-67).[1]

Section 15A-1235 sets out, *inter alia*, permissive guidelines for a judge when instructing a deadlocked jury:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

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1. We note that the opinion in *Patterson* is ambiguous as to whether the defendant's objection under the Constitution of North Carolina was preserved. However, a defendant is permitted to argue the totality of the circumstances as part of his or her contention that plain error exists.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C.G.S. § 15A-1235 (a)-(c) (2013).

We have held that even when jury instructions " 'do not precisely follow the guidelines set forth in N.C.G.S. § 15A-1235,' " no error arises when " 'the essence of the instructions was merely to ask the jury to continue to deliberate' " without being coercive. *Aikens*, 342 N.C. at 579-80, 467 S.E.2d at 107 (citation omitted). In *Aikens*, even though the trial court failed to include some of the language in N.C.G.S. § 15A-1235(b)(2) and (b)(4), we found no error occurred and that plain error analysis was unnecessary because "the trial court's instructions were in no way coercive" and "[o]n the contrary, the trial court repeatedly emphasized to the jurors the importance of their individual convictions." *Id.* at 580, 467 S.E.2d at 107. In *Bussey*, the trial court substantially gave the instructions set forth in N.C.G.S. § 15A-1235, followed later on two occasions by additional instructions that were colloquial versions of the same statutory language. 321 N.C. at 93-95, 361 S.E.2d at 565-66. This Court considered these instructions in their totality and found no error. *Id.* at 97, 361 S.E.2d at 567.

[2] Here, the trial court's initial instructions to the jury similarly followed N.C.G.S. § 15A-1235(b) virtually verbatim, specifically including an instruction that "none of you should change or surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict." After approximately two hours of deliberation, the jury sent a note indicating they were deadlocked. In response, the trial court informed the jurors that "I don't care how you come out or what you do in the end, that's your choice, but I'm going to ask you to continue on with your deliberations at this point." The court then reinstructed the jury, echoing the language of N.C.G.S. § 5A-1235(b), that:

> In the course of your deliberations, each of you should not hesitate to re-examine your views and change your opinion if it is erroneous. But I repeat, none of you should surrender your honest conviction as to the weight or sufficiency of the evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

After another thirty minutes of deliberation, the jury indicated that it remained deadlocked. The court again instructed the jury to "continue to deliberate with a view towards reaching an agreement if it can be done without violence to your individual judgment. As I said earlier, none of you should change your opinion if you, you know, if you feel like that's what your conscience dictates, you stick by it." Following this last instruction, the trial court inquired whether both attorneys were satisfied with the instruction, to which defense counsel responded, "Yes, Your Honor. Thank you."

Thus we see that through the course of three separate instructions, "the trial court repeatedly emphasized to the jurors the importance of their individual convictions," *Aikens*, 342 N.C. at 580, 467 S.E.2d at 107, while giving instructions that substantially tracked the language of N.C.G.S. § 15A-1235(b). We find no error in these portions of the instructions.

Defendant argues that the trial court's instructions were erroneous and coercive in two other areas. First, defendant contends that the trial court's 3:00 p.m. instruction forced the jury to return a verdict within thirty minutes. However, the instructions may be read equally well as the judge telling the jurors that, whether or not they reached a verdict, he was not going to keep them late and that their work would be done in half an hour. Second, defendant argues that the trial court's statement pertaining to the expense of the trial and the possible necessity for a

retrial was coercive. Assuming without deciding that the court's instruction to continue deliberations for thirty minutes and the court's isolated mention of a retrial were erroneous, these errors do not rise to the level of being so fundamentally erroneous as to constitute plain error.

Defendant has failed to establish that the trial court plainly erred in its jury instructions. Accordingly, we reverse the holding of the Court of Appeals to the contrary.

REVERSED.

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

ALICE HART, RODNEY ELLIS, JUDY CHAMBERS, JOHN HARDING LUCAS, MARGARET ARBUCKLE, LINDA MOZELL, YAMILE NAZAR, ARNETTA BEVERLY, JULIE PEEPLES, W.T. BROWN, SARA PILAND, DONNA MANSFIELD, GEORGE LOUCKS, WANDA KINDELL, VALERIE JOHNSON, MICHAEL WARD, T. ANTHONY SPEARMAN, BRITTANY WILLIAMS, RAEANN RIVERA, ALLEN THOMAS, JIM EDMONDS, SASHA VRTUNSKI, PRISCILLA NDIAYE, DON LOCKE, AND SANDRA BYRD, PLAINTIFFS

v.

STATE OF NORTH CAROLINA AND NORTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY, DEFENDANTS,

and

CYNTHIA PERRY, GENNELL CURRY, TIM MOORE, AND PHIL BERGER, INTERVENOR-DEFENDANTS

No. 372A14

Filed 23 July 2015

1. Constitutional Law—North Carolina—Article IX, Section 6—Opportunity Scholarship Program—appropriation from general funds—educational initiative outside of public school system

The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article IX, Section 6 of the North Carolina Constitution. While Section 6 mandates that funds from certain sources be used exclusively to support the state's public school system, the section does not prohibit the General Assembly

from appropriating funds from the general revenue to support other educational initiatives outside of the public school system.

2. Constitutional Law—North Carolina—Article IX, Section 5—Opportunity Scholarship Program—appropriation from general funds—educational initiative outside of public school system

The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article IX, Section 5 of the North Carolina Constitution. Because Article IX, Section 6 permits the General Assembly to appropriate funds from the general revenue to support educational initiatives outside of the public school system, plaintiffs' arguments under Section 5—that the funding for the Program should have gone to the public schools—was without merit.

3. Constitutional Law—North Carolina—Article IX, Section 2(1)—uniformity clause—Opportunity Scholarship Program—educational initiative outside of public school system

The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article IX, Section 2(1) of the North Carolina Constitution. The uniformity clause of Section 2(1) applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system.

4. Constitutional Law—North Carolina—Article V, Sections 2(1) and 2(7)—Opportunity Scholarship Program—public purpose

The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article V, Sections 2(1) and 2(7) of the North Carolina Constitution. By providing lower-income families monetary assistance to procure additional educational opportunities, the Program involved a "reasonable connection with the convenience and necessity of the [State]" and benefitted the public generally. Therefore, the Program was for a public purpose under Sections 2(1) and 2(7).

5. Constitutional Law—North Carolina—Article I, Section 15—Opportunity Scholarship Program—sound basic education

The trial court erred by granting summary judgment in favor

of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article I, Section 15 of the North Carolina Constitution. Article I, Section 15 is not an independent basis for relief under the state constitution, and *Leandro v. State*, 346 N.C. 366 (1997), does not require the state to deliver a sound basic education outside of the public school system. The constitution envisions that children may be education outside of the public school system.

6. Constitutional Law—North Carolina—Article I, Section 19—Opportunity Scholarship Program—religious discrimination claim—standing

The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article I, Section 19 of the North Carolina Constitution. Plaintiffs' religious discrimination argument had no effect on the Court's analysis of the public purpose doctrine. Further, plaintiff taxpayers were not in the class of persons allegedly discriminated against by the Program, and they therefore lacked standing to make a standalone claim under Section 19.

HUDSON, J., dissenting.

BEASLEY, J., and ERVIN, J., join in this dissenting opinion.

BEASLEY, J., dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from an order and final judgment granting summary judgment and injunctive relief for plaintiffs entered on 28 August 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 24 February 2015.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, and Paul E. Smith; and North Carolina Justice Center, by Carlene McNulty and Christine Bischoff, for plaintiff-appellees.

Roy Cooper, Attorney General, by Lauren M. Clemmons, Special Deputy Attorney General, for defendant-appellants.

Institute for Justice, by Richard D. Komer, pro hac vice, Robert Gall, and Renée Flaherty, pro hac vice; and Shanahan Law Group, PLLC, by John E. Branch, III, for parent intervenor-defendant-appellants Cynthia Perry and Gennell Curry.

Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetler III and Stephen D. Martin, for legislative officer intervenor-defendant-appellants Tim Moore and Phil Berger.

American Civil Liberties Union of North Carolina Legal Foundation, by Christopher Brook, for Americans United for Separation of Church and State, American Civil Liberties Union, American Civil Liberties Union of North Carolina Legal Foundation, Anti-Defamation League, Baptist Joint Committee for Religious Liberty, and Interfaith Alliance Foundation, amici curiae.

Liberty, Life, and Law Foundation, by Deborah J. Dewart; Thomas C. Berg, pro hac vice, University of St. Thomas School of Law (Minnesota); and Christian Legal Society, by Kimberlee Wood Colby, pro hac vice, for Christian Legal Society; North Carolina Christian School Association; Roman Catholic Diocese of Charlotte, North Carolina; Roman Catholic Diocese of Raleigh, North Carolina; North Carolina Family Policy Council; Liberty, Life, and Law Foundation; Association of Christian Schools International; American Association of Christian Schools; and National Association of Evangelicals, amici curiae.

Jane R. Wettach for Education Scholars and Duke Children's Law Clinic, amici curiae.

Tin Fulton Walker & Owen, by Luke Largess; and National Education Association, by Philip Hostak, pro hac vice, for National Education Association, amicus curiae.

UNC Center for Civil Rights, by Mark Dorosin, Managing Attorney, and Elizabeth Haddix, Senior Staff Attorney, for North Carolina Conference of the National Association for the Advancement of Colored People, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for Pacific Legal Foundation, amicus curiae.

MARTIN, Chief Justice.

When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly. *E.g.*, *In re Hous. Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). North Carolina courts have the authority and responsibility to declare a law unconstitutional,[1] but only when the violation is plain and clear. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt. *Baker*, 330 N.C. at 334-35, 410 S.E.2d at 889.

In this case plaintiffs challenge the Opportunity Scholarship Program, which allows a small number of students[2] in lower-income families to receive scholarships from the State to attend private school. According to the most recent figures published by the Department of Public Instruction, a large percentage of economically disadvantaged students in North Carolina are not grade level proficient with respect to the subjects tested on the State's end-of-year assessments.[3] Disagreement exists as to the innovations and reforms necessary to address this and other educational issues in our state. Our state and country benefit from the debate between those with differing viewpoints in this quintessentially political dialogue. Such discussions inform the legislative process. But the role of judges is distinguishable, as we neither participate in this dialogue nor assess the wisdom of legislation. Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts. *See In re Alamance Cty. Court Facils.*, 329 N.C. 84, 94, 405 S.E.2d 125, 130 (1991) ("Just as

1. *See* N.C. Const. art. IV, § 1; *Bayard v. Singleton*, 1 N.C. 5 (1787) (recognizing the courts' power of judicial review and declaring unconstitutional an act of the legislature infringing upon the right to a trial by jury).

2. In the first year of the Opportunity Scholarship Program, 2300 students were selected to participate. The average daily membership in our State's public and charter schools is approximately 1.5 million students. N.C. Dep't of Pub. Instruction, *Facts and Figures 2012-13*, http://www.dpi.state.nc.us/docs/fbs/resources/data/factsfigures/2012-13figures.pdf (last visited July 21, 2015) (reporting a combined average daily membership of 1,492,793 in public and charter schools during calendar year 2012-13).

3. N.C. Dep't of Pub. Instruction, *2013-14 School Report Cards*, NC School Report Cards, http://www.ncpublicschools.org/src/ (last visited July 21, 2015).

the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial branch and the other branches of government.").[4] Our constitutionally assigned role is limited to a determination of whether the legislation is plainly and clearly prohibited by the constitution. Because no prohibition in the constitution or in our precedent forecloses the General Assembly's enactment of the challenged legislation here, the trial court's order declaring the legislation unconstitutional is reversed.

* * *

I

Under the provisions of the Opportunity Scholarship Program,[5] the State Educational Assistance Authority (the Authority) makes applications available each year "to eligible students for the award of scholarship grants to attend any nonpublic school." N.C.G.S. § 115C-562.2(a) (2014). An "[e]ligible student" is defined as "a student who has not yet received a high school diploma" and who, in addition to meeting other specified criteria, "[r]esides in a household with an income level not in excess of one hundred thirty-three percent (133%) of the amount required for the student to qualify for the federal free or reduced-price lunch program." *Id.* § 115C-562.1(3) (2013). A "[n]onpublic school" is any school that meets the requirements of either Part 1 ("Private Church Schools and Schools of Religious Charter") or Part 2 ("Qualified Nonpublic Schools") of Article 39 of Chapter 115C of the General Statutes. *Id.* § 115C-562.1(5) (2013).

The Authority awards scholarships to the program's applicants, with preference given first to previous scholarship recipients, and then to students in lower-income families and students entering kindergarten or the first grade. *Id.* § 115C-562.2(a). Subject to certain restrictions,

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4. This foundational principle of constitutional law is well established in North Carolina. *See* N.C. Const. art I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *see also id.* art. II (describing the legislative sphere of authority); *id.* art. III (describing the executive sphere of authority); *id.* art. IV (describing the judicial sphere of authority).

5. The Opportunity Scholarship Program was ratified by the General Assembly and signed into law by the Governor in July 2013 as part of the "Current Operations and Capital Improvements Appropriations Act of 2013"—the State's budget bill for fiscal years 2013-14 and 2014-15. Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, sec. 8.29, 2013 N.C. Sess. Laws 995, 1064-69. The program was amended in August of 2014 to its present form, The Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, sec. 8.25, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 328, 371-73, and is codified as amended in Part 2A to Article 39 of Chapter 115C of the General Statutes, N.C.G.S. §§ 115C-562.1 through -562.7 (2013 & Supp. 2014).

students selected to participate in the program may receive a scholarship grant of up to $4,200 to attend any nonpublic school. *Id.* § 115C-562.2(b) (2014). Once a student has been selected for the program and has chosen a school to attend, the Authority remits the grant funds to the nonpublic school for endorsement, and the parent or guardian "restrictively endorse[s] the scholarship grant funds awarded to the eligible student to the nonpublic school for deposit into the account of [that] school." *Id.* § 115C-562.6 (2013).

A nonpublic school that accepts a scholarship recipient for admission must comply with the requirements of N.C.G.S. § 115C-562.5(a), which include: (1) providing the Authority with documentation of the tuition and fees charged to the student; (2) providing the Authority with a criminal background check conducted on the highest ranking staff member at the school; (3) providing the parent or guardian of the student with an annual progress report, including standardized test scores; (4) administering at least one nationally standardized test or equivalent measure for each student in grades three or higher that measures achievement in the areas of English grammar, reading, spelling, and mathematics; (5) providing the Authority with graduation rates of scholarship program students; and (6) contracting with a certified public accountant to perform a financial review for each school year in which the nonpublic school accepts more than $300,000 in scholarship grants. *Id.* § 115C-562.5(a)(1)-(6) (2014). Nonpublic schools enrolling more than twenty-five Opportunity Scholarship Program students must report the aggregate standardized test performance of the scholarship students to the Authority. *Id.* § 115C-562.5(c) (2014). Furthermore, all nonpublic schools that accept scholarship program students are prohibited from charging additional fees based on a student's status as a scholarship recipient, *id.* § 115C-562.5(b) (2014), and from discriminating with respect to the student's race, color, or national origin, *id.* § 115C-562.5(c1) (2014); *see also* 42 U.S.C. § 2000d (2012). Nonpublic schools that fail to comply with these statutory requirements are ineligible to participate in the program. N.C.G.S. § 115C-562.5(d) (2014).

The Opportunity Scholarship Program also subjects the Authority to certain reporting requirements. Each year, the Authority must provide demographic information and program data to the Joint Legislative Education Oversight Committee. *Id.* § 115C-562.7(b) (2014). The Authority is also required to select an independent research organization to prepare an annual report on "[l]earning gains or losses of students receiving scholarship grants" and on the "[c]ompetitive effects on public school performance on standardized tests as a result of the

scholarship grant program." *Id.* § 115C-562.7(c) (2014). Following submission of these reports to the Joint Legislative Education Oversight Committee and the Department of Public Instruction, "[t]he Joint Legislative Education Oversight Committee shall review [the] reports from the Authority and shall make ongoing recommendations to the General Assembly as needed regarding improving administration and accountability for nonpublic schools accepting students receiving scholarship grants." *Id.*

The Opportunity Scholarship Program is funded by appropriations from general revenues to the Board of Governors of the University of North Carolina, which provides administrative support for the Authority. In fiscal year 2014-15, the General Assembly appropriated a total of $10,800,000 to the program.

II

On 11 December 2013, plaintiff Alice Hart and twenty-four other taxpayers filed a complaint in Superior Court, Wake County, challenging the constitutionality of the Opportunity Scholarship Program under the Constitution of North Carolina.[6]

Plaintiffs' amended complaint asserted five claims for relief, all of which presented facial challenges under the North Carolina Constitution. First, plaintiffs alleged that the Opportunity Scholarship Program "appropriates revenue paid by North Carolina taxpayers to private schools for primary and secondary education" in violation of Article IX, Sections 2(1) and 6, and Article I, Section 15. Second, plaintiffs alleged that the law "appropriates revenue paid by North Carolina taxpayers to private schools for the ostensible purpose of primary and secondary education without those funds being supervised by the Board of Education" in violation of Article IX, Section 5. Third, plaintiffs alleged that the law creates "a non-uniform system of schools for primary and secondary education" in violation of Article IX, Section 2(1). Fourth, plaintiffs alleged that in "transfer[ring] revenue paid by North Carolina taxpayers to private schools without any accountability or requirements ensuring that students will actually receive an education," the law "does not accomplish any public purpose" in violation of Article V, Sections 2(1) and 2(7). Fifth, plaintiffs alleged that in "transfer[ring] revenue paid by North Carolina taxpayers to private schools that are permitted to

6. Although plaintiffs generally represent a cross section of individuals who currently interact or have previously interacted with our state's public schools, plaintiffs' complaint in the present action was made in their capacity as taxpayers of the state.

discriminate against students and applicants on the basis of race, color, religion, or national origin,"[7] the law serves no public purpose and therefore violates Article V, Section 2(1), and Article I, Section 19. Plaintiffs requested a declaration that the scholarship program is unconstitutional under the challenged provisions, as well as a permanent injunction to prevent implementation and enforcement of the legislation.

On cross-motions for summary judgment, the trial court entered an order and final judgment on 28 August 2014, allowing plaintiffs' motion for summary judgment on all claims, denying defendants' and intervenor-defendants' motions for summary judgment,[8] and declaring the Opportunity Scholarship Program unconstitutional on its face. The trial court permanently enjoined implementation of the Opportunity Scholarship Program legislation, including the disbursement of public funds.

Defendants appealed, and this Court, on its own initiative, certified the appeal for immediate review prior to a determination in the Court of Appeals.[9] For the following reasons, we reverse the trial court's order and final judgment declaring the Opportunity Scholarship Program unconstitutional and dissolve the injunction preventing further implementation and enforcement of the challenged legislation.

III

Defendants' appeal from the trial court's order and final judgment presents questions to this Court concerning the construction and interpretation of provisions in the North Carolina Constitution.[10] As the court of last resort in this state, we answer with finality "issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina." *Preston*, 325 N.C. at 449, 385 S.E.2d at 479 (citations omitted). Accordingly, our review of the constitutional questions presented is de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001); *see*

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7. Plaintiffs' allegations concerning a nonpublic school's ability to discriminate based on race, color, or national origin were rendered moot by the passage of N.C.G.S. § 115C-562.5(c1). *See* ch. 100, sec. 8.25(d), 2013 N.C. Sess. Laws (Reg. Sess. 2014) at 371.

8. For purposes of this opinion, we will refer to defendants and intervenor-defendants collectively as "defendants."

9. We also certified the companion case of *Richardson v. State*, No. 384A14, for immediate review, which we decide today in a separate opinion.

10. Plaintiffs have not presented any claims under the United States Constitution.

Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009).

In exercising our de novo review, we apply well-settled principles to assess the constitutionality of legislative acts. At the outset, the North Carolina Constitution is not a grant of power, but a limit on the otherwise plenary police power of the State. *See, e.g.*, *Preston*, 325 N.C. at 448-49, 385 S.E.2d at 478. We therefore presume that a statute is constitutional, and we will not declare it invalid unless its unconstitutionality is demonstrated beyond reasonable doubt. *Baker*, 330 N.C. at 334-35, 410 S.E.2d at 889; *see also Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (stating that an act of the General Assembly will be declared unconstitutional only when "it [is] plainly and clearly the case" (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936))). Next, when the constitutionality of a legislative act depends on the existence or nonexistence of certain facts or circumstances, we will presume the existence or nonexistence of such facts or circumstances, if reasonable, to give validity to the statute. *In re Hous. Bonds*, 307 N.C. at 59, 296 S.E.2d at 285 (citing *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970)). Further, a facial challenge to the constitutionality of an act, as plaintiffs have presented here, is the most difficult challenge to mount successfully. *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citations omitted). "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Id.* (citation omitted); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 1191 (2008) (discussing why facial challenges are disfavored). Accordingly, we require the party making the facial challenge to meet the high bar of showing "that there are no circumstances under which the statute might be constitutional." *Beaufort Cty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280 (citation omitted); *see also United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987) ("[T]he challenger must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the [act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ."). It is through this lens of constitutional review that we begin our analysis in this case.

A

[1] The first question presented by defendants' appeal is whether Article IX, Section 6 of the state constitution prohibits the General Assembly

from appropriating tax revenues to the Opportunity Scholarship Program, which is not part of our public school system.

Defendants contend that Article IX, Section 6 should not be read as a limitation on the State's ability to spend on education generally. In plaintiffs' view, however, even when the General Assembly explicitly intends, as it did here, to appropriate money for educational scholarships to nonpublic schools, the plain text of Article IX, Section 6 prohibits that option and requires that any and all funds for education be appropriated exclusively for our public school system.

Entitled "State school fund," Article IX, Section 6 provides:

> The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

N.C. Const. art. IX, § 6.

The manifest purpose of this section is to protect the "State school fund" in order to preserve and support the public school system, not to limit the State's ability to spend on education generally. Section 6 accomplishes this purpose by identifying sources of funding for the State school fund and mandating that funds derived by the State from these sources be "faithfully appropriated for establishing and maintaining in this State a system of free public schools." *City of Greensboro v. Hodgin*, 106 N.C. 182, 186-87, 11 S.E. 586, 587-88 (1890) (quoting a previous version of the provision). The first four clauses of Section 6 identify non-revenue sources of funding, two of which appear to be mandatory and two of which appear to be within the discretion of the General Assembly to otherwise appropriate as it sees fit. The fifth clause (the revenue clause) states that a portion of the State's revenue "may be set apart for that purpose"—meaning for the purpose of "establishing and maintaining a uniform system of free public schools." This clause

recognizes that the General Assembly may choose to designate a portion of the State's general tax revenue as an additional source of funding for the State school fund.

Thus, within constitutional limits, the General Assembly determines how much of the revenue of the State will be appropriated for the purpose of "establishing and maintaining a uniform system of free public schools." Insofar as the General Assembly appropriates a portion of the State's general revenues for the public schools, Section 6 mandates that those funds be faithfully used for that purpose. Article IX, Section 6 does not, however, prohibit the General Assembly from appropriating general revenue to support other educational initiatives. *See Preston*, 325 N.C. at 448-49, 385 S.E.2d at 478 ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (citations omitted)). Because the Opportunity Scholarship Program was funded from general revenues, not from sources of funding that Section 6 reserves for our public schools, plaintiffs are not entitled to relief under this provision.

Faithful appropriation and use of educational funds was a very real concern to the framers of our constitution. Before the introduction of Article IX, Section 6 in the 1868 Constitution, the Literary Fund, which was devoted to funding public education, was routinely threatened to be used during the Civil War to pay for other expenses and was almost completely depleted by the war's end. *See* M.C.S. Noble, *A History of the Public Schools of North Carolina* 242-49, 272 (1930); Milton Ready, *The Tar Heel State: A History of North Carolina* 263 (2005). The framers of the 1868 Constitution sought to constitutionalize the State's obligation to protect the State school fund. In so doing, our framers chose not to limit the State from appropriating general revenue to fund alternative educational initiatives. Plaintiffs' arguments to the contrary are without merit.

[2] Given our disposition of plaintiffs' claim under Article IX, Section 6, we agree with defendants that plaintiffs are likewise not entitled to relief under Article IX, Section 5. Under Article IX, Section 5, "[t]he State Board of Education shall supervise and administer the free public school system *and the educational funds provided for its support.*" N.C. Const. art. IX, § 5 (emphasis added). Because public funds may be spent on educational initiatives outside of the uniform system of free public schools, plaintiffs' contention that funding for the Opportunity Scholarship Program should have gone to the public schools—and therefore been brought under the supervision and administration of the State Board of Education—is without merit.

[3] The final issue under Article IX presented by defendants' appeal is whether the Opportunity Scholarship Program legislation violates Article IX, Section 2(1). Under Section 2(1), "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." *Id.* art. IX, § 2(1). Plaintiffs contend that "[i]f the uniformity clause has any substance, it means that the State cannot create an alternate system of publicly funded private schools standing apart from the system of free public schools mandated by the Constitution."

Plaintiffs' characterization of the Opportunity Scholarship Program is inaccurate. The Opportunity Scholarship Program legislation does not create "an alternate system of publicly funded private schools." Rather, this legislation provides modest scholarships to lower-income students for use at nonpublic schools of their choice. Furthermore, we have previously stated that the uniformity clause requires that provision be made for public schools of like kind throughout the state. *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 363 N.C. 165, 171-72, 675 S.E.2d 345, 350 (2009). The uniformity clause applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system. Accordingly, the Opportunity Scholarship Program does not violate Article IX, Section 2(1).

B

[4] The next question presented by defendants' appeal is whether the appropriation of general revenues to fund educational scholarships for lower-income students is for a public purpose under Article V, Sections 2(1) and 2(7).

Defendants contend that providing lower-income students the opportunity to attend private school "satisfies the State's legitimate objective of encouraging the education of its citizens." Defendants maintain that, in satisfying this objective, appropriations directed to the Opportunity Scholarship Program are made for a public purpose. Plaintiffs contend that the program does not accomplish a public purpose because the program appropriates taxpayer money for educational scholarships to private schools without regard to whether the schools satisfy substantive education standards.

Under Article V, Section 2(1), "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Under Article V, Section 2(7), "[t]he General Assembly may

enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only." *Id.* art. V, § 2(7). Because "[t]he power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury," we subject both legislative powers to the public purpose requirement. *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 749-50 (1968).

At the outset, we note that "the fundamental concept underlying the public purpose doctrine" is that "the ultimate gain must be the public's, not that of an individual or private entity." *Maready v. City of Winston-Salem*, 342 N.C. 708, 719, 467 S.E.2d 615, 622 (1996). Thus, in resolving challenges to legislative appropriations under the public purpose clause, this Court's inquiry is discrete—we ask whether the legislative purpose behind the appropriation is public or private. *See id.* at 716, 467 S.E.2d at 620-21; *Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750. If the purpose is public, then the wisdom, expediency, or necessity of the appropriation is a legislative decision, not a judicial decision. *See Maready*, 342 N.C. at 714, 467 S.E.2d at 619. Accordingly, our public purpose analysis does not turn on whether the appropriation will, in the words of plaintiffs, "accomplish" a public purpose.

Likewise, sustaining a legislative appropriation under the public purpose clause does not require a concurrent assessment of whether other constitutional infirmities exist that might render the legislation unconstitutional. If the challenged appropriation is constitutionally infirm on other grounds, proper redress is under the applicable constitutional provisions, not the public purpose clause. Thus, plaintiffs' contentions that the Opportunity Scholarship Program runs afoul of Article I, Sections 15 and 19, due to scholarships being remitted to allegedly "unaccountable" schools or schools that discriminate on the basis of religion, are inapposite to the public purpose analysis.[11]

Our inquiry under Article V, Sections 2(1) and 2(7), therefore, is whether the appropriations made by the General Assembly to fund the Opportunity Scholarship Program are for a public rather than private purpose. In addressing this question, we are mindful of the general proposition articulated by this Court over forty-five years ago: "Unquestionably, the education of residents of this State is a recognized object of State government. Hence, the provision therefor is for a public

11. The independent applicability of Article I, Sections 15 and 19, in this case is discussed in Part III(C) of our opinion.

purpose." *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) (citing *Jamison v. City of Charlotte*, 239 N.C. 682, 696, 80 S.E.2d 904, 914 (1954); *Green v. Kitchin*, 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948)).

In determining whether a specific appropriation is for a public purpose, "[t]he term 'public purpose' is not to be narrowly construed." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (citing *Briggs v. City of Raleigh*, 195 N.C. 223, 226, 141 S.E. 597, 599 (1928)). We have also specifically "declined to 'confine public purpose by judicial definition[, leaving] "each case to be determined by its own peculiar circumstances as from time to time it arises." ' " *Maready*, 342 N.C. at 716, 467 S.E.2d at 620 (alteration in original) (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 33, 199 S.E.2d 641, 653 (1973)). Indeed, "[a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions." *Id.* (quoting *Mitchell*, 273 N.C. at 144, 159 S.E.2d at 750). Although the initial determination of the General Assembly in passing the law is given "great weight" by this Court, *Madison Cablevision*, 325 N.C. at 644-45, 386 S.E.2d at 206, "the ultimate responsibility for the public purpose determination rests, of course, with this Court," *id.* at 645, 386 S.E.2d at 206. "[T]wo guiding principles have been established for determining that a particular undertaking by [the State] is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the [State]; and (2) the activity benefits the public generally, as opposed to special interests or persons." *Maready*, 342 N.C. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207 (citations omitted)).

"As to the first prong, whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action." *Id.*; *see also Green v. Kitchin*, 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948) ("A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government." (citations omitted)). Here, the provision of monetary assistance to lower-income families so that their children have additional educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry. *See State Educ. Assistance Auth.*, 276 N.C. at 587, 174 S.E.2d at 559 ("Unquestionably, the education of residents

of this State is a recognized object of State government."); *see also Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 10, 418 S.E.2d 648, 655 (1992) ("Education is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' "); *Delconte v. State*, 313 N.C. 384, 401-02, 329 S.E.2d 636, 647 (1985) ("We also recognize that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education.").

In *State Education Assistance Authority v. Bank of Statesville*, for example, we approved the use of revenue bond proceeds to "make loans to meritorious North Carolinians of slender means" for the purpose of "minimiz[ing] the number of qualified persons whose education or training is interrupted or abandoned for lack of funds." 276 N.C. at 587, 174 S.E.2d at 559. Observing that "[t]he people of North Carolina constitute our State's greatest resource," we held that "bond proceeds are used for a *public purpose* when used to make such loans." *Id.*

Similarly, in *Hughey v. Cloninger* we addressed the legality of an appropriation made by the Gaston County Board of Commissioners to a private school for dyslexic children. 297 N.C. 86, 88, 95, 253 S.E.2d 898, 900, 903 (1979). Although we held that the Board of Commissioners lacked statutory authority to make such an appropriation, we stated, albeit in obiter dictum, that had there been statutory authority, such an appropriation "would have presented no 'public purpose' difficulties as it is well established that both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose." *Id.* at 95, 253 S.E.2d at 903-04. We therefore conclude that the appropriations made to the Opportunity Scholarship Program involve a "reasonable connection with the convenience and necessity of the [State]." *Maready*, 342 N.C. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207).

As to the second prong of the public purpose inquiry, whether "the activity benefits the public generally, as opposed to special interests or persons," *id.* (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207), "[i]t is not necessary, in order that a use may be regarded as public, that it should be for the use and benefit of every citizen in the community," *id.* at 724, 467 S.E.2d at 625 (quoting *Briggs*, 195 N.C. at 226, 141 S.E. at 599-600). "[A]n expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose." *Id.*; *see also State Educ. Assistance Auth.*, 276 N.C.

at 588, 174 S.E.2d at 560 ("[T]he fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of 'a paramount public purpose.' " (quoting *Clayton v. Kervick*, 52 N.J. 138, 155, 244 A.2d 281, 290 (1968))).

The promotion of education generally, and educational opportunity in particular, is of paramount public importance to our state. Indeed, borrowing language from the Northwest Ordinance of 1787, our constitution preserves the ethic of educational opportunity, declaring that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and *the means of education* shall forever be encouraged." N.C. Const. art. IX, § 1 (emphasis added). Although the scholarships at issue here are available only to families of modest means, and therefore inure to the benefit of the eligible students in the first instance, and to the designated nonpublic schools in the second, the ultimate beneficiary of providing these children additional educational opportunities is our collective citizenry. *Cf. Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (recognizing that an expenditure providing an "incidental private benefit" is for a public purpose if it serves "a primary public goal"). Accordingly, the appropriations made by the General Assembly for the Opportunity Scholarship Program were for a public purpose under Article V, Sections 2(1) and 2(7).

C

[5] The next issue presented by defendants' appeal concerns the independent applicability, if any, of Article I, Section 15 to plaintiffs' claims. Article I, Section 15 declares: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. This constitutional provision states a general proposition concerning the right to the privilege of education, the substance of which is detailed in Article IX. Article I, Section 15 is not an independent restriction on the State. *See generally* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 62-63 (2d ed. 2013).

Plaintiffs rely on Article I, Section 15 and *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997), a case challenging the adequacy of public school funding, for the proposition that "public funds spent for education must go to institutions that will provide meaningful educational services—specifically, to institutions with a sufficient curriculum and competent teachers." Because the Opportunity Scholarship Program legislation does not require that participating nonpublic schools meet the sound basic education standard announced in *Leandro*, 346 N.C.

at 347, 488 S.E.2d at 255, or impose regulatory standards approximating those placed on our public schools in Chapter 115C of the General Statutes, plaintiffs contend that the scholarship program accomplishes no public purpose and is constitutionally inadequate.[12]

As stated above, Article I, Section 15 has no effect on our disposition with respect to plaintiffs' public purpose claim. In its order and final judgment, however, the trial court purported to grant independent relief to plaintiffs under Article I, Section 15, concluding that the Opportunity Scholarship Program legislation fails to " 'guard and maintain' the right of the people to the privilege of education" by "appropriating taxpayer funds to educational institutions that are not required to meet educational standards" and by "expending public funds so that children can attend private schools." To the extent that plaintiffs rely on Article I, Section 15 as an independent basis of relief, we agree with defendants that such reliance is misplaced.

It is axiomatic that the responsibility *Leandro* places on the State to deliver a sound basic education has no applicability outside of the education delivered in our public schools. In *Leandro* we stated that a public school education that "does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." 346 N.C. at 345, 488 S.E.2d at 254. We concluded that "Article I, Section 15 *and* Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education *in our public schools.*" Id. at 347, 488 S.E.2d at 255 (emphases added). Thus, *Leandro* does not stand for the proposition that Article I, Section 15 independently restricts the State outside of the public school context.

Furthermore, our constitution specifically envisions that children in our state may be educated by means outside of the public school system. *See* N.C. Const. art. IX, § 3 ("The General Assembly shall provide

12. Plaintiffs acknowledge that at least some nonpublic schools may be able to provide scholarship students a meaningful education. Even so, plaintiffs contend that "[t]he State has an affirmative obligation to ensure that public funds are used to accomplish a public purpose" and that, without built-in accountability standards, the State cannot ensure that the Opportunity Scholarship Program will accomplish its intended purposes as to each scholarship recipient. In making this argument, plaintiffs would require the State to demonstrate that the program operates constitutionally in all circumstances, rather than accepting the burden of showing that there is no set of circumstances under which the law could operate in a constitutional manner.

that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, *unless educated by other means*." (emphasis added)); *see also Delconte*, 313 N.C. at 385, 400-01, 329 S.E.2d at 638, 646-47 (concluding that home school instruction did not violate compulsory attendance statutes and noting that a contrary holding would raise a serious constitutional question under the North Carolina Constitution). Thus, even if Article I, Section 15 could serve as an independent basis of relief, there is no merit in the argument that a legislative program designed to increase educational opportunity in our state is one that fails to "guard and maintain" the "right to the privilege of education."

[6] The final issue presented by defendants' appeal concerns plaintiffs' Article I, Section 19 religious discrimination claim. Article I, Section 19 declares, in pertinent part, "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, *religion*, or national origin." N.C. Const. art. I, § 19 (emphasis added). Plaintiffs couch their religious discrimination claim, both for justiciability purposes and with respect to the merits of the claim, in terms of the public purpose doctrine. In short, plaintiffs contend that the Opportunity Scholarship Program accomplishes no public purpose because it allows funding for educational scholarships to schools that may discriminate on the basis of religion. Again, our analysis of the public purpose doctrine made clear that Article I, Section 19, like Article I, Section 15, has no effect on our disposition with respect to plaintiffs' public purpose claim.

With respect to the independent applicability of Article I, Section 19 as a stand-alone claim, defendants have maintained throughout this litigation that such a claim is not justiciable in this case because plaintiffs, as taxpayers of the state, lack standing. Specifically, defendants contend that plaintiffs have suffered no injury in fact because they are not in the class of persons against which the program allegedly discriminates. We agree and therefore hold that plaintiffs' Article I, Section 19 claim must be dismissed.

Generally, "a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). Yet, "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) (citations omitted). "[A] person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose

unless he belongs to the class which is prejudiced by the statute." *In re Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974) (quoting 16 Am. Jur. 2d *Constitutional Law* § 123 (1964)). Here plaintiffs are taxpayers of the state, not eligible students alleged to have suffered religious discrimination as a result of the admission or educational practices of a nonpublic school participating in the Opportunity Scholarship Program. Because eligible students are capable of raising an Article I, Section 19 discrimination claim on their own behalf should the circumstances warrant such action, plaintiffs have no standing to assert a direct discrimination claim on the students' behalf.

IV

"The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution." *Redev. Comm'n v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960); s*ee also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386-87 (1932) (Brandeis & Stone, JJ., dissenting) (indicating that an individual state may serve as a laboratory of democracy and experiment with new legislation in order to meet changing social and economic needs). In this case the General Assembly seeks to improve the educational outcomes of children in lower-income families. The mode selected by the General Assembly to effectuate this policy objective is the Opportunity Scholarship Program.

When, as here, the challenged legislation comports with the constitution, the wisdom of the enactment is a decision for the General Assembly. As this Court has previously recognized, "[i]t may be that the measure may prove eventually to be a disappointment, and is ill advised, but the wisdom of the enactment is a legislative and not a judicial question." *Sec. Nat'l Bank of Greensboro*, 252 N.C. at 612, 114 S.E.2d at 700. To the extent that plaintiffs disagree with the General Assembly's educational policy decision as expressed in the Opportunity Scholarship Program, their remedy is with the legislature, not the courts. Our review is limited to a determination of whether plaintiffs have demonstrated that the program legislation plainly and clearly violates our constitution. Plaintiffs have made no such showing in this case. Accordingly, the trial court erred in declaring the Opportunity Scholarship Program unconstitutional. We therefore reverse the trial court's order and final judgment.

REVERSED.

Justice HUDSON dissenting.

Because the Opportunity Scholarship Program provides for the spending of taxpayer money on private schools without incorporating any standards for determining whether students receive a sound basic—or indeed, any—education, I conclude that the program violates the North Carolina Constitution in two respects. As a result, I must respectfully dissent.

First, the Opportunity Scholarship Program (also known as the "voucher program") violates the requirements of Article V, Sections 2(1) and 2(7) that public funds be spent for public purposes only. "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). Additionally, "[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only." *Id.* § 2(7). Second, in so doing, the spending authorized under the voucher program also violates Article I, Section 15, which states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." *Id.* art. I, § 15.

In its order the trial court includes the following among the "Undisputed Material Facts":

> 4. Private schools that receive scholarship funds are (1) not required to be accredited by the State Board of Education or any other state or national institution; (2) not required to employ teachers or principals who are licensed or have any particular credentials, degrees, experience, or expertise in education; (3) not subject to any requirements regarding the curriculum that they teach; (4) not required to provide a minimum amount of instructional time; and (5) not prohibited from discriminating against applicants or students on the basis of religion. *See* N.C. Gen. Stat. § 115C-562.1 *et seq*.
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> . . . .
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> 6. Of the 5,556 scholarship applicants, 3,804 applicants identified 446 private schools they planned to attend. Of those 446 schools, 322 are religious schools and 117 are independent schools. Of the 322 religious schools

> scholarship recipients planned to attend, 128 are accredited by some organization and 194 are not accredited by any organization. Of the 117 independent schools scholarship recipients planned to attend, 58 are accredited by some organization and 59 are not accredited by any organization.

The trial court then reached the following conclusions of law, among others:

> 3. The Court concludes from the record beyond a reasonable doubt that the [Opportunity Scholarship Program] Legislation funds private schools with taxpayer dollars as an alternative to the public school system in direct contravention of Article [I], Section[ ] 15 . . . and Article V, Sections 2(1) and (7) of the North Carolina Constitution. The legislation unconstitutionally
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> . . . .
>
> b. appropriates public funds for education in a manner that does not accomplish a public purpose, in violation of Article V, Sections 2(1) and (7), in particular by appropriating funds to private primary and secondary schools without regard to whether these schools satisfy substantive educational standards: appropriating taxpayer funds to unaccountable schools does not accomplish a public purpose;
>
> . . . .
>
> e. fails to "guard and maintain" the right of the people to the privilege of education in violation of Article I, Section 15 by appropriating taxpayer funds to educational institutions that are not required to meet educational standards, including curriculum and requirements that teachers and principals be certified[.]
>
> . . . .
>
> 4. The General Assembly fails the children of North Carolina when they are sent with taxpayer money to private schools that have no legal obligation to teach them anything.

As noted above, these facts are undisputed, and in my view, these conclusions are correct.

In *Madison Cablevision, Inc. v. City of Morganton* this Court articulated a two-part test for determining if a spending statute complies with the requirements of the North Carolina Constitution as found in Article V, Section 2(1), which is quoted above and known as the "public purpose" clause. 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989). As noted by the majority, while "[t]he initial responsibility for determining what is and what is not a public purpose rests with the legislature" and "its determinations are entitled to great weight," "the ultimate responsibility for the public purpose determination rests, of course, with this Court." *Id.* at 644-45, 386 S.E.2d at 206 (internal citations omitted). Further, in *Stanley v. Department of Conservation and Development* this Court articulated the following principle regarding public purpose expenditures: "In determining what is a public purpose the courts look not only to the ends sought to be attained but also 'to the means to be used.' " 284 N.C. 15, 34, 199 S.E.2d 641, 653 (1973) (citations omitted), *abrogated in part on other grounds by Madison Cablevision*, 325 N.C. at 647-48, 386 S.E.2d at 208, *and superseded by constitutional amendment*, N.C. Const. art V, §§ 2(7), 9. Therefore, I conclude that the majority's assertion that "our public purpose analysis does not turn on whether the appropriation will . . . 'accomplish' a public purpose" is contrary to our precedent. It is precisely this determination that we are called upon to undertake here. To that end, this Court has articulated "[t]wo guiding principles" for determining whether an expenditure of tax funds is for a public purpose. *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207 (citations omitted) (involving operation of a public enterprise by a municipality). A governmental expenditure satisfies the public purpose clause if: "(1) it involves a reasonable connection with the convenience and necessity of the particular [jurisdiction], and (2) the activity benefits the public generally, as opposed to special interests or persons." *Id.*

Defendants assert, and I agree with the majority, that our courts have long held that education generally serves a public purpose. *See, e.g.*, *State Educ. Assistance Auth. v. Bank of Statesville*, 276 N.C. 576, 587, 174 S.E.2d 551, 559 (1970) ("Unquestionably, the education of residents of this State is a recognized object of State government. Hence, provision therefor is for a public purpose." (citations omitted)). I further agree with the majority that, in principle, "the provision of monetary assistance to lower-income families so that their children have greater educational opportunities is well within the scope of permissible governmental action and is intimately related to the needs of our state's citizenry."

Nonetheless, I cannot agree that the spending of taxpayer funds on private school education through the Opportunity Scholarship Program here serves "public purposes only" as our constitution requires. N.C. Const. art. V, § 2(1). In *Leandro v. State* this Court concluded that "the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). We went on to say in *Hoke County Board of Education v. State* that a sound basic education should include an "effective instructional program" taught by "competent, certified, well-trained" teachers and led by "well-trained competent" principals. 358 N.C. 605, 636, 599 S.E.2d 365, 389 (2004). Admittedly, this is the standard we have set for our public schools, not our private ones, and it is conceivable that we would set a less comprehensive substantive standard for private schools. However, a large gap opens between *Leandro*-required standards and no standards at all, which is what we have here. When taxpayer money is used, the total absence of standards cannot be constitutional.

Before the legislature created the Opportunity Scholarship Program, taxpayer money had not been used to directly finance any part of a private school education. The expenditure of public taxpayer funds brings the Opportunity Scholarship Program squarely within the requirements of Article V, Sections 2(1) and 2(7). As the trial court noted, the schools that may receive Opportunity Scholarship Program money have no required teacher training or credentials and no required curriculum or other means of measuring whether the education received by students at these schools prepares them "to participate and compete in the society in which they live and work." *Leandro*, 346 N.C. at 345, 488 S.E.2d at 254. As we have observed in *State Education Assistance Authority v. Bank of Statesville*, "[t]he people of North Carolina constitute our State's greatest resource." 276 N.C. at 587, 174 S.E.2d at 559. Educating our citizens plants the seeds for their participation, and when we are able to reap the rewards of having an educated citizenry, we can see that our people are our greatest resource. *See*, *e.g.*, *Saine v. State*, 210 N.C. App. 594, 604-05, 709 S.E.2d 379, 388 (2011) ("Educating North Carolinians certainly promotes the welfare of our State, particularly at a time when unemployment is high and many jobs that have historically not required education beyond a high school diploma, or its equivalent, are rapidly disappearing."). Therefore, while students enrolled in private schools may be receiving a fine education, if taxpayer money is spent on a private school education that does not prepare them to function

in and to contribute to our state's society, that spending cannot be for "public purposes only." In my view, spending on private schools through the Opportunity Scholarship Program, which includes no means to measure the quality of the education, cannot satisfy the second prong of the *Madison Cablevision* test. The main constitutional flaw in this program is that it provides no framework at all for evaluating any of the participating schools' contribution to public purposes; such a huge omission is a constitutional black hole into which the entire program should disappear.

I am not persuaded by any of defendants' arguments that the program, as created, contains standards that are constitutionally relevant or adequate. Defendants assert that "layers" of accountability standards are built into the Opportunity Scholarship Program. I find none of these arguments convincing. First, defendants argue that the "educational marketplace" will regulate the quality of the education provided by participating schools. Defendants assert that parents will not send their children to schools that do not provide a solid education or adequately prepare students for college or beyond. This may be true, but marketplace standards are not a measure of constitutionality. To the contrary, this Court must insulate constitutional standards from the whims of the marketplace. *See Maready v. City of Winston-Salem*, 342 N.C. 708, 739, 467 S.E.2d 615, 634 (1996) (Orr, J., dissenting) ("While economic times have changed and will continue to change, the philosophy that constitutional interpretation and application are subject to the whims of 'everybody's doing it' cannot be sustained.").

In a related argument, both intervenor legislative officers and intervenor parents contend that, because parents choose the private schools, the program is "directly accountable to the parents." This argument serves only to underscore that the program serves the private interests of the particular families and not the public good. While families are surely entitled to choose schools for their children according to their interests, a program like the Opportunity Scholarship Program that spends taxpayer money must, to be constitutional, serve "public purposes only."

Second, defendants look to the statutory requirements governing all private and nonpublic schools in North Carolina. These standards relate to attendance, health, and safety, and also require standardized testing at certain intervals. *See* N.C.G.S. §§ 115C-547 to -562 (2013). Here, however, we are not considering standards for private schools that receive no public funding. Those schools are not governed by the same constitutional requirements as schools receiving public funding; they need not serve "public purposes only." When considering these statutory standards in a

public purpose context, it is clear that they do not help measure whether the students enrolled are receiving an education that prepares them to function in our state's society. Even the requirement regarding standardized testing falls short: that provision simply mandates that all private schools "administer, at least once in each school year, a nationally standardized test . . . to all students enrolled or regularly attending grades three, six, and nine." *Id.* § 115C-549; *see also id.* § 115C-557. A similar testing requirement exists for eleventh grade students. *Id.* § 115C-550; *see also id.* § 115C-558. These testing standards do not specify that students take any particular test, nor do they require any minimum result. When a wide range of testing options are available and administered, it can be difficult to compare results across schools (a tool which is regularly used to determine the efficacy of our public schools). While the regulations governing private schools do require comparisons with public school populations, these provisions impose no consequences, regardless of test results. Moreover, the standards require no accreditation of schools and no particular training or certification of teachers. As a result, these standards fail to ensure that spending on these schools through public Opportunity Scholarship Program funds is for any public purpose.

Third, defendants point to statutes regulating schools participating in the Opportunity Scholarship Program. In addition to the above requirements for private and nonpublic schools, schools wishing to participate in the program must also:

> (1) Provide to the [State Education Assistance] Authority documentation for required tuition and fees charged to the student by the nonpublic school.
>
> (2) Provide to the Authority a criminal background check conducted for the staff member with the highest decision-making authority, as defined by the bylaws, articles of incorporation, or other governing document, to ensure that person has not been convicted of any crime listed in G.S. 115C-332.
>
> (3) Provide to the parent or guardian of an eligible student, whose tuition and fees are paid in whole or in part with a scholarship grant, an annual written explanation of the student's progress, including the student's scores on standardized achievement tests.
>
> (4) Administer, at least once in each school year, a nationally standardized test or other nationally standardized

> equivalent measurement selected by the chief administrative officer of the nonpublic school to all eligible students whose tuition and fees are paid in whole or in part with a scholarship grant enrolled in grades three and higher. The nationally standardized test or other equivalent measurement selected must measure achievement in the areas of English grammar, reading, spelling, and mathematics. Test performance data shall be submitted to the Authority by July 15 of each year. Test performance data reported to the Authority under this subdivision is not a public record under Chapter 132 of the General Statutes.
>
> (5) Provide to the Authority graduation rates of the students receiving scholarship grants in a manner consistent with nationally recognized standards.
>
> (6) Contract with a certified public accountant to perform a financial review, consistent with generally accepted accounting principles, for each school year in which the school accepts students receiving more than three hundred thousand dollars ($300,000) in scholarship grants awarded under this Part.

Id. § 115C-562.5(a) (2014). Like the standards referenced above for private schools in general, none of these additional requirements relates to the quality of education received by enrolled students. Simply mandating that a report card be sent home to parents provides no guarantee that the education received is sufficient. And the same problems exist as articulated above regarding the requirements to administer standardized tests.

Finally, defendants point out the Opportunity Scholarship Program is required by statute to report to the General Assembly. Under Section 115C-562.7, the program's overseers must report annually to the legislature specific administrative statistics (relating to enrollment numbers, student demographics, and funds received), as well as "[l]earning gains or losses of students receiving scholarship grants." *Id.* § 115C-562.7 (2014). While the data will allow the legislature insight into the successes of the program, such reporting does not determine constitutionality. First, the legislature is under no obligation to act on the reports. Second, as we held long ago in *Madison Cablevision*, it is ultimately up to this Court to determine if public spending serves a public purpose. 325 N.C. at 644-45, 386 S.E.2d at 206. Legislative oversight does not automatically make a

controversial program constitutional, particularly when, as here, the law creating and governing the program mandates no action.

Defendants themselves admit that the program lacks the standards outlined in *Hoke County* for the employment of certified teachers and principals and for curriculum. *Hoke Cty. Bd. of Educ.*, 358 N.C. at 636, 599 S.E.2d at 389. Despite this concession, they argue that because this is a facial challenge to the statute, plaintiffs must show that the program is unconstitutional under all conceivable facts and circumstances. *See, e.g.*, *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970). To that end, defendants argue that even if substantive standards were required under our state constitution, some of the participating private schools would meet those standards. This argument falls short, however, because our state constitution mandates that *every child* obtaining an education paid for by public funds receive an education that prepares him to succeed in society, and because we are analyzing the statutory framework of the program, not the merits of a specific school. N.C. Const. art. I, § 15; id. art. IX, § 2(1); *Leandro*, 346 N.C. at 351, 488 S.E.2d at 257 (concluding that our state constitution "requires that *all children* have the opportunity for a sound basic education" (emphasis added)). While I acknowledge that "[w]e seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them," it is important to remember that we must also "measure the balance struck in the statute against the minimum standards required by the constitution." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280-81 (2009) (citation omitted). Here those minimum standards require that children receiving a publicly funded education obtain an education that serves a public purpose. The statute at issue here creates a program that fails to incorporate any requirement to determine, much less ensure, that any, let alone all, children enrolled are receiving a real education; as such, the statute cannot survive a facial challenge.

Private schools are free to provide whatever education they deem fit within the governing statutes' requirements. When parents send their children to any private school of their choosing on their own dime, as they are free to do, that education need not satisfy our constitutional demand that it be a for a public purpose. However, when public funds are spent to enable a private school education, that spending must satisfy the public purpose clause of our constitution by preparing students to contribute to society. Without meaningful standards meant to ensure that this or any minimum threshold is met, public funds cannot be spent constitutionally through this Opportunity Scholarship Program.

As stated above, I would not necessarily impose the same detailed requirements on our private schools receiving public funds as are imposed on purely public schools by *Leandro* and its progeny. I do conclude that such spending must include some standards by which to measure compliance with the public purpose doctrine; the complete lack of any such standards in North Carolina's voucher program makes determining such compliance impossible. It is instructive that all other states that have adopted similar programs have included substantive requirements. Although other states certainly are not bound by constitutional obligations identical to ours, examining their similar programs and the substantive standards imposed on participating schools exposes the woeful lack of oversight in the Opportunity Scholarship Program here. For example, compared with ten similar programs across the country, North Carolina's program falls painfully short. As opposed to other jurisdictions' legislative requirements for participating private schools in the categories of state approval or accreditation, state-required curriculum, required teacher qualifications, required participation in a state testing program, and required number of instructional days or hours, the Opportunity Scholarship Program fails to incorporate any of those mandates. In comparison, six of the ten other jurisdictions have requirements in all those areas; nine out of ten have requirements in at least four of the five areas; and all ten have requirements in at least one of these areas.[13] For example, in Indiana (which has the largest state wide voucher program in the country), participating schools must be accredited, Ind. Code. § 20-51-1-6(a)(3) (2010); Ind. Code. Ann. § 20-51-1-4.7(4) (West 2013), and must teach subjects prescribed by the State, Ind. Code. Ann. § 20-51-4-1(f)(9) (West 2011). These schools must participate in state wide testing. *Id.* § 20-51-1-4.7(5) (West 2013). In Louisiana participating schools must be approved by a state board, and approval is contingent on a showing that the quality of the curriculum is at least as high as that mandated for similarly situated public schools. La. Stat. Ann. § 17:11 (2001); *id.* § 17:4021(A) (West Supp. 2012). Even in Arizona, the least regulated jurisdiction behind North Carolina identified by amici, participating schools must educate students in reading, grammar, math, social studies, and science. Ariz. Rev. Stat. Ann. § 15-2402(B)(1) (West Supp. 2011). As summarized above, North Carolina's Opportunity Scholarship Program lacks any kind of substantive oversight, curriculum standards, or instructional requirements. Schools receiving public

13. According to the brief filed by amici curiae Education Scholars, the other jurisdictions include Arizona, Cleveland, the District of Columbia, Indiana, Louisiana, Maine, Milwaukee, Ohio, Vermont, and Wisconsin.

funding through the program are essentially free to employ whomever they desire to teach whatever they desire. This is a perfectly acceptable scheme for truly private schools, but it fails utterly to satisfy the constitutionally mandated educational standards required when public funds are spent on education.

This failure brings me to the second constitutional flaw in the Opportunity Scholarship Program: the breach of the State's duty to guard and maintain the right to the privilege of education as set forth in Article I, Section 15, which is part of our constitution's Declaration of Rights. Notwithstanding this constitutional provision's clear statement that the people of our State have "a right to . . . education" and that it is the State's duty "to guard and maintain that right," N.C. Const. art. I, § 15, the majority indicates that this constitutional provision merely states a "general proposition concerning the right to the privilege of education"; that this provision is merely aspirational, rather than substantive, in nature; and that plaintiffs' reliance on it as an independent source of relief is misplaced. The majority has not, however, cited any decision from this Court in support of this proposition, and I believe the majority's assertion is inconsistent with this Court's constitutional jurisprudence.

In *Leandro* this Court concluded that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution worked together in combination to "guarantee every child of this state an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255. In other words, this Court gave Article I, Section 15, considered in conjunction with other constitutional provisions, substantive effect. As such, the plain language of Article I, Section 15 and this Court's decision in *Leandro* regarding the interplay between Article I, Section 15 and Article IX, Section 2 makes me unable to accept the majority's statements regarding the substantive import of this constitutional provision. *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 62-63 (2d ed. 2013) (citing *Leandro* as an example in which, along with other constitutional provisions, Article I, Section 15 was given substantive effect by this Court and stating that "[i]n addition to the substantive component, this section may also secure other rights, the violation of which could subject a local school board to suit without the benefit of governmental immunity or insurance coverage").

Turning to the application of Article I, Section 15 to the instant matter, this voucher program, as explained above, allows for taxpayer funds to be spent on private schooling with no required standard to ensure that teachers are competent or that students are learning at all. I must conclude that by creating this program, the State's legislature has

completely abrogated the duty to "guard and maintain [the] right" to an education. N.C. Const. art I, § 15. As the trial court concluded, "[t]he General Assembly fails the children of North Carolina when they are sent with taxpayer money to private schools that have no legal obligation to teach them anything." This failure violates the duty set forth in Article I, Section 15.

This Court's duty to the people of our State, as expressed in several clauses of our constitution, is to ensure that if taxpayer money is spent on private education, the expenditure is for an education that can prepare our children to participate and thrive in our state's society. When the General Assembly fails to ensure that these constitutional requirements are satisfied, this Court must exercise its responsibility to do otherwise. Because the majority fails to do so, I respectfully dissent.

Justices BEASLEY and ERVIN join in this dissenting opinion.

Justice BEASLEY dissenting.

I join fully Justice Hudson's dissent. I write separately to explain my additional concerns with the Opportunity Scholarship Program as currently enacted. I also write to urge caution and to reiterate the State's duties under the North Carolina Constitution "to guarantee every child of this state an opportunity to receive a sound basic education in our public schools," *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997), and to "*afford*[ ] *school facilities of recognized and ever-increasing merit to all the children of the State . . . to the full extent that our means could afford and intelligent direction accomplish*," *id.* at 346, 488 S.E.2d at 254 (emphasis added) (quoting *Bd. of Educ. v. Bd. of Cty. Comm'rs*, 174 N.C. 469, 472, 93 S.E. 1001, 1002 (1917)).

The Supreme Court of the United States made the following prescient observation regarding education more than sixty years ago. These words remain equally valid now.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening

> the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Bd. of Educ., 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873, 880 (1954), *additional proceedings at* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). Central to the Court's decision was the understanding that "[w]e must consider public education in the light of its full development and its present place in American life." *Brown*, 347 U.S. at 492, 74 S. Ct. at 691, 98 L. Ed. 2d at 880.

Free public education historically has been, and today remains, vital to American life. Its diminishment in quality or its concentration among a few invites despots to power and risks oppressing the rest. With continued necessity for preserving and promoting free public education clearly in view, I turn to the Opportunity Scholarship Program.

The Court correctly explains that our circumspect inquiry is constrained to the facial challenge presented in view of established principles of constitutional interpretation. Nonetheless, the majority's opinion should not be read so broadly as to set an impossible standard for a facial challenge to legislation, particularly when the legislation stands to affect the education of the children of North Carolina. *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280-81 (2009) ("This Court will only measure the balance struck in the statute against the minimum standards required by the constitution."). It is well established that, subject to the constitution, it is for the General Assembly to "establish minimum educational requirements and standards." *Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985); see id. at 401-02, 329 S.E.2d at 647 ("We also recognize that the state has a compelling interest in seeing that children are educated and may, constitutionally, establish minimum educational requirements and standards for this education." (citations omitted)). But those standards must comport with the constitutional minimum, and it has long been beyond dispute that this Court has jurisdiction to determine whether legislation meets the minimum allowed by our Constitution. *E.g.*, *Bayard v. Singleton*, 1 N.C. 5 (1787).

This Court already has articulated "the minimum standards required by the constitution," *Beaufort Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d

at 281, when the General Assembly purports to provide for public education. In *Leandro* we "address[ed] plaintiff-parties' constitutional challenge to the state's public education system." 346 N.C. at 345, 488 S.E.2d at 254. We explained that the North Carolina Constitution guarantees every child the right to a sound basic education, and we defined the mandate for public education by explaining that

> [f]or purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255 (citations omitted).

Although *Leandro* concerned public schools, this Court has established that the particular type of building in which the education occurs is immaterial. *See Delconte*, 313 N.C. 384, 329 S.E.2d 636 (allowing home schools). It is the opportunity for a constitutionally permissible minimum quality of education that is essential. If the General Assembly appropriates public funds[14] for public education, whether that education occurs in public schools or nonpublic schools receiving public funds, the General Assembly is limited to doing so only for the constitutionally permissible public purpose of providing a "sound basic education."

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14. The General Assembly is conspicuously careful to avoid acknowledging that the grants at issue are public funds. *See, e.g.*, N.C.G.S. § 115C-555 (2013) ("For the purposes of this Article, scholarship grant funds awarded pursuant to Part 2A of this Article to eligible students attending a nonpublic school *shall not be considered funding from the State of North Carolina.*") (emphasis added); *id.* § 115C-562.1(6) (2013) (defining "Scholarship grants" as "Grants awarded annually by the Authority to eligible students"). The majority correctly notes that the program is funded through appropriations from the general revenue of the Board of Governors of The University of North Carolina.

When *public funds* are used for *nonpublic initiatives* to fulfill the constitutional public education mandate, the appropriation may violate the public purpose clause, especially if the grant recipients are chosen because the public school system fails to meet their educational needs.

In denying relief for plaintiffs under North Carolina Constitution Article IX, Sections 2(1), 5, and 6, the majority posits that these sections constitutionally protect funds designated for education but do not limit the General Assembly's designation of other public funds for additional nonpublic education initiatives. In setting education policy, the danger posed by the General Assembly in designating general funds for nonpublic education and a non-public purpose is that it effectively undermines the support the legislature is constitutionally obligated to provide to the public school system. Because the Opportunity Scholarship Program circumvents the mission of public schools to successfully offer a sound basic education to all students, the General Assembly has failed to meet the mandated minimum standard.

Given North Carolina's history of public education and the State's continued efforts to address shortcomings to deliver on its constitutional mandate, the General Assembly's decision to pursue vouchers at this time and in this way is vexing.[15] The majority notes that the purpose of the grants is to address grade level deficiencies of a "large percentage of economically disadvantaged students," but as shown below, it is unclear whether or how this program truly addresses those children's needs. While every member of this Court fully recognizes the legislature's responsibility to implement education policy and its right to pursue novel approaches, *Redev. Comm'n v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960), this Court should not permit the State to lessen its obligation to the children of North Carolina.

In endeavoring to provide its citizens with a sound basic education, North Carolina has long embraced a complex variety of educational initiatives, including public schools, secular and sectarian private schools, and home schools. *See generally* M.C.S. Noble, *A History of the Public Schools of North Carolina* (1930) (discussing the history of public education in North Carolina, including the development of curricula,

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15. There may be instances when the use of public funds for nonpublic schools can serve a public purpose. While public schools are supposed to accommodate all students' educational needs, some circumstances exist in which the public purpose may be best met by funding a nonpublic educational situation, such as the education of children with disabilities under North Carolina General Statutes Chapter 115C, Subchapter IV, Article 9. This issue, however, is not before our Court at this time.

religious instruction in public schools, teachers' qualifications, and segregated schools); *see also Delconte*, 313 N.C. at 397-400, 329 S.E.2d at 645-46 (summarizing the development of public education legislation). Our legislature has met the standard with varying degrees of success. It is worth observing that our General Assembly previously embraced vouchers for approximately a decade as a means to avoid the State's obligation under the U.S. Constitution to desegregate public schools as required by the Supreme Court of the United States in its seminal *Brown v. Board* decisions. *See* Milton Ready, *The Tar Heel State: A History of North Carolina* 349 (2005) (describing the "Pearsall Plan" as "a stubbornly conservative strategy that eventually satisfied no one"); *id.* at 355-56 (explaining that beginning in the 1960s and 1970s, "[s]ophisticated racial and segregationist appeals . . . . took on a more abstract form" and "[m]any of the newer strategies came wrapped in terms as local control, vouchers, charter schools, tax cuts, distributive welfare, and limited government interference in the private affairs of ordinary citizens"); *see also Hawkins v. N.C. State Bd. of Educ.*, No. 2067, 11 Race Rel. L. Rep. 745 (W.D.N.C. Mar. 31, 1966) (declaring the Pearsall Plan facially unconstitutional). Indeed, some of our schools are only now achieving unitary status under long-standing federal orders to desegregate. *E.g.*, *Everett v. Pitt Cty. Bd. of Educ.*, 788 F.3d 132 (4th Cir. 2015). Even those victories, however, are tempered by a different reality:

> The rapid rate of de facto resegregation in our public school system in recent decades is well-documented. As one scholar put it, "Schools are more segregated today than they have been for decades, and segregation is rapidly increasing." Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 Am. U. L. Rev. 1461, 1461 (2003) (footnote omitted); *see also* Lia B. Epperson, *Resisting Retreat: The Struggle for Equity in Educational Opportunity in the Post–Brown Era*, 66 U. Pitt. L. Rev. 131, 145 (2004) ("American public schools have been steadily resegregating for more than a decade, dismantling the integrative successes of hundreds of districts that experienced significant levels of integration in the wake of *Brown* and its progeny. Such racial isolation in public schools is worse today than at any time in the last thirty years.").

Id. at 150-51 (Wynn, J., dissenting).

For now, as noted by the majority, the program is available only to lower-income families. This availability assumes that private schools are

available within a feasible distance, that these families win the grant lottery, and that their children gain admission to the nonpublic school of their choice. With additional costs for transportation, tuition, books, and, at times, school uniforms, for the poorest of these families, the "opportunity" advertised in the Opportunity Scholarship Program is merely a "cruel illusion." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154-55 (Tenn. 1993) ("[E]ducational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence . . . . Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged. . . . 'The notion of local control was a "cruel illusion" for the poor districts due to limitations placed upon them by the system itself. . . .' ") (first and second ellipses in original) (quoting *Dupree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 346, 651 S.W.2d 90, 93 (1983)) (third ellipsis in original))).

Without systemic and cultural adjustments to address social inequalities, the further cruel illusion of the Opportunity Scholarship Program is that it stands to exacerbate, rather than alleviate, educational, class, and racial divides. *See generally* Julian E. Zelizer, *How Education Policy Went Astray*, The Atlantic (Apr. 10, 2015), http://www.theatlantic.com/education/archive/2015/04/how-education-policy-went-astray/390210/ (last visited July 16, 2015) (discussing changes in American education policy over the past fifty years and the relationship between continually failing education policy and economic inequality). *See also* Br. for N.C. Conference of the NAACP as Amicus Curiae Supporting Plaintiff-Appellees at 3-9, *Hart v. State*, ___ N.C. ___, ___ S.E.2d ___ (2015) (No. 372A14) (discussing discriminatory "creaming" and "cropping" practices by which private schools admit "the best and least costly students" or "deny[ ] services and enrollment to diverse learners" (citations omitted)). In time, public schools may be left only with the students that private schools refuse to admit based on perceived lack of aptitude, behavioral concerns, economic status, religious affiliation, sexual orientation, or physical or other challenges, or public schools may become grossly disproportionately populated by minority children. The policy promoted by the Opportunity Scholarship Program, therefore, may serve to widen already considerable gaps and create a larger class of underserved children.

REVEREND ROBERT RICHARDSON, III, REVEREND MICHAEL AND DELORES GALLOWAY, STEVEN W. SIZEMORE, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, ALAMANCE-BURLINGTON BOARD OF EDUCATION, ASHEBORO CITY BOARD OF EDUCATION, CATAWBA COUNTY BOARD OF EDUCATION, CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION, CHATHAM COUNTY BOARD OF EDUCATION, CLEVELAND COUNTY BOARD OF EDUCATION, COLUMBUS COUNTY BOARD OF EDUCATION, CRAVEN COUNTY BOARD OF EDUCATION, CURRITUCK COUNTY BOARD OF EDUCATION, DAVIDSON COUNTY BOARD OF EDUCATION, DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION, EDENTON-CHOWAN BOARD OF EDUCATION, GATES COUNTY BOARD OF EDUCATION, GRAHAM COUNTY BOARD OF EDUCATION, HALIFAX COUNTY BOARD OF EDUCATION, HARNETT COUNTY BOARD OF EDUCATION, HYDE COUNTY BOARD OF EDUCATION, LEE COUNTY BOARD OF EDUCATION, LENOIR COUNTY BOARD OF EDUCATION, LEXINGTON CITY BOARD OF EDUCATION, MACON COUNTY BOARD OF EDUCATION, MARTIN COUNTY BOARD OF EDUCATION, MOUNT AIRY CITY BOARD OF EDUCATION, NEWTON-CONOVER CITY BOARD OF EDUCATION, ONSLOW COUNTY BOARD OF EDUCATION, ORANGE COUNTY BOARD OF EDUCATION, PAMLICO COUNTY BOARD OF EDUCATION, PERSON COUNTY BOARD OF EDUCATION, PITT COUNTY BOARD OF EDUCATION, POLK COUNTY BOARD OF EDUCATION, ROCKINGHAM COUNTY BOARD OF EDUCATION, RUTHERFORD COUNTY BOARD OF EDUCATION, SCOTLAND COUNTY BOARD OF EDUCATION, STANLEY COUNTY BOARD OF EDUCATION, SURRY COUNTY BOARD OF EDUCATION, VANCE COUNTY BOARD OF EDUCATION, WARREN COUNTY BOARD OF EDUCATION, WASHINGTON COUNTY BOARD OF EDUCATION, WHITEVILLE CITY BOARD OF EDUCATION, YANCEY COUNTY BOARD OF EDUCATION, ALEXANDER COUNTY BOARD OF EDUCATION, ASHEVILLE CITY BOARD OF EDUCATION, AVERY COUNTY BOARD OF EDUCATION, BERTIE COUNTY BOARD OF EDUCATION, BLADEN COUNTY BOARD OF EDUCATION, CAMDEN COUNTY BOARD OF EDUCATION, CASWELL COUNTY BOARD OF EDUCATION, CHEROKEE COUNTY BOARD OF EDUCATION, CLINTON CITY BOARD OF EDUCATION, CUMBERLAND COUNTY BOARD OF EDUCATION, EDGECOMBE COUNTY BOARD OF EDUCATION, ELIZABETH CITY-PASQUOTANK BOARD OF EDUCATION, FRANKLIN COUNTY BOARD OF EDUCATION, GRANVILLE COUNTY BOARD OF EDUCATION, GUILFORD COUNTY BOARD OF EDUCATION, HAYWOOD COUNTY BOARD OF EDUCATION, HERTFORD COUNTY BOARD OF EDUCATION, HICKORY CITY BOARD OF EDUCATION, HOKE COUNTY BOARD OF EDUCATION, JACKSON COUNTY BOARD OF EDUCATION, JONES COUNTY BOARD OF EDUCATION, KANNAPOLIS CITY BOARD OF EDUCATION, MONTGOMERY COUNTY BOARD OF EDUCATION, MOORE COUNTY BOARD OF EDUCATION, MOORESVILLE GRADED SCHOOL DISTRICT BOARD OF EDUCATION, NASH-ROCKY MOUNT BOARD OF EDUCATION, NORTHAMPTON COUNTY BOARD OF EDUCATION, BOARD OF TRUSTEES FOR ROANOKE RAPIDS GRADED SCHOOL DISTRICT, SAMPSON COUNTY BOARD OF EDUCATION, THOMASVILLE CITY BOARD OF EDUCATION, AND TRANSYLVANIA COUNTY BOARD OF EDUCATION, PLAINTIFFS

v.

STATE OF NORTH CAROLINA, NORTH CAROLINA STATE BOARD OF EDUCATION, AND NORTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY, DEFENDANTS,

and

CYNTHIA PERRY, GENNELL CURRY, TIM MOORE, AND PHIL BERGER, INTERVENOR-DEFENDANTS

RICHARDSON v. STATE

[368 N.C. 158 (2015)]

No. 384A14

Filed 23 July 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from an order and final judgment granting summary judgment and injunctive relief for plaintiffs entered on 28 August 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. On 14 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 24 February 2015.

Poyner Spruill LLP, by Edwin M. Speas, Jr. and Carrie V. McMillan; and Tharrington Smith, LLP, by Deborah R. Stagner and Kenneth A. Soo, for individual and school board plaintiff-appellees;[1] *and Robert F. Orr for plaintiff-appellee North Carolina School Boards Association.*

Roy Cooper, Attorney General, by Lauren M. Clemmons, Special Deputy Attorney General, for defendant-appellants.

Institute for Justice, by Richard D. Komer, pro hac vice, Robert Gall, and Renée Flaherty, pro hac vice; and Shanahan Law Group, PLLC, by John E. Branch, III, for parent intervenor-defendant-appellants Cynthia Perry and Gennell Curry.

Nelson Mullins Riley & Scarborough, LLP, by Noah H. Huffstetler III and Stephen D. Martin, for legislative officer intervenor-defendant-appellants Tim Moore and Phil Berger.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jill R. Wilson, and Robert J. King III; and AdvancED, by Kenneth Bergman, for Advance Education, Inc., amicus curiae.

American Civil Liberties Union of North Carolina Legal Foundation, by Christopher Brook, for Americans United for Separation of Church and State, American Civil Liberties Union, American Civil Liberties Union of North Carolina Legal

1. Attorneys Speas and McMillan are counsel for all plaintiff-appellees except Chatham County Board of Education, Nash-Rocky Mount Board of Education, Board of Trustees for Roanoke Rapids Graded School District, and Granville County Board of Education. Attorneys Stagner and Soo represent these four entities.

Foundation, Anti-Defamation League, Baptist Joint Committee for Religious Liberty, and Interfaith Alliance Foundation, amici curiae.

Williamson, Dean, Williamson & Sojka, L.L.P., by Nickolas J. Sojka, Jr.; and Michael A. Rebell, pro hac vice, for Campaign for Educational Equity, Teachers College, Columbia University, amicus curiae.

Liberty, Life, and Law Foundation, by Deborah J. Dewart; Thomas C. Berg, pro hac vice, University of St. Thomas School of Law (Minnesota); and Christian Legal Society, by Kimberlee Wood Colby, pro hac vice, for Christian Legal Society; North Carolina Christian School Association; Roman Catholic Diocese of Charlotte, North Carolina; Roman Catholic Diocese of Raleigh, North Carolina; North Carolina Family Policy Council; Liberty, Life, and Law Foundation; Association of Christian Schools International; American Association of Christian Schools; and National Association of Evangelicals, amici curiae.

Campbell Shatley, PLLC, by Chad R. Donnahoo; and National School Boards Association, by Francisco M. Negrón, Jr., pro hac vice, for National School Boards Association, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for Pacific Legal Foundation, amicus curiae.

PER CURIAM.

For the reasons stated in *Hart v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2015) (372A14), the decision of the trial court is reversed.

REVERSED.

Justice HUDSON, Justice BEASLEY, and Justice ERVIN dissent for the reasons stated in Justice Hudson's dissenting opinion in *Hart v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2015) (372A14). Justice BEASLEY also dissents for the reasons stated in her dissenting opinion in *Hart v. State*, *id.* at ___, ___ S.E.2d at ___.

STATE OF NORTH CAROLINA
v.
WALTER ERIC MCKINNEY

No. 47PA14

Filed 21 August 2015

Search and Seizure—search warrant—probable cause—totality of circumstances

The trial court did not err by denying defendant's motion to suppress evidence of contraband found in his home pursuant to a search warrant. Based on the totality of the circumstances, the magistrate had a substantial basis for concluding that probable cause existed to justify the warrant. The affidavit attached to the search warrant application described the citizen complaint about suspected drug activity that led to the officers' surveillance, the arrest of a man who spent six minutes in defendant's home and was found to have a substantial amount of cash and remnants of marijuana in his vehicle, and the text messages regarding a drug sale on the man's cell phone.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 752 S.E.2d 726 (2014), reversing a judgment entered on 8 October 2012 by Judge Patrice A. Hinnant and an order entered on 11 October 2012 by Judge William Z. Wood, Jr., both in Superior Court, Guilford County. Heard in the Supreme Court on 16 March 2015.

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

Staples S. Hughes, *Appellate Defender*, *by Jon H. Hunt*, *Assistant Appellate Defender*, *for defendant-appellee.*

EDMUNDS, Justice.

An investigation that began with an anonymous complaint to police led to a search of defendant's home, where contraband was found. After the trial court denied defendant's motion to suppress the evidence found during the search, he pleaded guilty to several drug-related offenses. We conclude that the totality of circumstances demonstrates that the magistrate had a substantial basis for concluding that probable cause existed to justify issuing a warrant authorizing the search of defendant's

home. Accordingly, we reverse the holding of the Court of Appeals to the contrary.

On 22 April 2012, a citizen met with Officer Christopher Bradshaw of the Greensboro Police Department and reported observing heavy traffic in and out of Apartment C at 302 Edwards Road. Pointing out that the visitors made abbreviated stays at the apartment, the citizen also reported having seen the resident of that apartment dealing in narcotics in the parking lot of the apartment complex. The citizen added that he or she believed that behavior was related to narcotics.

In response to this report, Officer Bradshaw and others in his unit immediately began surveillance of the named apartment and saw a red Pontiac arrive there at 12:41 p.m. The driver of the vehicle entered the apartment, emerged six minutes later, and drove away. One of the officers promptly stopped the Pontiac for a traffic violation, and the driver, Roy Foushee, was found to have $4,258.00 in cash on his person. A gallon-size plastic bag that contained marijuana remnants was recovered from the interior of the vehicle.

The officers arrested Foushee, and, incident to the arrest, searched his cell telephone. A series of text messages exchanged minutes before Foushee was seen entering the Edwards Road apartment caught the officers' attention. The first, timed at 12:12 p.m., was sent to Foushee from "Chad" and said, "Bra, when you come out to get the money, can you bring a fat 25. I got the bread." The next, also from "Chad," asked, "Can you bring me one more, Bra?" Foushee replied, "About 45," and "Chad" responded, "ight."

Inferring that Foushee had just completed a delivery of drugs for cash, Officer Bradshaw applied for a search warrant for the Edwards Road apartment. The attached affidavit described the nature of the citizen complaint that triggered the investigation, the results of the officers' surveillance, the arrest of Foushee, the material found on Foushee's person and in his car, and the text messages recovered from Foushee's telephone. The warrant was issued and executed that same day. After discovering controlled substances, drug paraphernalia, and a firearm and ammunition in the apartment, the officers arrested defendant, who lived there and was present during the search. The name "Chad" was never linked to anyone identified in the investigation.

On 2 July 2012, defendant was indicted by a Guilford County grand jury for trafficking in cocaine by possession, possession of cocaine, possession of marijuana with intent to sell or deliver, possession of marijuana, and maintaining a dwelling used for selling controlled substances,

all in violation of the North Carolina Controlled Substances Act. He also was indicted for possession of a firearm by a felon, in violation of N.C.G.S. § 14-415.1. On 7 September 2012, defendant filed a motion to suppress the evidence seized from his residence pursuant to the search warrant, arguing that the warrant was not supported by probable cause. At the conclusion of an evidentiary hearing held on 11 September 2012, the trial court orally denied the motion. On 11 October 2012, the trial court filed a written order finding that under the totality of circumstances, "a sufficient basis for probable cause in the supporting attachment to the search warrant for the defendant's residence" existed.

On 1 October 2012, defendant entered a negotiated agreement in which he pleaded guilty to possession of a firearm by a felon, possession of marijuana with intent to sell or deliver, possession of cocaine with intent to sell or deliver, and maintaining a dwelling place to keep or sell controlled substances. In the agreement, defendant reserved his right to appeal the trial court's denial of his motion to suppress. The trial court imposed an active sentence of eleven to twenty-three months of imprisonment.

Defendant appealed to the Court of Appeals, arguing that the trial court erred in denying his motion to suppress the evidence seized from his residence. That court found that the information provided in Officer Bradshaw's affidavit was "insufficient to establish probable cause to search defendant's apartment," *State v. McKinney*, ___ N.C. App. ___, ___, 752 S.E.2d 726, 730 (2014), because it "implicates [defendant's] premises *solely as a conclusion of the affiant*," *id.* at ___, 752 S.E.2d at 730 (alteration in original) (quoting *State v. Campbell*, 282 N.C. 125, 131, 191 S.E.2d 752, 757 (1972)). The court concluded that "[t]he inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed on the described premises—does not reasonably arise from the facts alleged." *Id.* at ___, 752 S.E.2d at 730 (alteration in original) (quoting *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757). Concluding that no "reasonable nexus" existed between Foushee's vehicle in which marijuana was found and defendant's residence, *id.* at ___, 752 S.E.2d at 730, the Court of Appeals held that the search warrant was unsupported by probable cause and reversed the trial court's denial of defendant's motion to suppress, *id.* at ___, 752 S.E.2d at 731.

In reviewing a trial court's ruling on a motion to suppress, we consider "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291

S.E.2d 618, 619 (1982). We review an opinion of the Court of Appeals for error of law. N.C. R. App. P. 16(a); *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994).

Defendant argues that his Fourth Amendment rights were violated when his apartment was searched pursuant to a warrant that he claims was issued without probable cause. The Fourth Amendment protects citizens from "unreasonable searches and seizures" and permits warrants to be issued only upon a showing of probable cause. U.S. Const. amend. IV. A "neutral and detached magistrate" determines whether probable cause exists. *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436, 440 (1948); *see also Campbell*, 282 N.C. at 131, 191 S.E.2d at 756. Courts interpreting the Fourth Amendment have expressed a "strong preference for searches conducted pursuant to a warrant." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527, 547 (1983); *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434 (1991)). "A grudging or negative attitude by reviewing courts toward warrants" is inconsistent with that preference. *United States v. Ventresca*, 380 U.S. 102, 106-08, 85 S. Ct. 741, 745, 13 L. Ed. 2d 684, 689 (1965). Recognizing that affidavits attached to search warrants "are normally drafted by nonlawyers in the . . . haste of a criminal investigation," *id.* at 108, 85 S. Ct at 746, 13 L. Ed. 2d at 689, courts are reluctant to scrutinize them "in a hypertechnical, rather than a commonsense, manner," *id.* at 109, 85 S. Ct. at 746, 13 L. Ed. 2d at 689.

Under North Carolina law, an application for a search warrant must be supported by an affidavit detailing "the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched." N.C.G.S. § 15A-244(3) (2013). A magistrate must "make a practical, common-sense decision," based on the totality of the circumstances, whether there is a "fair probability" that contraband will be found in the place to be searched. *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548; *e.g.*, *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 598 (2014). This standard for determining probable cause is flexible, *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984), permitting the magistrate to draw "reasonable inferences" from the evidence in the affidavit supporting the application for the warrant, *see Riggs*, 328 N.C. at 221, 400 S.E.2d at 434 (quoting *Gates*, 462 U.S. at 240, 103 S. Ct. at 2333, 76 L. Ed. 2d at 549), and from supporting testimony, as set out in N.C.G.S. § 15A-245(a). That evidence is viewed from the perspective of a police officer with the affiant's training and experience, *Benters*, 367 N.C. at 672, 766 S.E.2d at 603 (citing *Ornelas v. United*

States, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911, 920-21 (1996)), and the commonsense judgments reached by officers in light of that training and specialized experience, *see United States v. Ortiz*, 422 U.S. 891, 897, 95 S. Ct. 2585, 2589, 45 L. Ed. 2d 623, 629 (1975).

Probable cause requires not certainty, but only "*a probability or substantial chance* of criminal activity." *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433 (quoting *Gates*, 462 U.S. at 244 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13 (emphasis added)). The magistrate's determination of probable cause is given "great deference" and "after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citing *Gates*, 462 U.S. at 236, 103 S. Ct. at 2331, 76 L. Ed. 2d at 547). Instead, a reviewing court is responsible for ensuring that the issuing magistrate had a " 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U.S. at 238-39, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548 (alterations in original) (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697, 708 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980)).

Defendant makes several arguments contending that the warrant was invalid. He maintains that the citizen complaint underlying the officer's application for the search warrant was unreliable because the complaint gave no indication when the citizen observed either the short stays or drugs purportedly changing hands, that the complaint was only a "naked assertion" that the observed activities were narcotics-related, and that the State failed to establish a nexus between Foushee's vehicle and defendant's apartment. None of these arguments are persuasive, either individually or collectively.

As for the amount of detail in the citizen's complaint, "an officer '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.' " *State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (quoting *Jones*, 362 U.S. at 269, 80 S. Ct. at 735, 4 L. Ed. 2d at 707). Moreover, such a citizen complaint is not necessarily reviewed in isolation. In addition to the information detailed above that the citizen gave Officer Bradshaw, the affidavit stated that officers thereafter conducted surveillance of the identified apartment, observed Foushee make a six-minute visit, and found both marijuana remnants in an otherwise empty bag and a substantial cash sum during a subsequent investigatory stop. The officer's direct observations were thus consistent with the citizen's information.

As for the nexus between Foushee's vehicle and defendant's apartment, while defendant points out that the evidence gave no indication how long the marijuana could have been in Foushee's car and that Foushee's visit with defendant could just as easily have been innocent, the affidavit included relevant texts exchanged between Foushee and "Chad" minutes before Foushee arrived at defendant's apartment. The timing and substance of these texts suggested preparation for and negotiation of a drug transaction involving Foushee and someone he was about to meet. Although no "Chad" was identified when defendant's apartment was later searched, this contingency could not be foreseen when Officer Bradshaw applied for the warrant. Instead, the information available to the officer and provided to the magistrate at the time the search warrant was requested and issued sufficiently indicated that the transaction adumbrated in the texts was consummated moments later in defendant's apartment. Thus, this case is distinguishable from *Campbell*, cited both by defendant and the Court of Appeals. In *Campbell*, the affidavit asserted only that the defendants were named in arrest warrants charging narcotics offenses, were selling drugs to certain individuals, and were residing at the residence to be searched. 282 N.C. at 130, 191 S.E.2d at 756. Unlike the case at bar, the affidavit in *Campbell* included no information indicating that drugs had been possessed in or sold from the dwelling to be searched. As a result, *Campbell* does not control the outcome here.

We conclude that, under the totality of circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants recovered from Foushee's vehicle and defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search defendant's apartment. Considering this evidence in its entirety, "the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Id.* at 131, 191 S.E.2d at 757. Accordingly, we reverse the holding of the Court of Appeals to the contrary.

REVERSED.

IN RE R.R.N.

[368 N.C. 167 (2015)]

IN THE MATTER OF R.R.N.

No. 186PA14

Filed 21 August 2015

Child Abuse, Dependency, and Neglect—sexual abuse by adult during sleepover—abuser not caretaker—not abused and neglected juvenile

The trial court erred by adjudicating a child an abused and neglected juvenile after she was sexually abused by an adult relative during a sleepover. The abuser's supervision of the child for one night did not render him a "caretaker" under N.C.G.S. § 7B-101(3). Factors that determine whether a person is "entrusted with a juvenile's care" include duration and frequency of care, location of care, and decision-making authority.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 757 S.E.2d 503 (2014), reversing an order entered on 22 July 2013 by Judge Pell C. Cooper in District Court, Wilson County. Heard in the Supreme Court on 16 February 2015.

Stephen L. Beaman for petitioner-appellant Wilson County Department of Social Services.

Tawanda N. Foster, Appellate Counsel, Administrative Office of the Courts, for appellee Guardian ad Litem.

Annick Lenoir-Peek, Assistant Appellate Defender, for respondent-appellee mother.

NEWBY, Justice.

This case requires us to determine whether an adult relative who supervises a child during a sleepover is a "caretaker" of that child under section 7B-101(3) of the Juvenile Code, thus involving the State in the life of the child and her family. The Juvenile Code defines a "caretaker" in part as "an adult relative entrusted with the juvenile's care." N.C.G.S. § 7B-101(3) (2013). Though an adult relative who supervises a sleepover is temporarily responsible for ensuring the child's safety while the child is visiting, such a temporary arrangement does not mean the adult is "entrusted with"

the child's care as contemplated by the Juvenile Code. When, as here, the child's mother and stepfather responded appropriately, the abuse of the child by the adult relative does not warrant the State's intrusion into the family unit. Therefore, we affirm the decision of the Court of Appeals.

At the time of the events at issue, R.R.N. was twelve years old and lived at home with her mother (respondent), stepfather, brother, and stepbrother. R.R.N.'s mother has had full custody of her since birth. Occasionally, R.R.N.'s family visited with and attended cookouts at the home of Mr. B., who is R.R.N.'s stepfather's cousin, and Mr. B.'s family. Mr. B. and his wife have a son, and the couple also had custody of two other children in 2012. During the spring and summer of 2012, Mr. B., who was thirty-six years old at the time, engaged in sexual acts with then-twelve-year-old R.R.N. During one family get-together at Mr. B.'s house, Mr. B. kissed R.R.N. on the lips and with his tongue behind a barn. On another occasion, they "rode a four wheeler into the woods" where R.R.N. performed oral sex on Mr. B, and he fondled her breasts. A short time later, Mr. B. took R.R.N. to Walmart to buy her a birthday present. During the drive back to R.R.N.'s house, Mr. B. stopped at the side of the road, where R.R.N. again performed oral sex on him and he touched her breasts. R.R.N. believed Mr. B. was her boyfriend, and the two made plans for R.R.N. to spend the night at Mr. B.'s house on 18 August 2012 so they could have sexual intercourse. Mr. B. told R.R.N. to keep their relationship secret because otherwise, he could go to jail.

On 18 August 2012, R.R.N.'s mother allowed R.R.N. to spend the night at Mr. B.'s house with Mr. B., his wife, and the three children. That night R.R.N. fell asleep in a bed with one of the other girls. After his wife fell asleep, Mr. B. carried the other girl into another room and returned to the bedroom, where R.R.N. was alone. R.R.N. performed oral sex on Mr. B., and Mr. B. digitally penetrated R.R.N.'s vagina; however, they did not have sexual intercourse.

The next day R.R.N.'s mother picked up R.R.N. from Mr. B.'s house, and R.R.N. discovered that Mr. B. had engaged in sexual relations with a woman who was not his wife. Disappointed and hurt, R.R.N. told her mother that she was in a relationship with Mr. B., and she described the inappropriate sexual conduct between them. R.R.N.'s mother and stepfather sought counseling for R.R.N. and did not allow any further contact between R.R.N. and Mr. B. R.R.N.'s mother also reported the alleged abuse to the Wilson County Department of Social Services (DSS).

DSS filed a petition alleging R.R.N. was an abused and neglected juvenile. The petition stated that Mr. B. was R.R.N.'s "caretaker" on

18 August 2012 when R.R.N. spent a single night at his house. R.R.N.'s mother moved to dismiss DSS's petition under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that the Juvenile Code did not apply because Mr. B. was not R.R.N.'s caretaker. The trial court disagreed. It concluded that Mr. B. was R.R.N.'s caretaker on 18 August 2012 and adjudicated R.R.N to be an abused and neglected juvenile, thereby allowing the court to assume authority over R.R.N. and her family. The court nevertheless found that it was in R.R.N.'s best interest that she remain in her mother's custody. R.R.N.'s mother appealed the adjudication of abuse and neglect.

The Court of Appeals reversed the trial court's adjudication, concluding that Mr. B. was not R.R.N.'s "caretaker." *In re R.R.N.*, ___ N.C. App. ___, ___, 757 S.E.2d 503, 506 (2014). The Court of Appeals explained that generally an adult is not a caretaker under the Juvenile Code unless the adult provides extended care. *Id.* at ___, 757 S.E.2d at 506. Therefore, because R.R.N.'s sleepover at Mr. B.'s house was temporary in nature, Mr. B. did not meet the definition of "caretaker." *Id.* at ___, 757 S.E.2d at 506. Accordingly, the Court of Appeals determined that the trial court erred in adjudicating R.R.N. abused and neglected. *Id.* at ___, 757 S.E.2d at 507. We allowed DSS's Petition for Discretionary Review.

"The Juvenile Code strikes a balance between the constitutional rights of a parent and the best interests of a child . . . ." *In re L.M.T.*, 367 N.C. 165, 167, 752 S.E.2d 453, 455 (2013) (citing N.C.G.S. § 7B-100(3) (2011)). Not every child who is a victim of serious criminal conduct is necessarily an abused and neglected juvenile under the Juvenile Code. Only when the family fails to provide proper care is DSS empowered to intervene. In furtherance of this limitation on intervention, the legislature confined the definition of "abused" or "neglected juveniles" to those children who are abused or neglected by a "parent, guardian, custodian, or caretaker." N.C.G.S. § 7B-101(1), (15) (2013). DSS contends that Mr. B. was R.R.N.'s caretaker on 18 August 2012 because (1) he was her adult relative, and (2) her parents "entrusted" him with her care by allowing her to spend one night at his home. We disagree and hold that, under the totality of the circumstances in this case, Mr. B. was not R.R.N.'s caretaker on 18 August 2012 because he was not "entrusted with [her] care" as intended by the statute.

The Juvenile Code defines "caretaker," in part, as

> [a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for

> a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, *an adult relative entrusted with the juvenile's care*, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services.

Id. § 7B-101(3) (emphasis added).

The "caretaker" statute protects children from abuse and neglect inflicted by people with significant, parental-type responsibility for the daily care of a child in the child's residential setting. Stepparents, foster parents, and adult members of the juvenile's household, for example, live with the child in the child's home. Similarly, house parents or cottage parents are in charge of children in nontraditional residential settings, such as dormitories or group residences, where children live for extended periods of time. Therefore, in the context of the statute as a whole, "an adult relative entrusted with the juvenile's care" is a person who has a significant degree of parental-type responsibility for the child. *See*, *e.g.*, *In re A.P.*, 165 N.C. App. 841, 844, 846, 600 S.E.2d 9, 11, 13 (2004) (concluding that a step-grandfather was a caretaker after the child lived with him temporarily for eight months). The trial court must consider the totality of the circumstances in determining whether a person is "entrusted with the juvenile's care," including the duration and frequency of care provided by the adult, the location in which that care is provided, and the decision-making authority granted to the adult.

Here, under the totality of the circumstances, Mr. B. was not "entrusted with" R.R.N.'s care on 18 August 2012, when she spent one night at his house for a children's sleepover. Both Mr. and Mrs. B. were present along with three other children, and R.R.N. returned to her mother's home the next day. Mr. B. was not responsible for R.R.N. in her own home. Furthermore, as the Court of Appeals explained, "When a parent or guardian allows a child to attend a sleepover, the parent does not relinquish responsibility over the child's health and welfare." *In re R.R.N.*, ___ N.C. App. at ___, 757 S.E.2d at 506. Though Mr. B. may have been responsible for R.R.N.'s short-term safety while she visited his home for one night, R.R.N.'s mother retained the ultimate decision-making authority over her health and welfare. Therefore, because Mr. B. was not "entrusted with" R.R.N.'s care as contemplated by N.C.G.S.

§ 7B-101(3), he was not her "caretaker" on 18 August 2012 when he sexually abused her at his home.

This interpretation of the "caretaker" statute is consistent with the Juvenile Code's dual purpose of promoting the best interests of the child while still safeguarding the parent–child relationship from needless State interference. *In re L.M.T.*, 367 N.C. at 167, 752 S.E.2d at 455; *see* N.C.G.S. § 7B-100 (2013) (stating that the purposes and policies underlying the Juvenile Code include: (1) "provid[ing] procedures . . . that protect the constitutional rights of juveniles and parents"; (2) "develop[ing] a disposition . . . that reflects . . . the strengths and weaknesses of the family"; (3) "provid[ing] for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence"; and (4) "provid[ing] standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court").

We recognize that DSS has an important role in protecting children; however, because parents have a fundamental right to parent their children, *In re A.K.*, 360 N.C. 499, 457, 628 S.E.2d 753, 758 (2006), we must "acknowledge the limits within which governmental agencies may interfere with or intervene in the parent–child relationship," *In re Stumbo*, 357 N.C. 279, 286, 582 S.E.2d 255, 260 (2003). Therefore, before subjecting families to ongoing DSS supervision and an array of possible adverse collateral consequences that can flow from an adjudication of abuse or neglect, *see, e.g.*, N.C.G.S. § 7B-903(a)(2)(c) (2013) (stating a court may order that a child be placed in foster care); *id.* § 7B-904(c) (2013) (authorizing a court to order parents to undergo psychological treatment); *In re A.K.*, 360 N.C. at 458, 628 S.E.2d at 759 ("[A] stigma is likely to attach to a person who abuses or neglects his or her child."), trial courts should consider the purposes of the Juvenile Code when determining whether intervention is necessary to protect the welfare of the child. If not, DSS should not intervene. Ultimately, the best interest of the child is the lodestar, but if parents act appropriately to protect their child, their constitutional right to rear that child is paramount. *See Troxel v. Granville*, 530 U.S. 57, 68-69, 120 S. Ct. 2054, 2061, 147 L. Ed. 2d 49, 58 (2000) (plurality) ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

Here none of the purposes of the Juvenile Code are met by subjecting R.R.N.'s family to DSS supervision because of Mr. B.'s conduct on

18 August 2012. An adjudication of abuse and neglect neither promotes R.R.N.'s best interest nor protects her mother's fundamental right to parent her child. DSS's petition does not allege that R.R.N. was abused or neglected by her mother or stepfather, the two adults responsible for her care on a daily basis in her own home. To the contrary, R.R.N.'s mother and stepfather took appropriate steps to ensure R.R.N.'s safety, and the trial court released her into her mother's custody. Because R.R.N. was safe in her own home, there was no reason for DSS to assert its authority over her and her family under these circumstances.

Accordingly, under the facts of this case, we hold that Mr. B. was not "entrusted with" R.R.N.'s care as contemplated by section 7B-101(3) of the Juvenile Code. At most, Mr. B. acted as R.R.N.'s supervisor for one night on one occasion, while her mother maintained responsibility for her daughter's health and welfare at all times. Although Mr. B.'s conduct should result in criminal charges, R.R.N.'s mother and stepfather responded appropriately, and the family did not require State intervention to ensure R.R.N.'s safety. Therefore, because Mr. B. was not R.R.N.'s "caretaker" when he sexually abused her on 18 August 2012, the trial court erred in adjudicating her an abused and neglected juvenile. We affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JAMES DOUGLAS TRIPLETT

No. 343PA14

Filed 21 August 2015

Evidence—potential bias of witness—relevant—weak probative value—potential to confuse jury

In defendant's trial resulting in his convictions for robbery with a dangerous weapon, second-degree burglary, and first-degree murder under the felony murder rule, the trial court did not abuse its discretion by excluding evidence of a voice message that showed a potential bias against defendant by defendant's sister who testified for the State. The trial court properly concluded that the voice message met the low bar of relevancy and then conducted a Rule 403 analysis. The sister was not a key witness for the State, and the trial

court properly balanced the weak probative value of the voice message against the possibility of confusing the jury with information about a feud within defendant's family.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 762 S.E.2d 632 (2014), vacating a judgment entered on 18 February 2013 by Judge Edgar B. Gregory in Superior Court, Wilkes County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 20 April 2015.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

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

HUDSON, Justice.

Here we are asked to determine if the trial court abused its discretion by excluding evidence of a threatening voice mail message left by one of defendant's sisters for a different sister. We hold that it did not.

The evidence at trial tended to show the following: On 9 December 2009, defendant was drinking and using drugs with his brother and two other co-defendants. That evening, the men went to the victim's house looking for more drugs. While they were there, a fight broke out and defendant fatally stabbed the victim. One co-defendant testified that the plan was to rob the victim of his drugs, and a cellmate of defendant's testified that defendant told him he killed the victim in the course of a robbery. At trial defendant maintained that he was unaware of any plot to steal drugs from the victim, blacked out during the ride to the victim's house, and only stabbed the victim because when he came to, he heard one of his companions yell, "He's got a gun," and saw the men fighting. Defendant claimed self-defense.

The State called defendant's sister Teresa Ogle as a witness at trial. Around the time of these events, defendant lived with Ogle in her mobile home on family land owned by a different sister. Ogle testified that on the night in question, defendant and the co-defendants arrived at home in bloody clothing and that defendant's brother, one of the co-defendants, had been stabbed in the leg. While defendant first claimed the blood and injuries were the result of a hunting accident, he soon admitted what had happened, stating that he had killed a man and that he was no better

than his grandfather, who had killed his grandmother. Ogle further testified that when she left for work later that evening, defendant gave her interlocking potholders apparently containing something and that she threw the potholders over a bridge on her way to work. Most significantly, Ogle testified that defendant told her he knew that the co-defendants had planned to rob the victim and that he took a knife from her kitchen to the victim's residence that night because he knew the victim had a gun. A large knife was missing from Ogle's kitchen.

In her testimony, Ogle also alluded to a potential rift within the family over her testimony for the State. She testified that defendant called her and urged her not to testify, and that he hung up on her when she told him she would tell the truth. On cross-examination, the defense sought to attack Ogle's credibility by questioning her about her previously diagnosed bipolar disorder and by attempting to show animus between Ogle and defendant and their family. Out of the presence of the jury, defense counsel asked to introduce a voice mail message Ogle left for another sister in the family. The defense played the message for the trial court and explained that it was left by Ogle in late 2011 after the family had evicted her from the family land and had allegedly threatened Ogle to keep her from testifying. The message included hostile statements towards the sister in response to an eviction notice taped on Ogle's door and a statement that Ogle "can call the law" or "call the D.A." Defense counsel argued that the voice mail suggested that Ogle was biased against defendant and their family. In response, the State asserted that the message was unrelated to the current charges (and much more relevant to an eviction proceeding and a charge of interfering with and intimidating a State's witness pending against the sister for whom the voice mail had been left). After some discussion, the trial court excluded the evidence under Rule 403, concluding that the probative value of the message was substantially outweighed by confusion of the issues and that defendant would be potentially prejudiced by admission of the evidence.

The jury convicted defendant of robbery with a dangerous weapon, second-degree burglary, and first-degree murder under the felony murder rule. The trial court arrested judgment on defendant's convictions for robbery with a dangerous weapon and second-degree burglary, and entered judgment on the first-degree murder conviction. Defendant was sentenced to life imprisonment without parole. Defendant appealed.

The Court of Appeals held that the trial court erred in excluding the voice mail message. *State v. Triplett*, ___ N.C. App. ___, ___, 762 S.E.2d 632, 636 (2014). After discussing the abuse of discretion standard

of review, that court held that the voice mail message was "relevant to attack Ogle's credibility and show Ogle's bias towards defendant and defendant's family." *Id.* at ___, 762 S.E.2d at 636. Noting that the trial court had "serious doubts" regarding the relevance of the evidence, the Court of Appeals concluded that "because the trial court questioned the relevance of the message, the trial court could not have properly weighed the probative value of the message against the dangers of unfair prejudice and confusion." *Id.* at ___, 762 S.E.2d at 636. Finally, the Court of Appeals held that the error was prejudicial because "Ogle was a key witness for the State" and gave essential testimony regarding defendant's knowledge of the plan to rob the victim before the group left for the victim's house. *Id.* at ___, 762 S.E.2d at 636. The Court of Appeals reasoned that "[w]ithout evidence that defendant was aware of the plan to rob [the] victim, it is likely the jury would not have found defendant guilty of robbery and burglary, the felonies underlying defendant's conviction for first degree felony murder." *Id.* at ___, 762 S.E.2d at 636. Accordingly, the Court of Appeals vacated the judgment and ordered that defendant receive a new trial. *Id.* at ___, 762 S.E.2d at 637.

We review relevancy determinations by the trial court de novo before applying an abuse of discretion standard to any subsequent balancing done by the trial court. *See State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (explaining that before a reviewing court applies an abuse of discretion standard in evaluating a Rule 404(b) ruling by the trial court, it must "review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)"). We have also said that "[a] trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (citations omitted), *cert. denied*, ___ U.S. ___, 132 S. Ct. 816, 181 L. Ed. 2d 529 (2011). In ruling on relevancy, the trial court stated: "So I make the following ruling. I rule that this tape may not be played before the jury; that I really have problems with Rule 402 and whether it's relevant." The trial court then conducted a Rule 403 balancing test. Here, as noted by the Court of Appeals, the voice mail does show potential bias by Ogle against defendant and his family. Therefore, like the Court of Appeals, we hold that the voice mail meets the low bar of relevancy under our standard.

Nonetheless, we reverse the decision of the Court of Appeals for three reasons. First, we hold that the trial court properly determined that, while barely so, the evidence was relevant, and then weighed its probative value against Rule 403 concerns. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that

is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2013). "Evidence which is not relevant is not admissible." *Id.* Rule 402 (2013). Although the trial court's remarks are subject to different interpretations, the court did not clearly state that the voice mail was irrelevant. Instead, it appears the trial court believed the voice mail had minimal relevance, the admissibility of which the trial court then evaluated in an extensive Rule 403 balancing analysis. More importantly, because the trial court conducted the Rule 403 analysis, it necessarily found the voice mail relevant; otherwise, the court would have excluded the evidence under Rule 402, making a Rule 403 analysis unnecessary or at least, mere surplusage.

Second, despite defendant's arguments to the contrary and the statements of the Court of Appeals, Ogle was not a key witness for the State. Defendant argues (and the Court of Appeals agreed) that Ogle was the only witness to testify to defendant's prior knowledge of the robbery plan. This assertion is not accurate; while Ogle did testify to that fact, other witnesses did so as well. One of the co-defendants, Dillon Walsh, testified as follows regarding the plan:

> [The State.] And what did Ben [Watson, a third co-defendant] say after he had talked about the amount of crack that Bruce [the victim] had?
>
> [Mr. Walsh.] He was wanting to go get it.
>
> Q. Okay. Did he talk about you-all coming with him?
>
> A. Yeah.
>
> Q. And what was the purpose of you coming with him?
>
> A. I guess to try to take his dope.
>
> Q. Why do you say that?
>
> A. Because Ben said, "You-all hold him. I'll take his dope."
>
> Q. How did you guys get from the living room to whatever car you got into?
>
> A. We walked.
>
> Q. Was everybody in the living room when Ben said that?

A. I think so.

In addition, defendant's cellmate testified that defendant knew about the plan to rob the victim:

> [The State.] Okay. . . . What did the defendant tell you was their purpose for going up to Bruce Barnes' house that night?
>
> [Mr. Dickerson.] To get crack.
>
> Q. And did he describe how they were going to get that crack?
>
> A. One way or another.

Defense counsel effectively attempted to discredit this evidence by arguing that both of these witnesses gained concessions from the State for their testimony and pointing to inconsistencies in Mr. Walsh's previous statements. Nonetheless, it is not this Court's function to evaluate the credibility of a witness; the jury here apparently believed these witnesses, as it was free to do. In addition to the above testimony describing defendant's knowledge of the robbery plan, Ogle's testimony on this point was not crystal clear. At first she testified only that defendant went armed to the victim's house because defendant knew the victim had a gun and knew they were going to get drugs:

> [Ms. Ogle.] He said he took [the knife] before they left. And I said, "Why would you take a knife from my kitchen that I used with you to buy drugs?"
>
> [The State.] Did he respond to that statement – or your question?
>
> A. "Well, Bruce has got a gun. We know he has got a gun."
>
> Q. Did James ever tell you why he went up to Bruce's house that night?
>
> A. Said they went to get crack.

This testimony does not necessarily contradict the theory that defendant and the others went to the victim's house to buy drugs (a version of events presented earlier at trial by co-defendant Ben Watson). Later, Ogle's testimony changed slightly:

> Q. [In] [w]hich conversation did the defendant tell you why they went up to Bruce Barnes' house that night?

> A. It was probably the next day, the 10th. We were riding, just like we did always, out on the back dirt roads. And he said that they had went over there to buy crack. He said that he knew that Ben had planned to rob him.

Ogle then clarified her statement, appearing to explain that she meant that defendant knew Ben Watson planned to rob the victim earlier the same day:

> Q. And I believe you just had testified that James knew that Ben planned to rob him; is that what you testified?
>
> A. Right, but he wasn't with him when he robbed him because he didn't go the first time.

Given the confusion and inconsistencies in her testimony and the existence of other witnesses' testimony regarding defendant's knowledge of the plan to rob the victim on the night of 9 December 2009, Ogle's testimony becomes less significant. Taken together, these three witnesses potentially strengthened the State's case against defendant; however, the State could prove even without Ogle's testimony that defendant knew about the plan to rob the victim. As such, any alleged bias resulting from a fight between Ogle and her family becomes less probative.

Third, we hold that the trial court did not abuse its discretion in excluding the evidence under a Rule 403 balancing test. Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2013).

> We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record."

State v. Whaley, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citing and quoting *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007), *cert. denied*, 552 U.S. 1271, 128 S. Ct. 1682, 170 L. E. 2d 377

(2008)). In weighing the probative value against any potential Rule 403 concerns, the trial court stated:

> I rule under 403 that the probative value is substantially outweighed by the confusion of the issues involving her eviction and the problems that she might have had with her sisters; that there is no -- it's not fair to tie whatever problem she had with her sisters to the defendant; that may be prejudicial to the defendant.

Defense counsel then tried to have only a portion of the tape admitted, but the trial court rejected the argument again, reiterating:

> All right. I decline that request for the same reasons, that I think it would open up an area that would be confusing to the jury; that you may ask her about any problems, if you desire, about her feelings about her family. But anything about an eviction, it seems to me that that are things that don't relate to the defendant necessarily . . . .
>
> . . . .
>
> It opens up areas that are not necessary and are confusing. And under Rule 403 and the balancing test, I'm going to keep it out as the gatekeeper of the evidence.

Such a ruling was not an abuse of discretion. The trial court here looked at the weak probative value of the evidence and weighed it against the confusion that could result from drawing the jury into a family feud that was tangential to the death of the victim here. We hold that it was not "manifestly unsupported by reason," *id.* at 160, 655 S.E. 2d at 390, for the trial court to rule that the probative value of the voice mail message was outweighed by the other concerns under Rule 403.

Having found no abuse of discretion, we need not examine any potential prejudice to defendant. Accordingly, for the reasons stated above, the opinion of the Court of Appeals is reversed. We remand this case to that court for consideration of defendant's remaining issue on appeal and if necessary, for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

LEXISNEXIS RISK DATA MANAGEMENT INC., A FLORIDA CORPORATION, AND
LEXISNEXIS RISK SOLUTIONS INC., A GEORGIA CORPORATION
v.
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE
COURTS; MARION R. WARREN, IN HIS OFFICIAL CAPACITY
AS INTERIM DIRECTOR OF THE NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS; AND
JENNIFER KNOX, IN HER OFFICIAL CAPACITY AS THE CLERK OF WAKE COUNTY SUPERIOR COURT

No. 101PA14

Filed 21 August 2015

Public Records—court records—private party request for copy of Automated Criminal/Infraction System—nonexclusive contracts—sole means of remote electronic access

The Court of Appeals erred by concluding that the Public Records Act provided the legal basis for granting plaintiff private companies' request seeking a copy of the Automated Criminal/Infraction System (ACIS) from the North Carolina Administrative Office of the Courts. While the Public Records Act applies generally to state government records, N.C.G.S. § 7A-109 is specifically limited to court records. The General Assembly intended that the nonexclusive contracts authorized in section 7A-109(d) be the sole means of remote electronic access to ACIS. This case was remanded to the Court of Appeals for consideration of plaintiffs' remaining issues on appeal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 754 S.E.2d 223 (2014), affirming in part and reversing and remanding in part an order entered on 8 February 2013 by Judge James E. Hardin, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 24 February 2015.

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Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for defendant-appellants N.C. Administrative Office of the Courts and Marion R. Warren.

Arnall Golden Gregory LLP, by W. Jerad Rissler, for Consumer Data Industry Association, amicus curiae.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, for The News and Observer Publishing Company, Capitol Broadcasting Company, Inc., Time-Warner Entertainment-Advance Newhouse Partnership, DTH Media Corporation, and North Carolina Press Foundation, Inc., amici curiae.

Kilpatrick Townsend & Stockton, LLP, by Phillip A. Harris, Jr. and Joseph S. Dowdy, for Associate Professor Ryan Thornburg, amicus curiae.

EDMUNDS, Justice.

In this case, we consider whether our state's Public Records Act, N.C.G.S. §§ 132-1 to -10 requires the North Carolina Administrative Office of the Courts to issue a copy of the Automated Criminal/Infraction System to a private party. We hold that N.C.G.S. § 7A-109(d), addressing "remote electronic access" to court records, is a more specific statute that overrides applicability of the Public Records Act here. In addition, we conclude that the legislature intended that remote electronic access to the Automated Criminal/Infraction System be available solely through nonexclusive contracts, as provided in section 7A-109(d). Accordingly, we reverse the decision of the Court of Appeals.

The Automated Criminal/Infraction System (ACIS) is an electronic compilation of all criminal records in North Carolina. While the North Carolina Administrative Office of the Courts (AOC) administers and maintains ACIS, the information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk. Any subsequent modifications to that information are under the exclusive control of the office of the Clerk that initially entered the information, so that personnel in one Clerk's office cannot change records entered into ACIS by personnel in a different Clerk's office. In other words, the information in ACIS both duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court. ACIS includes information not subject to disclosure, and not every employee in each Clerk's office can access all the information in ACIS.

The parties do not dispute that the public has various avenues of access to the information in ACIS that is subject to disclosure. Each Clerk's office possesses a public terminal, commonly known as a "green

screen," that any member of the public may use to search within ACIS. Members of the public can also access information that has been entered into ACIS either by directly viewing in the appropriate Clerk's office the physical records from which ACIS information is derived or by requesting copies of those records from that Clerk's office. Private parties may obtain remote electronic access to ACIS by entering into a contract with the AOC, as permitted by N.C.G.S. § 7A-109(d).

Plaintiffs, two private corporations that aggregate public information in their private databases, including information gleaned from criminal records, and then sell access to their databases to public and private entities, seek a copy of the ACIS database itself via the Public Records Act. On 23 September 2011, plaintiffs sent written public records requests to then-AOC Director Judge John W. Smith, II and then-Wake County Clerk of Superior Court N. Lorrin Freeman. Plaintiffs' requests to both were virtually identical, seeking an index of all computer databases created or compiled by the recipient's office and "[t]he entire computer database(s) which contain criminal records information" available to the recipient of the request. Plaintiffs asked that the material be supplied in hard copy and in electronic formats.

Both recipients interpreted the request as seeking the information contained in ACIS. The AOC responded by sending plaintiffs' attorney a compact disk containing copies of the "indexing done to date for databases maintained by the NCAOC and subject to G.S. § 132-6.1." However, the AOC declined to produce an index of the ACIS database, pointing out N.C.G.S. § 132-6.1(b), a provision in the Public Records Act that addresses such indices, does not apply to ACIS because ACIS predated enactment of that statute. *See* N.C.G.S. § 132-6.1(b) (2013). The AOC also declined to provide a copy of ACIS, asserting that the individual Clerks of Superior Court are custodians of the records and the data in those records, adding that the AOC merely "created and maintains ACIS in its administrative support role for the [C]lerks." In addition, the AOC pointed out that distribution of and access to ACIS is accomplished through non-exclusive licensing agreements, citing N.C.G.S. § 7A-109(d).

Defendant Freeman responded separately, denying that her office possessed any records responsive to plaintiffs' request. While acknowledging that her office "is responsible for data entry into a number of case index systems," she stated that her office does not maintain those databases and is incapable of providing copies of those systems.

On 13 October 2011, plaintiffs filed suit in Superior Court, Wake County, seeking an order requiring production of the requested

materials pursuant to N.C.G.S. § 132-9(a). Plaintiffs requested that the court declare "that the ACIS database is a public document or public information as defined by N.C. Gen. Stat. § 132-1;" declare that defendant Smith or defendant Freeman, or both, are "custodian[s] of the ACIS database and of the electronic criminal records information contained therein;" and order either or both defendants "to provide to Plaintiffs a complete copy of the ACIS database."

On 15 December 2011, defendants filed their joint answer. Defendants first responded that, unlike criminal records, ACIS is not subject to the Public Records Act. Second, defendants claimed that each individual Clerk of Court is a custodian of the criminal records relating to his or her county but is unable to make an electronic copy of the entire ACIS database, while defendant AOC has possession and control of ACIS but is not the custodian of the criminal records contained within it.

On 6 February 2012, plaintiffs filed a Motion for Judgment on the Pleadings. Following a 10 August 2012 hearing, the trial court on 31 January 2013 issued an order denying plaintiffs' motion, granting judgment for defendants on their responsive pleadings, and dismissing the case. In its order, the trial court concluded as a matter of law that, while defendant Freeman was the custodian of criminal records in Wake County, she did not violate the Public Records Act because her office "does not compile or create databases for criminal records information." The trial court further concluded as a matter of law that defendant Smith did not violate the Public Records Act because the "AOC is not the custodian of the criminal records stored in the ACIS database," even though the AOC "administers, supports, and maintains" ACIS. Finally, the trial court concluded as a matter of law that "[r]equiring . . . AOC to provide a copy of the entire ACIS database would negate the provisions of N.C. Gen. Stat. § 7A-109(d)."

The Court of Appeals affirmed the trial court's conclusions and judgment as to defendant Freeman but reversed the trial court as to defendants Smith and the AOC. *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, ___ N.C. App. ___, 754 S.E.2d 223 (2014). Noting that the parties agreed that the individual criminal records maintained by Clerks of Court are public records and that each Clerk is the custodian of the records in that Clerk's office, the Court of Appeals found that "once the [C]lerks of [C]ourt enter information from their criminal records into ACIS, the database becomes a new public record 'existing distinctly and separately from' the individual criminal records from which it is created." *Id.* at ___, 754 S.E.2d at 227. The Court of Appeals then concluded that ACIS, having incorporated that

newly-entered information, is an "electronic data-processing record" under section 132-1(a) and thus is a public record subject to disclosure under the Public Records Act. *Id.* at ___, 754 S.E.2d at 227. The Court of Appeals next concluded that the source of the information entered into ACIS was immaterial because the Public Records Act refers to custodians of records, not custodians of information, and the AOC was the custodian of the newly-created public record. *Id.* at ___, 754 S.E.2d at 227-28. The Court of Appeals further noted that each Clerk's custodianship of the criminal records from which ACIS is compiled is immaterial because plaintiffs were seeking a copy of ACIS, not copies of the criminal records. *Id.* at ___, 754 S.E.2d at 227-28. That court also found irrelevant AOC's argument that employees of individual Clerk's offices entered data into ACIS and could later modify it, observing that "the clerks have acted at the direction of the AOC." *Id.* at ___, 754 S.E.2d at 228 (relying upon *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992)). The Court of Appeals thus held that ACIS is a public record and AOC is its custodian. *Id.* at ___, 754 S.E.2d at 228.

Finally, the Court of Appeals rejected the trial court's conclusion that granting access to plaintiffs would "negate" N.C.G.S. § 7A-109(d). *Id.* at ___, 754 S.E.2d at 228. The Court of Appeals found that this provision and the Public Records Act were not mutually exclusive but were instead complementary means of accessing judicial records. *Id.* at ___, 754 S.E.2d at 228-29 ("The plain language of this subsection simply allows the AOC to offer an additional method of access to 'court records' . . . ."). Again citing *Poole*, the Court of Appeals concluded that the language of section 7A-109 did not provide a "clear statutory exemption or exception" that excluded ACIS from the Public Records Act. *Id.* at ___, 754 S.E.2d at 229 (quoting *Poole*, 330 N.C. at 486, 412 S.E.2d at 19). We allowed the Petition for Discretionary Review filed by defendants Smith and the AOC.

Defendants contend both that the Court of Appeals opinion negates N.C.G.S. § 7A-109 and that the ongoing process of making additions and amendments to ACIS does not create a new public record distinct from the original records entered by the Clerks of Court. Accordingly, we must examine the relationship between the Public Records Act and N.C.G.S. § 7A-109, applying de novo review. *In re Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012) (citation omitted).

In their initial letters to defendants and in their complaint, plaintiffs relied on the Public Records Act and did not cite section 7A-109. The Public Records Act, codified in Chapter 132 of the General Statutes,

generally governs access to public records in North Carolina, and section 132-6(a) states that "[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall . . . furnish copies thereof." N.C.G.S. § 132-6(a) (2013). This Court has consistently found that "it is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citation omitted); *see also State Emps. Ass'n of N.C. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 211, 695 S.E.2d 91, 95 (2010).

However, the Public Records Act anticipates that exceptions may apply, *see* N.C.G.S. § 132-1(b) (2013) ("[I]t is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost *unless otherwise specifically provided by law.*" (emphasis added)), and indeed, the General Assembly has enacted a separate statute applicable to court records, *id.* § 7A-109 (2013); *see Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463, 515 S.E.2d 675, 685 (1999) (acknowledging that court records are public records but finding that "[t]he public's right of access to court records is provided by N.C.G.S. § 7A-109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings").[1] Section 7A-109(a) addresses the maintenance of court records and provides, *inter alia*, that "these records shall be open to the inspection of the public during regular office hours." N.C.G.S. § 7A-109(a). This statute incorporates themes similar to those found in the Public Records Act, such as liberal access, *compare* N.C.G.S. § 132-6(a) ("*Every* custodian . . . shall permit *any record* . . . to be inspected and examined at reasonable times . . . and shall, *as promptly as possible*, furnish copies thereof . . . ." (emphases added)), *with id.* § 7A-109(a) ("[R]ecords shall be open to the inspection of the public.") *and* -109(d) (stating that the provisions therein are intended "to facilitate public access to court records"); promotion of good government, *compare id.* § 132-6(b) (2013) ("No person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request."), *with id.* § 7A-109(a)(6) (describing the statute's purpose as

1. In *Virmani*, this Court was careful to observe that North Carolina courts "always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control" their records "in the proper circumstances" and that "the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has 'no power' to diminish it in any manner." 350 N.C. at 463, 515 S.E.2d at 685 (quoting N.C. Const. art. IV, § 1).

"provid[ing] a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them"); and affordability, *compare id.* § 132-1(b) (records shall be provided for "free or at minimal cost," defining the latter as "the actual cost of reproducing . . . the information"), *with id.* § 7A-109(d) (providing that the contracts "with third parties to provide remote electronic access to the records by the public" shall limit fees to those necessary for "reasonable cost recovery").

Nevertheless, the Public Records Act and section 7A-109 are not identical, and if

> "there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized . . . ; but, to the extent of any necessary repugnancy between them, the special statute . . . will prevail over the general statute . . . ."

Nat'l Food Stores v. N.C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (quoting 82 C.J.S. *Statutes* § 369, at 839-40 (1953)); *see also Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997); *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995). While the Public Records Act applies generally to state government records, section 7A-109 is specifically limited to court records. Consistent with our holding in *Virmani*, we conclude that section 7A-109 controls plaintiffs' request for these records. Accordingly, we find that the Court of Appeals erred by concluding that the Public Records Act provided the legal basis for granting plaintiffs' request and that section 7A-109 was inapposite to an analysis of access to such records.

We next consider whether the material requested by plaintiffs is available to them under section 7A-109 by means other than a nonexclusive contract with the AOC, as set out in subsection 7A-109(d). Because this statute does not refer to the "custodian" of the pertinent records, we need not address arguments that are dependent on a determination of who is the custodian of ACIS and the records included in that database. Instead, we observe that section 7A-109(a) focuses on providing broad access to the public to review and copy court records that are not legally protected from disclosure. In 1997, subsequent to enactment of the Public Records Act, the North Carolina General Assembly added subsection (d) to section 7A-109, providing that "[i]n order to facilitate public access to court records, except where public access is prohibited

by law, the [AOC] Director may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the records by the public." *See* Act of June 11, 1997, ch. 199, sec. 1, 1997 N.C. Sess. Laws 389, 390.

The parties dispute the meaning and import of subsection (d). Defendants have argued consistently that the legislature intended that subsection (d) be the exclusive means of remote electronic distribution of and access to ACIS. Plaintiffs, by contrast, argue that the addition of subsection (d) was meant to create an additional means of access, allowing the public the option of either seeking a copy of ACIS through the Public Records Act or contracting for remote electronic access to it pursuant to N.C.G.S. § 7A-109(d). The Court of Appeals agreed with plaintiffs. *LexisNexis*, ___ N.C. App. at ___, 754 S.E.2d at 228-29 ("The plain language of this subsection simply allows the AOC to offer an additional method of access to 'court records' via 'remote electronic access.' " (brackets omitted)).

In resolving this dispute, we are mindful that "[t]he cardinal principle of statutory construction is that the intent of the legislature is controlling." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (quoting *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978)). Here, we find guidance in the General Assembly's addition of subsection (d) and its conditions specifically relating to remote electronic access to court records. Just as a more specific statute will prevail over a general one, *see, e.g.*, *In re Testamentary Tr. of Charnock*, 358 N.C. 523, 529, 597 S.E.2d 706, 710 (2004), a specific provision of a statute ordinarily will prevail over a more general provision in that same statute, *see, e.g.*, *State ex rel. Utils. Comm'n. v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 633, 670 (1969). Moreover, just as it "is true *a fortiori*" that a specific statute prevails over a general one "when the special act is later in point of time," *Nat'l Food Stores*, 268 N.C. at 629, 151 S.E.2d at 586 (quoting 82 C.J.S. *Statutes* § 369, at 842-43), the later addition of a specific provision to a pre-existing more general statute indicates the General Assembly's most recent intent, *see Adair v. Orrell's Mut. Burial Ass'n*, 284 N.C. 534, 541, 201 S.E.2d 905, 910 (1974) ("The conflicting provisions in . . . the statute first enacted must yield to the provision of [the later enacted statute], since the later statute represents the latest expression of legislative will and intent."), *appeal dismissed*, 417 U.S. 927, 94 S. Ct. 2637, 41 L. Ed. 2d 231 (1974). While subsection 7A-109(a) applies to court records in general, later-added subsection (d) focuses narrowly on court records maintained in electronic form. Accordingly, we conclude that the General

Assembly intended that the nonexclusive contracts authorized in section 7A-109(d) be the sole means of remote electronic access to ACIS.

We note in closing that our holding does not deny anyone access to any public record not otherwise restricted by law. Rather, this decision acknowledges the General Assembly's intent to limit the methods of access to one narrow category of court records. Access to the public information maintained in ACIS remains fully available by obtaining the physical records from the appropriate Clerk of Court, through the "green screen" terminal maintained in the local courthouse, or by means of a contract with the AOC for remote access. Nor will our holding impose an undue financial burden on those seeking access to criminal records. *See* N.C.G.S. § 7A-109(d) (authorizing the AOC to enter into remote electronic access contracts that incorporate "reasonable cost recovery terms"). North Carolina's robust tradition that "strongly favors the release of public records to increase transparency in government" endures. *State Emps. Ass'n*, 364 N.C. at 214, 695 S.E.2d at 97.

This case is remanded to the Court of Appeals for consideration of plaintiffs' remaining issues on appeal.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
JASON LYNN YOUNG

No. 124PA14

Filed 21 August 2015

1. Appeal and Error—preservation of issues--use of civil pleadings in criminal prosecution—objection required

The Court of Appeals erred in a prosecution for first-degree murder by determining that defendant was entitled to a new trial on the grounds that the admission of evidence concerning a wrongful death and declaratory judgment action and a child custody action violated N.C.G.S. § 1-149. That statute provides that pleadings

cannot be used in a criminal prosecution against the party as proof of a fact admitted or alleged, but the N.C. Supreme Court has clearly indicated that a failure to object to the admission of evidence that allegedly violates N.C.G.S. § 1-149 results in a waiver of the right to challenge the admission of that evidence on appeal.

2. Evidence—preservation of issues—risk of prejudice outweighing probative value—use of civil pleadings in criminal case

The Court of Appeals erred by awarding a first-degree murder defendant a new trial based upon the admission of evidence concerning defendant's response to a wrongful death and declaratory judgment action and a child custody action where defendant objected under N.C.G.S. § 8C-1, Rule 403. As a general proposition, appellate decisions holding that a trial court erroneously failed to sustain an objection lodged pursuant to N.C.G.S. § 8C-1, Rule 403, tend to rest on determinations that the admission of the evidence in question served little or no purpose other than to inflame the passions of the jury. A careful review of the record demonstrated that the evidence relating to the wrongful death and declaratory judgment action had at least some material probative value for the purpose of challenging the validity of defendant's alibi defense. Moreover, the trial court made a serious attempt to address the risk of unfair prejudice.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 756 S.E.2d 768 (2014), vacating a judgment entered on 5 March 2012 by Judge Donald W. Stephens in Superior Court, Wake County, and remanding for a new trial. Heard in the Supreme Court on 19 May 2015.

Roy Cooper, *Attorney General*, *by Daniel P. O'Brien*, *Special Deputy Attorney General*, *and Amy Kunstling Irene*, *Assistant Attorney General*, *for the State-appellant.*

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

ERVIN, Justice.

Defendant Jason Lynn Young was convicted of the first-degree murder of his wife, Michelle Fisher Young. A unanimous panel of the Court of Appeals vacated defendant's conviction and ordered a new trial. We now reverse the Court of Appeals' decision and remand this case to the

Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgment.

I. Factual Background

A. Substantive Facts

1. State's Evidence

a. Youngs' Marital Difficulties

As of 2 November 2006, the Youngs had been married for slightly more than three years. The Youngs' friends assumed that their courtship, which had been less than idyllic, resulted in marriage solely because Ms. Young became pregnant. The Youngs' relationship was described as "volatile," with the couple tending to argue in public over relatively petty matters. Ms. Young's sister, Meredith Fisher, thought that defendant was irresponsible and treated Ms. Young poorly. Although Meredith Fisher told Ms. Young that she should leave defendant, Ms. Young made no effort to divorce her husband. On one occasion, defendant told a friend that he was afraid that, if he and Ms. Young divorced, Ms. Young would leave the Raleigh area and move to New York with their two-and-one-half-year-old daughter, Emily.[1]

Among the sources of conflict which the Youngs experienced was the role played by Ms. Young's mother, Linda Fisher, who visited the Youngs for extended periods of time, wanted to move to North Carolina so that she could spend more time with her daughter and granddaughter, and offered to renovate the Youngs' house so that she could live there. Although Ms. Young wanted to have her mother's assistance with the family cooking, cleaning, and child care responsibilities, defendant was adamantly opposed to sharing a residence with Linda Fisher.

On 12 September 2006, defendant sent an e-mail to an address that had been used by his former fiancée, Genevieve Cargol. During their engagement, defendant had engaged in acts of domestic violence against Ms. Cargol, including an incident in which he forcibly removed the engagement ring that he had given her. Although he had not had any contact with her for a couple of years, defendant professed his love for Ms. Cargol in the 12 September 2006 e-mail while indicating that he did not intend to act on his feelings.

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1. "Emily" is a pseudonym used throughout this opinion to protect the identity of the Youngs' daughter.

At the end of September 2006, defendant began communicating on a regular basis with Michelle Money, who was one of Ms. Young's college sorority sisters and who believed that her husband was being unfaithful to her. On 7 October 2006, defendant mailed an anniversary card to Ms. Young from Orlando, Florida, where he had gone to spend time with Ms. Money. Defendant had sexual intercourse with Ms. Money during his visit to her in Orlando and informed a friend that he had fallen in love with Ms. Money. In the thirty days prior to 2 and 3 November 2006, defendant and Ms. Money exchanged over 400 calls and text messages.

About ten days prior to Ms. Young's death, defendant had sexual intercourse with Carol Ann Sowerby, another family friend, in the Youngs' residence. Ms. Young was out of town at the time that this incident occurred. On that occasion, defendant took Ms. Sowerby's wedding ring from her and pretended to swallow it. However, defendant returned Ms. Sowerby's ring on the following day.

The Youngs e-mailed each other on 24 October 2006 about the extent to which they should undergo marriage counseling. Although defendant reiterated his willingness to attend counseling sessions, he reminded Ms. Young that the two of them had agreed that she would obtain individual counselling first. During a session with a therapist on 27 October 2006, Ms. Young stated that she was upset that defendant waited until the end of the weekend before doing his household chores, that their childless friends had more money than the Youngs did, that defendant wanted their relationship to be more sexual in nature, and that defendant drank at tailgate parties. On the other hand, Ms. Young told the therapist that her current pregnancy was planned.

About three weeks prior to Ms. Young's death, defendant told a friend after having had an argument with his wife that "he was done." On 27 October 2006, defendant stated in the presence of both Ms. Young and Meredith Fisher that "all of this would just, you know, go away if you'd let me have a girl on the side." Although Ms. Young did not claim to have been physically abused by her husband, the therapist concluded that Ms. Young had experienced verbal abuse. Ms. Young told Meredith Fisher that defendant had thrown a remote control device at her on 1 November 2006.

b. Events Occurring on 2-3 November 2006

i. Events Involving Ms. Young

As a result of the fact that defendant was scheduled to conduct a sales call in Clintwood, Virginia, at 10:00 a.m. on Friday, 3 November

2006, Ms. Young made plans to spend the evening of 2 November 2006 with her friend Shelly Schaad, whose husband was also expected to be out of town on the evening in question. When Ms. Schaad arrived at the Youngs' residence at approximately 6:30 p.m. on 2 November 2006, she was surprised to discover that defendant was still at home. Although he was invited to stay and dine with Ms. Schaad and Ms. Young, defendant declined this invitation and indicated that he planned to eat at a Cracker Barrel while en route to Galax, Virginia, where he intended to spend the night before continuing on to Clintwood in the morning.

After Ms. Schaad and Ms. Young ate dinner, they bathed Emily, diapered her, and dressed her in her pajamas. During this process, Ms. Young told Ms. Schaad that she and defendant had been arguing about plans for the upcoming holidays. Although Ms. Young wanted Linda Fisher to stay with the family from Thanksgiving through Christmas, defendant was opposed to such a lengthy visit. While Ms. Schaad and Ms. Young watched *Grey's Anatomy*, defendant made one of the seven calls that he placed to the house that evening.

In view of the fact that she had an "eerie feeling" that the house was being watched, Ms. Schaad asked Ms. Young to walk her to her car when she left the Youngs' residence between 10:00 and 10:30 p.m. According to Terry Tiller, a newspaper delivery person, certain interior, exterior, and driveway lights were on and a light-colored SUV was positioned in the yard or on the street in front of the Youngs' residence when she passed it between 3:30 and 4:00 a.m. on 3 November 2006.

ii. Events Involving Defendant

After buying gas in Raleigh at 7:30 p.m. on 2 November 2006, defendant called his mother, Pat Young. During this conversation, defendant discussed his business trip, his plans for the Thanksgiving holiday, and certain items of furniture that his mother planned to give him. Among other things, defendant told Pat Young that he would check with Ms. Young to see if he could spend Friday night at his mother's residence in Brevard in order to pick up the furniture that Pat Young planned to give him before leaving for Raleigh early Saturday morning.

After purchasing dinner at a Cracker Barrel restaurant in Greensboro at 9:25 p.m., defendant traveled in his white Ford Explorer to Hillsville, Virginia, where he checked into a Hampton Inn at 10:54 p.m. According to surveillance camera footage taken at both the Hampton Inn and the Cracker Barrel, defendant was wearing a light shirt, jeans, and brown slip-on shoes. Although defendant entered his hotel room using a key card at 10:56 p.m., he never used that key card again. Just before

midnight, hotel surveillance cameras showed defendant at the front desk and as he walked down a hallway leading to both the stairs providing access to the upper floors and to an exit door on the western end of the hotel. At that time, defendant was wearing a darker-colored shirt with a light-colored horizontal stripe across the chest. No further images of defendant appear on surveillance footage taken at the hotel during the remainder of the night of 2 to 3 November 2006.

Keith Hicks, an employee of the Hillsville Hampton Inn, slid checkout receipts under the doors leading to occupied guest rooms between 3:00 and 5:00 a.m. on 3 November 2006. At approximately the same time, Mr. Hicks hung copies of the weekend edition of *USA Today* on the door handles of the same rooms. After taking advantage of the Hampton Inn's express checkout service, defendant left the hotel on 3 November 2006 without going to the front desk. As a result of the fact that he did not check out in person, the Hampton Inn had no record of the actual time at which defendant left the premises. However, defendant did call his mother at 7:40 a.m. on 3 November, with this call having been made using a cell tower near Wytheville, Virginia. Defendant arrived about thirty minutes late for his 10:00 a.m. sales call.

iii. Defendant's Testimony at the First Trial

In his testimony at the first trial, which the State introduced into evidence at the second trial, defendant denied having killed his wife, having been present when she was killed, or having any knowledge of who had killed her. Although defendant admitted that he had not been a good husband, he claimed that he loved his wife, wanted their marriage to work, and was ecstatic that his wife had become pregnant with a boy before her death. Defendant did not believe that he and Ms. Young argued more than other couples. Instead, defendant thought that the only difference between the Youngs and other couples was that the Youngs argued more in public. Defendant denied having ever assaulted his wife.

In November 2006, defendant had obtained a new job selling electronic health records software. After his employer set up the Clintwood sales call for relatively early on the morning of 3 November 2006, defendant decided to stay overnight at a hotel between Raleigh and Clintwood instead of attempting to make the entire drive that morning. Upon checking in at the Hillsville Hampton Inn on the night of 2 November, defendant called both his wife and Ms. Money. As a result of the fact that he was nervous about the sales call that he was scheduled to make the following morning, defendant decided to review the demonstration software that he intended to use during that meeting. However, when

he began the review process, defendant discovered that he had left his laptop charger in his car.

Upon making this determination, defendant left the door to his room unlatched and walked downstairs to the exit nearest to the place where he had parked. In view of the fact that the exit door would not open from the exterior without a key card and the fact that he had left his key card in his room, defendant broke a stick off of a nearby shrub and stuck it in the door while he went to retrieve his charger. After returning to his room and reviewing the materials for the upcoming sales meeting, defendant decided to obtain a copy of *USA Today* and smoke a cigar.[2] As a result, defendant left his room without fully closing the door for a second time, got a copy of *USA Today* from the desk clerk, walked down a hallway to the exit door, stuck another stick in the door, and went outside to smoke his cigar. Once he had finished his cigar, defendant re-entered the hotel, returned to his room, and went to sleep. Defendant claimed that he had been late to his sales call in Clintwood on the following morning because he had gotten lost.

iv. Testimony of Ms. Calhoun

The Four Brothers BP in King, North Carolina, a service station located at an exit along the most direct route between Raleigh and Hillsville, was the only location at which gasoline could be purchased at that exit in the early morning hours of 3 November 2006.[3] According to Gracie Calhoun, an employee at the Four Brothers BP station, a man drove a white SUV to the farthest pump at approximately 5:00 to 5:30 a.m. on 3 November 2006 and made repeated efforts to pump gas. After the man entered the store and cursed her because the pumps were not operational, Ms. Calhoun told the prospective customer that, at that time of day, customers must provide money or identification before the gasoline pumps would be activated. At that point, the man, whom Ms. Calhoun identified from a photograph presented to her by investigating officers and in open court as defendant,[4] threw twenty dollars in cash at

2. A number of witnesses testified that defendant did not smoke and hated smoking. However, a humidor was found in the Youngs' house after Ms. Young's death and a credit card owned by Ms. Young was used to purchase cigars in 2004.

3. An investigating officer made the trip from Hillsville to Raleigh in a Ford Explorer during a time when traffic was light in two hours and twenty-five minutes.

4. In her trial testimony, Ms. Calhoun claimed to have been face-to-face with the man in the store and to have gotten a good look at him. On cross-examination, Ms. Calhoun acknowledged that she had been hit by a truck when she was six years old and sustained a brain injury for which she continued to collect disability benefits and which had left her with lasting memory problems.

her, returned to the pump at which his vehicle was parked, and pumped fifteen dollars' worth of gasoline into his vehicle before driving off without collecting his change. According to receipts obtained by investigating officers, a fifteen dollar gasoline purchase was made at the Four Brothers BP station at 5:27 a.m. on 3 November 2006 and a twenty dollar gasoline purchase was made at the Four Brothers BP station some nine minutes later.

v. Hampton Inn Security Cameras

Early on 3 November 2006, Mr. Hicks discovered that the first floor emergency door that led from the western stairwell to the exterior of the hotel and that is ordinarily locked between 11:00 p.m. and 6:00 a.m. had been propped open with a small red rock that had been obtained from a nearby landscaping bed. After removing the rock, Mr. Hicks shut the door. Upon returning to the front desk, at which still images from the ten surveillance cameras utilized in the hotel could be observed on a rotating basis, Mr. Hicks noticed that the camera in the stairwell associated with the door that had been propped open was not working and returned to that stairwell to investigate the situation. At that point, Mr. Hicks noticed that the camera had been unplugged, with the last image shown on that camera having been made at 11:19:59 p.m. on 2 November 2006. No images were made on the camera in question from 11:20:13 p.m. on 2 November 2006 until Elmer Goad, a Hampton Inn maintenance employee, plugged it back in at 5:50 a.m. on 3 November 2006. However, the camera in question did not remain fully operational for long, since someone pointed it toward the ceiling between 6:34 and 6:35 a.m.

c. Discovery of Ms. Young's Body

Meredith Fisher arrived at the Youngs' residence at around 1:00 p.m. on 3 November 2006 in response to a request from defendant, who had left a voice mail on her cell phone asking her to go the house to pick up the printouts relating to an eBay search for Coach purses that defendant had conducted before leaving on his sales trip so that Ms. Young would not find them. According to Meredith Fisher, defendant claimed that he had been thinking of surprising his wife with a purse as a belated anniversary present.

After arriving at the house, Meredith Fisher entered the residence through the unlocked garage and went into the kitchen. As she walked upstairs in the direction of the home office, Meredith Fisher saw what looked like red hair dye in the bathroom that Emily normally used. Meredith Fisher saw more of the red substance on the upstairs landing and in the master bedroom. Once Meredith Fisher had seen her sister's

body on the floor of the master bedroom, she realized that the red substance that she had observed at various locations throughout the house was blood.

As Meredith Fisher called 911, Emily, who was not wearing a diaper, emerged from under the covers on the bed in the master bedroom. Emily repeatedly asked that she be given band-aids on the grounds that Ms. Young had "boo-boos everywhere."[5] In response to an inquiry posed by the 911 operator about the extent to which Ms. Young had "personal problems," Meredith Fisher replied, "Um not really. You know her and her husband fight a little bit, but nothing too ridiculous."

A paramedic who came to the Youngs' residence in response to Meredith Fisher's call confirmed that Ms. Young had been dead for some time. In addition, the paramedic checked Emily and determined that she was calm, had not sustained any injuries, and was not dehydrated. As a result of the fact that Emily was clean except for the presence of dried blood on her toenails and the bottom and seat of her pajama pants, an officer asked Meredith Fisher if she had cleaned Emily and received a negative answer.

d. Investigative Discoveries

A large amount of dried blood was found around Ms. Young's body, which was discolored, cold, and stiff. In addition, blood spattering appeared on the walls of the master bedroom. According to Dr. Thomas Clark, who performed the autopsy on her body, Ms. Young died from blunt force trauma to her head. Although he did not express any opinion concerning the time at which Ms. Young had died, Dr. Clark did state that Ms. Young had sustained at least thirty blows, the most serious of which had probably been inflicted with a heavy blunt object featuring a rounded surface that caused crescent-shaped skull fractures. In addition, Dr. Clark found signs that Ms. Young had been subjected to manual strangulation. Although Ms. Young had sustained a broken jaw, skull fracturing, brain hemorrhaging, lacerations, abrasions, and dislodged teeth, there was no evidence that she had been the victim of a sexual assault. Ms. Young was approximately twenty weeks pregnant with a son at the time of her death.

Emily's bloody footprints were visible on the floor of the master bedroom, her bathroom, and the second floor landing. In addition, blood

5. After returning to day care following Ms. Young's death, Emily was observed striking two dolls against each other. When asked what she was doing, Emily said that the "mommy doll" was being "spanked" for biting and was covered with "red stuff" and "boo-boos."

smears at the level of a child's height were present in Emily's bathroom. The only blood found outside of the second floor of the Youngs' home appeared on the doorknob leading from the kitchen to the garage, with the DNA markers present in this bloodstain being consistent with Ms. Young's DNA.

Although defendant's DNA and fingerprints were present in the bedroom, none of his fingerprints were blood-stained. At the time that he was examined by officers of the Wake County Sheriff's Office on 7 November 2006, defendant did not have any cuts, bruises, or other injuries to his hands or body aside from a bruised and broken toenail. In addition, investigating officers failed to find any evidence of blood in or on defendant's vehicle, defendant's clothes, or the hotel room in which defendant stayed on 2 November 2006.

According to Agent Michael Smith of the Federal Bureau of Investigation, Agent Andy Parker of the Raleigh/Wake City-County Bureau of Identification, and Special Agent Karen Morrow of the State Bureau of Investigation, bloody footwear impressions made by two distinct shoe types appeared on pillows found near Ms. Young. One of these two sets of footprints was consistent with the impressions that would be made by size twelve Hush Puppy Orbital, Sealy, and Belleville shoes, all of which have the same outsole design. The other set of impressions was made by a shoe type consistent with a size ten Air Fit or Franklin athletic shoe. According to Special Agent Morrow and Special Agent Greg Tart of the SBI, defendant had purchased a pair of size twelve Hush Puppy Orbitals on 4 July 2005, which defendant claimed had been donated to Goodwill. The State never produced a pair of shoes that matched either of these sets of impressions, although investigating officers recovered two pairs of brown shoes from defendant's vehicle on 3 November 2006.[6]

A careful examination of the Youngs' residence indicated that there were no signs that entry had been forced or that the house had been ransacked. However, investigating officers determined that two drawers had been removed from a jewelry box in the master bedroom. DNA testing performed on the jewelry box revealed the presence of four markers that were not consistent with either of the Youngs' DNA. According to Meredith Fisher, Ms. Young "didn't really have a lot of fancy jewelry" with the exception of her wedding and engagement rings, which she rarely removed and did not keep in the jewelry box. Neither of the rings that Meredith Fisher mentioned was found on Ms. Young's body or ever recovered.

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6. A checkout receipt from the Hillsville Hampton Inn and a copy of the weekend edition of *USA Today* were recovered from defendant's Ford Explorer on 3 November 2006 as well.

According to Agent Beth Whitney of the CCBI, Internet searches for purses were made on the Youngs' computer between 7:05 p.m. and 7:23 p.m. on 2 November 2006. Although three fingerprints were lifted from the eBay printouts generated as a result of these searches, only one of them was defendant's, with the other two fingerprints remaining unidentified at the time of trial. In addition, investigating officers determined that someone had checked defendant's personal e-mail account and that MapQuest inquiries for directions between Raleigh and Clintwood had been made on the Youngs' computer on the evening of 2 November 2006 as well. Agent Whitney also discovered that, at some undetermined time, Internet searches concerning the "anatomy of a knockout," "head trauma blackout," "head blow knockout," and "head trauma" had been conducted on the Youngs' computer, which defendant explained as having been related to an accident that he had witnessed. Finally, an examination of defendant's laptop computer revealed no indication that that machine had been used for any work-related purpose on the night of 2 to 3 November 2006.

2. Defendant's Evidence

On the afternoon of 3 November 2006, Linda Fisher called Pat Young and told her that Ms. Young was dead. At that time, defendant was driving from Virginia to Pat Young's residence in Brevard. After defendant's arrival in Brevard, his stepfather told defendant of Ms. Young's death. Upon receiving this information, defendant sank to the ground in disbelief. In addition, defendant sobbed after Meredith Fisher told him that Ms. Young's death had been a homicide.

Shortly after his arrival in Brevard, defendant and various members of his family left for Raleigh in defendant's Explorer, from which defendant's luggage had not been removed. As he traveled to Raleigh, defendant received calls from friends who told him that investigating officers had been asking Meredith Fisher and others if the Youngs had been having marital problems and suggested that he refrain from talking to investigating officers before consulting an attorney. In accordance with advice that he received from his counsel, defendant never answered any questions posed by investigating officers or discussed Ms. Young's death with friends or family members.

A newspaper delivery person drove by the Youngs' home at approximately 3:50 a.m. on 3 November 2006 without noticing anything unusual. Cynthia Beaver noticed that the house and driveway lights were on and that a light-colored "soccer-mom car" in which a white male was seated in the driver's seat and another person, who was possibly female, was

seated in the passenger seat, was positioned at the edge of the driveway associated with the Youngs' residence when she drove by at approximately 5:20 to 5:30 a.m. on the same date. When Fay Hinsley drove past the Youngs' house at approximately 6:15 a.m. on 3 November 2006, she observed an empty SUV positioned at the edge of the driveway. Although she testified that the car she had seen was not on Birchleaf Drive, on which the Youngs' residence was located, Ms. Hinsley insisted that she had seen the car at the Youngs' house.

B. Procedural History

On 14 December 2009, the Wake County Grand Jury returned a bill of indictment charging defendant with murdering Ms. Young. The charge against defendant came on for trial before the trial court and a jury at the 31 May 2011 criminal session of the Superior Court, Wake County. On 27 June 2011, the trial court declared a mistrial after the jury announced that it could not reach a unanimous verdict.

The charge against defendant came on for trial a second time at the 17 January 2012 session of the Superior Court, Wake County, before the trial court and a jury. On 5 March 2012, the jury returned a verdict convicting defendant of first-degree murder. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of life imprisonment without parole. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

Before the Court of Appeals, defendant argued that the trial court had committed prejudicial error by allowing the admission of evidence concerning a complaint that had been filed and default judgments that had been entered in a wrongful death and declaratory judgment action that had been brought against him by Linda Fisher as executrix of Ms. Young's estate and a complaint that had been filed in an action in which Linda Fisher and Meredith Fisher sought to obtain custody of Emily from defendant. *State v. Young*, __ N.C. App. __, __, 756 S.E.2d 768, 778 (2014). On 1 April 2014, the Court of Appeals filed an opinion holding that the trial court had committed prejudicial error by admitting evidence concerning the complaint and default judgments in the wrongful death and declaratory judgment action and the complaint in the child custody case on the grounds that the admission of the challenged evidence violated N.C.G.S. § 1-149, and N.C.G.S. § 8C-1, Rule 403. *Id.* at __, __, 756 S.E.2d at 782-84. We now reverse the Court of Appeals' decision and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgment.

II. Legal Analysis

A. Relevant Factual Information

1. Wrongful Death Action

At the second trial, the State was allowed to introduce evidence concerning a civil action that had been filed against defendant. On 29 October 2008, Linda Fisher, acting in her capacity as the executrix of Ms. Young's estate, filed a complaint seeking a damage recovery from defendant for wrongful death and a declaration that defendant was disqualified from receiving any monetary benefit as the result of Ms. Young's death pursuant to the provisions of Chapter 31A of the General Statutes. After defendant failed to file an answer or other responsive pleading, the estate sought the entry of default judgments against defendant. The estate's motion for the entry of a default judgment in the declaratory judgment action was heard before the trial court on 5 December 2008, at which point the trial court reviewed the record and certain affidavits that had been submitted in support of the estate's request for a declaratory judgment and entered a judgment determining that defendant had "unlawfully killed" Ms. Young, and was a "slayer" as that term is used in N.C.G.S. § 31A-3(3)d. Subsequently, Judge W. Osmond Smith, III, entered a default judgment in the wrongful death action awarding damages in excess of fifteen million dollars to Ms. Young's estate.

At trial, the State called Lorrin Freeman, who served as Clerk of Superior Court for Wake County at that time, for the purpose of testifying concerning the wrongful death and declaratory judgment action.[7] At that point, defendant's trial counsel objected "to the entire line of questioning about the wrongful death case." Defense counsel added: "And we would cite basically Rule 403, that we believe that to the extent [that it's] probative of anything that the danger of confusing, misleading, undue prejudice to the defendant substantially outweighs the probative value, and don't wish to be heard further." In response, the trial court ruled that the fact that a wrongful death and declaratory judgment action had been filed and that defendant, the primary beneficiary under Ms. Young's policy of life insurance,

> elected to be defaulted and in response to the wrongful death action and permitted by law for the Court to enter

7. At the time that the State made reference to evidence concerning the wrongful death and declaratory judgment action in its opening statement, defendant's trial counsel objected to the prosecutor's argument. After initially sustaining defendant's objection, the trial court allowed the prosecutor to argue that defendant "allowed a civil judgment to be entered against him."

> a judgment disqualifying him from benefiting from the death of Michelle Young may be a factor, that is, might be relevant to any number of matters that the jury has already heard and will hear and are considering, and so I do believe it's relevant and I do believe that the probative value outweighs any prejudicial effect.

After making this ruling, the trial court indicated that it would instruct the jury about "the law relating to a civil action and a civil judgment," "the obligation of the defendant named to answer," and the law allowing entry of a default judgment in the event that a defendant failed to file an answer or other responsive pleading.

After the prosecutor asked Ms. Freeman whether a civil action had been filed against defendant by Linda Fisher on behalf of Ms. Young's estate, defendant lodged another objection. After overruling the objection, the trial court outlined the procedures utilized in civil actions, advised the jury that judgment could be entered in the plaintiff's favor in the event that the defendant failed to respond to the plaintiff's complaint, explained to the jury that allegations made in a civil complaint are deemed to have been admitted when no responsive pleading is filed "whether actually true or not," and instructed the jury that the entry of a "civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense." Following the delivery of these instructions, which the trial court indicated would be supplemented at the conclusion of the trial, Ms. Freeman explained the nature of a wrongful death action and an action pursuant to N.C.G.S. § 31A-3(3)d; read the allegation contained in the complaint to the effect that, "[i]n the early morning hours of November 3rd, 2006 Jason Young brutally murdered Michelle Young at their residence"; reported that defendant never filed an answer or other responsive pleading in the wrongful death and declaratory judgment action; stated that a hearing at which Ms. Young's estate intended to seek the entry of a default judgment in the declaratory judgment action pursuant to N.C.G.S. § 31A-3(3)d was noticed for 5 December 2008; confirmed that this notice of hearing had been served on defendant and Roger Smith, Jr., an attorney with whom defendant had consulted during the investigation of Ms. Young's death; indicated that various items of evidence were presented for the trial court's consideration; and, over a renewed objection, testified that the trial court had entered a default judgment in the declaratory judgment action finding that defendant had "unlawfully killed [Ms. Young] . . . within the definition of [s]layer in the civil law." At a later time, Ms. Freeman testified, Judge Smith entered a default judgment in the

wrongful death action in which he awarded Ms. Young's estate "[o]ver $15 million."[8]

On cross-examination, Ms. Freeman testified that the attorneys representing Ms. Young's estate in the wrongful death and declaratory judgment action filed affidavits in support of the estate's motion for the entry of a default judgment, described the items that those attorneys examined during their investigation into the validity of the claims that the estate had asserted against defendant, and stated the amount of money that the estate and its attorneys had obtained as a result of the entry of these default judgments. On redirect examination, Ms. Freeman testified that an autopsy report concerning the cause of Ms. Young's death was contained in the file relating to the wrongful death and declaratory judgment action and that the affidavit executed by one of the attorneys who represented Ms. Young's estate in those proceedings had asserted that, "in his opinion . . . [defendant] brutally murdered [Ms.] Young at their residence."

At the conclusion of the trial, the trial court delivered additional instructions to the jury concerning the manner in which they should consider the evidence that they had heard concerning the wrongful death and declaratory judgment action. More specifically, the trial court instructed the jury that:

> I further instruct you there is evidence that tends to show that a civil complaint was filed in the Civil Superior Court of Wake County against the defendant by Linda Fisher on behalf of the Estate of Michelle Young and that a civil summons was issued by the clerk of the court commanding the defendant to answer or otherwise respond to the allegations of that civil complaint within the time required by law. There is further evidence that tends to show that the defendant was timely served with these documents and that he did not file an answer or otherwise respond to the complaint and that a default judgment was entered against him by reason of that failure.
>
> As I previously instructed you, when a defendant in a civil action has been properly served with the civil

8. Similarly, Michael Schilawski, who represented Linda Fisher and Meredith Fisher in the child custody action, testified, without objection, that the trial court stated in its declaratory ruling judgment that defendant "quote, [w]illfully and unlawfully killed, unquote, [Ms. Young], and as a result of that judgment the defendant is barred from collecting any insurance proceeds payable on [Ms. Young's] life or from inheriting any property from [Ms. Young's] estate."

> summons and the civil complaint and fails to timely respond, upon motion of the plaintiff the Court is authorized to enter a civil judgment against the defaulting defendant. For purpose of the civil law, the allegations of the complaint which have not been denied, whether actually true or not, are deemed to be admitted for the purpose of allowing the plaintiff to have a civil judgment entered against the defendant. The burden of proof in a civil case requires only that the plaintiff satisfy the Court or the jury by the greater weight of the evidence that the plaintiff's claims are valid. This means that the plaintiff must prove that the facts are more likely than not to exist in the plaintiff's favor. When there is a default, that burden of proof is deemed in law to be met.
>
> The entry of a civil default judgment is not a determination of guilt by the Court that the named defendant has committed any criminal offense.

Neither party lodged any objection to this portion of the trial court's instructions to the jury concerning the evidence relating to the wrongful death and declaratory judgment action.

2. Child Custody Action

On 17 December 2008, Linda Fisher and Meredith Fisher filed a complaint seeking the entry of an order awarding them custody of Emily after defendant had denied their requests for access to his daughter. In their complaint, Linda Fisher and Meredith Fisher alleged that defendant had "brutally murdered" Ms. Young and that, "[u]pon information and belief, [Emily] was in the residence at the time [defendant] murdered her mother." In their prayer for relief, Linda Fisher and Meredith Fisher requested that defendant be subject to discovery and submit to a psychological evaluation. After the filing of this custody action, defendant entered into a consent judgment with Linda Fisher and Meredith Fisher pursuant to which the parties agreed that Meredith Fisher would have primary physical custody of Emily and that no discovery or psychological examination of defendant would be conducted.

The child custody action initially came to the jury's attention during the cross-examination of Meredith Fisher, when defendant's trial counsel asked her about the filing of the child custody complaint and the request that defendant be subject to a psychological examination. After the State, without objection, sought and obtained the admission of the child custody complaint into evidence, Mr. Schilawski testified, also

without objection, that Linda Fisher and Meredith Fisher had alleged in the child custody complaint that, "[i]n the early morning hours of November 3rd, 2006 the defendant brutally murdered [Ms. Young] at their residence" at a time when Ms. Young "was pregnant with defendant's son" and, upon information and belief, when Emily "was in the residence." After defendant filed a motion seeking a change of venue, the parties entered into negotiations resulting in the entry of a consent judgment under which "primary physical custody was awarded to Meredith Fisher" after the completion of a transitional process, the parties "waive[d] the right to conduct discovery with respect to each other," and defendant was absolved from any responsibility for submitting to a psychological evaluation.

B. Admissibility of the Challenged Evidence

The Court of Appeals held that the trial court erred by allowing the admission of evidence concerning the wrongful death and declaratory judgment complaint and default judgments and the child custody complaint on the grounds that the trial court's decision contravened N.C.G.S. § 1-149 and N.C.G.S. § 8C-1, Rule 403. We do not, however, believe that defendant properly preserved his challenge to the admission of any of the challenged evidence on the basis of N.C.G.S. § 1-149 for purposes of appellate review. In addition, we do not believe that defendant properly preserved his challenge to the admission of evidence concerning the child custody complaint for purposes of appellate review on any grounds. Finally, we conclude that defendant's challenge to the admission of evidence concerning the wrongful death and declaratory judgment complaint and judgments as violative of N.C.G.S. § 8C-1, Rule 403 lacks merit. As a result, the Court of Appeals' decision must be reversed and this case remanded to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgment.

1. N.C.G.S. § 1-149

[1] In seeking relief from the Court of Appeals' decision, the State contends that the Court of Appeals erred by determining that defendant was entitled to a new trial on the grounds that the admission of evidence concerning the wrongful death and declaratory judgment action and the child custody action violated N.C.G.S. § 1-149. Among other things, the State contends that defendant failed to properly preserve his challenge to the admission of this evidence for purposes of appellate review on the grounds that, as defendant appears to acknowledge, no objection to the admission of the challenged evidence as violative of N.C.G.S. § 1-149 was asserted in the trial court. As a result, the first issue that we

must address is the extent, if any, to which defendant's failure to object to the admission of the challenged evidence in reliance upon N.C.G.S. § 1-149 in the court below precludes us from reaching the merits of defendant's claim. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and "obtain[ed] a ruling upon the party's request, objection, or motion.").

N.C.G.S. § 1-149 provides, in pertinent part, that "[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." N.C.G.S. § 1-149 (2013). Although the literal language of N.C.G.S. § 1-149 relates solely to the contents of pleadings, this Court has reviewed the admissibility of any evidence relating to civil pleadings or judgments utilizing the standard set out in N.C.G.S. § 1-149 rather than limiting the applicability of N.C.G.S. § 1-149 to the contents of such documents. *See State v. Wilson*, 217 N.C. 123, 126-27, 7 S.E.2d 11, 12-13 (1940) (excluding evidence concerning both a pleading and an order in a civil case); *State v. Dula*, 204 N.C. 535, 536-37, 168 S.E. 836, 836-37 (1933) (excluding evidence concerning the contents of a civil pleading and a civil judgment). As a result, N.C.G.S. § 1-149 requires the exclusion of any evidence relating to the allegations and determinations made in the course of civil litigation "as proof of a fact admitted or alleged in it." N.C.G.S. § 1-149.

According to the Court of Appeals, the fact that defendant did not object to the admission of evidence concerning the complaint filed and default judgments entered in the wrongful death and declaratory judgment action and the complaint filed in the child custody action on the basis of N.C.G.S. § 1-149 at trial does not preclude consideration of defendant's challenge to the admission of this evidence as violative of N.C.G.S. § 1-149 on the merits despite the absence of a contemporaneous objection in the trial court given that the admission of the challenged evidence involved judicial "act[ion] contrary to a statutory mandate." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); *see also State v. McCall*, 289 N.C. 570, 576, 223 S.E.2d 334, 337 (1976) (stating that "[w]hen . . . evidence rendered incompetent by statute was admitted, it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held reversible error whether exception was noted or not" (quoting *State v. Porter*, 272 N.C. 463, 468, 158 S.E.2d 626, 630 (1968))). After careful consideration, however, we hold that the legal principle upon which the Court of Appeals relied in reaching the merits

of the claim that defendant has asserted on the basis of N.C.G.S. § 1-149 does not apply in this instance.

As an initial matter, we note that the extent to which the admission of evidence related to civil actions in criminal proceedings is subject to appellate review despite the failure of the defendant to object under N.C.G.S. § 1-149 was addressed by this Court, albeit in dictum, in *State v. Stephenson*, 218 N.C. 258, 10 S.E.2d 819 (1940). In *Stephenson*, the defendant was convicted of insurance fraud after he burned his tobacco packhouse for the purpose of collecting insurance proceeds. *Id.* at 259, 262, 10 S.E.2d at 820, 822. The State, without objection, introduced the verified complaint that the defendant had filed against his insurance company for the purpose of obtaining a recovery under his fire insurance policy. *Id.* at 261, 10 S.E.2d at 821. After hearing closing arguments and receiving the trial court's instructions, the jury took the verified complaint to the jury room for use during its deliberations. *Id.* at 262-63, 10 S.E.2d at 822. On appeal, the defendant challenged the jury's use of the complaint during its deliberations without raising any objection based upon the fact that the document in question had been admitted into evidence. *Id.* at 263, 10 S.E.2d at 822. After quoting from what is now N.C.G.S. § 1-149, this Court stated that, "[t]hough the complaint was admitted in evidence, without objection, *which amounted to waiver of objection thereto*, it was not permissible for the jury to take it into the jury room without the consent of defendant or of his counsel." *Id.* at 265, 10 S.E.2d at 824 (emphasis added) (internal citations omitted). As a result, this Court has clearly indicated that a failure to object to the admission of evidence that allegedly violates N.C.G.S. § 1-149 results in a waiver of the right to challenge the admission of that evidence on appeal.

A careful comparison of the statutory provisions that this Court has treated as "mandatory" with the language contained in N.C.G.S. § 1-149 establishes that our dictum in *Stephenson* reflected a correct understanding of the applicable law. For example, the statutory provision held to be mandatory in *Ashe* provided that, "[i]f the jury, after retiring for deliberation requests a review of certain testimony or other evidence, *the jurors must be conducted to the courtroom*," at which point "[t]he 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." 314 N.C. at 33-34, 331 S.E.2d at 656 (quoting N.C.G.S. § 15A-1233(a) (emphases added)). Similar language appears in other statutory provisions that this Court has treated as "mandatory." *See, e.g.*, *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) ("*Unless*

the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section: . . . (2) Felony death by vehicle is a Class E felony. . . . (4) Felony serious injury by vehicle is a Class F felony." (quoting N.C.G.S. § 20-141.4(b) (2009) (emphasis added))); *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (citing N.C.G.S. § 15A-1222 ("The judge *may not express* during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." (emphasis added)), and *id.* § 15A-1232 ("In instructing the jury, the judge *shall not express* an opinion as to whether or not a fact has been proved . . . ." (emphasis added))); *McCall*, 289 N.C. at 575, 223 S.E.2d at 337 (stating that N.C.G.S. § 8-57 provided that "defendant's wife was not a competent witness to testify against him, and her failure to testify for him could not be used to his prejudice"). As a result, the statutory provisions that this Court has treated as "mandatory" either include language that requires the trial court to act in a very specific manner or renders certain types of evidence inadmissible for any purpose whatsoever.

The language contained in N.C.G.S. § 1-149 cannot be deemed "mandatory" as that term is used in *Ashe* and similar cases. As a result, N.C.G.S. § 1-149 does not render civil pleadings and judgments invariably inadmissible as a matter of law in every criminal case in the same way that compelled spousal testimony concerning areas outside the statutorily specified exceptions is rendered inadmissible by the current version of N.C.G.S. § 8-57. On the contrary, a trial court required to evaluate the validity of an objection lodged in reliance upon N.C.G.S. § 1-149 must determine whether there is a permissible purpose for which the evidence in question can be admitted, with the ultimate issue being whether the evidence is relevant for some purpose other than proving the same facts found, admitted, or alleged in the civil proceeding in question.

The necessity for the trial court to conduct such an inquiry is repeatedly noted in this Court's jurisprudence concerning N.C.G.S. § 1-149. On the one hand, this Court has precluded the admission of evidence concerning the allegations and admissions contained in civil pleadings. In *Dula*, in which the defendant was charged with embezzling monies that he had collected from the sale of thirteen pianos, 204 N.C. at 535, 168 S.E. at 836, the State offered into evidence the complaint, answer, verdict, and judgment from a civil action in which the piano company had successfully sued the defendant under a consignment contract for the purpose of recovering the amount that the defendant had collected for selling the pianos in question, *id.* at 536, 168 S.E. at 836. As we noted in our opinion, the State offered this evidence for the purpose of showing

that the defendant had received the pianos and sold them without delivering the sales proceeds to the company from which he had procured them, a set of facts that provided the basis for the embezzlement charge that had been lodged against the defendant. *Id.* at 536, 168 S.E. at 836. Although the evidence in question was admitted in the trial court, we overturned the defendant's conviction on the grounds that the evidence concerning the civil filings and orders had been unlawfully admitted during the criminal trial for the purpose of proving the same facts that were alleged or admitted in the related civil matter. *Id.* at 536, 168 S.E. at 836-37. Similarly, we held in *Wilson* that evidence concerning the contents of certain civil pleadings was not admissible at the defendant's embezzlement trial given that the challenged evidence was offered for the purpose of proving that, as guardian of an estate, the defendant had improperly made loans to himself and mismanaged funds. 217 N.C. at 126-27, 7 S.E.2d at 13. As a result, our decisions construing N.C.G.S. § 1-149 clearly prohibit the admission of civil pleadings or judgments for the purpose of proving the facts alleged, admitted, or found in those documents.

On the other hand, in *State v. McNair*, 226 N.C. 462, 38 S.E.2d 514 (1946), we recognized that a party's decision to seek the admission of a civil judgment in a criminal case does "not necessarily use the pleading as proof of any fact therein alleged," *id.* at 464, 38 S.E.2d at 516, and stated that the admissibility of a civil pleading in a criminal trial hinges on the purpose for which the challenged evidence is offered, *id.* at 463-64, 38 S.E.2d at 516. In upholding the trial court's decision to permit the prosecutor to cross-examine the defendant concerning a civil suit in which the defendant had claimed to be the owner of a vehicle that he was alleged to have stolen, this Court stated that:

> The solicitor announced that the object of the cross-examination relative to the complaint in the civil action, was "to impeach the witness or to contradict him," and not to prove any of the facts alleged therein, as they were at variance with the theory of the State's case. The purpose of the solicitor was to use the allegations of the complaint in the civil action, not "as proof of a fact admitted or alleged in it," but to show that the defendant had made two contradictory statements about the matter, neither of which was correct.

Id. at 463-64, 38 S.E.2d at 516. Similarly, in *State v. Phillips*, 227 N.C. 277, 279, 41 S.E.2d 766, 767 (1947), we held that evidence concerning an annulment action brought against the defendant by his second wife, which had been offered for the purpose of proving that he had a motive

to kill his first wife rather than to prove that he was a party to a bigamous marriage, was properly admitted. Thus, this Court has clearly allowed the admission of evidence concerning the contents of criminal pleadings for purposes other than showing the truth of the allegations and admissions contained in those documents.

As a result, given the fact that N.C.G.S. § 1-149 does not contain any mandatory language and given that the prior decisions of this Court do not treat evidence concerning the allegations, admissions, and findings contained in civil pleadings and judgments as invariably inadmissible in criminal cases, we hold that N.C.G.S. § 1-149 is not a "mandatory" statute the violation of which is cognizable on appeal despite the absence of an objection in the trial court. The same logic upon which the Court of Appeals relied in reaching a contrary result would necessarily result in treating most of the provisions of the North Carolina Rules of Evidence as "mandatory," a result that would be contrary to the manner in which this Court has treated evidentiary arguments that were not supported by an objection lodged at trial for most of its history. As a result, since defendant did not object to the admission of evidence concerning the wrongful death and declaratory judgment complaint and default judgments on the basis of N.C.G.S. § 1-149, he is not entitled to challenge the admission of this evidence as violative of that statutory provision on appeal. The same is true of his challenge to the admission of evidence concerning the child custody complaint. The Court of Appeals erred in reaching a contrary conclusion.[9]

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9. After awarding defendant a new trial, the Court of Appeals dismissed defendant's pending motion for appropriate relief as moot. After this Court granted the State's discretionary review petition and assumed jurisdiction over this case, defendant filed a motion for appropriate relief with this Court in which he has asked us to consider his ineffective assistance of counsel claim on the merits in the event that we were to reverse the decision of the Court of Appeals. In addition, the State has also effectively requested us to consider defendant's ineffective assistance of counsel claim on the merits by addressing and deciding the issue of whether evidence related to the civil actions was admitted for an improper purpose under N.C.G.S. § 1-149 even if we find that defendant failed to properly preserve that issue for purposes of appellate review. We decline the parties' invitation to directly or indirectly address defendant's claim for ineffective assistance of counsel at this time. As we have noted elsewhere in this opinion, the effect of our decision to reverse the Court of Appeals' decision in this case is to resuscitate the motion for appropriate relief that defendant filed in that court, a development that renders it unnecessary for us to address and decide the issues that defendant has sought to raise in the essentially identical motion for appropriate relief that he has filed with this Court. Having discussed how N.C.G.S. § 1-149 should be construed in the course of deciding whether defendant had properly preserved the claim that he has advanced in reliance upon that statute for purposes of appellate review, we believe that we have given the lower courts sufficient guidance concerning the manner in which any remaining issues relating to N.C.G.S. § 1-149 should be decided. As a result, we decline to further address the merits of the claim that defendant

2. N.C.G.S. § 8C-1, Rule 403

[2] Secondly, the State contends that the Court of Appeals erred by holding that the trial court abused its discretion in overruling defendant's objection to exclude evidence of the civil suits under N.C.G.S. § 8C-1, Rule 403.[10] According to the State, the Court of Appeals misapplied the applicable standard of review by essentially reweighing the factors that supported and militated against the admission of the challenged evidence rather than determining whether the trial court's decision to admit the challenged evidence lacked any reasoned basis. Once again, we find the State's argument persuasive.[11]

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2013). "This determination is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a

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has advanced in reliance upon N.C.G.S. § 1-149 at this time and dismiss the motion for appropriate relief that defendant has filed with this Court without prejudice to his right to pursue the similar motion for appropriate relief that will be before the Court of Appeals on remand.

10. In his brief, defendant points out that, in addition to explicitly objecting to the admission of evidence concerning his response to the wrongful death and declaratory judgment action pursuant to N.C.G.S. § 8C-1, Rule 403, he also lodged one or more objections for which no grounds were stated at one point during Ms. Freeman's testimony. Based upon that fact, defendant appears to suggest that he is entitled to challenge the admission of the evidence in question on relevance and hearsay grounds as well as on the basis of N.C.G.S. § 8C-1, Rule 403. However, given that a "general objection, if overruled is no good, unless on the face of the evidence, there is no purpose whatever for which it could have been admissible," *State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980) (quoting 1 *Stansbury's North Carolina Evidence* § 27, at 72 (Brandis rev. 1973)), and given that the challenged evidence, as is explained in more detail below, is not inadmissible for all purposes, defendant's relevance and hearsay arguments are not properly before us.

11. As an aside, we note that, despite the Court of Appeals' determination that the admission of evidence concerning both of the civil actions discussed in the text of this opinion violated N.C.G.S. § 8C-1, Rule 403, defendant never actually objected to admission of evidence of the child custody complaint and consent judgment on any grounds at trial. In view of that fact, the Court of Appeals lacked the authority to consider the validity of defendant's challenge to the admission of evidence concerning the child custody proceeding under N.C.G.S. § 8C-1, Rule 403, on the merits. As a result, the only issue that is properly before us under N.C.G.S. § 8C-1, Rule 403, is the extent to which the trial court erred by allowing the admission of evidence relating to defendant's response to the wrongful death and declaratory judgment action.

reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *cert. denied*, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001). Thus, the ultimate issue raised by defendant's challenge to the admission of evidence concerning his response to the wrongful death and declaratory judgment action is whether the trial court's decision to allow the admission of the challenged evidence was so arbitrary that it could not have resulted from the making of a reasoned decision.

The Court of Appeals held that the trial court abused its discretion by allowing the admission of the challenged evidence for two basic reasons. *Young*, __ N.C. App. at __, 756 S.E.2d at 783. As an initial matter, the Court of Appeals held that the substantial prejudice resulting from the introduction of this evidence "irreparably diminished" defendant's presumption of innocence and "vastly outweighed [its] probative value." *Id.* at __, 756 S.E.2d at 783. We do not find this logic convincing.

As a general proposition, appellate decisions holding that a trial court erroneously failed to sustain an objection lodged pursuant to N.C.G.S. § 8C-1, Rule 403, tend to rest on determinations that the admission of the evidence in question served little or no purpose other than to inflame the passions of the jury. *See*, *e.g.*, *Hennis*, 323 N.C. at 283, 286-87, 372 S.E.2d at 526, 531 (finding prejudicial error in a trial court decision to allow the admission of thirty-five gruesome photographs depicting the decayed bodies of murder victims displayed on a screen positioned immediately over the defendant's head and distributed one at a time to the jury over the course of an hour); *State v. Kimbrell*, 320 N.C. 762, 768-69, 360 S.E.2d 691, 694-95 (1987) (holding that the trial court committed prejudicial error by admitting evidence that the defendant engaged in "devil worship" because the evidence "had little or no probative value and can only have been [used] to arouse the passion and prejudice of the jury"). For that reason, one of the ultimate questions raised by the argument that defendant has advanced in reliance upon N.C.G.S. § 8C-1, Rule 403, in challenging the trial court's decision to admit evidence concerning the complaint filed and default judgments entered in the wrongful death and declaratory judgment action is whether the evidence in question had any significant probative value or, alternatively, whether the sole effect of the challenged evidence was to unfairly prejudice the defendant in the eyes of the jury.

A careful review of the record demonstrates that the evidence relating to the wrongful death and declaratory judgment action had at least some material probative value for the purpose of challenging the validity

of defendant's alibi defense. Evidence has "probative value" if it "tends to prove or disprove a point in issue." *Probative Evidence*, *Black's Law Dictionary* (8th ed. 2004). As a result, the extent to which evidence does or does not have probative value depends upon the extent to which a reasonable mind would be more or less influenced by the introduction of the evidence in question in determining whether a disputed fact did or did not exist.

This Court has repeatedly upheld the admission of evidence concerning a defendant's actions after the commission of a crime on the theory that such evidence was relevant to the issue of whether the defendant committed the crime in question. *See State v. McDougald*, 336 N.C. 451, 457, 444 S.E.2d 211, 215 (1994) (finding that the probative value of evidence to the effect that the defendant had escaped from jail before trial was not substantially outweighed by the danger of unfair prejudice on the grounds that the challenged evidence "tended to show the defendant's consciousness of his guilt"); *State v. Stager*, 329 N.C. 278, 321-22, 406 S.E.2d 876, 900-01 (1991) (upholding the admission of evidence to the effect that, among other things, the defendant exhibited a calm demeanor on the morning of her husband's death and that the defendant had disposed of some of her husband's personal effects the day after his funeral). In other words, there is no blanket rule prohibiting the admission of evidence concerning a defendant's conduct after the commission of a crime as long as that evidence has a tendency to shed light on the issue of whether the defendant committed the crime for which he is standing trial. As a result, in order to evaluate the validity of defendant's argument in reliance upon N.C.G.S. § 8C-1, Rule 403, we need not do any more than determine whether that evidence had probative value without being overly concerned about the temporal relationship between the events described in the evidence in question and the date upon which the crime charged was allegedly committed.[12]

The strategy employed by the State in defendant's second trial included an attempt to demonstrate that the alibi evidence that defendant presented at the first trial was false. As part of that process, the

12. The extent to which evidence has probative value and the extent to which evidence may be admitted for a particular purpose are two different, albeit related, questions. As a result, even if, as defendant vigorously contends, the State intended for the jury to draw an inference that is forbidden by N.C.G.S. § 1-149 based upon the introduction of evidence concerning defendant's response to the wrongful death and declaratory judgment action, the proper manner in which to address that problem would have been for defendant to have lodged an appropriate objection and to either obtain a favorable ruling with respect to that issue or to properly preserve that issue for purposes of appellate review.

State attempted to demonstrate that defendant had attempted to "sandbag" the prosecution by waiting until after he had heard the State's evidence before offering up his own version of what had happened, thereby gaining for himself the opportunity to provide an explanation for all of the incriminating evidence that the State had amassed against him. The admission of evidence that, at a substantial economic cost, defendant allowed the entry of a default judgment against himself in the wrongful death and declaratory judgment action rather than offering up a defense and subjecting his account of the events of 2 and 3 November 2006 to scrutiny by others, including agents of the State, in that proceeding did tend to bolster the validity of the State's attack upon the credibility of defendant's alibi. As a result, we are unable to say that the evidence concerning defendant's response to the wrongful death and declaratory judgment action that the trial court admitted at defendant's second trial had no probative value in light of the fact that the credibility of a defendant's account of what happened is always of significant interest to jurors.[13]

We recognize that the admission of evidence that defendant failed to respond to the allegations advanced against him in the wrongful death and declaratory judgment action posed a significant risk of unfair prejudice to defendant. This risk of unfair prejudice was heightened by the fact that the trial court had heard the estate's motion for the entry of a default judgment in the declaratory judgment action and found that defendant had "unlawfully" killed Ms. Young. In recognition of this risk, the trial court explicitly instructed the jury concerning the manner in which civil cases are heard and decided, the effect that a failure to respond has on the civil plaintiff's ability to obtain the requested relief, and the fact that "[t]he entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense."[14] As a result of the fact that the jury is presumed to have

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13. The fact that the State advanced a similar argument at the first trial without attempting to introduce the challenged evidence has no bearing on the extent to which the State was entitled to take a different tack on retrial.

14. Although the trial court did not, as defendant notes, instruct the jury that the evidence concerning the wrongful death and declaratory judgment action was admitted for the sole purpose of attacking the credibility of defendant's claim of alibi, "[t]he admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction." *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989) (citation omitted). As a result of the fact that defendant's trial counsel never requested the trial court to instruct the jury concerning the purposes for which the jury was entitled to consider the evidence concerning the wrongful death and declaratory judgment action or objected to the instructions that the trial court, acting *ex mero*

followed the trial court's instructions, *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004) (citation omitted), *cert. denied*. 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005), the record reflects that the trial court took action that is presumed to have been effective to protect defendant against the exact harm about which he expresses concern.

Although the members of this Court might well have reached a different result from the trial court after balancing the probative value of the evidence concerning defendant's failure to respond to the wrongful death and declaratory judgment action against the risk of unfair prejudice associated with the admission of that evidence, the applicable standard of review requires us to simply determine whether the trial court could have made a reasoned decision to allow the admission of the evidence in question. *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 302-03 (2009) (stating that, "[i]n our review, we consider not whether we might disagree" with the trial court but whether "the trial court's actions are fairly supported by the record" (quoting *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008))). In view of the fact that the evidence concerning defendant's response to the wrongful death and declaratory judgment action had material probative value and the fact that the trial court recognized and made a serious attempt to address the risk of unfair prejudice that would inevitably flow from the admission of that evidence, we cannot conclude that the trial court erred in determining that the risk of unfair prejudice resulting from the introduction of the challenged evidence did not substantially outweigh its probative value.

In awarding defendant a new trial, the Court of Appeals relied upon this Court's decision in *State v. Scott*, 331 N.C. 39, 43, 413 S.E.2d 787, 789 (1992), for the proposition that, "[w]hen the intrinsic nature of the evidence itself is such that its probative value is always necessarily outweighed by the danger of unfair prejudice, the evidence becomes inadmissible under [Rule 403] as a matter of law." *Young*, __ N.C. App. at __, 756 S.E.2d at 783 (second alteration in original) (quoting *Scott*, 331 N.C. at 43, 413 S.E.2d at 789). In *Scott*, this Court concluded that the admission of evidence of a prior alleged offense for which the defendant "had been tried and acquitted" in an earlier trial constituted an abuse of discretion "as a matter of law" on the grounds that the probative value of the evidence in question depended on the extent to which the defendant

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motu, decided to deliver concerning that subject, defendant is not entitled to complain that the prejudicial effect of the challenged evidence was compounded by the trial court's failure to instruct the jury concerning the purposes for which the challenged evidence could properly be considered.

had actually committed the prior alleged offense and that the fact that he had been found not guilty of having committed that offense deprived the evidence in question of any probative value, 331 N.C. at 42, 413 S.E.2d at 788, on the theory that the defendant's acquittal meant that he "has been 'set free or judicially discharged from an accusation; released from . . . a charge or suspicion of guilt,' " *id.* at 43, 413 S.E.2d at 789 (quoting *State v. Marley*, 321 N.C. 415, 424, 364 S.E.2d 133, 138 (1988) (alterations in original)). The probative value of the evidence at issue in this case, unlike that of the evidence at issue in *Scott*, was not undercut by the existence of a prior judicial determination that the accusation lodged against the defendant in the related matter had no merit. As a result, the Court of Appeals' reliance upon *Scott* was misplaced.

The second justification advanced by the Court of Appeals in support of its decision to hold that the trial court had abused its discretion by allowing the admission of evidence concerning defendant's response to the wrongful death and declaratory judgment action was that the trial court admitted the challenged evidence while subject to a misapprehension of law. *Young*, __ N.C. App. at __, 756 S.E.2d at 783. According to well-established North Carolina law, "[w]here a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979) (citation omitted). In support of this determination, the Court of Appeals held that the trial court had an obligation, even in the absence of an objection, to conduct an inquiry for the purpose of determining whether the admission of the challenged evidence would violate N.C.G.S. § 1-149 and had failed to do so. *Young*, __ N.C. App. at __, 756 S.E.2d at 783. As we have already noted, however, N.C.G.S. § 1-149 does not require the trial court to act in the absence of an objection from one or the other party. In view of the fact that neither party to this case directed the trial court's attention to N.C.G.S. § 1-149 at the time that the challenged evidence was admitted, the trial court was not obligated to consider the potential applicability of N.C.G.S. § 1-149 at the risk of being reversed on appeal in the absence of a showing of plain error.[15] As a result, given that the Court of Appeals erred by holding that the trial court violated N.C.G.S. § 8C-1, Rule 403, by admitting evidence concerning defendant's response to the wrongful death and declaratory

15. Although defendant alludes at one point in his brief to the possibility that the admission of the challenged evidence constituted plain error, the Court of Appeals did not decide this case on plain error grounds and defendant has failed to advance any detailed "plain error"-based argument in his brief before this Court.

judgment action, defendant is not entitled to relief from the trial court's judgment on the basis of the admission of that evidence.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the Court of Appeals erred by awarding defendant a new trial based upon the admission of evidence concerning defendant's response to the wrongful death and declaratory judgment action and the child custody action that were filed against him by members of Ms. Young's family.[16] As a result, the Court of Appeals' decision should be, and hereby is, reversed, and this case should be, and hereby is, remanded to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgment, including the issues raised by the motion for appropriate relief that defendant filed before the Court of Appeals.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; AQUA NORTH CAROLINA, INC., Applicant; and PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION, Intervenor

v.

ATTORNEY GENERAL ROY COOPER, Intervenor

No. 347A14

Filed 21 August 2015

Utilities—rate adjustment mechanism—infrastructure—water and sewer service

The Utilities Commission provided sufficient findings, reasoning, and conclusions to support its ultimate finding that Aqua N.C., Inc.'s use of the rate adjustment mechanism in N.C.G.S. § 62-133.12 was in the public interest, and the Commission's determination was supported by substantial evidence in view of the whole record. The Commission initially found that the legislative intent behind section 62-133.12 was to provide a mechanism to incentivize quicker investments in water and sewer infrastructure by allowing for faster recovery of some portion of invested costs, then thoroughly

16. The remaining issues addressed by the Court of Appeals are not before this Court, so the Court of Appeals' decision with respect to these issues remains undisturbed.

explained how Aqua's use of the rate adjustment mechanism would benefit Aqua's customers. Moreover, the Commission took meaningful steps to ensure that problems with water quality were addressed and that customers were charged only after Aqua has made improvements to the quality and reliability of its service.

On direct appeal as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90(d) from a final order of the North Carolina Utilities Commission entered on 2 May 2014 in Docket No. W-218, Sub 363. Heard in the Supreme Court on 16 March 2015.

Sanford Law Office, PLLC, by Jo Anne Sanford; Bennink Law Office, by Robert H. Bennink, Jr.; Law Office of Charlotte Mitchell, by Charlotte Mitchell; and Allegra Collins Law, by Allegra Collins, for applicant-appellee Aqua North Carolina, Inc.

Antoinette R. Wike, Chief Counsel, and William E. Grantmyre, Staff Attorney, for intervenor-appellee Public Staff – North Carolina Utilities Commission.

Stuart Saunders, Assistant Attorney General, Kevin Anderson, Senior Deputy Attorney General, and Jennifer T. Harrod, Special Deputy Attorney General, for intervenor-appellant Roy Cooper, Attorney General.

JACKSON, Justice.

In this case we consider whether the North Carolina Utilities Commission (the Commission) properly concluded that it is in the public interest to allow Aqua North Carolina (Aqua) to utilize a rate adjustment mechanism of the type described in section 62-133.12 of the North Carolina General Statutes. We conclude that the Commission's determination was based upon sufficient findings of fact and was supported by competent, material, and substantial evidence in view of the entire record. *See* N.C.G.S. § 62-94 (2013). Accordingly, we affirm.

Aqua is a public utility that provides water and sewer utility service to customers in North Carolina. On 2 August 2013, Aqua filed an application with the Commission seeking authority to increase its rates for water and sewer service in North Carolina. As part of its application, Aqua also requested authority to implement a rate adjustment mechanism pursuant to section 62-133.12, which states in pertinent part:

> The Commission may approve a rate adjustment mechanism in a general rate proceeding . . . to allow a water or sewer public utility to recover through a system improvement charge the incremental depreciation expense and capital costs associated with the utility's reasonable and prudently incurred investment in eligible water and sewer system improvements. The Commission shall approve a rate adjustment mechanism authorized by this section only upon a finding that the mechanism is in the public interest. The frequency and manner of rate adjustments under the mechanism shall be as prescribed by the Commission.

Id. § 62-133.12(a) (2013).

On 19 August 2013, the Commission entered an order declaring this proceeding to be a general rate case and suspending the proposed new rates for up to 270 days. The Commission scheduled six hearings across the state to receive public witness testimony. The Commission also scheduled an evidentiary hearing for 27 January 2014. The Attorney General of North Carolina and the Public Staff of the Commission intervened as allowed by law. *See id.* §§ 62-15, -20 (2013).

Subsequently, Aqua and the Public Staff entered into a Stipulation that resolved all the issues in the case between the two parties. At the time, the Commission had not adopted final rules establishing the appropriate procedures for implementing a rate adjustment mechanism. Nevertheless, the Stipulating Parties agreed that "this docket is the appropriate forum for a decision by the Commission on [Aqua's] request to implement a [rate adjustment] mechanism based on a finding that the [mechanism] is in the public interest." The Attorney General did not join in the Stipulation.

During the hearings before the Commission, fifty-four Aqua customers testified, and the parties presented testimony from several witnesses. Thirty customers expressed service-related concerns, which primarily focused on problems with water quality, such as receiving water that appeared discolored, contained sediment, caused damage to appliances, and stained laundry items. Customers also raised other concerns, including billing issues, low water pressure, and sulfur or chlorine odors. Customers "almost unanimously" opposed any rate increase.

At the evidentiary hearing, Aqua offered evidence supporting the conclusion that use of a rate adjustment mechanism is in the public interest. Aqua's President and Chief Operating Officer, Thomas J. Roberts, asserted that the mechanism would allow Aqua to adjust its rates to

recover money invested in "necessary, reasonable, approved and completed projects," with the cumulative rate adjustment limited to five percent of the total annual service revenues approved by the Commission in the current general rate case. Roberts stated that, as a result of these rate adjustments, Aqua would be able to fund "earlier and more robust investment in infrastructure" and recover its investments "on a more timely basis." In addition, Roberts noted that the mechanism would allow for "incremental adjustments" to rates, "rather than the sharp rate changes that are characteristic of general rate cases."

Roberts acknowledged that some customers have difficulties with discolored, sediment-laden water, and he stated that these problems are caused by naturally occurring iron and manganese present in ground water. Roberts testified that, although many customers do not find such water acceptable, it complies with environmental regulations and does not create any health risks. Roberts asserted that Aqua could employ a number of methods to improve water quality, and he stated that use of a rate adjustment mechanism would provide funding "to accelerate the investment needed to address these concerns."

In addition to discussing customers' concerns about water quality, Roberts stated that other aspects of Aqua's system need improvements. Roberts testified that an internal analysis had revealed that portions of Aqua's water main infrastructure are seriously outdated and need replacement. Roberts also stated that Aqua needs to fund replacement of motors, pumps, and other equipment, as well as implement measures to improve how the system copes with significant rain events. Ultimately, Roberts asserted that use of a rate adjustment mechanism would facilitate improvements to infrastructure and result in "fewer water quality related complaints, enhanced water pressure, and decreased main breaks."

Aqua witness Robert A. Kopas, Regional Controller for Aqua Ohio, Inc., provides financial supervision and guidance to Aqua North Carolina. He testified that Aqua had presented to the Commission a "three-year plan" listing possible future projects that could be eligible for recovery through a rate adjustment mechanism. Kopas explained that Aqua did not submit this document to seek Commission approval of any of the specific projects listed; instead, it was submitted to support the company's contention that use of a rate adjustment mechanism is in the public interest. Kopas asserted that before Aqua could recover any money through the mechanism, the company would have to construct an eligible improvement, place the improvement into service, and propose the improvement for inclusion in a rate adjustment, after which the

Commission and the Public Staff would determine the project's eligibility and the reasonableness of the associated costs.

Aqua witness Pauline M. Ahern, a principal with AUS Consultants, testified that a rate adjustment mechanism would partially mitigate regulatory lag, "which occurs during the time between the incurrence of a utility capital expenditure or expense and the time when the utility can begin to earn a return on . . . the capital investment or recovery of the expense incurred." Ahern stated that the mechanism "will improve the capital attractiveness of [Aqua], improve its service quality and reliability, and provide for more moderate, gradual rate increases."

The Public Staff presented testimony from David C. Furr, Director of the Public Staff's Water and Sewer Division. Furr testified that he had reviewed the three-year plan filed by Aqua in order to evaluate whether the listed projects might be eligible for recovery through a rate adjustment mechanism. Furr stated that Aqua's three-year plan did not contain enough detail for him to determine whether the projects would be eligible, and although the Public Staff had requested additional information, Aqua's response remained "materially inadequate." In contrast, Roberts testified that Aqua believed it had provided sufficient detail and that the company was "willing to give all the detail that the Public Staff and the Commission would want."

The Commission entered an order in Aqua's general rate case on 2 May 2014. The Commission noted that the water quality concerns raised by some Aqua customers were related to high concentrations of naturally occurring iron and manganese in the source supply of water. The Commission found that iron and manganese are "subjects of Department of Environment and Natural Resources (DENR) secondary – not primary – water quality standards, and thus do not represent health issues." Nevertheless, the Commission concluded that "[a]dditional attention is required to address the issues which arise from elevated levels of naturally occurring iron and manganese in the source water supply in certain Aqua systems."

In addition, the Commission found that enactment of section 62-133.12 "was intended to encourage and accelerate investment in needed water and sewer infrastructure" by "alleviat[ing] the effects of regulatory lag by allowing for earlier recovery of some portion" of "depreciation expense and capital costs." The Commission determined that if a rate adjustment mechanism were authorized here, "Aqua would be incentivized and encouraged to accelerate its investment in water and sewer infrastructure improvements to comply with applicable water

quality and effluent standards, including secondary water quality standards." Specifically, the Commission explained that the mechanism "will be available to fund projects to address problematic systemic secondary water quality issues should the Commission direct [Aqua] to undertake them in individual subdivision service areas." The Commission found that such additional investment in infrastructure would lead to "better water quality" and "improved system reliability." As a result, the Commission found that Aqua's request to implement a rate adjustment mechanism is in the public interest and therefore approved the company's request.

At the same time, the Commission ordered Aqua and the Public Staff "to develop and implement a plan to identify and respond to [significant] secondary water quality concerns" in particular service areas. The Commission required Aqua and the Public Staff, "[a]t a minimum," to file written reports on the first of June and the first of December every year while the rate adjustment mechanism is in effect. These written reports must describe any secondary water quality concerns affecting Aqua's customers. If a particular concern affects at least ten percent of the customers in an individual subdivision or at least twenty-five billing customers, additional information must be provided. In such cases the reports must recommend whether Aqua should be required to undertake corrective action with respect to specific water quality concerns.

The Commission noted that final rules implementing the rate adjustment mechanism had not been approved. The Commission concluded that it should adopt alternative procedures, which were set forth in appendices to its order, to enable Aqua to make the requisite filings and qualify for implementation of charges pursuant to the rate adjustment mechanism without having to file an additional general rate case application once final rules were adopted. The Attorney General appealed the Commission's order to this Court as of right pursuant to N.C.G.S. §§ 7A-29(b) and 62-90.

Subsection 62-79(a) of the North Carolina General Statutes "sets forth the standard for Commission orders against which they will be analyzed upon appeal." *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n* (*CUCA I*), 348 N.C. 452, 461, 500 S.E.2d 693, 700 (1998). Subsection 62-79(a) provides:

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (2013). When reviewing an order of the Commission, this Court may, *inter alia*,

> reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions, or
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> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

Id. § 62-94(b). Pursuant to subsection 62-94(b) this Court must determine "whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record." *CUCA I*, 348 N.C. at 460, 500 S.E.2d at 699 (citation omitted). "Substantial evidence [is] defined as 'more than a scintilla or a permissible inference.' " *Id.* at 460, 500 S.E.2d at 700 (alteration in original) (quoting *State ex rel. Utils. Comm'n v. S. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973), *cert. denied*, 284 N.C. 623, 201 S.E.2d 693 (1974)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126, 140 (1938)). The Commission must include all necessary findings of fact, and failure to do so constitutes an error of law. *Id.* (citation omitted).

The Attorney General argues that the Commission's finding that Aqua's request to use a rate adjustment mechanism is in the public interest is not based upon sufficient findings, reasoning, and conclusions,

and is not supported by substantial evidence. In addition, the Attorney General contends both that the Commission had no proper basis for this finding and that the Commission's conclusion that the mechanism would incentivize Aqua to invest in infrastructure and improve its service quality "is, at most, speculative" because the order did not impose any "concrete obligation, commitment, or anything else." We disagree.

"The Utilities Commission, not this Court, is the finder of fact in this proceeding. Findings of fact made by the Commission are prima facie just and reasonable on appeal." *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 382-83, 358 S.E.2d 339, 363 (1987) (citations omitted). "[T]he Commission's findings, if supported by competent, material, and substantial evidence in view of the record as a whole, are binding upon this Court." *State ex rel. Utils. Comm'n v. Pub. Staff*, 317 N.C. 26, 45, 343 S.E.2d 898, 910 (1986) (citing *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966)). As a result, if there is substantial evidence to support the Commission's determination, this Court will not substitute its judgment for that of the Commission. *Id.* at 46-47, 343 S.E.2d at 910-11.

By enacting section 62-133.12, the General Assembly authorized the use of a rate adjustment mechanism upon a "finding" by the Commission "that the mechanism is in the public interest." N.C.G.S. § 62-133.12(a). As previously stated, the Commission found that allowing Aqua to use a rate adjustment mechanism is in the public interest. In making this determination, the Commission initially found that the legislative intent behind section 62-133.12 was to provide a mechanism to incentivize quicker investments in water and sewer infrastructure by allowing for faster recovery of some portion of invested costs.

The Commission explained that, because of the time involved in preparing and processing general rate cases, the long periods of construction required for major projects, and the Commission's use of historical test years in setting rates, a regulatory lag period occurs between when a utility invests in improvements and when it begins to recover the capital costs of those improvements. The Commission noted that Roberts had testified that implementing a rate adjustment mechanism would allow Aqua to recover invested funds more quickly and therefore enable Aqua to invest more capital in this state. Similarly, the Commission observed that Ahern had testified that use of the mechanism would result in "[p]artial mitigation of [regulatory] lag" and lead to water quality improvements that otherwise would be delayed. After considering their testimony and the arguments raised by the Attorney General, the Commission concluded that implementing the mechanism

"will promote adequate, reliable, and economical utility service for Aqua's customers" by "incentiviz[ing] Aqua to increase and accelerate infrastructure improvements." These findings are supported by the testimony of Roberts and Ahern.

The Commission discussed the "secondary water quality issues" raised by Aqua's customers and found that, as stated by Roberts, these problems result from high concentrations of iron and manganese found naturally in sources of groundwater within Aqua's system. The Commission determined that in the past, water utilities may have given lower priority to correcting secondary water quality issues because these companies first spend their limited budgets on primary water quality improvements. The Commission found that use of a rate adjustment mechanism would benefit customers further because accelerated funding will be available for projects undertaken at the Commission's direction to improve secondary water quality. The Commission then ordered Aqua and the Public Staff to file written reports addressing secondary water quality concerns twice each year while the mechanism is in effect and required that these filings detail particular water quality problems and make recommendations on whether Aqua should be ordered to pursue corrective action. Rather than solely relying upon a commitment by Aqua or the Public Staff, the Commission affirmatively imposed obligations to ensure that Aqua would use the rate adjustment mechanism only to make meaningful improvements to its system.

The Commission further noted that pursuant to the alternative procedures it had adopted in its order, approval of the mechanism would not result in automatic surcharges for customers. The Commission explained that these procedures require Aqua to obtain Commission approval for any additional charges, and the approval process will involve review by the Public Staff and the Commission to determine whether Aqua's investments and costs are reasonable and prudent. Furthermore, the Commission explained that Aqua could use the mechanism to recover only those costs that are invested in "eligible system improvements" that are "completed and placed in service prior to the Company requesting approval."

The Commission acknowledged that witness Furr had testified that Aqua's initial three-year plan was "materially deficient," but noted that Roberts had testified that Aqua "is willing to provide all information required by the Public Staff." In addition, the Commission found that, because this case involves a new process, "one party . . . may believe the level of detail provided is sufficient; whereas, another party may not." The Commission also directed Aqua to provide enough information to

allow the Public Staff to "conduct its investigation and review of [Aqua's] initial three-year plan," "have productive discussions with [Aqua] regarding the specific projects included in the plan," and "conclude whether the projects included in [the] three-year plan meet the criteria established in [section] 62-133.12" to "be considered for recovery through the [rate adjustment] mechanism."

Ultimately, the Commission found that

> Aqua would be incentivized and encouraged to accelerate its investment in water and sewer infrastructure improvements to comply with applicable water quality and effluent standards, including secondary water quality standards, if authorized to utilize a [rate adjustment] mechanism to recover some of its investment in a more timely manner and alleviate the effects of regulatory lag. Such accelerated investment to address aging infrastructure and water quality issues would benefit customers through improved system reliability and better water quality. The [rate adjustment] mechanism would further benefit customers because it will be available to fund projects to address problematic systemic secondary water quality issues should the Commission direct the Company to undertake them in individual subdivision service areas, even though such projects may not be specifically required by federal and/or state standards and might not be of high system priority absent the direction of the Commission. The [rate adjustment] mechanism does not affect or take away the Commission's authority to disallow recovery for projects and investments found to be unreasonable and imprudent.

The Commission thoroughly explained how Aqua's use of a rate adjustment mechanism would benefit Aqua's customers, and the Commission took meaningful steps to ensure that problems with water quality are addressed and that customers are charged only after Aqua has made improvements to the quality and reliability of its service. We hold that the Commission provided sufficient findings, reasoning, and conclusions to support its ultimate finding that the mechanism is in the public interest, and that the Commission's determination is supported by substantial evidence in view of the record as a whole. Accordingly, the Commission's order is affirmed.

AFFIRMED.

IN RE BURKE

[368 N.C. 226 (2015)]

IN THE MATTER OF LYNN MARIE BURKE

No. 410A14

Filed 21 August 2015

Attorneys—application to take Bar exam denied—candor and truthfulness—pattern of omitting past criminal offenses

The denial of petitioner's application to stand for the July 2011 North Carolina Bar Examination was affirmed where the Board of Law Examiners (Board) concluded that petitioner "failed to carry her burden of proving she possesses the requisite general fitness and good moral character expected of attorneys licensed to practice law in North Carolina." The Board considered the evidence in the record as a whole and concluded that petitioner had demonstrated "a lack of candor and truthfulness" in that she had committed a substantial number of criminal offenses throughout the 1980s and 1990s; failed to disclose six criminal convictions on her law school application; omitted seven criminal charges on her District of Columbia Bar application and six charges of failure to appear on her North Carolina Bar application; and her accounts of a shoplifting incident differed. Counsel for the Board did not dispute petitioner's assertion that she had turned her life around and subsequently "has done remarkable things in her life." The Board weighed all the evidence, reached a decision, and the Board's decision was supported by substantial evidence in view of the whole record.

Appeal of right pursuant to section .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina from an order entered on 1 October 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County, affirming the 14 May 2013 order of the Board of Law Examiners denying the applicant's application to stand for the July 2011 North Carolina Bar Examination. Heard in the Supreme Court on 20 April 2015.

Robert F. Orr; and Poyner Spruill LLP, by Andrew H. Erteschik, Carrie V. McMillan, and J.M. Durnovich, for petitioner-appellant Lynn Marie Burke.

Roy Cooper, Attorney General, by Robert C. Montgomery, Senior Deputy Attorney General, and H. Dean Bowman, Special Deputy Attorney General, for respondent-appellee North Carolina Board of Law Examiners.

JACKSON, Justice.

In this case we consider whether the Board of Law Examiners (the Board) erred by concluding that petitioner Lynn Marie Burke "failed to carry her burden of proving she possesses the requisite general fitness and good moral character expected of attorneys licensed to practice law in North Carolina." We conclude that the Board's decision is supported by substantial evidence in view of the whole record. Accordingly, we affirm.

In May 2010, petitioner received her Juris Doctor degree from North Carolina Central University School of Law. After law school, petitioner initially applied for, and later received, a license to practice law in Washington, D.C. In October 2010, while her District of Columbia Bar application still was pending, petitioner applied to take the North Carolina Bar Examination. In her North Carolina Bar application, petitioner disclosed forty incidents between 1983 and 2004 in which she had been accused of criminal offenses including forgery, larceny, shoplifting, writing worthless checks, using a stolen credit card, possessing stolen property, and obtaining property by false pretenses. Petitioner acknowledged that many of these incidents had resulted in criminal convictions.

Because of concerns about her application, the Board sent petitioner a notice instructing her to appear at a hearing before a panel of the Board. The notice stated that during the hearing, petitioner would be asked to testify regarding the criminal charges that she had disclosed in her application. In addition, the notice stated that petitioner would be questioned about several criminal charges that she failed to disclose in her applications for admission to law school, the District of Columbia Bar, and the North Carolina Bar. The hearing was conducted on 28 September 2011, and subsequently, the panel directed petitioner to appear at a de novo hearing before the full Board.

The de novo hearing was held on 9 and 10 January 2013. Petitioner testified at the hearing in support of her application and explained that, beginning in the 1980s, she committed a number of criminal offenses, which she characterized as being motivated by financial necessity. Yet she also stated that her life started to change after a particular incident of shoplifting that occurred in 2002. Petitioner testified that on this occasion, which occurred the day of her twin daughters' prom, she had attempted to take prom dresses from a department store by concealing them in a bag. Petitioner stated that after she was caught and her daughters learned what she had done, the extent of her criminal conduct was "put in front of [her] face." She testified that subsequently, she began

going to counseling and started working for her father. She testified that she had not stolen anything since the incident in 2002.

Petitioner stated that she had been truthful about her criminal history when applying to law school, the District of Columbia Bar, and the North Carolina Bar. Although petitioner acknowledged that she had "neglected" to include some of her criminal history in her law school application and her two bar applications, she testified that the omissions occurred because she "just forgot." Petitioner stated that she had amended each application to correct the omissions.

Petitioner was questioned about discrepancies between her testimony concerning the shoplifting incident from 2002 and two written statements she had drafted. Specifically, petitioner was asked about the following statement initially submitted as part of amendments to her District of Columbia and North Carolina Bar applications, which appeared to contain materially different facts when compared with her testimony:

> I was at Crabtree Valley mall with my twin daughters. They were going to the prom in a week. I had their prom dresses in a shopping bag to take them to be hemmed at the tailor shop. While I was waiting for them, I went to Dillard's Department store. I knew that they did not have the proper undergarments to wear under the dresses and I attempted to take them. . . . [T]he store security guard . . . . charged me with larceny of the dresses and shoplifting of the undergarments. My daughter went back later on that day with the receipts for the dresses and was given them back.

Next, petitioner was asked about a later filing submitted to the District of Columbia Court of Appeals Committee on Admissions (District of Columbia Bar Committee) asserting that the incident occurred one day before the prom and involved the attempted theft of two prom dresses and shoes. Petitioner stated that the discrepancy arose because she had difficulty obtaining records related to the incident. Petitioner testified that the statement made in the amendments to her District of Columbia and North Carolina Bar applications came from memory and contained inaccurate details. She stated that "it took . . . a couple of weeks" to obtain relevant documents, but explained that she had more complete information by the time she prepared the later filing submitted to the District of Columbia Bar Committee. Although the revised narrative was introduced at the hearing and was part of the record before the Board,

petitioner acknowledged that she also "should have re-amended" her North Carolina Bar application to reflect the updated information.

On 14 May 2013, the Board entered an order denying petitioner's application. In its order the Board noted that petitioner had committed a substantial number of criminal offenses throughout the 1980s and 1990s. The Board found that petitioner had failed to disclose six criminal convictions on her law school application and that she had received a letter of caution from the school "remind[ing]" her of her "obligation to provide full disclosure." In addition, the Board stated that petitioner had omitted seven criminal charges on her District of Columbia Bar application and six charges of failure to appear on her North Carolina Bar application.

The Board discussed how petitioner's accounts of the 2002 shoplifting incident differed. The Board explained that in petitioner's initial written account, she asserted that "she had taken the prom dresses (previously purchased) to a tailor to be hemmed," and after unsuccessfully attempting to steal undergarments to go with the dresses, she eventually produced receipts for the dresses and had them returned to her. The Board noted that this written account differed from petitioner's testimony describing the event and concluded that the differences "showed a lack of candor."

Ultimately, the Board found by the greater weight of the evidence that

> (a) [Petitioner] failed to disclose on her application to North Carolina Central University School of Law six criminal convictions including Resisting a Public Officer, four Worthless Checks, and Misdemeanor Forgery and Uttering,
>
> (b) [Petitioner] failed to disclose seven criminal charges on her District of Columbia Bar Application,
>
> (c) [Petitioner] was charged on six (6) occasions with Failure to Appear,
>
> (d) [Petitioner] failed to disclose six (6) charges of Failure to Appear on her North Carolina Bar Application,
>
> (e) [Petitioner] was charged with 40 criminal charges between 1983-1999,
>
> (f) In May 1988, [petitioner] was convicted of multiple felony counts of False Pretense and Obtaining Property by False Pretenses and placed on probation,

> (g) Within a matter of months, [petitioner] began shoplifting again and was arrested. She was sentenced to 10 years imprisonment and was incarcerated in North Carolina for 20 months,
>
> (h) In 2002, [petitioner] attempted to steal two prom dresses from a department store in Raleigh, North Carolina and was charged with Larceny. [Petitioner] showed a lack of candor in her testimony regarding this event which differed from the way she had described the event in her District of Columbia Bar [A]pplication,
>
> (i) [Petitioner] ignored her obligations to the courts of North Carolina which caused her to be charged on six separate occasions with Failure to Appear.

The Board concluded that "the foregoing conduct, individually and collectively, as well as [petitioner's] testimony at her full Board hearing regarding these matters demonstrate a lack of candor and truthfulness." Accordingly, the Board ruled that petitioner had failed to carry her burden of proving that she possesses the requisite general fitness and good moral character expected of North Carolina attorneys. Petitioner filed a petition for judicial review in the Superior Court, Wake County. Applying the whole record test, the court found that the Board's decision was supported by substantial evidence and therefore affirmed that decision. Petitioner appealed to this Court as of right pursuant to section .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina.

In her appeal petitioner argues that the Board's findings and conclusions related to her alleged misstatements and omissions are not supported by the evidence. Specifically, petitioner contends that these misstatements and omissions were unintentional and immaterial, and did not demonstrate a lack of candor and truthfulness. We disagree.

This Court uses the whole record test when reviewing decisions of the Board. *In re Gordon*, 352 N.C. 349, 352, 531 S.E.2d 795, 797 (2000) (citations omitted). The whole record test requires this Court to evaluate all the evidence, including "that which supports as well as that which detracts from the Board's findings," and determine whether substantial evidence supports the Board's findings of fact and conclusions of law. *Id.* at 352, 531 S.E.2d at 797 (quoting *In re Moore*, 308 N.C. 771, 779, 303 S.E.2d 810, 816 (1983)). Substantial evidence is "relevant evidence which a reasonable mind . . . could accept as adequate to support a conclusion." *Id.* at 352, 531 S.E.2d at 797 (alteration in original) (quoting

In re Golia-Paladin, 344 N.C. 142, 149, 472 S.E.2d 878, 881 (1996), *cert. denied*, 519 U.S. 1117, 117 S. Ct. 962, 136 L. Ed. 2d 847 (1997)).

"Good moral character has many attributes, but none are more important than honesty and candor." *In re Legg*, 325 N.C. 658, 672, 386 S.E.2d 174, 182 (1989) (quoting *In re Green*, 464 A.2d 881, 885 (Del. 1983) (per curiam)), *cert. denied*, 496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990). "Testimony that is contradictory, inconsistent, or inherently incredible is a sufficient basis upon which to deny admission on character grounds." *In re Braun*, 352 N.C. 327, 335, 531 S.E.2d 213, 218 (2000) (citing *In re Elkins*, 308 N.C. 317, 326, 302 S.E.2d 215, 220, *cert. denied*, 464 U.S. 995, 104 S. Ct. 490, 78 L. Ed. 2d 685 (1983)). Similarly, "[m]aterial false statements can be sufficient to show the applicant lacks the requisite character and general fitness for admission to the Bar." *In re Legg*, 325 N.C. at 672, 386 S.E.2d at 182 (quoting *In re Elkin*s, 308 N.C. at 327, 302 S.E.2d at 221). In the case *sub judice* the Board concluded that petitioner had failed to carry her burden of demonstrating that she possesses the requisite character for admission, partly because of her past criminal conduct and partly because of numerous misstatements and omissions that were revealed by the evidence. The evidence establishes that petitioner submitted inaccurate accounts of the 2002 shoplifting incident to both the Board and the District of Columbia Bar Committee. Her initial narrative contained specific but inaccurate details, such as taking the prom dresses to be hemmed, being falsely accused of shoplifting the dresses, and having the dresses later returned to her. Subsequently, petitioner submitted to the District of Columbia Bar Committee a revised statement asserting that the incident occurred on the night before the prom and that she stole prom dresses and shoes, while in her North Carolina Bar application, petitioner stated that the incident happened a week before the prom. Petitioner acknowledged that she "should have re-amended" her North Carolina Bar application to reflect this revised statement. Finally, during her testimony before the Board, petitioner stated that the incident occurred both on the day of the prom and the night before. When she was asked "exactly" what she attempted to take, she responded, "It was the dresses," and when asked whether she attempted to take "[a]nything else," she said, "No." These three accounts each differ significantly with respect to factual details such as when the incident occurred and what was taken. The Board did not err by considering petitioner's testimony and other statements and concluding that she demonstrated "a lack of candor."

Moreover, "a purposeful pattern of omitted material information" can support a conclusion that an applicant has failed to establish the

good moral character required to practice law. *In re Legg*, 325 N.C. at 672, 386 S.E.2d at 182. Here petitioner omitted multiple criminal charges when preparing her law school application, District of Columbia Bar application, and North Carolina Bar application. On 9 September 2008, petitioner sent a letter to Dean Raymond Pierce of North Carolina Central University School of Law stating that she had discovered that she had omitted six criminal convictions from her law school application and requesting to amend her application. These convictions were for resisting a public officer, writing worthless checks, and misdemeanor forgery and uttering. She received a letter of caution from the University dated 13 May 2009 "as a reminder of [her] obligation to provide full disclosure." This letter specifically warned petitioner that the omissions in her law school application "might be perceived as a willingness to withhold or omit information that is not favorable to [her], in circumstances in which complete candor is required."

Nevertheless, in May 2010, when she applied for admission to the District of Columbia Bar, petitioner again omitted seven criminal charges including resisting a public officer, writing worthless checks, and obtaining property by false pretenses. A charge related to the shoplifting incident from 2002 also was omitted. Petitioner amended her application to correct these omissions in a filing dated 11 January 2011, which noted that the omissions were "brought to [her] attention . . . by the Board of NC Bar Examiners" on 5 January 2011. Finally, in a filing dated 19 January 2011, petitioner amended her North Carolina Bar application to include six charges of failure to appear. Petitioner stated that she omitted these charges from her initial application because she "did not consider" charges of failure to appear that arose from traffic offenses. Ultimately, the evidence establishes omissions of multiple criminal charges in three separate applications, even though petitioner previously had received a letter emphasizing the importance of full disclosure.

The Board considered the evidence in the record as a whole and concluded that petitioner had demonstrated "a lack of candor and truthfulness." This Court will not "replace the Board's judgment as between two reasonably conflicting views, even though the [C]ourt could justifiably have reached a different result had the matter been before it *de novo*." *In re Elkins*, 308 N.C. at 322, 302 S.E.2d at 217-18 (quoting *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). "As long as the Board does not act in an arbitrary, capricious, or erroneous manner, it has, as an instrument of the State, 'wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law.' " *In re Braun*, 352 N.C. at 335, 531 S.E.2d at 218 (quoting *In re Golia-Paladin*,

344 N.C. at 152, 472 S.E.2d at 883). Applying the whole record test, we conclude that petitioner's past conduct, her contradictory statements about the shoplifting incident in 2002, her acknowledgment that she "should have re-amended" her North Carolina Bar application after learning that she had submitted incorrect information to the Board, and her numerous omissions from law school and bar applications support the Board's conclusion. Accordingly, petitioner's argument is without merit.

Next, petitioner argues that the Board's Guidelines for Determining Character and Fitness of Bar Applicants require the Board to consider "evidence of rehabilitation." Petitioner contends that the Board failed to make any findings of fact regarding whether she had demonstrated rehabilitation. "Administrative agencies must find facts when factual issues are presented." *In re Rogers*, 297 N.C. 48, 56, 253 S.E.2d 912, 918 (1979). Even so, "[i]n cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the Board need only weigh the evidence and determine whether the applicant has shown his good moral character." *Id.* at 56, 253 S.E.2d at 917. In *In re Rogers* this Court explained that the Board erred by failing to make findings of fact because, given the evidence presented, "[t]he Board could have found that [the applicant] had not shown his good moral character only if it believed" that he had committed two specific wrongful acts, which he denied. *Id.* at 60, 253 S.E.2d at 920. But in the case *sub judice* counsel for petitioner stated at the hearing that "the facts in this case are not in dispute." Similarly, counsel for the Board did not dispute petitioner's assertion that she had turned her life around and subsequently "has done remarkable things in her life." The Board made proper findings describing both petitioner's past conduct and her present failure to provide full and accurate disclosure in her law school and bar applications, weighed all the evidence, and reached a decision. The Board did not err by declining to make specific findings about rehabilitation when its ultimate decision was based upon "an exercise of delicate judgment" after evaluating undisputed evidence. *Id.* at 56, 253 S.E.2d at 917 (quoting *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 248, 77 S. Ct. 752, 761, 1 L. Ed. 2d 796, 807 (1957) (Frankfurter, Clark & Harlan, JJ., concurring)). Accordingly, petitioner's argument on this issue is also without merit.

For the foregoing reasons, we affirm the order of the Superior Court, Wake County, which affirmed the Board's 14 May 2013 decision denying petitioner's application to stand for the July 2011 North Carolina Bar Examination.

AFFIRMED.

ROBERT CARPENTER AND TAMMY CARPENTER, INDIVIDUALLY AND TAMMY CARPENTER AS ADMINISTRATOR OF THE ESTATE OF MONIQUE L. CARPENTER	)	
v.	)	From Guilford County
WILLIE MCKINNEY, INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH WINDHAM HEATING AND AIR CONDITIONING, INC., INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH OLD REPUBLIC HOME PROTECTION COMPANY, INC., INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH PAUL EDWARD WINDHAM, INDIVIDUALLY AND D/B/A WINDHAM HEATING & AIR	)	

No. 266P14

ORDER

The plaintiffs' petition for writ of certiorari is allowed only as to whether the Court of Appeals erred by dismissing plaintiffs' appeal as interlocutory. The petition is denied as to any remaining issues.

By Order of this Court, this 20th day of August, 2015.

s/Ervin, J.

For the Court

KING v. BRYANT

[368 N.C. 235 (2015)]

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)	

No. 294PA14

ORDER

This case has come before the Court by way of defendants' Petition for Discretionary Review. Defendants sought review of the second opinion of the Court of Appeals in *King v. Bryant* (*King II*), ___ N.C. App. ___, 763 S.E.2d 338, 2014 WL 3510481 (2014) (unpublished). There the Court of Appeals held that it was bound by its prior opinion in the same case to hold that a fiduciary relationship existed between the parties. *Id.* at *6. A close reading of that first opinion reveals, however, that the court did not specifically hold that such a relationship existed. *King v. Bryant* (*King I*), ___ N.C. App. ___, ___, 737 S.E.2d 802, 808-09 (2013) (discussing that the physician–patient relationship gives rise to a fiduciary duty, but never stating that such a relationship existed here). Nonetheless, it appears that on remand the trial court may have interpreted *King I* in the same manner as the second panel of the Court of Appeals did in *King II* and thus assumed the existence of such a relationship. As a result, the trial court made no findings of fact regarding when the physician–patient relationship (and any resulting fiduciary relationship) began.

Because when this relationship was formed is an essential fact for our review here, this Court, on its own motion, ORDERS this case certified to the trial court for findings of fact necessary to determine this issue as presented by defendants in their Petition: "Whether a physician–patient relationship existed at the time Mr. King signed the arbitration agreement." The trial court is directed to hold the necessary hearings and certify its findings to this Court within 120 days of the filing date of this order.

By order of the Court in Conference, this 20th day of August, 2015.

s/Ervin, J.

For the Court

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

5 MARCH 2015

001P11-2	State v. Lacy Lee Williams, Jr.	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/09/2015**
002P15	State v. Tremayne Antoine Lynch	Def's PDR Under N.C.G.S. § 7A-31	Denied
003P15	Eric Tucker v. Fayetteville State University and James A. Anderson, Chancellor	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-178)	Denied
005P15	Commscope Credit Union v. Butler & Burke, LLP, a North Carolina Limited Liability Partnership v. Barry D. Graham, James L. Wright, Ed Dutton, Frank Gentry, Geral Hollar, Joe Cresimore, Mark Honeycutt, Rose Sipe, Todd Pope, Jason Cushing, and Scott Saunders	1. Def/Third-Party Plt's PDR (COA14-273) 2. Motion of the N.C. Association of Certified Public Accountants and the American Institute of Certified Public Accountants for Leave to File *Amicus Curiae* Brief 3. Motion by Cherry Bekaert LLP, and CliftonLarsonAllen LLP and Dixon Hughes Goodman LLP for Leave to File *Amicus Curiae* Brief in Support of Def/ Butler & Burke, LLP 4. Motion by the N.C. Chamber for Leave to File Brief *Amicus Curiae* 5. Motion by the National Association of State Boards of Accountancy for Leave to File *Amicus Curiae* Brief	1. Allowed 2. Dismissed as moot 3. Allowed 4. Dismissed as moot 5. Dismissed as moot **Beasley, J., recused**
007P15	State v. Christopher W. Oden	Def's *Pro Se* PWC to Review Order of COA (COAP14-222)	Dismissed
009A14	Tovar-Mauricio, et al. v. T.R. Driscoll, Inc., et al.	1. Motion to Withdraw as Counsel 2. Motion to Substitute Counsel	1. Allowed 2. Allowed
013P15	George T. Powell, Jr. v. George R. Brown, Penny R. Powers, Robert E. Rousseau, and Shafic Androas	Plt's *Pro Se* Motion for Notice of Appeal	Dismiss *ex mero motu*
017P15	Philip J. Mohr, as Administator of the Estate of Sam Monroe Matthews v. John C. Matthews, Gloria Matthews, and Joby Matthews	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-271)	Denied

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

5 MARCH 2015

018P15	State v. Jose Valvere-Liborio	Def's *Pro Se* Motion for PDR (COA09-296)	Denied
019P15	State v. Henry Ford Adkins	Def's *Pro Se* Petition for Writ of *Certiorari* to Review Order of COA (COAP14-978)	Dismissed
021P15	State v. Leon M. Knight, Jr.	1. Def's *Pro Se* Petition for Writ of *Certiorari* to Review Order of Superior Court of Pasquotank County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
022PA14	Thomas C. Wetherington v. N.C. Department of Crime Control and Public Safety; North Carolina Highway Patrol	1. State's Motion for Consolidation 2. State's Motion to Amend Certificate of Service for Notice of Appearance and Motion to Consolidate 3. Respondent's Motion to Substitute Party 4. State's Motion to Appear	1. Denied 2. Allowed 3.Allowed 4. Denied **Ervin, J., recused**
023P15	State v. Jackie Emmitt Moorehead	1. Def's *Pro Se* PWC to Review Order of Superior Court of Halifax 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
030P15	State v. Crystal Ann Sitosky	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA14-639)	1. Allowed **01/20/2015** Dissolved **03/05/2015** 2. Denied 3. Denied

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

5 MARCH 2015

031P15	State v. Anthony Dominick A. Figurelli and State v. Stephen Marshall Sarday	1. Def Sarday's Motion for Temporary Stay 2. Def Sarday's Petition for *Writ of Supersedeas* 3. Def' Sarday's Notice of Appeal Based Upon a Constitutional Question (COA14-483) 4. Def. Sarday's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Def. Sarday's Notice of Appeal 6. Def Figurelli's Motion for Temporary Stay 7. Def Figurelli's Petition for *Writ of Supersedeas* (COA14-483) 8. Def Figurelli's Notice of Appeal Based Upon a Constitutional Question 9. Def Figurelli's PDR Under 7A-31 10. State's Motion to Dismiss Def Figurelli's Notice of Appeal	1. Allowed **01/20/2015** Dissolved **03/05/2015** 2. Denied 3. --- 4. Denied 5. Allowed 6. Allowed **01/27/2015** Dissolved **03/05/2015** 7. Denied 8. --- 9. Denied 10. Allowed
035P15	State v. Charles Michael Lightsey	Def's PDR Under N.C.G.S. § 7A-31 (COA14-576)	Denied
041P15	State v. William Antwain Patterson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-618)	Denied
049A15	State v. Shawn Adrian Pendergraft	1. Def's NOA Based Upon a Dissent (COA14-39) 2. Def's PDR as to Additional Issues	1. --- 2. Denied **Ervin, J., recused**
049PA14	State v. James Kevin Moir	Def's Motion to Substitute Counsel	Allowed **01/29/2015**
050P15	State v. Aaron Murdock Suggs	Def's *Pro Se* Motion to Vacate Sentence	Dismissed

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

5 MARCH 2015

053P15	State v. Margaret K. Sewell	1. State's Motion for Temporary Stay (COA14-269) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **2/04/2015** Dissolved **03/05/2015** 2. Denied 3. Denied
065P15	State v. Keith Antonio Barnett	1. State's Motion for Temporary Stay (COA14-447) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/2015** 2. 3. **Beasley, J., recused**
067P15	State v. Leroy Phillips	Def's *Pro Se* Motion for PDR of the Decision of the COA	Dismissed
068P15	Sampson County Board of Education v. Andrew T. Heath, in his official capacity as Chair of the North Carolina Industrial Commission	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR 4. Plt's Motion to Amend Title of "Amended PDR Under N.C. Gen Stat § 7A-31(c) and Petition for *Writ of Supersedeas* and Motion to Stay" to Petition for Writ of *Certiorari*, Petition for *Writ of Supersedeas* and Motion to Stay" 5. Motion to Admit Diane Marger Moore *Pro Hac Vice* 6. Def's Motion to Withdraw Amended PDR, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay	1. Allowed **02/10/2015** Dissolved **03/02/2015** 2. — 3. — 4. Allowed **02/11/2015** 5. Allowed **02/19/2015** 6. Allowed **03/02/2015**
077P15	In the Matter of M.G. and H.G.	1. Petitioner's Motion for Temporary Stay (COA14-934) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/23/2015** 2. 3.

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

5 MARCH 2015

082P15	In the Matter of A.E.C.	1. Petitioner's Motion for Temporary Stay (COA14-854) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Petitioner's Motion to Deem PDR Timely filed	1. Allowed **02/25/2015** 2. 3. 4.
105P14	Donna G. Clements, by and through her Guardian of the Estate, Kimberly Batten v. Robert S. Clements et al.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-596) 2. Plt's Motion to Amend Certificate of Service for PDR 3. Defs' (Alexandra Lee Clements Irrevocable Trust and the Kyle Davis Clements Irrevocable Trust by and through Their Trustee, Michael Green, and Intervenors Alexandra Lee Clements and Kyle Davis Clements, a Minor, by and through his Guardian *Ad Litem*, Charles Meier) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot
111P14-2	Judy Knox v. University of North Carolina at Charlotte	Petitioner's *Pro Se* Motion for Notice of Appeal Based on Dissent in Court of Appeals (COA14-229)	Dismissed as moot
115PA14	Millie E. Hershner v. N.C. Department of Administration and the N.C. Human Relations Commission	Def's Motion to Withdraw PDR	Allowed **02/09/2015** **Ervin, J., recused**
128P14-2	State v. Michael Edward Brooks	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP13-33)	Dismissed
130P14	State v. Michael Anthony Shannon	Def's PWC to Review Decision of COA (COA13-214)	Denied
172P11-4	State v. Kelvin Errol Smith	Def's *Pro Se* PWC to Review Order of Superior Court of Buncombe County	Dismissed
189P14	State v. Lateisha Maria Jandreau	Def's PDR Under N.C.G.S. § 7A-31 (COA13-735)	Denied **Ervin, J., recused**

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

5 MARCH 2015

202P14	State v. Dameon Jose Glover	Def's *Pro Se* Motion for Appeal to North Carolina Supreme Court (COA13-1079)	Denied
234P05-2	State v. Gregory Allen Gant	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31(c) (COAP14-950)	Denied
254P08-2	State v. Michael Orlando Cook	Def's *Pro Se* Motion for PDR	Dismissed
258P14	SRS Arlington Offices 1, LLC, et al. v. Arlington Condominium Owners Association, Inc., and Arlington Commercial Holdings, LLC, and James J. Gross	1. Defs' (Arlington Commercial Holdings, LLC, and James J. Gross) PDR Under N.C.G.S. § 7A-31 (COA13-808) 2. Def's (Arlington Condominium Owners Association, Inc.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
270P14	Terri Lynn Robertson and Mary Dianne Godwin Daniel v. Steris Corporation, a Delaware Corporation, et al.	Plts' PDR Under N.C.G.S. § 7A-31 (COA13-1301)	Denied **Ervin, J., recused**
290P14	State v. Robert Leroy Williams	1. Def's NOA Based Upon a Constitutional Question (COA13-1280) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
300P14	In the Matter of S.H., J.H., S.B., Minor Children	1. Respondent-Mother's PDR (COA14-196) 2. Petitioner's Motion to Dismiss	1. Denied 2. Dismissed as moot
309P14	State v. Elizabeth Harrelson Mead	Def's PDR Under N.C.G.S. § 7A-31 (COA14-3)	Denied
332P14	State v. Gregory Aldon Perkins	1. Def's Notice of Appeal Based on a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA13-1352) 3. Def's Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Allowed 3. Allowed

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

5 MARCH 2015

353P14	Surgical Care Affiliates, LLC and Blue Ridge Day Surgery Center, L.P. v. N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section, and WakeMed, Intervenor	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA13-1322)	Denied **Ervin, J., recused**
372A14	Hart et al. v. State	1. Americans United for Separation of Church and State, et al., Motion for Leave to File Amicus Brief 2. Helen F. Ladd, et al., Motion for Leave to File Amicus Brief	1. Allowed **02/03/2015** 2. Allowed **02/03/2015**
372A14	Hart et al. v. State	1. National Education Association's Motion for Leave to File Amicus Brief 2. Motion to Admit Philip A. Hostak *Pro Hac Vice*	1. Allowed **02/03/2015** 2. Allowed **02/03/2015**
372A14	Hart et al. v. State	Def-Intervenor's Motion to Substitute Party	Allowed **02/10/2015**
373A14	Cape Fear River Watch, et al. v. N.C. Environmental Management Commission, et al.	Petitioners' Motion to Substitute New Party Name	Allowed **02/02/2015** **Edmunds, J., recused**
373A14	Cape Fear River Watch, et al. v. N.C. Environmental Management Commission, et al.	Intervenor's Motion to Extend Time for Oral Argument	Denied **03/02/2015** **Edmunds, J., recused**
373A14	Cape Fear River Watch, et al. v. N.C. Environmental Commission, et al.	Petitioner's Motion to Extend Time for Oral Argument	Denied **03/02/2015** **Edmunds, J., recused**
374P13-2	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion for PDR	1. Allowed 2. Dismissed as moot 3. Dismissed **Ervin, J., recused**

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

5 MARCH 2015

375A14	Arnesen et al. v. Rivers Edge Golf Club and Plantation, Inc., et al.	Plt's Motion for Extension of Time to File Reply Brief	Allowed **01/26/2015**
375P09-3	State v. Avenger Ridgeway	1. Def's *Pro Se* Petition for Writ of Mandamus (COAP13-292) 2. Def's *Pro Se* Motion to Amend Petition for Writ of Mandamus	1. Denied 2. Dismissed as moot
376A14	Anderson, et al. v. Coastal Communities at Ocean Ridge Plantation, Inc., et al.	Plt's Motion for Extension of Time to File Reply Brief	Allowed **01/26/2015**
377A14	Barton, et al. v. Coastal Communities at Ocean Ridge Plantation, Inc., et al.	Plaintiff's Motion for Extension of Time to File Reply Brief	**Allowed 01/26/2015**
378A14	Barry, et al. v. Ocean Isle Palms, Inc., et al.	Plaintiff's Motion for Extension of Time to File Reply Brief	Allowed **01/26/2015**
379A14	Beadnell, et al. v. Coastal Communities at Ocean Ridge Plantation, Inc. et al.	Plaintiff's Motion for Extension of Time to File Reply Brief	Allowed **01/26/2015**
384A14	Richardson, et al. v. The State of North Carolina, et al.	Motion to Admit Francisco M. Negron, Jr. *Pro Hac Vice*	Allowed **01/30/2015**
384A14	Richardson, et al. v. The State of North Carolina, et al.	Motion to Withdraw	Allowed **02/02/2015**
384A14	Richardson, et al. v. The State of North Carolina, et al.	1. Motion to Admit Michael A. Rebell *Pro Hac Vice* 2. Campaign for Educational Equity, Teachers College, Columbia University's Motion for Leave to File Amicus Brief	1. Allowed **02/04/2015** 2. Allowed **02/04/2015**
384A14	Richardson, et al. v. The State of North Carolina, et al.	Def-Intervenor's Motion to Substitute Party	Allowed **02/10/2015**

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384A14	Richardson, et al. v. The State of North Carolina, et al.	Motion of Robert Orr to Appear as Counsel of Record	Allowed **02/11/2015**
385P14-2	State v. Joseph Edward Tucker	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
386P13-2	Bryan Debaun v. Daniel Kuszaj, a/k/a D.J. Kuszaj, a Durham Police Officer in his Individual and Official Capacity; and City of Durham, N.C.	Plt's PDR Under N.C.G.S. § 7A-31 (COA12-1520-2)	Denied **Ervin, J., recused**
400P14-3	State v. Dennis Moore	Def's *Pro Se* Motion for Petition for "Herein"	Dismissed
410A14	In the Matter of Lynn Marie Burke	Motion to Appear as Counsel of Record	Allowed **02/23/2015**
417P00-4	Frank Moore v. Attorney General, et al.	Def's *Pro Se* Petition for Writ of Habeas Corpus	Denied **02/23/2015**
418P14	Hans Kindsgrab v. State of N.C. Board of Barber Examiners	1. Petitioner's NOA Based Upon a Constitutional Question (COA13-1321) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
419P14	Rutherford Electric Membership Corporation v. 130 of Chatham, LLC	1. Respondent's NOA Based Upon a Constitutional Question (COA14-134) 2. Respondent's PDR Under N.C.G.S. § 7A-31 3. Petitioner's Motion to Dismiss Appeal 4. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31 5. Petitioner's Motion for Expedited Disposition of NOA and PDR	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Dismissed as moot
424P14-2	Stritzinger v. Bank of America, et al.	Plt's *Pro Se* Motion for a Petition for Review Under Original Jurisdiction	Dismissed

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427P14	State v. Larry Thomas McGee	1. Def's Motion for Temporary Stay (COA14-339) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/25/2014** Dissolved **03/05/2015** 2. Denied 3. Denied
428P14	State v. Jerry Lee Pittman	Def's *Pro Se* Motion for PDR (COAP14-719)	Dismissed
432P14	State v. Neil Stanley Page, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-16)	Denied
444P09-5	State v. Charles Gene Rogers	Def's *Pro Se* Motion for Appointment of Counsel	Denied
447P02-3	Edward McCrae v. State	Def's *Pro Se* Motion for PDR	Dismissed
450P14	State v. Matthew Smith Shepley	Def's PDR Under N.C.G.S. § 7A-31 (COA14-390)	Denied
454P14	State v. Karsten Eugene Turner	Def's PDR Under N.C.G.S. § 7A-31 (COA14-318)	Denied
461P14	State v. Billy Frank Larkin	Def's PDR Under N.C.G.S. § 7A-31 (COA14-443)	Denied
463P14	David C. Faustin v. North Carolina Building Code Council	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-82) 2. Plt's Motion to Supplement the Record	1. Denied 2. Dismissed as moot
464P14	State v. Jarmal Flood	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-179 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
466PA11-3	State v. Heather Rochelle Surratt	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-202) 2. Def's PDR Under N.C.G.S. § 7A-21 3. State's Motion to Dismiss Appeal	1. --- 2. Dismissed 3. Allowed **Ervin, J., recused**
467P14	State v. Andrew Grady Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA14-443)	Denied

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470P14	N.C. Department of Public Safety v. Carrie J. Tucker	1. State's PDR Prior to a Determination of the COA (COA14-1308) 2. State's Motion for Consolidation	1. Denied 2. Dismissed as moot **Ervin, J., recused**
473P14	State v. Terry Dean Spivey	1. Def's *Pro Se* Motion for Notice of Appeal (COA13-656) 2. Def's *Pro Se* Petition for Writ of Certiorari to Review Decision of N.C. COA 3. Def's *Pro Se* Petition for Writ of Habeas Corpus	1. Dismissed *ex mero motu* 2. Denied 3. Denied 0**2/25/2015**
475P14-2	State v. Reginald U. Fullard	Def's *Pro Se* Motion for Reconsideration with Additional Evidence	Dismissed
478P14	State v. Joe Louis Petty, Jr.	1. Def's NOA Based Upon A Constitutional Question (COA14-641) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
493P10-2	State v. Elijah Shane Clary	Def's *Pro Se* Motion for Recision of Contract	Dismissed
525P13-2	State v. Dennis O'Keith Blackwell	Def's *Pro Se* Motion to Appeal Complaint Filed with the N.C. Judicial Standards Commission	Dismissed

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005PA15	Commscope Credit Union v. Butler & Burke, LLP, a North Carolina Limited Liability Partnership v. Barry D. Graham, et al.	1. Motion to Admit Richard A. Simpson *Pro Hac Vice* 2. Motion to Admit Ashley E. Eiler *Pro Hac Vice*	1. Allowed **04/02/2015** 2. Allowed **04/02/2015** **Beasley, J., recused**
005PA15	Commscope Credit Union v. Butler & Burke, LLP, a North Carolina Limited Liability Partnership v. Barry D. Graham, et al.	North Carolina Chamber's Motion for Leave to File Amicus Brief	Allowed **04/06/2015** **Beasley, J., recused**
005PA15	Commscope Credit Union v. Butler & Burke, LLP, a North Carolina Limited Liability Partnership v. Barry D. Graham, et al.	1. National Association of Boards of Accountancy's Motion for Leave to File Amicus Brief 2. NCACPA, AICPA, and Center for Audit Quality's Motion for Leave to File Amicus Brief 3. Chamber of Commerce of the United States of America's Motion for Leave to File Amicus Brief	1. Allowed **04/07/2015** 2. Allowed **04/07/2015** 3. Allowed **04/07/2015** **Beasley, J., recused**
006P15	State v. Major Woody Myers, Jr.	1. State's Motion for Temporary Stay (COA14-504) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. 7A-31	1. Denied **01/06/15** 2. Denied 3. Denied
008P15	Jonathan E. Walker v. North Carolina Bar	Plt's *Pro Se* Motion for Notice of Appellant's Request for Review of North Carolina Bar's Decision of Cases #14G0226 and #14G0227	Dismissed
010P15	Clifford Roberts Wheeless, III, MD v. Maria Parham Medical Center, Inc., et al.	1. Plt's NOA Based Upon a Constitutional Question (COA14-612) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Motion to Dismiss PDR	1. — 2. Denied 3. Allowed 4. Dismissed as moot **Ervin, J., recused**
011P15	Glenn R. Wilmoth v. Gilbert W. Hemric and Van W. Hemric	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-459)	Denied **Ervin, J., recused**

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012P15	State v. Bonrick Lee Barksdale	1. Def's *Pro Se* NOA Based Upon a Constitutional Question (COA14-595) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
013P15-2	George T. Powell, Jr. v. George R. Brown, et al.	Plt's *Pro Se* Motion for Reconsideration	Dismissed
015P15	State v. Jaired Antonio Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA14-463)	Denied
016P15	State v. William Friend, III	Def's PDR Under N.C.G.S. § 7A-31 (COA14-336)	Denied
020P15	State v. Susan Denise Shaw	1. Def's Motion for Temporary Stay (COA14-124) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/15/15** Dissolved **04/09/2015** 2. Denied 3. Denied
022PA14	Thomas C. Wetherington v. North Carolina Department of Public Safety (FKA N.C. Department of Crime Control and Public Safety); North Carolina Highway Patrol	Joint Motion to Supplement the Record	Allowed **Ervin, J., recused**
024P15	State v. Juan Carlos Benitez	1. State's Motion for Temporary Stay (COA14-542) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR 4. State's Petition for Writ of *Certiorari* to Review Order of COA	1. Allowed **01/16/2015** 2. Allowed 3. Allowed 4. Dismissed as moot
027P15	State v. William Earl Huffstetler	1. Def's NOA Based Upon a Constitutional Question (COA14-727) 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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028P15	The Town of Black Mountain and The County of Buncombe, North Carolina v. Lexon Insurance and Bond Safeguard Insurance Company	Defs' PDR Under N.C.G.S. § 7A-31 (COA14-740)	Denied
040P15	State v. Napoleon Junior Rankins	1. Def's *Pro Se* PWC to Review Order of Superior Court of Guilford 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
042P15	State v. Reginald U. Fullard	1. Def's *Pro Se* PWC to Review Order of Superior Court of Forsyth 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
043P15	State v. Reginald U. Fullard	1. Def's *Pro Se* PWC to Review Order of Superior Court of Forsyth 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
044P15	Jo Ann Ward v. Mark E. Fogel and William B. Wright, Jr., as Co-Trustees under certain trust agreements dated February 1, 2005 and January 1, 2006, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-417)	Denied
046P08-2	State v. Rodney Christopher Craig	1. Def's *Pro Se* PWC to Review Order of Superior Court of Mecklenburg County 2. Def's P*ro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
047P15	Sherie Powell v. Emily Christopherson and Unnamed Insurance Company	Def Christopherson's PDR Under N.C.G.S. § 7A-31 (COA14-659)	Denied

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055P02-13	State v. Henry Ford Adkins	Def's *Pro Se* Motion for PDR	Denied
056P15	The Currituck Club Property Owners Association, Inc. v. Mancuso Development, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-476)	Denied
057P15	In the Matter of O.K.D., G.M.D., I.W.D.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA14-755)	Denied
059P15	State v. Burnice Antwon Hinnant, Jr.	1. Def's NOA Based Upon a Constitutional Question (COA14-599) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
060P15	In the Matter of David P. Hall	1. Petitioner's NOA Based Upon a Constitutional Question (COA14-435) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
061P15	In the Matter of J.K.P.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA14-756)	Denied
062P15	Mary Lacey and Jonathan Lucas v. Bonnie Kirk, Individually and as Attorney-In-Fact, Bonnie Kirk as Trustee of the Mary Frances Cochran Longest Testamentary Trust, and Bonnie Kirk as Executrix of the Estate of Mary Frances Cochran Longest	1. Def's Motion for Temporary Stay (COA14-688) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/13/2015** Dissolved **04/09/2015** 2. Denied 3. Denied **Ervin, J., recused**
063P15	State v. Isidro Garcia Hernandez	1. Def's *Pro Se* Motion for NOA (COAP14-731) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* PWC to Review Order of the COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed

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066P15	State v. Thomas Willoughby	1. Def's PWC to Review Order of COA 2. Def's PWC to Review Order of Superior Court of Onslow County	1. Dismissed 2. Dismissed **Jackson, J., recused**
069P15	State v. Jason Keith Williford	Def's PDR Under N.C.G.S. § 7A-31 (COA14-50)	Denied
072P15	State v. Tyrone Lamonia Exum	Def's *Pro Se* PWC to Review Order of Superior Court of Lenoir County	Denied
073P15	State v. John Edward Rogers	Def's *Pro Se* Petition for Writ of *Certiorari* to Review Order of COA (COAP15-9)	Dismissed
074P15	State v. Gary Lee Wells, Sr.	1. Def's *Pro Se* PWC to Review Order of Superior Court of Randolph County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
075P15	State v. Travis L. Wilkins	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
078P15	State v. Jonathan Michael Runyon	Def's PDR Under N.C.G.S. § 7A-31 (COA14-817)	Denied
080A13-2	State v. Timothy Charles Wilkes	1. Def's PWC To Review Order of the COA (COA14-307) 2. Def's PWC to Review Order of the Superior Court of Moore County 3. Def's Motion to Appoint Counsel 4. State's Motion to Amend Response to PWC	1. Dismissed 2. Dismissed 3. Denied 4. Allowed
081P15	Stephanie L. Needham, Individually and as Guardian *Ad Litem* for John Doe, Jane Doe, and June Doe v. Roy Alan Price	Def's PDR Under N.C.G.S. § 7A-31 (COA14-706)	Allowed
085P15	State v. Lashon Kentrell Fairley	1. Def's *Pro Se* Motion for Mandamus 2. Def's *Pro Se* Motion for Appointment of Counsel	1. Denied 2. Dismissed as moot

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086A12	State v. Danny Robbie Hembree, Jr.	1. Def's Motion for Appropriate Relief 2. Def's Motion to Remand for Evidentiary Hearing	1. Dismissed as moot 2. Dismissed as moot **Ervin, J., recused**
086P15	State v. Charles Edwards McCrae	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-790)	Dismissed without prejudice
087P15	Sandra S. Cowart, Individually and as Trustee Under the Sandra S. Cowart Living Trust, Date July 1. 2004 v. Bank of America, N.A., Shapiro & Ingle, LLP, and Cornish Law, PLLC	1. Respondent's *Pro Se* Motion for Temporary Stay (COAP15-124) 2. Respondent's *Pro Se* Petition for Writ of Supersedeas 3. Respondent's *Pro Se* PWC	1. Denied **03/05/2015** 2. Denied **03/05/2015** 3. Denied
088P15	Mason W. Hyde v. State of North Carolina	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/06/2015**
089P15	State v. Jean Arthur Darcelien	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **03/06/2015** 2.
090P15	State v. Demario Lamont Snead	1. State's Motion for Temporary Stay (COA14-940) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/09/2015** 2. 3.
091P14-2	State v. Salim Abdu Gould	1. Def's *Pro Se* PWC to Review Order of Superior Court of Bertie County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Appeal 4. Def's *Pro Se* Petition for *Writ of Mandamus* 5. Def's *Pro Se* Motion for *Writ of Coram Nobis*	1. Dismissed 2. Allowed 3. Denied 4. Denied 5. Denied
093A15	Town of Boone v. North Carolina and County of Watauga	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Special Order **03/19/2015** 2. Special Order **03/19/2015**

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094P15	State v. Steve D. Morrison	Def's *Pro Se* PWC to Review Order of COA (COAP15-17)	Dismissed
095P15	State v. Lance Antwan Moses	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
097P15	State v. Chowan Anthony Williams	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
098P15	In re James A. Austin	Def's *Pro Se* Application for Writ of Mandamus Under N.C.G.S. § 7A-32(b)	Dismissed
099P15	State v. Jonathan Lavon Friend	Def's *Pro Se* Motion for Petition for Review (COAP15-29)	Dismissed
104P15	State v. Jermaine Antoine Cade	Def's *Pro Se* NOA Based Upon a Constitutional Question (COA14-785)	Dismissed *ex mero motu*
105P15	Sandra S. Blair v. James H. Blair	Def's PDR Under N.C.G.S. § 7A-31 (COA14-887)	Denied
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	1. Governors' Motion for Expedited Hearing 2. Motion to Appear on Behalf of Governor Patrick L. McCrory as Legal Counsel	1. Special Order **03/26/2015** 2. Allowed **04/01/2015**
119P15	In the Matter of N.T.	1. Petitioner's Motion for Temporary Stay (COA14-974) 2. Petitioner's Petition for *Writ of Supersedeas*	1. Allowed **04/01/2015** 2.
124P15	State v. Michael Scott Hamilton	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/06/2015** 2. 3.
198P14	Suzie Jane Burakowski v. Steven Allen Burakowski	Plaintiff-Appellant's PDR Under N.C.G.S. § 7A-31 (COA13-986)	Denied
269P14	Elizabeth Hinshaw v. John Kuntz	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1184)	Allowed
280A14-2	In the Matter of J.C. and J.C.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA14-79) 2. Guardian *Ad Litem's* Motion to Withdraw and Substitute Attorney	1. Denied 2. Dismissed as moot

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317P14	State v. Rodney Nigee Pledger Taylor	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-21) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
323A92-9	Charles Alonzo Tunstall v. Lumberton Correctional Health Care Provider(s)	1. Plt's *Pro Se* Motion for NOA (COAP15-156) 2. Plt's *Pro Se* PWC to Review Order of the COA	1. Dismissed *ex mero motu* 2. Denied
330P14	Keen Lassiter, as Guardian Ad Litem for Jakari Baize, a minor v. The North Carolina Baptist Hospitals, Incorporated, et al.	Defs' PDR Under N.C.G.S. § 7A-31 (COA14-165)	Allowed
346P14	State v. Russell Edward Murray	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1207)	Denied **Ervin, J., recused**
356P14	In the Matter of K.R.M., K.A.L.M.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA14-248)	Denied **Ervin, J., recused**
358P14	State v. Jerry D. Surratt II	1. Def's *Pro Se* PWC to Review Order of Superior Court of Forsyth County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Petition to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
366P14	State v. Jesse Curtis Sharpe, II	Def's *Pro Se* PWC to Review Order of Superior Court of Person County	Dismissed
374P13-3	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Discretionary Review *Writ of Certiorari* Dated 7 March 2015 2. Def's *Pro Se* Motion for *Writ of Certiorari*/Discretionary Review Dated 10 March 2015	1. Dismissed 2. Dismissed **Ervin, J., recused**

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386P14	Trillium Ridge Condominium Association, Inc. v. Trillium Links & Village, LLC; Trillium Construction Company, LLC; Shamburger Design Studio, P.C.; Shamburger Design, Inc. (FKA Shamburger Design Studio, Inc.); S.C. Culbreth, Jr.; and Gregory A. Ward	1. Defs' (S.C. Culbreth, Jr. and Gregory A. Ward) PDR Under N.C.G.S. § 7A-31 (COA14-183) 2. Def's (Trillium Construction Company, LLC) PDR Under N.C.G.S. § 7A-31 3. Def's (Trillium Links & Village, LLC) PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Denied 4. Dismissed as Moot 5. Dismissed as Moot **Ervin, J., recused**
390P14	Kim Casola, Antonio Casola, A Casola Motorsports, LLC, d/b/a Tri-County Motor Speedway v. Caldwell County, North Carolina	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-177) 2. Def's Motion for Leave to Amend Response to PDR	1. Denied 2. Allowed
404P14	State v. Creig Wiand Bryant	Def's PWC to Review Decision of the COA (COA13-1384)	Denied **Ervin, J., recused**
406P14	Lifestore Bank, f/k/a AF Bank v. Mingo Tribal Preservation Trust Dated January 4, 1993. et al.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-46) 2. Def's Motion to Supplement PDR	1. Denied 2. Allowed **Ervin, J., recused**
407P14-2	State v. Dwain Cornelius Ferrell	1. Def's *Pro Se* Motion for Petition to Amend 2. Def's *Pro Se* PWC to Review Order of the COA (COA14-742)	1. Dismissed 2. Dismissed
416P14	State v. Santonio Thurman Jenrette	1. Def's NOA Based Upon a Constitutional Question (COA13-1353) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
420P14	State v. William Anthony Shown	1. Def's *Pro Se* PWC to Review Order of Superior Court of Guilford County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed without prejudice 2. Allowed 3. Dismissed as moot

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422P14	Paula K. Gregory, Administratrix of the Estate of Daryl Tyrone Gregory, Jr. v. Old Republic Home Protection Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1439)	Denied
430P14	Lamar Alphonso Mack v. Erwin Carmichael, Roy Cooper, and State of North Carolina	1. Petitioner's *Pro Se* Motion for Notice and 2. Petition for Joinder of Claims Seeking Inquiry into Restraints on Liberty	1. Dismissed 2. Dismissed
434P14	State v. Anthony Scott	Def's PDR Under N.C.G.S. § 7A-31 (COA14-450)	Denied
436P14	State v. Matthew Hagert Salentine	Def's PDR Under N.C.G.S. § 7A-31 (COA14-63)	Denied
438P14	State v. Sergio M. Borrayo	Def's *Pro Se* Motion for PDR (COAP14-819)	Dismissed
440P14	State v. Joshua Winkler	1. State's Motion for Temporary Stay (COA14-442) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/04/2014** 2. Allowed 3. Allowed
441P14	Helena Marjorie Safron v. Mary Elaine Council	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-288)	Denied
442P14	State v. Travis Markee Lennon	1. State's Motion for Temporary Stay (COA14-354) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/05/2014** Dissolved **04/09/2015** 2. Denied 3. Denied
449P11-11	State v. Charles Everette Hinton	1. Petitioner's *Pro Se* Motion for Notice 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Denied
451P14-2	State v. Kevin Kennedy Gilchrest	Def's *Pro Se* Motion to Dismiss	Dismissed

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453P14	State v. William Keith Davis	1. State's Motion for Temporary Stay (COA14-575) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/16/2014** Dissolved **04/09/2015** 2.Denied 3. Denied **Ervin, J., recused**
455P14	State v. Reginald Fullard	1. Def's *Pro Se* PWC to Review Order of Superior Court of Forsyth 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
458P14	State v. James Earl Parker, Jr.	1. State's Motion for Temporary Stay (COA14-412) 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 **12/19/14** Dissolved **04/09/2015** 2. Denied 3. Denied 4. Allowed
459P14	Bulent Bediz v. Capital Facilities Foundation, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-421) 2. Plt's Motion that PDR be Deemed Filed as of December 9, 2014 3. Plt's Motion in the Alternative that PDR be treated as a PWC	1. Dismissed 2. Denied 3. Denied
460P14	Mayford Wyatt v. Haldex Hydraulics and Sentry Insurance	1. Defs' Motion for Temporary Stay (COA14-335) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2014** Dissolved **04/09/2015** 2. Denied 3. Denied
462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	1. Petitioners' NOA Based Upon a Dissent (COA13-157) 2. Respondent's PDR as to Additional Issues	1. --- 2. Denied

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462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	Motion by Robin T. Currin to Withdraw as Counsel	Allowed
465P14	State v. Kawana Spruill and Richard Conoley Chapman	Defs' PDR Under N.C.G.S. § 7A-31 (COA14-369)	Denied
468P14	State v. Ryan Albert Cox	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA14-692) 2. Def's *Pro Se* Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court of Henderson County	1. Denied 2. Denied
471P14	John Price v. State of N.C. Office of the State Auditor	1. State's PDR Under N.C.G.S. § 7A-31 (COA14-375) 2. State's Motion for Consolidation 3. Petitioner's Motion to Dismiss PDR 4. Respondent's Motion for Leave to File Reply Brief to Response to Motion to Dismiss 5. Motion to Appear	1. 2. Denied **04/09/2015** 3. 4. 5. **Ervin, J., recused**
474P14	State v. Corey Deon Floyd	1. State's Motion for Temporary Stay (COA14-533) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/31/2015** 2. Allowed 3. Allowed **Ervin, J., recused**
476P14	State v. James M. Roberts	1. Def's Motion for Temporary Stay (COA14-175) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/31/2014** Dissolved **04/09/2015** 2. Denied 3. Denied **Ervin, J., recused**
538P00-3	State v. Smittie James	Def's PWC to Review Order of Superior Court of Northampton County	Dismissed

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568A03-2	State v. Larry Stubbs	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PWC to Review Order of COA	1. Dismissed 09/16/2014 2. Dismissed as moot 3. Dismissed as moot **Ervin, J. and Beasley, J., recused**

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003P08-3	In the Matter of: Melvin Davis and Licurtis Reels v. Asa Buck, Sheriff, Carteret County	Petitioners' *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/04/2015**
004P15	State v. Robert Teon Ingram	Def's PDR Under N.C.G.S. § 7A-31 (COA14-406)	Denied **Ervin, J., recused**
014P12-2	State v. Jarrell Damont Wilson	1. Def's Motion for Temporary Stay (COA14-638) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **05/21/2015** 2. Denied 3. Dismissed 4. Dismissed
014P15	In the Matter of Foreclosure of a Deed of Trust Executed by Courtney M. Powell aka Courtney Powell (Present Record Owner(s): Courtney M. Powell) in the Original Amount of $107,813.00 Dated November 12, 2008, Recorded in Book 6092 Page 635 Durham County Registry Substitute Trustee Services, Inc., Substitute Trustee	Respondent's PDR Under N.C.G.S. § 7A-31 (COA14-498)	Denied
016P07-6	State v. Joey Duane Scott	1. Def's *Pro Se* PWC to Review Order of Superior Court of Guilford County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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022PA14	Wetherington v. North Carolina Department of Public Safety	1. State Employees Association of North Carolina Motion for Leave to file *Amicus* Brief 2. Professional Fire Fighters and Paramedics of North Carolina's Motion for Leave to File *Amicus* Brief 3. National Association of Police Organization's Motion for Leave to File *Amicus* Brief 4. Southern States Police Benevolent Association and North Carolina Police Benevolent Association's Motion for Leave to File *Amicus* Brief	1. Allowed **04/20/2015** 2. Allowed **04/20/2015** 3. Allowed **04/20/2015** 4. Allowed **04/20/2015**
022PA14	Wetherington v. North Carolina Department of Public Safety	1. *Amicus* Parties' Motion to Admit Christina L. Corl *Pro Hac Vice* 2. *Amicus* Parties' Motion to Admit Larry H. James *Pro Hac Vice*	1. Allowed **04/15/2015** 2. Allowed **04/15/2015**
022PA14	Wetherington v. North Carolina Department of Public Safety	Petitioner's Motion to Allow *Amicus Curiae* SEANC to Participate in Oral Argument	Denied **05/18/2015**
022P15	State v. Wade Leon Shaw	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-921)	Denied
026P15	In the Matter of: State v. Bobby Darrell Hoxit, Sr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/20/2015** Dissolved **06/10/2015** 2. Denied 3. Denied **Ervin, J., recused**
029P15	State v. Darrett Crockett	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-403) 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed

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032P15	Eastern Carolina Regional Housing Authority v. Sherbreda Lofton	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-212) 2. Raleigh Housing Authority's Conditional Motion for Leave to File *Amicus* Brief 3. Def's Motion to Amend Response to PDR 4. Plt's Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed 4. Allowed **Ervin, J., recused**
033P15	Charlotte Pavilion Road Retail Investment, L.L.C., and WLA Enterprises, Inc. v. North Carolina CVS Pharmacy, LLC; Jeffrey Carpenter; Carpenter Investment Properties, LLC; Suburban Gardens Incorporated; and Sonny Boy Properties, LLC	1. Defs' (North Carolina CVS Pharmacy, LLC and Sonny Boy Properties, LLC) PDR Under N.C.G.S. § 7A-31 (COA14-658) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied **Ervin, J., recused**
036P15	State v. Eric Everett Blackmon	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-594) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
037P15	State v. Kelly Winton Pierce	Def's PDR Under N.C.G.S. § 7A-31 (COA14-574)	Denied
039P15	Gwendolyn Gillins Fennell Wimes v. North Carolina Board of Nursing	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA14-525)	Denied **Ervin, J., recused** **Jackson, J., recused**
040P15-2	State v. Napoleon Junior Rankins	Def's *Pro Se* Motion for Appeal Entry Notice	Dismissed
042P15-2	State v. Reginald U. Fullard	Def's *Pro Se* Motion for Appeal Orders Entered 15 April 2015	Dismissed
043P15-2	State v. Reginald U. Fullard	Def's *Pro Se* Motion for Appeal Orders Entered in Case 43P15-1	Dismissed

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045P15	State v. O'Reynold Jamaar Lennon	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-806) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
048P15	State v. Ronald Dewayne Deese, III	Def's PDR Under N.C.G.S. § 7A-31 (COA14-508)	Denied
051P15	Le Oceanfront, Inc., et al. v. Lands End of Emerald Isle Association, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-287)	Denied
052P15	James Patrick Logan v. Charles Albert Morgan, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-487)	Denied
054P15	State v. Christopher David Amyx	Def's PDR Under N.C.G.S. § 7A-31 (COA14-583)	Denied **Ervin, J., recused**
055P15	State v. James Edward Johnson	Def's PDR Under N.C.G.S. § 7A-31 (COA14-543)	Denied **Ervin, J., recused**
064P15	Tariq M. Khwaja v. Mohammed S. Khan and wife, Haseeb Akhtar, Mohammed Pervez Iqbal and wife, Irshad Begum	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-728)	Denied
065P15	State v. Keith Antonio Barnett	1. State's Motion for Temporary Stay (COA14-447) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/06/2015** 2. Allowed 3. Allowed **Beasley, J., recused**

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070P15	Wayne Goodwin, as Commissioner of Insurance for the State of North Carolina v. CAGC Insurance Company v. North Carolina Insurance Guaranty Association v. North Carolina Self-Insurance Security Association	1. North Carolina Insurance Guaranty Association's PDR Under N.C.G.S. § 7A-31 (COA14-445) 2. North Carolina Self-Insurance Security Association's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
077P15	In the Matter of M.G. and H.G.	1. Petitioner's Motion for Temporary Stay (COA14-934) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/23/2015** Dissolved **06/10/2015** 2. Denied 3. Denied
079P15	State v. Barney Adrian Dunlap	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 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
080P15	State v. Van Lamar McKnight	Def's PDR Under N.C.G.S. 7A-31 (COA14-752)	Denied
081PA15	Stephanie Needham v. Roy Alan Price	Def's Motion for Extension of Time to File Appellant's Brief	Allowed **05/26/2015**
082P15	In the Matter of A.E.C.	1. Petitioner's Motion for Temporary Stay (COA14-854) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Petitioner's Motion to Deem PDR Timely filed 5. Respondent-Father's Motion to Dismiss PDR	1. Allowed **02/25/2015** Dissolved **06/10/2015** 2. Denied 3. Denied 4. Allowed 5. Denied

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089P15	State v. Jean Arthur Darcelien	1. Def's Motion for Temporary Stay (COA14-582) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/06/2015** Dissolved **06/10/2015** 2. Denied 3. Denied
091P15	Jerry Wilson and wife, Doris Wilson v. Conleys Creek Limited Partnership, a North Carolina Partnership, and Michael Cornblum	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA14-823) 2. Defs' Motion for Leave to Amend PDR 3. Defs' Second Motion for Leave to Amend PDR	1. Denied 2. Allowed 3. Denied
093A15	Town of Boone v. State of North Carolina and County of Watauga	Plt's Motion to Strike the County's Brief	Special Order
103P15	Jeffrey Bowden v. Dwayne Maurice Young, Coastal Plains Restaurants, LLC, and First Liberty Insurance Corporation	1. Plt's Notice of Appeal Based Upon a Constitutional Question 2. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-819) 3. Def's (First Liberty) Motion to Dismiss Appeal 4. Def's (First Liberty) Motion to Strike 5. Plt's Motion to Dismiss Frivolous Interlocutory Appeal and for Sanctions	1. — 2. Denied 3. Allowed 4. Allowed **04/30/2015** 5. Stricken *ex mero motu* **04/30/2015**
104P15	State v. Jermaine Antoine Cade	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-785) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* **04/09/2015** 2. Denied
106P15	Jennifer Elisabeth Martin v. Susan Raye Moreau, in her Individual Capacity, and George Noel Gentieu, in his Individual Capacity	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-811) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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108P14-2	Duke Energy Carolinas, LLC v. Herbert A. Gray, Defendant/Third-Party Plaintiff v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., Third Party Defendant and Builder Support Services of the Carolinas, Inc. f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc., Fourth-Party Plaintiff v. Yarborough-Williams & Houle, Inc., Lucas-Forman, Inc., and Carter Land Surveyors & Planners, Inc., Fourth-Party Defendants	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-283) 2. Piedmont Natural Gas Company, Inc. and Public Service Company of North Carolina, Inc. d/b/a PSNC Energy's Conditional Motion for Leave to File Amicus Brief 3. North Carolina Electric Membership Corporation and the North Carolina Association of Electric Cooperatives' Conditional Motion for Leave to File Amicus Brief 4. Def/Third- Party Plt (Herbert A. Gray), Third-Party Def, Fourth-Party Plt (Builder Support Services), and Fourth-Party Def (Yarborough-Williams)'s Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed 3. Allowed 4. Allowed
108P15	Michael C. Piro v. Karen Shapiro Piro (Now Karen Shapiro)	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 2. Def's *Pro Se* Motion for Temporary Stay 3. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. 2. Allowed **05/11/2015** 3.
110P15	State v. Terrance Newkirk	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
111P15	ACC Construction, Inc. v. Suntrust Mortgage, Inc., et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-789)	Denied
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Def's Motion for Leave to File Amended Brief	Allowed **05/07/2015**
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	1. Defendant-Appellants' Motion for Enlargement of Time Allowed for Oral Argument 2. *Amici*'s (Carolina AGC, et al.) Motion for Leave to Participate at Oral Argument	1. Denied 2. Allowed

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113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Cherie Berry, N.C. Commissioner of Labor; Wayne Goodwin, N.C. Commissioner of Insurance; Steve Troxler, N.C. Commissioner of Agriculture; and Beth A. Wood, C.P.A., State Auditor of N.C.'s Motion for Leave to File *Amicus* Brief	Special Order **05/28/2015**
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Janet Cowell, Treasurer's Motion to Withdraw Previous Motion to File *Amicus Curiae* Brief	Allowed **05/29/2015**
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Motion of the North Carolina Institute for Constitutional Law for Leave to File *Amicus Curiae* Brief	Allowed **06/10/2015**
114P15	State v. Slade Weston Hicks, Jr.	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA14-57)	Denied
115P15	In the Matter of Boyd J. Hicks	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-234)	Dismissed
116P15	State v. Phillip Scott Baker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-260)	Denied
117P15	State v. Milton Carlos Jenkins	1. Def's *Pro Se* Motion for PDR (COAP15-143) 2. Def's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion for Petition to Amend Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed 3. Allowed
118P15	State v. Victor Adrian Gutierrez	1. Def's *Pro Se* Motion for PDR (COAP15-65) 2. Def's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Order of the COA	1. Dismissed 2. Dismissed
121P15	State v. Aggrey Winston Manning	1. Def's *Pro Se* Motion for PDR (COAP15-191) 2. State's Motion to Dismiss "PDR"	1. Dismissed 2. Dismissed as moot
122P15	State v. John Pate	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA14-464) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Court of Appeals	1. Denied 2. Denied **Ervin, J., recused**

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123P15	State v. Loranzo Square, III	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-181) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
125P15	State v. Paul A. Fuller	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-183)	Dismissed
129P15	State v. Marqueion Jamal Harrison	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
130P15	In re James R. Clark	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
131P15	State v. Daniel Walter Setzer	Def's PDR Under N.C.G.S. § 7A-31	Denied
135P15	State v. Leonard Eugene Joyner	Def's PDR Under N.C.G.S. § 7A-31 (COA14-957)	Denied
136P15	State v. Kevin Crawford Gunter	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-942)	Denied
138P15	State v. Percy Edward Smith	Def's *Pro Se* Petition for *Writ of Mandamus* Under N.C.G.S. § 7A-32(b)	Dismissed
141P15	State v. Lamont Dashawn Lafoucade	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-820) 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
142P15	In re Jermain Covington	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
143P15	State v. Jacob Mark Spivey	1. State's Motion for Temporary Stay (COA14-1046) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/24/2015** 2. 3.
144P15	State v. Calvin Lewis Moore, Jr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR	1. Allowed **04/27/2015** 2. 3.

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147P15	State v. Donovan Richardson	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
148P15	Cecil L. Miller v. Torran Holloman	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-485)	Denied
151P15	State v. Timothy Prince	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
152P11-3	State v. Keith Leonardo Shropshire	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
153P15	State v. Christopher Scott Byrd	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1087)	Denied
154P15	State v. Rickey G. Shore	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-251)	Dismissed
155P15	State v. Franklin Marcus Grullon, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-104)	Denied
156A15	State v. Anna Laura Huckelba	1. State's Motion for Temporary Stay (COA14-916) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/08/2015** 2.
165P15	State v. Nathaniel Paige Phillips	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **05/15/2015** 2.
166P15	State v. Michelle Lynn Bailey	1. Def's Motion for Temporary Stay (COA14-1151) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/18/2015** 2. 3.
167P15	State v. Jonathon Johnson	1. Def's *Pro Se* Motion for Complaint Citing Violations of the Rules of Professional Conduct 2. Def's *Pro Se* Motion for Reappointment of Counsel	1. Dismissed 2. Dismissed

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172P15	State v. Mohammed Nadder Jilani	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **05/27/2015** 2. Dismissed **05/27/2015**
173P15	State v. Juli Ann Williams	1. Def's Motion for Temporary Stay (COA14-1113) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/26/2015** 2. 3.
179P14-2	State v. Torrey Dale Grady	U.S. Supreme Court Order Vacating and Remanding	Special Order
187P15	State v. Aleksandr Sergeyevich Kiselev	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 (COA14-1020)	1. Allowed **06/08/2015** 2. 3.
194P07-2	State v. Lawrence Clay McGee	1. Def's *Pro Se* Motion for PDR (COAP15-248) 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
201PA12-3	Margaret Dickson, et al. v. Robert Rucho, et al.	1. Order and Mandate from the Supreme Court of the United States 2. Plt's Motion for Expedited Schedule on Remand	1. Special Order **05/07/2015** 2. Special Order **05/07/2015**
208P14	State v. Colell B. Steele	1. Def's *Pro Se* Motion in Arrest of Judgment (COAP13-101) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
227P08-3	State v. Sabas Ibarra	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
248P99-2	State v. Howard Cleveland, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA	Dismissed
269PA14	Elizabeth Hinshaw v. John Kuntz	Joint Motion for Order Allowing Withdrawal of PDR	Allowed **04/21/2015**

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287P09-3	State v. Jonathan E. Walker, Sr.	1. Def's *Pro Se* Motion for Another Direct Appeal 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Jackson, J., recused**
305P97-6	State v. Egbert Francis, Jr.	Def's *Pro Se* PWC to Review Order of COA (COAP15-255)	Denied
308P14	David Allen Tilley v. North Carolina Post-Release Supervisor Parole Commissioner, Paul Butler, Tony Rand, and Brett Ross and Amy Porter (Parole Officers)	1. Petitioner's *Pro Se* Motion for PDR (COAP14-361) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
315PA13-2	State v. Travis Kenyel Sanders	Def's PDR Under N.C.G.S. § 7A-31 (COA14-532)	Denied
316P06-2	State v. Ian Aulden Campbell	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County 2. Def's Motion to Hold Petition for *Writ of Certiorari* in Abeyance	1. Dismissed 2. Dismissed as moot **Hudson, J., recused**
331P01-4	State v. Nicholas Nathaniel Cauley	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Dare 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
354P13-2	State v. Steven R. Ramirez	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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364P14	Daniel Joseph Truhan v. Susan P. Walston and David M. Walston, and Third-Party Plaintiff, Susan P. Walston v. North Carolina Farm Bureau Mutual Insurance Company, United Services Automobile Association, and Western Surety Company	1. Plt & Third Party Def's (Western Surety) PDR Under N.C.G.S. § 7A-31 (COA14-43)	1. Denied
		2. N.C. Association of Chiefs of Police's Motion for Leave to File *Amicus* Brief	2. Dismissed as moot
		3. N.C. Association of County Commissioners' Motion for Leave to File *Amicus* Brief	3. Dismissed as moot
		4. New Hanover County's Motion for Leave to File A*micus* Brief	4. Dismissed as moot
		5. Durham County's Motion for Leave to File *Amicus* Brief	5. Dismissed as moot
		6. City of Winston-Salem's Motion for Leave to File *Amicus* Brief	6. Dismissed as moot
		7. Pasquotank County's Motion for Leave to File *Amicus* Brief	7. Dismissed as moot
		8. Catawba County's Motion for Leave to File *Amicus* Brief	8. Dismissed as moot
		9. Third-Party Defs' (United Services Automobile Association & N.C. Farm Bureau) PDR Under N.C.G.S. § 7A-31	9. Denied
		10. Gaston County's Motion for Leave to File *Amicus* Brief	10. Dismissed as moot
		11. Town of Franklin's Motion for Leave to File *Amicus* Brief	11. Dismissed as moot
		12. Lincoln County's Motion for Leave to File *Amicus* Brief	12. Dismissed as moot
		13. Brunswick County's Motion for Leave to File *Amicus* Brief	13. Dismissed as moot
		14. N.C. Sheriff's Assoc. Motion for Leave to File *Amicus* Brief	14. Dismissed as moot
		15. Haywood County's Motion for Leave to File *Amicus* Brief	15. Dismissed as moot
		16. Macon County's Motion for Leave to File *Amicus* Brief	16. Dismissed as moot
370P14	State v. Donald Eugene Borders	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1208)	Denied **Ervin, J., recused**

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373A14	Cape Fear River Watch, et al. v. N.C. Environmental Management Commission, et al.	1. Intervenor's Motion for Judicial Notice 2. Petitioners' Motion for Judicial Notice 3. Respondent's Motion for Extension of Time to File Response to Petitioners' Motion for Judicial Notice 4. Petitioners' Motion for Judicial Notice	1. Denied 2. Dismissed as moot 3. Allowed **12/02/2014** 4. Denied **Edmunds, J., recused**
388A10	State v. Andrew Darrin Ramseur (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Iredell County 2. Def's Motion to Maintain Stay of Direct Appeal	1. 2. Allowed **06/10/2015**
396P14	State v. Johntia Luwonzia Barnette	Def's PDR Under N.C.G.S. § 7A-31 (COA14-308)	Denied
413A14	State v. Ronald Michael McCrary	1. State's Motion for Temporary Stay (COA13-1059) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Notice of Appeal Based Upon a Dissent 5. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Allowed **11/07/2014** 2. Allowed 3. Allowed 4. --- 5. Allowed
418P13-2	Hillery Boyce aka Charles Wharton v. Shelia Mitchell, State of North Carolina	Petitioner's Pro Se Petition for *Writ of Habeas Corpus*	Denied **04/23/2015**
426P14	State v. Torrence Wesley Peoples	Def's PDR Under N.C.G.S. § 7A-31 (COA14-416)	Denied **Ervin, J., recused**

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433P14	Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Medical Center v. North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section, et al.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA14-161)	Denied
439P14	State v. Malik Jaquez Walton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-402) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem Notice of Appeal and PDR Timely Filed 4. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Denied 3. Denied 4. Denied
448P14	Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Medical Center v. North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section, et al.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA14-160)	Denied
449P14	State v. Derick Johnelle Miles	Def's PDR Under N.C.G.S. § 7A-31 (COA14-458)	Denied
455P14-2	State v. Reginald Fullard	Def's *Pro Se* Motion to Appeal All Orders Entered in 455P14-1	Dismissed
469P14	State v. James Cecil Pearce	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA13-1359)	1. Dismissed *ex mero motu* 2. Denied **Ervin, J., recused**

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474P11-2	State v. Charles Vincent Hayes	1. Def's *Pro Se* Motion for Notice of Appeal (COAP14-841) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed *ex mero motu* 2. Dismissed
493P10-3	State v. Elijah Shane Clary	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion for Extension of Time 3. Def's *Pro Se* Motion for Notice of Intent to Seek Review	1. Denied 2. Dismissed as moot 3. Dismissed
510PA13	State v. Floyd Edward May, Sr.	Def's Motion to Take Judicial Notice of the Files of the Appellate Courts in the Case of State v. Roberts and State v. Bunch	Allowed **Ervin, J., recused**
597P06-2	Alfred Alphonza Wallace v. Lawrence Parsons	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/12/2015**

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22 JULY 2015

372A14	Hart, et al. v. The State of North Carolina, et al.	Intervenor-Defendants' Motion for Supplemental Relief Pursuant to this Court's *Writ of Supersedeas*	Special Order
384A14	Richardson, et al. v. The State of North Carolina, et al.	Plts' Motion to Supplement to Record on Appeal	Allowed
384A14	Richardson, et al. v. The State of North Carolina, et al.	Intervenor-Defendants' Motion for Supplemental Relief Pursuant to this Court's *Writ of Supersedeas*	Special Order

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001A15	State v. Bo Anderson Taylor	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent (COA14-490)	1. Allowed **01/02/15** 2. Allowed 3. — **Ervin, J., recused**
009P15	State v. Dexter Durane Henry	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-561) 2. Def's P*ro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
013P11-2	State v. Tracy Lamont Clark	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Rockingham 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
024P10-2	Joseph Michael Griffith v. Linda M. McGee, Chief Judge, North Carolina Court of Appeals	Petitioner's *Pro Se* Petition for Writ of Mandamus	Denied **Jackson, J., recused**
024PA15	State v. Juan Carlos Benitez	Def's Motion to Take Judicial Notice	Allowed
024PA15	State v. Juan Carlos Benitez	Def's Motion to Strike Paragraph in Defendant's New Brief for Inadvertent Inaccuracy	Allowed
025P15	TSG Finishing, LLC v. Keith Bollinger	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 (COA14-623)	1. Allowed **01/20/2015** Dissolved **08/20/2015** 2. Denied 3. Denied

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21 AUGUST 2015

034A15	Sammy R. Pruett, Plaintiff v. Joel D. Bingham and Jean's Bus Service, Inc., Defendants and Third-Party Plaintiffs v. Gregory Alan Wiggins, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., Third-Party Defendants	1. Defs' and Third-Party Plts' Notice of Appeal Based Upon a Dissent (COA14-191) 2. Defs' and Third-Party Plts' PDR as to Additional Issues	1. --- 2. Denied
040P15-3	State v. Napoleon Junior Rankin	1. Def's *Pro Se* Motion for Appointment of Counsel 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Notice of Appeal 4. Def's *Pro Se* Motion for Ineffective Assistance of Counsel	1. Dismissed as moot 2. Allowed 3. Dismissed *ex mero motu* 4. Dismissed
038P15	James Norman Richardson v. PCS Phosphate Company, Inc., Ace USA/ESIS, Zurich North America Insurance Co., Federal Insurance Company/Chubb Group, RSK Co. (k/n/a CNA), Specialty Risk Services, and Broadspire	Defs' (PCS Phospate Company, Inc. and Broadspire) PDR Under N.C.G.S. § 7A-31 (COA14-615)	Denied
042P15-3	State v. Reginald U. Fullard	1. Def's *Pro Se* Motion to Appeal 2. Def's *Pro Se* Motion for Order of Transcripts	1. Dismissed 2. Dismissed
043P15-3	State v. Reginald U. Fullard	1. Def's *Pro Se* Motion to Appeal 2. Def's *Pro Se* Motion for Order of Transcripts	1. Dismissed 2. Dismissed

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046P15	Carolina Marlin Club Marina Association, Inc. d/b/a Morehead-Beaufort Yacht Club v. Harry Preddy and Valerie Preddy	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA14-377) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as Moot **Ervin, J., recused**
056P14-2	Everette E. Kirby and wife, Martha Kirby, et al. v. North Carolina Department of Transportation	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-184) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Allowed
058P15	Fred Wally, Lavon Benton, Don Crowe, and George Martocchio v. The City of Kannapolis, a North Carolina Municipal Corporation	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA13-1425) 2. Plts' Motion to Amend PDR	1. Denied 2. Allowed **Ervin, J., recused**
076P15	State v. Cesario Zamora-Ramos	Def's *Pro Se* Motion for PDR (COA07-738)	Denied
083P15	Myra Lynne Combs v. Michael D. Robertson, Commissioner of North Carolina Division of Motor Vehicles	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA14-709) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
084P15	State v. Curtis Louis Sangster	1. Def's *Pro Se* Petition for *Writ of Mandamus* Filed 2 March 2015 2. Def's Pro Se Petition for *Writ of Mandamus* Filed 8 June 2015	1. Denied 2. Denied
086P15-2	State v. Charles Edwards McCrae	Def's *Pro Se* Motion for PDR	Denied
087P15-2	Sandra S. Cowart, Individually and as Trustee Under the Sandra S. Cowart Living Trust Dated July 1, 2004 v. Bank of America, N.C., Shapiro & Ingle, LLP, and CornishLaw, PLLC	Plt's *Pro Se* Motion to Order Urgent Permanent Preliminary Injunction Barring Sale of Home (COAP15-124)	Dismissed 0**6/17/2015**

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090P15	State v. Demario Lamont Snead	1. State's Motion for Temporary Stay (COA14-940) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Deem Response to PDR Timely Filed	1. Allowed **03/09/2015** 2. Allowed 3. Allowed 4. Denied 5. Allowed
092P15	Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A. v. Edna S. Coleman a/k/a Edna Coleman, et al.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-683)	Denied
096P15	State v. Jose Antonio Marin, II	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Cumberland County	Dismissed
100P15	State v. Antonio Nathan Greene	Def's *Pro Se* Motion for Reappointment of Counsel	Dismissed
101P15	State v. Christopher Anthony Clegg	Def's *Pro Se* Motion for Witness Protection	Dismissed
101PA14	LexisNexis Risk Data Management, Inc., a Florida Corporation, and LexisNexis Risk Solutions, Inc., a Georgia Corporation v. North Carolina Administrative Office of the Courts; John W. Smith, II, in his official capacity as the Director of the North Carolina Administrative Office of the Courts; and Nancy Lorrin Freeman, in her official capacity as the Clerk of the Wake County Superior Court	1. The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc.'s Motion for Leave to File Amicus Brief 2. The News and Observer Publishing Co.; Capitol Broadcasting Company, Inc.; Time-Warner Entertainment-Advance Newhouse Partnership; DTH Media Corp.; and the North Carolina Press Foundation, Inc.'s Motion for Leave to Participate in Oral Argument 3. Motion of Associate Professor Ryan Thornburg for Leave to File Brief *Amicus Curiae*	1. Special Order **10/15/2014** 2. Special Order **10/15/2014** 3. Allowed **08/05/2015** **Ervin, J., recused**

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102P13-2	State v. Charles Anthony Ball	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Henderson County	1. Dismissed
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed
		3. Def's *Pro Se* Motion to Appoint Counsel	3. Dismissed as moot
		4. Def's *Pro Se* Motion for Change of Venue	4. Dismissed
		5. Def's *Pro Se* Motion for Court to Provide Expert Witness and/or Investigator	5. Dismissed
		6. Def's *Pro Se* Motion to Suppress	6. Dismissed
		7. Def's *Pro Se* Motion Seeking Release of Exculpatory Evidence	7. Dismissed
102P15	State v. Joshua Wilford Houser	Def's PDR Under N.C.G.S. § 7A-31 (COA14-973)	Denied
108PA14-2	Duke Energy Carolinas, LLC v. Gray, et al.	Motion for Extension of Time to File Briefs	Allowed **08/07/2015**
112A15	Dana Marie Ribelin (f/k/a Creel) v. Phillip Ray Creel	1. Plt's Notice of Appeal Based Upon a Dissent (COA14-643)	1. —
		2. Plt's PDR as to Additional Issues	2. Allowed
		3. Plt's Motion to Accept Corrected Certificate of Filing and Service	3. Dismissed as moot
		4. Plt's Motion to Deem Notice of Appeal and PDR Timely Filed	4. Dismissed as moot
		5. Plt's Amended Motion to Accept Corrected Certificate of Filing and Service	5. Allowed
		6. Plt's Amended Motion to Deem Notice of Appeal and PDR Timely Filed	6. Allowed
		7. Plt's Petition for *Writ of Certiorari* to Review Decision of COA	7. Dismissed as moot
		8. Plt's Motion to Amend Petition for *Writ of Certiorari* and Amended Motion to Deem Timely Filed to Replace COA Opinion	8. Allowed
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Arch T. Allen III's Motion for Leave to File *Amicus* Brief	Allowed **06/29/2015**

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119P15	In the Matter of N.T.	1. Petitioner's Motion for Temporary Stay (COA14-974) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/01/2015** 2. Allowed 3. Allowed
124PA14	State v. Jason Lynn Young	1. Def's Motion for Appropriate Relief 2. State's Motion for Extension of Time to File Response	1. See Opinion **08/20/2015** 2. Allowed **01/14/2015**
124P15	State v. Michael Scott Hamilton	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/06/2015** 2. Allowed 3. Special Order
125P15-2	State v. Paul A. Fuller	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-183)	Dismissed
127P15	State v. Grant Ruffin Hayes	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-766) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
128P15	Dorothy Hagood Corning v. Louis Avery Corning, IV	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-764) 2. Plt's Petition for *Writ of Certiorari* to Review Order of District Court of Craven County	1. Denied 2. Denied
131P01-11	State v. Anthony Dove	1. Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA (COAP14-513) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Denied
133P15	State v. William Earl Askew	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-411) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
134P15	State v. Mario Dante Ramsey	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1095)	Denied

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137P15	In the Matter of Julio Zelaya Sorto	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-170)	Denied
139P15	Frances Atiapo v. Goree Logistics, Inc., and Owen Thomas Inc. v. The North Carolina Industrial Commission v. Goree Logistics, Inc., and Owen Thomas, Inc., and Mandieme Diouf	1. Def's (Owen Thomas, Inc.) PDR Under N.C.G.S. § 7A-31 (COA14-977) 2. Defs' (Goree Logistics and Mandieme Diouf) PDR Under N.C.G.S. § 7A-31 3. American Trucking Association, Inc., and North Carolina Trucking Association's Conditional Motion for Leave to File *Amicus* Brief	1. Denied 2. Denied 3. Dismissed as moot
140P15	State v. Mark Dwayne Govan	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-999) 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**
143P15	State v. Jacob Mark Spivey	1. State's Motion for Temporary Stay (COA14-1046) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Attorney's Motion to Withdraw	1. Allowed **04/24/2015** 2. Allowed 3. Allowed 4. Allowed
145P15	State v. Steven Lorenzo Lowery	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA14-777)	Denied **Ervin, J., recused**
149P15	State v. Robin Otto Worth, Jr.	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-959) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
150P15	State v. Quincey Lamar Hill	1. Def's *Pro Se* Motion for Request for Counsel 2. Def's *Pro Se* Motion to Amend	1. Denied 2. Denied **Beasley, J., recused**
152P15	Charles Daniel Robbins v. Karen Thomas Robbins	Plt's PDR under N.C.G.S. § 7A-31 (COA14-742)	Denied

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156A15	State v. Anna Laura Huckelba	1. State's Motion for Temporary Stay (COA14-916) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/08/2015** 2. Allowed
156A15	State v. Anna Laura Huckelba	State's Motion to Amend Record on Appeal	Allowed **06/26/2015**
157P15	Tony Harold Pope, Administrator of the Estate of Susan Lanier Fries v. Bridge Boom, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-221) 2. Pltf's Motion to Amend PDR	1. Denied 2. Allowed
158P15	In the Matter of Appeal of Parkdale Mills and Parkdale America from the Decisions of the Davidson County Board of Equalization and Review Concerning the Valuation of Certain Real Property for the Tax Year 2007	Respondent's (Davidson County) PDR Under N.C.G.S. § 7A-31 (COA14-763)	Denied
159P15	State v. Jamar Ishmeal Wright	Def's PDR Under N.C.G.S. § 7A-31 (COA14-997)	Denied
160P15	In the Matter of L.L.B., a Juvenile	Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1106)	Denied
161P15	Citibank, N.A. v. Henry M. Michaux, Jr., et al.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-667)	Denied
162P15	Tonya M. Price v. Robert Calder, Jr.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-832)	Denied
163A15	Ivan McLaughlin and Timothy Stanley v. Daniel Bailey, in his Individual and Official Capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance	1. Plts' Notice of Appeal Based Upon a Dissent (COA14-446) 2. Plts' Notice of Appeal Based Upon a Constitutional Question 3. Plts' PDR as to Additional Issues 4. Defs' Motion to Dismiss Appeal	1. --- 2. --- 3. Allowed 4. Allowed **Ervin, J., recused**

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165P15	State v. Nathaniel Paige Phillips	1. Def's Motion for Temporary Stay (COA14-1056) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/15/2015** Dissolved **08/20/2015** 2. Denied 3. Denied
166P15	State v. Michelle Lynn Bailey	1. Def's Motion for Temporary Stay (COA14-1151) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/18/2015** Dissolved **08/20/2015** 2. Denied 3. Denied **Jackson, J., recused**
168P15	State v. Clay Dewayne Leaks, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1141)	Denied
169P15	State v. Johnny Williams	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-1100) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
170P15	State v. Patrick Shane Williams	Def's *Pro Se* Motion for Notice of Appeal (COAP14-58)	Dismissed *ex mero motu*
171P15	Arthur Donald Darby, Jr. v. Jamie Christina Campbell, Jason Murphy, Attorney, Matthew Rothbeind, Attorney, and Fairmont Police Department, Hamlett Police Department, Robeson County Court, "John Doe"	1. Plt's *Pro Se* Motion to Suppress Against Jamie Christina Campbell, Jason Murphy, Attorney, Matthew Rothbeind, Attorney 2. Plt's *Pro Se* Motion to Suppress Against Fairmont Police Department, Hamlet Police Department, Robeson County Court, "John Doe" 3. Plt's *Pro Se* Motion for Summons Motion Open Court to Clerk in Above	1. Dismissed 2. Dismissed 3. Dismissed
173P15	State v. Juli Ann Williams	1. Def's Motion for Temporary Stay (COA14-1113) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/26/2015** Dissolved **08/20/2015** 2. Denied 3. Denied
175P15	State v. Indo Ferrell Eure	Def's PDR Under N.C.G.S. § 7A-31 (COA14-396)	Denied

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176P15	State v. Michael Thurman Hall	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-947) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State of North Carolina' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
177P15	Jack Fowler and Janice Frohman, Individually and as Co-Trustees of a Protective Trust by and on Behalf of Mildred and Buford Fowler v. Norman C. Riddle and Norman C. Riddle, P.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA14-945)	Denied
179P15	State v. Cecil Harold Jones	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
181P15	Justin Lloyd v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA14-935) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Plt's Motion to Consolidate and/or Stay	1. --- 2. Allowed 3. Allowed 4. Denied
182A15	State v. Adam Jarmal Hodge	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-724) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Allowed
183P15	In the Matter of the Foreclosure of Deed of Trust Executed by Jason Brian Vicks and Mekeisha Vicks Dated February 12, 2007 and Recorded in the Union County Public Registry, North Carolina	1. Defs' *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-222) 2. Defs' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Trustee's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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186P10-2	State v. David Felton	1. Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA (COAP15-162) 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
185P15	In the Matter of the Foreclosure by Philip A. Glass, Substitute Trustee of a Deed of Trust Executed by Richard Phillip Brittain, Dated June 29, 2006 and Recorded in Book 180 at Page 755, of the Henderson County Public Registry	Respondent's PDR Under N.C.G.S. § 7A-31 (COA14-1078)	Denied
189P15	A.B. Cooper, Jr. v. Julian Everette Cameron, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1017)	Denied
191P15	Bruce D. Taylor v. Howard Transportation, Inc., and Travelers Indemnity Company of America	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-922)	Denied
194P15	State v. Julie Ann English	Def's PDR Under N.C.G.S. § 7A-31 (COA14-952)	Denied
195P15	State v. Timmy Strickland	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-340)	Denied
196A15	North Carolina State Bar v. Willie D. Gilbert, II	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1159) 2. Plt's Motion to Dismiss Appeal 3. Def's Petition for *Writ of Certiorari*	1. --- 2. Allowed 3. Denied
197P15	James R. Crider, Sr., and wife, Kathy Crider v. John Vincent Cattie, M.D.	Plts' PDR Under N.C.G.S. § 7A-31 (COA14-603)	Denied

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198P15	State v. Dennis Y. Jackson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-791)	Denied
200P15	State v. Kevin Mitchell	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **06/17/2015**
201PA12-3	Margaret Dickson, et al. v. Robert Rucho, et al.	1. Motion to Admit Robert A. Atkins *Pro Hac Vice* 2. Motion to Admit Farrah R. Berse *Pro Hac Vice* 3. Motion to Admit Pietro Signoracci *Pro Hac Vice* 4. Motion to Admit Theodore V. Wells, Jr. *Pro Hac Vice* 5. Motion to Admit Jaren Janghorbani *Pro Hac Vice*	1. Allowed **06/16/2015** 2. Allowed **06/16/2015** 3. Allowed **06/16/2015** 4. Allowed **06/16/2015** 5. Allowed **06/16/2015**
201PA12-3	Margaret Dickson, et al. v. Robert Rucho, et al.	Congressional Black Caucus' Motion for Leave to File *Amicus* Brief	Allowed **06/16/2015**
201PA12-3	Margaret Dickson, et al. v. Robert Rucho, et al.	N.C. Law Professors' Motion for Leave to File *Amicus* Brief	Allowed **06/29/2015**
201P15	Twan Bey (Antwan L. Burns) v. Cumberland County District Court, Robert J. Stiehl	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
203P15	State v. Anthony Craig Walker	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA13-1356) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied

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204P15	Mountain Villages, LLC, Melba Richards, Manager, and Lori Richards, Owner v. Zara Ellis Sadler	1. Def's *Pro Se* Motion for Temporary Stay (COAP15-437) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA 4. Def's *Pro Se* Motion for Temporary Stay 5. Def's *Pro Se* Petition for *Writ of Supersedeas* 6. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the Jackson County District Court 7. Plaintiff's Emergency Motion to Dismiss Appeal	1. Denied **06/24/2015** 2. Denied 3. Denied 4. Denied **07/13/2015** 5. Denied 6. Denied 7. Dismissed without prejudice **07/14/2015**
205P15	Stephen A. Best v. North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/23/2015**
206A15	State v. Keith A. Leak	1. State's Motion for Temporary Stay (COA14-591) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/23/2015** 2. Allowed
207P15	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., Mandy Locke, Joseph Neff, John Drescher, and Steve Riley	1. Defs' (The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke) Notice of Appeal Based Upon a Constitutional Question (COA14-625) 2. Defs' (The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke) PDR Under N.C.G.S. § 7A-31 3. North Carolina Association of Broadcasters, North Carolina Press Association, the Associated Press, BH Media Group, Inc., Gannett Company, Inc., Halifax Media Group, The Carolina Journal, and Time Warner Cable News' Conditional Motion for Leave to File *Amicus* Brief	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
210P15	State v. Luis Ovando	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1188)	Denied
211P15	State v. Vincent Gregory	Def's *Pro Se* Motion for PDR (COAP14-1029)	Dismissed

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212P15	State v. Tracy Donnell Cousin	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-386)	Dismissed
214P15	State v. Raymond Bennett	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/26/2015**
215P15	In the Matter of J.W. and K.M.	Respondent-Mother's PDR Under N.C.G.S. § 7A (COA14-927)	Denied
216P15	Amy Pharr Elam, Elizabeth F. Bailey, and Reid T. Deramus v. William Douglas Management, Inc. and Charlotte House Association of Unit Owners, Inc.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-1377) 2. Plts' Motion for Temporary Stay 3. Plts' Petition for *Writ of Supersedeas*	1. 2. Allowed **07/22/2015** 3.
217P15	State v. Raymond L. Hargett	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1252) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Craven County 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed
218P15	State v. Michael Bruce Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1135)	Denied
220P15	State v. Adam Courtney Hartley	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-432) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed *ex mero motu* 2. Dismissed as moot
221P15	State v. Aaron D. Stalls	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
222P15	Thomas F. Adcox v. Clarkson Brothers Construction Company and UTICA National Insurance Group	1. Defs' Motion for Temporary Stay 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **07/02/2015** 2.
222A14	State v. Bernard George Lamp, Jr. (DEATH)	Def's Motion to Consolidate Appeals	Allowed 07/13/2015

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223P15	State v. Robert Bishop	1. Def's Motion for Temporary Stay (COA14-227)	1. Allowed **07/02/2015**
		2. Def's Petition for *Writ of Supersedeas*	2. Allowed
		3. Def's Notice of Appeal Based Upon a Constitutional Question	3. ---
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Allowed
		5. Def's Petition for *Writ of Certiorari* in the Alternative	5. Dismissed as moot
		6. State's Motion to Dismiss Appeal	6. Allowed
226P15	State v. Dammion Lamont Martin	1. State's Motion for Temporary Stay (COA14-1179)	1. Allowed **07/06/2015** Dissolved **08/20/2015**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
227P15	State v. Salvador Quinonez	Def's PDR Under N.C.G.S. § 7A-31 (COA14-680)	Denied
228A15	North Carolina Association of Educators, Inc.; Richard J. Nixon; Rhonda Holmes, Brian Link, Annette Beatty, Stephanie Wallace, and John Deville v., The State of North Carolina	Motion to Admit Philip A. Hostak *Pro Hac Vice*	Allowed
228A15	North Carolina Association of Educators, Inc.; Richard J. Nixon; Rhonda Holmes, Brian Link, Annette Beatty, Stephanie Wallace, and John Deville v., The State of North Carolina	1. Def-Appellant's Notice of Appeal Based Upon a Dissent (COA14-998)	1. ---
		2. Def-Appellant's PDR as to Additional Issues	2. Allowed
229P15	State v. Christopher Lee King	1. Defendant-Appellant's Motion for Temporary Stay	1. Allowed **07/07/2015** Dissolved **08/20/2015**
		2. Defendant-Appellant's Petition for *Writ of Supersedeas*	2. Denied
		3. Defendant-Appellant's PDR Under N.C.G.S. § 7A-31	3. Denied

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231P15	State v. Adolfo Reyes Maldonado	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1119) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
232A95-5	State v. Timothy Richardson	Def's Motion for Enlargement of Time to File Petition for *Writ of Certiorari*	Allowed **08/07/2015**
233P15	State v. Jacobi Paylor Walker	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1259)	Denied
237P15	State v. Tony Levatte Smith	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Appointment of Counsel	1. Denied **07/13/2015** 2. Allowed **07/13/2015** 3. Dismissed as moot **07/13/2015**
239P10-2	State v. Jakiem Lance Wilson	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for W*rit of Supersedeas* (COAP15-405) 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County	1. Dismissed **08/03/2015** 2. Denied **08/03/2015** 3. Dismissed **08/03/2015**
239P15	Ivan Earl Warren v. Lawrence Parsons	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/15/2015**
240P15	In the Matter of Appeal of Celeste G. Broughton, Trustee, From the Decision of the Wake County Board of Equalization and Review Regarding the Valuation and Taxation of Certain Property for Tax Year 2013	1. Taxpayer's *Pro Se* Motion for Notice of Appeal (COA15-519) 2. Taxpayer's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied
241P11-4	State v. Delton Maynor	Def's *Pro Se* Motion for PDR of Writ of Certiorari (COAP15-396)	Dismissed
242P15	State v. Jermaine Earl Hicks	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
245P15	State v. Christopher Lee Furr	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1004)	Denied

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249P15	State v. Donald Wayne Mims	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1333)	Denied
251P15	Kevin Schaap v. Honorable Donna H. Johnson, Judge, Cabarrus County District Court and Mardan, II, LLC	Petitioner's *Pro Se* Motion for Notice of Appeal (COAP15-429)	Dismissed *ex mero motu*
252P15	In the Matter of D.L.W., D.L.N.W., V.A.W.	1. Petitioner and GAL's Motion for Temporary Stay (COA14-1341) 2. Petitioner and GAL's Petition for *Writ of Supersedeas* 3. Petitioner and GAL's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/22/2015** 2. 3.
255P15	State v. Anthony Tyrone McLean	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-282)	Dismissed
256P15	State v. Charles Edward Humphries, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Transylvania 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
259P15	State v. Jermaine L. Holloway	1. Def's *Pro Se* Motion for PDR (COAP15-403) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed
260P15	State v. Leonard Hardy	1. Def's Motion for Temporary Stay (COA14-1320) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Motion to Dissolve Temporary Stay 4. Def's Motion to Withdraw Petition for *Writ of Supersedeas*	1. Allowed **07/27/2015** 2. --- 3. Allowed **07/30/2015** 4. Allowed **07/30/2015**

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262P15	State v. Omar Jalam Cook	Def's *Pro Se* Motion to Dismiss	Dismissed
263P15	State v. Case Rafeal Tyler	Def's *Pro Se* Motion for Notice of Appeal	Dismissed *ex mero motu*
266P14	Robert Carpenter and Tammy Carpenter, individually and Tammy Carpenter as Administrator of the Estate of Monique L. Carpenter v. Willie McKinney, individually and jointly and severally with Windham Heating and Air Conditioning, Inc., individually and jointly and severally with Old Republic Home Protection Company, Inc., individually and jointly and severally with Paul Edward Windham, individually and d/b/a Windham Heating & Air	1. Plts' PWC to Review Order of COA (COA13-516) 2. Def's (Old Republic Home Protection Company, Inc.) Motion for Extension of Time to File Response	1. Special Order 2. Allowed **08/13/2014**
267P15	In the Matter of Julio Zelaya Sorto	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
271P15	State v. Felix Ricardo Saldierna	1. State's Motion for Temporary Stay (COA14-1345) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/03/2015** 2. 3.
272P15	Susan Vaughan v. Currituck DSS, et al.	1. Petitioner's *Pro Se* Motion for Temporary Stay (COAP14-997) 2. Petitioner's *Pro Se* Petition for *Writ of Supersedeas* 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **08/06/2015** 2. 3.

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277P15	George Andrew Bratton and the Estate of Geena Gee Bratton v. State of North Carolina, et al.	Plt's P*ro Se* Motion Under Rule 8(a) to Stay All Court Proceedings	Denied **08/07/2015**
278P15	State v. David Matthew Lowe	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **08/11/2015** 2.
280PA14	In the Matter of J.C. and J.C.	Petitioner's Motion to Dismiss Appeal	Dismissed as moot **07/01/2015**
294PA14	Robert E. King and wife, Jo Ann O'Neal v. Michael S. Bryant, M.D., and Village Surgical Associates, P.A.	Defs' PDR Under N.C.G.S. § 7A-31 (COA13-1003)	Special Order
296P15	Ernest James Nichols v. Richard Terry, Superintendent – Craggy Correctional Center; Frank L. Perry, Secretary of the North Carolina Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/20/2015**
302A14	State v. Juan Carlos Rodriguez	Def's Motion for Hearing on Designation of Biological Evidence Under N.C.G.S. § 268(a3)	Allowed **07/15/2015**
311P14	Packers Printing and Publishing Company, Inc., and Packers Printing and Publishing Company, Inc. t/d/b/a Budget Printing, Co. v. Anajet, LLC; and Anajet, LLC t/c/b/a Anajet, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA13-1449) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
330PA14	Lassiter, ex rel. v. North Carolina Baptist Hospitals, Incorporated, et al.	Plaintiff's Motion to Substitute Counsel	Allowed **08/05/2015**
332PA14	State v. Gregory Aldon Perkins	Def's Motion for Judicial Notice	Allowed **07/29/2015**

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332PA14	State v. Gregory Aldon Perkins	State's Motion to Amend Record on Appeal	Allowed
338P14-2	Waddell Bynum J. v. Progressive Ins. Group, Inc., Mark A. Valentine, Agent	Plt's *Pro Se* Motion to Appeal	Dismissed
341P12-3	State v. Donald Durrant Farrow	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1189) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed e*x mero motu* 2. Denied
349P14	State v. William Scott Keane	Def's PDR Under N.C.G.S. § 7A-31 (COA14-171)	Denied **Ervin, J., recused**
354P14	State v. Michael B. Postell	Def's PDR Under N.C.G.S. § 7A-31 (COA13-1390)	Denied **Ervin, J., recused**
355P14-2	Terri Young v. Daniel Bailey, in his Official Capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA14-966) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Plt's Motion to Consolidate and/or Stay	1. --- 2. Allowed 3. Allowed 4. Denied
374P13-4	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion to Reconsider 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Time Cut 4. Def's *Pro Se* Motion for Appellate Review 5. Def's *Pro Se* Motion for Appellate Procedure Substantial Offense 6. Def's *Pro Se* Motion for Appellate Review	1. Dismissed 2. Allowed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed **Ervin, J., recused**
383P14	State v. Montice Terrill Harvell	Def's PDR Under N.C.G.S. § 7A-31 (COA14-228)	Denied

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391P14	State v. Lynwood Eugene Harris, Jr.	1. Def's Motion for Temporary Stay (COA13-1330) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Denied **10/21/2014** 2. Denied 3. Denied **Ervin, J., recused**
407P14-3	Dwain Cornelius Ferrell v. Brad Perritt, Administrator	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion for Leave to Amend 3. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Denied **07/13/2015** 2. Dismissed as moot 3. Dismissed as moot
415P13-2	Kelvin W. Sellars v. Frank L. Perry	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for PDR	1. Denied **07/13/2015** 2. Denied **07/13/2015**
421P10-3	Robert Alan Lillie v. Michael Ball, Superintendent of Avery-Mitchell Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Denied **07/13/2015** 2. Denied **07/13/2015** 3. Allowed **07/13/2015** 4. Dismissed as moot **07/13/2015**
423P14	State v. Tavares Laquin Jeter	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-337) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
445P14	Shirley Lipe, Widow and Executrix of the Estate of Ross Iddings Lipe, Deceased Employee v. Starr Davis Company, Inc., Employer, Travelers Casualty & Surety (as Successors to Aetna Casualty & Surety Company), Carrier	1. Def's (Travelers Casualty & Surety) Motion for Temporary Stay (COA14-90-2) 2. Def's (Travelers Casualty & Surety) Petition for *Writ of Supersedeas* 3. Def's (Travelers Casualty & Surety) PDR Under N.C.G.S. § 7A-31 4. N.C. Chamber and N.C. Association of Defense Attorneys' Conditional Motion for Leave to File *Amicus* Brief 5. Def's (Travelers Casualty & Surety) Motion to Amend PDR	1. Allowed **12/10/2014** Dissolved **08/20/2015** 2. Denied 3. Denied 4. Dismissed as moot 5. Allowed

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449P11-12	State v. Charles Everette Hinton	1. Def's *Pro Se* Motion for Notice and Petition for *Writ of Certiorari* 2. Def's *Pro Se* Motion for Notice and Petition for the Chief Justice and Associate Justices to Take Judicial Notice of Adjudicative Facts and Findings by the Court 3. Def's *Pro Se* Motion for Petition for Remedial Writ	1. Dismissed 2. Dismissed 3. Dismissed
453P02-3	State v. Eugene Tyrone Miller	1. Def's *Pro Se* Motion for PDR (COAP15-473) 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
455P14-3	State v. Reginald Fullard	1. Def's *Pro Se* Motion to Appeal and Be Constitutionally Heard in Open Court Before a Sworn Jury 2. Def's *Pro Se* Motion for Order of Transcripts	1. Dismissed 2. Dismissed
462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	Respondent's Motion for Extension of Time to File Brief	Allowed **07/01/2015**
471P14	John Price v. State of N.C. Office of the State Auditor	1. State's PDR Under N.C.G.S. § 7A-31 (COA14-375) 2. State's Motion for Consolidation 3. Petitioner's Motion to Dismiss PDR 4. Respondent's Motion for Leave to File Reply Brief to Response to Motion to Dismiss 5. Motion to Appear	1. 2. Denied **04/09/2015** 3. 4. 5. Denied **08/20/2015** **Ervin, J., recused**
475P14-3	State v. Reginald U. Fullard	Def's *Pro Se* Motion for Order of Transcripts	Dismissed
567P13-2	State v. Manuel Castaneda Moreno	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of the COA (COA12-1402)	Dismissed **Ervin, J., recused**

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580P05-13	David L. Smith, on Behalf of Himself and All Others Similarly Situated v. State of North Carolina, Gov. Pat McCrory, Wake County Superior Court, and Judge Donald W. Stephens	1. Plt's *Pro Se* Petition for *Writ of Mandamus* 2. Application for *Writ of Mandamus* – Pursuant to N.C.G.S. § 7A-31 or Procedure by Common Law	1. Denied 2. Denied
618P07-2	State v. Alfred William Riley, Jr.	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
629P01-3	State v. John Edward Butler	Def's *Pro Se* Motion for N.C. Supreme Court Review (COAP14-558)	Dismissed

STATE OF NORTH CAROLINA
v.
BO ANDERSON TAYLOR

No. 1A15

Filed 25 September 2015

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. ___, 767 S.E.2d 585 (2014), finding error in judgments entered on 16 September 2011 by Judge Charles H. Henry in Superior Court, New Hanover County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 2 September 2015.

Roy Cooper, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *for defendant-appellee.*

PER CURIAM.

For reasons stated in the dissenting opinion, the opinion of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for consideration of defendant's remaining issue on appeal.

REVERSED AND REMANDED.

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

HIGH POINT BANK AND TRUST COMPANY
v.
HIGHMARK PROPERTIES, LLC, MITCHELL BLEVINS, CYNTHIA BLEVINS, CHARLES WILLIAMS, AND JANICE WILLIAMS

No. 8PA14

Filed 25 September 2015

1. Guaranty—guarantors—anti-deficiency legislation—waiver

Guarantors were among the class of obligors eligible to claim the benefit of N.C.G.S. § 45-21.36. A guarantor is protected by the provision of statute that provides for a judicial method of determining the indebtedness. It is not the type of "defense or offset" which is subject to waiver. Further, because anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy.

2. Parties—guarantors—permissive joinder

Plaintiff argued that joinder of Highmark was improper because N.C.G.S. § 26-12 did not apply to guarantors in this case. However, the law allows permissive or discretionary joinder and that statute allows joinder for the explicit purpose of giving the surety access to all defenses available to the primary borrower. Guarantors were permitted to move for joinder and the trial court committed no abuse of discretion by joining Highmark to this action.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 231 N.C. App. 31, 750 S.E.2d 886 (2013), finding no error in orders entered on 19 September 2011 and 4 October 2011 by Judge Ronald E. Spivey and a judgment entered on 11 July 2012 by Judge Stuart Albright, in Superior Court, Guilford County. On 6 March 2014, the Supreme Court allowed defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 17 November 2014.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellant/appellee.

Jenkins Law Group PLLC, by Ellis B. Drew, III and Ann G. Sugg, for defendant-appellees/appellants.

Goldsmith, Goldsmith & Dews, P.A., by Frank Goldsmith; and Martin & Jones, PLLC, by G. Christopher Olson, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this case we consider whether non-mortgagor guarantors of a loan may raise the anti-deficiency defense set forth in section 45-21.36 of the North Carolina General Statutes in order to reduce their outstanding indebtedness to the primary borrower's lender. In addition, we consider whether the primary borrower properly was joined in the action. We hold that joinder was proper and that, irrespective of the primary borrower's presence in the litigation, guarantors may assert the anti-deficiency defense.

Defendant Highmark Properties, LLC (Highmark) is a North Carolina limited liability company involved in real estate development. Defendants Mitchell and Cynthia Blevins and Charles and Janice Williams (guarantors) are the members of the LLC.

Plaintiff issued two loans to Highmark: one in January 2007 for $4,700,000 (the First Note) and the other in May 2007 for $1,750,000 (the Second Note). In addition to promissory notes executed by Highmark, the loans were guaranteed by guarantors and were secured by deeds of trust on two parcels of real property owned by Highmark in Forsyth County. Each guarantor executed "Commercial Guaranty" forms supplied by the Bank on 18 January 2007 and on 2 May 2007.

Subsequently, Highmark defaulted, leaving an indebtedness of $3,541,356 on the First Note and $1,336,556 on the Second Note as of 8 February 2011. On 19 October 2010, plaintiff filed a complaint in Superior Court, Guilford County, seeking a judgment against Highmark and the guarantors, both jointly and severally, for the outstanding indebtedness. Plaintiff then exercised the power of sale pursuant to its deeds of trust and sold the two properties at a foreclosure proceeding. Plaintiff was the sole bidder on both properties, paying $2,578,070 for one property and $720,000 for the other property.

In July 2011, plaintiff filed a motion for summary judgment. Three weeks later, plaintiff voluntarily dismissed without prejudice all claims against Highmark. Shortly thereafter, guarantors filed a motion to join Highmark as a defendant in the action pursuant to section 26-12 of the General Statutes and Rules 19 and 20 of the North Carolina Rules of Civil Procedure. Guarantors also sought leave to file a third-party complaint against Highmark for indemnity and contribution.

Plaintiff filed a motion *in limine* arguing, *inter alia*, that guarantors intended to raise an anti-deficiency defense and that this defense is not available to non-mortgagor guarantors of payment. On 19 September 2011, the trial court entered an order ruling that joinder of Highmark was "appropriate under N.C.G.S. § 26-12," and that, pursuant to the North Carolina Rules of Civil Procedure, Highmark was a necessary party pursuant to Rule 19, or a permissive party pursuant to Rule 20, and therefore "should be joined." The trial court found that Highmark "is a going concern; is not in bankruptcy; is not dissolved; and is subject to the jurisdiction of this Court." The court further noted that Highmark previously was a party until 18 August 2011, when plaintiff dismissed Highmark without prejudice. The trial court denied guarantors' motion to file a third-party complaint against Highmark.

In an order dated 4 October 2011, the trial court entered summary judgment against guarantors "on the issue of [their] liability for payment of the deficiency under the Notes." The order stated that "[t]he value of the property securing payment of the Notes and its effect, if any, on the deficiency owed are the sole unresolved issues remaining for trial." Highmark and guarantors all sought to amend their answers to assert the anti-deficiency defense, which the trial court allowed.

The parties stipulated to the following relevant facts by pretrial order: (1) "[A]ll parties have been correctly designated, and there is no question as to misjoinder"; (2) "The total deficiency on the First Note following the foreclosure sale . . . was . . . $963,286"; (3) "The total deficiency on the Second Note following the foreclosure sale . . . was . . . $616,556"; (4) "The single remaining issue for trial is the Defendants' affirmative defense under N.C. Gen. Stat. § 45-21.36"; and (5) Determination of this issue requires the court to find whether the amounts paid by plaintiff at the foreclosure sales for the two parcels of land were "substantially less than [the] true value" of the properties.

The case was tried in Superior Court, Guilford County, beginning in September 2011. On 20 April 2012, the jury found that the amounts paid by plaintiff for the parcels of real property at foreclosure were substantially less than the fair market values of the parcels on the date of sale. The jury determined the fair market value of the first parcel as $3,723,000 and that of the second parcel as $1,034,000. Accordingly, the trial court ruled that Highmark's indebtedness on the First Note was reduced to $0.00, because the jury had determined that the fair market value of the first parcel was greater than Highmark's remaining debt of $3,541,356. Next, the trial court ruled that Highmark's indebtedness on the Second Note was reduced to $302,556—the difference between

the jury's determination of the fair market value of the second parcel and Highmark's remaining debt of $1,336,556. The trial court ruled that Highmark and guarantors were jointly and severally liable and ordered payment to plaintiff in the amount of $302,556 for the remaining uncollected debt, plus attorney's fees and interest. Plaintiff appealed.

The Court of Appeals affirmed the trial court's rulings on 3 December 2013. *High Point Bank & Tr. v. Highmark Props., LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013). The panel was unanimous in concluding that the trial court did not abuse its discretion in joining Highmark to the action and that the reduction in guarantors' liability pursuant to section 45-21.36 was proper. *Id.* at 39, 750 S.E.2d at 891. But the majority and concurrence differed as to whether the statute provided incidental or direct relief to guarantors. The majority determined that once Highmark was joined as a party, guarantors were entitled to benefit from Highmark's use of section 45-21.36. *Id.* at 38, 750 S.E.2d at 890-91. The concurring judge reached the same result as the majority by concluding that guarantors could assert the anti-deficiency defense provided by section 45-21.36 even if Highmark was not a party. *Id.* at 40, 750 S.E.2d at 892 (Dillon, J., concurring in the result only in part). We allowed plaintiff's Petition for Discretionary Review and defendants' Conditional Petition for Discretionary Review.

This matter presents a question of statutory interpretation, which we review de novo. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012) (citation omitted). "When applying de novo review, we 'consider[ ] the case anew and may freely substitute' our own ruling for the lower court's decision." *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806-07 (2012) (alteration in original) (quoting *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust.*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011)).

[1] Plaintiff first argues that a guarantor is not among the class of obligors eligible to claim the benefit of section 45-21.36 because the statute applies only to a "mortgagor, trustor, or other maker of any such obligation whose property has been so purchased." Next, plaintiff contends that even if a guarantor is among those eligible to utilize the statute, according to the express language contained in the guaranty here, the guarantors have waived their right to the statutory defense. We disagree with both assertions. This Court previously has addressed the essence of these arguments. We held a guarantor is within the group of those who enjoy the protection of section 45-21.36. *See Wachovia Realty Invs. v. Housing, Inc.*, 292 N.C. 93, 112, 232 S.E.2d 667, 679 (1977) ("The

statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale . . . he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court.") (quoting *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.* (*Richmond Mortgage*), 210 N.C. 29, 185 S.E. 482 (1936), *aff'd*, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937)). The effect is that the section establishes an equitable method of calculating the indebtedness; therefore, it is not a "defense" in the usual sense which can be waived.

A guaranty, as it operates here, is a promise to repay the "indebtedness." Section 45-21.36 simply provides the method of calculating that amount as follows:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title . . . and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him[.]

N.C.G.S. § 45-21.36 (2013). The statute currently codified as section 45-21.36 was part of Chapter 275 of the 1933 Session Laws, a group of depression era laws designed to protect debtors. As such, our Court has stated, "we are compelled to construe [such a] statute more broadly" to ensure the legislative purposes are fulfilled. *Ross Realty Co. v. First Citizens Bank & Tr. Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979).[1]

1. In *Ross Realty*, we explained that we found particularly helpful a 1960 *Duke Law Journal* discussion on the history of anti-deficiency legislation, noting the relevant portion:

In *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938), we addressed an anti-deficiency statute that contained language nearly identical to the present-day section 45-21.36. In *Dunlop* a creditor made a loan secured by real estate and guaranteed by agreement with a guarantor. *Id.* at 196, 198 S.E. at 645. The borrower defaulted, and the creditor foreclosed on the collateral, but the net proceeds of the foreclosure sale failed to satisfy the debt fully. *Id.* at 197, 198 S.E. at 645. The high bidder at the foreclosure sale was a subsidiary of the creditor. *Id.* at 197, 198 S.E. at 645-46.

The guarantor died, and the creditor sued the guarantor's estate, but did not sue the borrower. *Id.* at 196-97, 198 S.E. at 645. The estate raised the anti-deficiency defense currently found in section 45-21.36, and the creditor moved to strike the defense, arguing that it was not available because the estate was not a "mortgagor, trustor, or other maker of any such obligation whose property has been so purchased (at foreclosure)," as required by the anti-deficiency statute. *Id.* at 197-98, 198 S.E. at 645. We determined that

> a proper construction of the statute should regard the act of a mortgagee, or trustee, or holder of the notes secured by the mortgage, in acquiring the mortgaged premises at a foreclosure sale had at its instigation and for its benefit, as an act going to the discharge of the instrument and giving the guarantor the benefit of this defense . . . . It would not be an unreasonable interpretation of the statute to hold that it proceeds upon the equitable assumption that the debtor [sic] has received payment in full when, by his own choice, he takes the land, and that the purpose of the law is, under such circumstances, to discharge the debt.

Id. at 198, 198 S.E. at 646. Consequently, we concluded that the guarantor, and thus the estate, had the right to utilize the statutory protection at trial. *Id.* at 198-99, 198 S.E. at 646.

> The year 1933 was one of deep depression, and North Carolina, along with other states, was concerned with the economic distress associated with wholesale mortgage foreclosures. The act . . . chapter thirty-six of the Laws of 1933 — was the first in a series of legislative attempts at the same session to deal with the mortgage problem. . . .

Id. at 370-71, 250 S.E.2d at 273-74 (quoting Brainerd Currie & Mark S. Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1 Duke L.J. 1, 11 (1960) (footnotes omitted)). We also observed that the authors of the article "concluded . . . that the 1933 General Assembly intended to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees." *Id.* at 371, 250 S.E.2d at 274.

Our holding in *Dunlop* is further illustrated by our prior decision in *Richmond Mortgage*. There, the debtor raised the statutory defense, and the creditor argued the statute was unconstitutional because it impaired the power to contract. Our Court held the statute constitutional and stated that its purpose was to protect a debtor from a creditor unilaterally determining the amount to be applied to a debt resulting from the trustee's sale of collateral. We stated:

> The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of sale.

Richmond Mortgage, 210 N.C. at 34-35, 185 S.E. at 485. In sum, the statute protects a debtor by calculating the debt based upon the fair market value of the collateral instead of the amount bid by the creditor at the trustee's sale. A creditor

> shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

Id. Thus, the statute is an equitable method of calculating the indebtedness, and as such is not subject to waiver.

Our holdings in *Dunlop* and *Richmond Mortgage* are controlling here. Just as a guarantor may raise this defense, he similarly is entitled to its benefits should it be determined that the property's fair market value exceeded the purchase price paid by the creditor at the trustee's foreclosure sale. In the instant case, plaintiff opted to satisfy Highmark's debt backed by guarantors by first exercising the power of sale pursuant to the deed of trust. As such, guarantors had the right to have the court determine the outstanding indebtedness by application of the fair market value of the collateral at the time of sale. Accordingly, we re-affirm

our prior holdings that a guarantor is protected by the provision of section 45-21.36 that provides for a judicial method of determining the indebtedness. As the guarantors only guaranteed the repayment of the indebtedness, the amount of the indebtedness is calculated pursuant to the statute. Accordingly, it is not the type of "defense or offset" which is subject to waiver.

In contrast, we held in *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 426-27, 762 S.E.2d 188, 188-89 (2014) that a group of guarantors waived prospective claims and defenses to a guaranty in a subsequent forbearance agreement, including claims arising from the lender's alleged violation of the Equal Credit Opportunity Act that potentially served as affirmative defenses to the agreement. The defense at issue there was in the form of a claim against the lender for a statutory violation, whereas here section 45-21.36 simply allows guarantors the right to a judicial method of debt calculation that accounts for the fair market value of the property at the time of a foreclosure sale. Accordingly, notwithstanding the waiver language contained in the guaranty agreements, guarantors did not waive their right to the protection of section 45-21.36.

We have stated that "[a] person sui juris may waive practically any right he has unless forbidden by law or public policy." *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949). While we have determined that section 45-21.36 is an equitable method of debt calculation as opposed to a traditional defense that is subject to waiver, we further conclude that because anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy. Plaintiff's argument is without merit.

[2] Finally, plaintiff argues that joinder of Highmark was improper because section 26-12 did not apply to guarantors in this case. We review the trial court's order joining Highmark as a party to the action for abuse of discretion. *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (citation omitted).

Upon a plain review of section 26-12, we conclude, as did the Court of Appeals, that the law allows permissive or discretionary joinder. Section 26-12 states that "[w]hen any surety is sued by the holder of the obligation, *the court, on motion of the surety may join the principal* as an additional party defendant." N.C.G.S. § 26-12(b) (2013) (emphasis added). A " 'surety' includes guarantors." *Id.* § 26-12(a) (2013). Plaintiff's argument that the standard of review for discretionary joinder

should shift based upon a party's future course of action as a result of the joinder is unpersuasive, because section 26-12 allows joinder for the explicit purpose of giving the surety access to all defenses available to the primary borrower. As such, we hold that guarantors were permitted to move for joinder and the trial court committed no abuse of discretion by joining Highmark to this action.

In sum, we hold: (1) Guarantors are permitted to stand in the shoes of the principal borrower and thus raise the section 45-21.36 anti-deficiency defense in their own right; (2) Guarantors did not waive the protection offered by section 45-21.36 despite certain provisions in the guaranty agreements they executed; and (3) Highmark properly was joined as a defendant in this action pursuant to N.C.G.S. § 26-12. Accordingly, except as modified herein, the opinion of the Court of Appeals is affirmed.

MODIFIED AND AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
RANDY BENJAMIN BARTLETT

No. 19PA14

Filed 25 September 2015

1. Evidence—findings—required only for material conflict

Case law requires findings of fact at a suppression hearing only when there is a material conflict in the evidence and allows the trial court to make these findings either orally or in writing. Cases that suggested otherwise were disavowed.

2. Evidence—findings—material conflict in the evidence—insufficient explanation of rationale

Disagreement between two expert witnesses created a material conflict in the evidence at a suppression hearing where the experts differed on defendant's apparent degree of impairment, a fact essential to the probable cause determination. A finding of fact, whether written or oral, was required to resolve this conflict, but

the judge made no such finding. Although he did attempt to explain his rationale for granting the motion, none of his statements could be construed as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there could be no meaningful appellate review of the trial judge's decision.

3. Evidence—material conflict—finding by second judge—suppression hearing required

A new evidence suppression hearing was required where one judge made an inadequate oral finding resolving a material conflict in the evidence, left office, and another judge resolved the evidentiary conflict without holding another suppression hearing.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 752 S.E.2d 237 (2013), affirming an oral ruling rendered by Judge Abraham P. Jones on 18 December 2012 and a written order signed by Judge Orlando F. Hudson Jr. and entered on 22 February 2013, both in Superior Court, Durham County. Heard in the Supreme Court on 21 April 2015.

Roy Cooper, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State-appellant.*

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

MARTIN, Chief Justice.

When the superior court conducts a pretrial hearing on a motion to suppress pursuant to N.C.G.S. § 15A-977, only the judge who presides at the hearing may make findings of fact concerning the evidence presented. When findings of fact are necessary to resolve a material conflict in the evidence and the judge who presides at the hearing does not make them, a new suppression hearing is required. In this case, a material conflict in the evidence arose from a disagreement between two expert witnesses, and a judge who did not hear the testimony of either expert resolved that conflict. Accordingly, a new suppression hearing is required.

After the State charged defendant with impaired driving in violation of N.C.G.S. § 20-138.1, defendant was found guilty in District Court, Durham County. Defendant appealed the judgment to the Superior Court, Durham County, where he also filed a pretrial motion to suppress

all evidence obtained after his arrest. In his motion, defendant argued that there was insufficient evidence of his impairment to establish probable cause for the arrest. Defendant's motion was heard before the Honorable Abraham P. Jones on 18 December 2012. At the suppression hearing, the State called the arresting officer as its sole witness. After being qualified as an expert in field sobriety testing, the officer described defendant's performance on a variety of field sobriety tests. The officer testified that, in his opinion, defendant's performance indicated appreciable impairment. Defendant did not contradict the officer's description of what happened during the field sobriety tests, but he did offer testimony from his own expert suggesting that defendant's performance did not indicate impairment. At the close of the hearing, Judge Jones orally granted defendant's motion and asked counsel to prepare a written order reflecting his decision.

But Judge Jones was not able to sign the proposed order before his term of office expired on 31 December 2012. Defendant subsequently presented the proposed order to the Honorable Orlando F. Hudson Jr., who was presiding at the 18 February 2013 criminal session of the Superior Court, Durham County. Over the State's objection, Judge Hudson signed the order granting defendant's motion to suppress without hearing any evidence himself. The order specifically found that defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support defendant's arrest.

The State appealed, contending that Judge Hudson was without authority to sign the order. The Court of Appeals found it unnecessary to reach the State's contention because the court considered the oral ruling by Judge Jones to be sufficient. *State v. Bartlett*, ___ N.C. App. ___, ___, 752 S.E.2d 237, 239 (2013). Relying on the two-part test that it had previously articulated in *State v. Williams*, 195 N.C. App. 554, 673 S.E.2d 394 (2009), the Court of Appeals observed that a trial court must issue a written order "unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *Bartlett*, ___ N.C. App. at ___, 752 S.E.2d at 239 (quoting *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395). Applying this test, the court determined that "there was no material conflict in the evidence presented at the suppression hearing" because the evidence concerning defendant's performance on the field sobriety tests was undisputed. *Id.* at ___, 752 S.E.2d at 239. The court also stated that Judge Jones adequately "supplied the rationale for his ruling from the bench." *Id.* at ___, 752 S.E.2d at 239. Based on this application of *Williams*, the court

affirmed the oral ruling rendered by Judge Jones. *Id.* at ___, 752 S.E.2d at 239. We allowed discretionary review and now reverse the decision of the Court of Appeals.

[1] In determining whether evidence should be suppressed, the trial court "shall make findings of fact and conclusions of law which shall be included in the record." N.C.G.S. § 15A-974(b) (2013); *see also id.* § 15A-977(f) (2013) ("The judge must set forth in the record his findings of facts and conclusions of law."). A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012). Although the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. *State v. Salinas*, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66 (2012); *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983). When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing. To the extent that cases such as *Williams* suggest otherwise, they are disavowed.

[2] At the suppression hearing in this case, disagreement between two expert witnesses created a material conflict in the evidence. Although defendant did not dispute the officer's testimony about what happened during the field sobriety tests, defendant's expert sharply disagreed with the officer's opinion on whether defendant's performance indicated impairment. Expert opinion testimony is evidence, and the two expert opinions in this case differed from one another on a fact that is essential to the probable cause determination—defendant's apparent degree of impairment. Thus, a finding of fact, whether written or oral, was required to resolve this conflict.

Here, Judge Jones made no such finding. Although he did attempt to explain his rationale for granting the motion, we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there can be no meaningful appellate review of the trial judge's decision. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 66. Accordingly, the oral ruling by Judge Jones did not comply with N.C.G.S. §§ 15A-974 and 15A-977.

[3] Because the oral ruling was inadequate, we now consider whether Judge Hudson had the authority to resolve the evidentiary conflict in his written order even though he did not conduct the suppression hearing. For the following reasons, we conclude that Judge Hudson did not have this authority and that a new suppression hearing is required.

Section 15A-977 of the General Statutes prescribes the procedure that the superior court must follow to decide a motion to suppress evidence. Pursuant to subsection (d) of this statute, "[i]f the motion is not determined summarily the judge must make the determination after a hearing and finding of facts." N.C.G.S. § 15A-977(d) (2013). Section 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts. The trial judge who presides at a suppression hearing "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 91 S. Ct. 2266 (1971). For this reason, our appellate courts treat findings of fact made by the trial court as "conclusive on appeal if they are supported by the evidence." *Id.* at 41, 178 S.E.2d at 601; *State v. Hughes*, 353 N.C. 200, 207-08, 539 S.E.2d 625, 630-31 (2000); *State v. Cooke*, 306 N.C. 132, 134-35, 291 S.E.2d 618, 619-20 (1982). "The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties . . . and to discern the sincerity of their responses to difficult questions." *In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991). But a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record. *See Smith*, 278 N.C. at 41, 178 S.E.2d at 601. We therefore reject an interpretation of N.C.G.S. § 15A-977 that would diminish the trial court's institutional advantages in the fact-finding process.

Notwithstanding the procedures set forth in section 15A-977, defendant contends that subsection 15A-1224(b) of the General Statutes permits Judge Hudson to sign an order on behalf of Judge Jones. Section 15A-1224 is part of the Criminal Procedure Act and is codified in Article 73, which is entitled "Criminal Jury Trial in Superior Court." Subsection 15A-1224(b) allows a substitute judge to complete an ongoing criminal trial unless the substitute judge concludes that he cannot perform that function, in which case he must order a mistrial. N.C.G.S. § 15A-1224(b) (2013). By its plain terms, subsection 15A-1224(b) applies only to criminal trials, not suppression hearings. Defendant's contention that subsection 15A-1224(b) is dispositive of this matter is therefore without merit.

Accordingly, we hold that N.C.G.S. § 15A-977 requires the judge who presides at the suppression hearing to make the findings of fact necessary to decide the motion. In this case, the testimony of the experts at the suppression hearing created a material conflict in the evidence that the presiding judge did not resolve. Although a second judge made the findings of fact necessary to resolve this conflict, he did so without hearing any evidence himself. Under these circumstances, a new suppression hearing is required. We therefore reverse the decision of the Court of Appeals and remand this matter to that court for further remand consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
SHAWN ADRIAN PENDERGRAFT

No. 49A15

Filed 25 September 2015

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 233 N.C. App. 286, 767 S.E.2d 674 (2014), affirming judgments entered on 19 July 2013 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 2 September 2015.

Roy Cooper, *Attorney General*, *by Phillip K. Woods*, *Special Deputy Attorney General*, *for the State.*

W. Michael Spivey for defendant-appellant.

PER CURIAM.

Justice ERVIN 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.

BURLEY v. U.S. FOODS, INC.

[368 N.C. 315 (2015)]

VINCENT BURLEY, EMPLOYEE
v.
U.S. FOODS, INC., EMPLOYER

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER
(GALLAGHER BASSETT SERVICES, INC., THIRD-PARTY ADMINISTRATOR)

No. 123A14

Filed 25 September 2015

Workers' Compensation—employment contract—made in another state—modified in North Carolina

The Court of Appeals erred by holding that the North Carolina Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. Section 97-36 does not apply to an employment contract initially made in another state and subsequently modified in North Carolina.

Justice HUDSON dissenting.

Justices BEASLEY and ERVIN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 233 N.C. App. 286, 756 S.E.2d 84 (2014), reversing an opinion and award filed on 28 June 2013 by the North Carolina Industrial Commission, and remanding for rehearing. Heard in the Supreme Court on 17 March 2015.

Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Raymond J. Williams, III and Jordan Benton, for defendant-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Nicole C. Shoemaker and M. Duane Jones, for North Carolina Association of Defense Attorneys, amicus curiae.

JACKSON, Justice.

In this case we consider whether an employment contract was "made in this State" when it was formed in South Carolina and allegedly modified in North Carolina. N.C.G.S. § 97-36 (2013). We conclude that the modification that occurred here did not alter the state in which the

contract was made. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiff is a resident of Augusta, Georgia. In May 2000, U.S. Foods, Inc. extended plaintiff an offer of employment, which plaintiff accepted by signing the offer letter. According to plaintiff's testimony, he was in Fort Mill, South Carolina, when he signed the offer letter. Subsequently, plaintiff began working for U.S. Foods as a delivery truck driver. Plaintiff's job responsibilities included driving a planned route with stops in Georgia and South Carolina, but no travel in North Carolina was involved.

As the result of a merger with another company in 2002, U.S. Foods ceased operating in the Columbia, South Carolina location where plaintiff was assigned. U.S. Foods then gave plaintiff the choice either to terminate his employment and receive a severance package or to have supervision of his employment transferred to Charlotte, North Carolina, or Lexington, South Carolina. Plaintiff elected to transfer to the company's Charlotte division, and the transfer was approved by U.S. Foods' Human Resources Department in Charlotte. Throughout the transfer, plaintiff was employed by U.S. Foods continuously. Thereafter, he performed the same job, and his title and responsibilities did not change. Plaintiff made deliveries to different customers after the transfer, and he earned more money because of a change in the way his pay was calculated. But although plaintiff's supervision was transferred to Charlotte, plaintiff never had a route that involved any deliveries in North Carolina during his employment with U.S. Foods.

On 23 September 2009, plaintiff received a back injury during a delivery in Georgia. Plaintiff's claim for benefits was accepted by defendants pursuant to the Georgia Workers' Compensation Act, and plaintiff began receiving disability and medical compensation according to Georgia law. On 8 July 2011, plaintiff filed a claim for benefits with the North Carolina Industrial Commission. After a hearing on 17 April 2012, Deputy Commissioner Philip A. Baddour, III concluded that the Commission did not have subject matter jurisdiction over plaintiff's claim. Plaintiff appealed to the Full Commission, which affirmed Deputy Commissioner Baddour's ruling.

Plaintiff appealed, and in a divided opinion, the Court of Appeals reversed, holding that the Commission has jurisdiction over plaintiff's claim. *Burley v. U.S. Foods, Inc.*, 233 N.C. App. 286, 296, 756 S.E.2d 84, 90 (2014). The majority concluded that plaintiff's transfer to U.S. Foods' Charlotte division involved a modification of plaintiff's employment

contract, *id.* at 295, 756 S.E.2d at 90, and that such a modification "may be a proper basis to find a contract is 'made' within North Carolina" for purposes of establishing the jurisdiction of the Commission pursuant to N.C.G.S. § 97-36, *id.* at 293, 756 S.E.2d at 88. Judge Dillon dissented, maintaining that modification of plaintiff's existing contract, in light of the facts presented here, is insufficient to confer jurisdiction upon the Commission. *Id.* at 296, 756 S.E.2d at 91 (Dillon, J., dissenting). Based upon the dissent, defendants appealed to this Court as of right pursuant to N.C.G.S. § 7A-30(2).

On appeal defendants argue that once an employment contract has achieved an identifiable situs, that situs is not changed by a subsequent modification of the contract in another state. Defendants therefore contend that, notwithstanding the alleged modification in the case *sub judice*, plaintiff's employment contract was not made in North Carolina and does not establish the Commission's jurisdiction pursuant to section 97-36. We agree.

Generally, appellate review of the Commission's decisions is limited to "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (alterations in original) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). But "the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (citing, *inter alia*, *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)). Accordingly, this Court must review the evidence and make findings of fact independently. *Id.* at 637, 528 S.E.2d at 904 (quoting *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261). "The Commission's conclusions of law are reviewed *de novo*." *McRae*, 358 N.C. at 496, 597 S.E.2d at 701 (citing *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

Section 97-36 specifies when an employee may be entitled to compensation for an accident that occurs during employment outside of North Carolina. This statute states in pertinent part:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State,

> then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State . . . .

N.C.G.S. § 97-36. Because the only issue addressed by the dissenting opinion concerns whether the Court of Appeals correctly concluded that plaintiff's employment contract was "made in this State," *Burley*, 233 N.C. App. at 296, 756 S.E.2d at 91; *see also id.* at 296 n.1, 756 S.E.2d at 87 n.1 (majority), we consider only that basis for compensation pursuant to section 97-36, *see* N.C. R. App. P. 16(b). "Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986) (citing *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 227, 176 S.E.2d 784, 787 (1970)); *see also Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 925-26 (1990), *disc. rev. denied*, 328 N.C. 576, 403 S.E.2d 522 (1991).

Although this case involves a matter of first impression in North Carolina, courts of several other states that have considered similar factual situations long have held that a modification of a contract did not change the location where the contract was made. In *Sims v. Truscon Steel Co.*, 343 Mo. 1216, 126 S.W.2d 204, *cert. denied*, 307 U.S. 646, 59 S. Ct. 1045, 83 L. Ed. 1526 (1939), a company hired a worker via a contract made in Missouri, but later argued that a new contract was entered into by correspondence between the employee, who was then working in Kansas, and the employer's Illinois office. *Id.* at 1220, 126 S.W.2d at 206. The Missouri Supreme Court rejected this contention, concluding that, although the correspondence resulted in "additional duties and additional pay" for the employee, there still was "only one contract of employment": the original contract made in Missouri. *Id.* at 1224, 126 S.W.2d at 208. Similarly, in *Selser v. Bragmans Bluff Lumber Co.*, 146 So. 690 (La. Ct. App. 1933), a Louisiana appellate court determined that a "change in [the employee's] position and the increase of his salary" that occurred in another jurisdiction "in no way abrogated or set aside" the remaining terms of the original contract. *Id.* at 696. Furthermore, in *Benguet Consolidated Mining Co. v. Industrial Accident Commission*, 36 Cal. App. 2d 158, 97 P.2d 267 (1939), a California appellate court concluded that a three-year contract of hire originally made in California "was still in effect in spite of the changes in duties and salary agreed upon in the Philippines" and remained binding even after subsequent mutual agreements made in the Philippines extended the worker's

employment beyond the time specified in the original contract. *Id.* at 167, 97 P.2d at 272. Consistent with these decisions, *Larson's Workers' Compensation Law* states that "[o]nce the contract has achieved an identifiable situs, that situs is not changed merely because the contract is modified in another state, as when there is a change in salary or other benefits made in the second state." 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 143.03[4], at 143-22 (2012) (citing *United Airlines, Inc. v. Indus. Comm'n*, 96 Ill. 2d 126, 449 N.E.2d 119 (1983); *Crawford v. Trans World Airline*, 27 N.J. Super. 567, 99 A.2d 673 (1953); *Tobin v. Rouse*, 118 Vt. 40, 99 A.2d 617 (1953)). We find this authority persuasive.

Kuzel v. Aetna Insurance Co., 650 S.W.2d 193 (Tx. App. 1983), which plaintiff references and which the Court of Appeals cited, does not contradict this result. The court in *Kuzel* concluded that, based upon the specific facts before it, the initial agreement regarding the plaintiff's employment in that case "was no more than preliminary negotiations," while "[a] contract [was] established [in another state] when agreement [was] reached on all terms, and the preliminary agreements [were] . . . incorporated into the final offer and acceptance." *Id.* at 195. As a result, *Kuzel* did not involve a modification of an existing contract, but rather concerned preliminary negotiations culminating in a subsequent final written employment agreement. Accordingly, the court's analysis in *Kuzel* is not persuasive in the case *sub judice*.

Although the Fifth Circuit in *Kilburn v. Grande Corp.*, 287 F.2d 371 (5th Cir. 1961), concluded that a modification *may* create a new contract, that decision was based in part upon the premise that, because the employee's "salary was to be paid on an hourly basis," thus indicating a less than " 'permanent' type of employment," whatever employment contract existed "had life on a pay-period-to-pay-period basis, and . . . a new contract was impliedly made each time that [the employee] reported to work and was given work following a pay period." *Id.* at 373. Because North Carolina law looks to "the final act necessary to make [the contract] a binding obligation," *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 925, and does not imply the creation of a new contract after each pay period, we find *Kilburn* unpersuasive.[1] *See also, e.g.*, *Murray*

1. Moreover, we note that the original agreement in *Kilburn* was never reduced to writing by the parties, which further distinguishes *Kilburn* from the instant case. The lack of a written agreement led the Fifth Circuit to find the absence of "an enforceable contract of employment for any period of time in existence when [the employee] moved to [the other state]." *Kilburn*, 287 F.2d at 373.

v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 296-97, 506 S.E.2d 724, 726 (1998) (citing *Thomas* and concluding that a contract for employment was complete when the plaintiff accepted the employer's offer in North Carolina, even though the plaintiff completed the necessary paperwork in another state, where he was assigned to perform his work).

Ultimately, section 97-36 authorizes compensation pursuant to North Carolina law if an individual's employment contract was "made" in North Carolina—the statute does not include the word "modified." After interpreting this statute in light of its plain language and upon consideration of decisions from other jurisdictions, we conclude that section 97-36 does not apply to a contract initially made in another state and subsequently modified in North Carolina.

Here the evidence in the record establishes that when plaintiff began working for U.S. Foods, his employment contract was not made in North Carolina. After being hired in South Carolina in 2000, plaintiff worked continuously for U.S. Foods and never left the job until he was terminated following his injury. Plaintiff's 2002 transfer involved administrative changes, new customers, and increased pay, but his job title and responsibilities did not change. Plaintiff's supervisor stated that plaintiff had the "[s]ame job" following the transfer. In addition, although plaintiff's pay eventually increased by a substantial amount, much of the increase occurred between 2004 and 2005, long after the 2002 transfer at issue here. Plaintiff testified that he was not informed about this change in salary before its implementation, suggesting that it was not part of how he understood the transfer process at the time it was taking place. We decline to hold that this internal transfer of supervision, which essentially allowed plaintiff to continue working for U.S. Foods in the same capacity throughout the merger, established a new employment contract. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justice HUDSON dissenting.

The majority holds that an employment contract modified in North Carolina does not qualify as one "made" in North Carolina for purposes of conferring subject matter jurisdiction on the North Carolina Industrial Commission, even when the modifications to the employment relationship are substantial and where it is undisputed that it was impossible for the employment relationship to continue on the original terms. In my

view, this holding contradicts the long-standing rule that North Carolina courts must liberally construe the Workers' Compensation Act in favor of providing relief to workers injured in the scope of their employment. Accordingly, I respectfully dissent.

The statute at issue here, N.C.G.S. § 97-36, governs when an employee may be entitled to compensation for a work-related accident that occurs outside North Carolina. Section 97-36 provides in relevant part:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation . . . if the contract of employment was made in this State . . . .

N.C.G.S. § 97-36 (2013). In interpreting this provision, it is well settled that the Workers' Compensation Act, including section 97-36, "must necessarily be viewed with liberality in order to accomplish its purpose[ ]" of providing compensation to employees injured during the course and within the scope of their employment. *Essick v. City of Lexington*, 232 N.C. 200, 208, 60 S.E.2d 106, 112 (1950); *see also Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930) ("It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation."). The question presented here is whether a contract of employment qualifies as a contract "made" in North Carolina when an employee is given a choice between termination and continuing the relationship under terms so significantly different that the arrangement amounts, in effect, to a new contract. I conclude that, on the facts presented here and against that liberal interpretive backdrop, it does.

Here, plaintiff first accepted an offer of employment with defendant U.S. Foods in May 2000. For two years, he worked as a delivery truck driver with an assigned drop yard in Columbia, South Carolina and a planned route in the Augusta, Georgia area. The customers to whom plaintiff made deliveries included health care facilities, convenience stores, and restaurants. While there was some variation among these customers, most of them remained the same during the time plaintiff had that route.

In 2002, U.S. Foods merged with another company, PYA Monarch, and defendant elected to close the Columbia drop yard. Plaintiff, like

many other employees based out of the Columbia location, was given a choice: He could either accept termination and a severance package, or he could transfer to a division based in Lexington, South Carolina, or one located in Charlotte, North Carolina. Because the Columbia drop yard was closing, the parties did not have the option of continuing the employment relationship as it had existed up to that point. Faced with this decision, plaintiff chose transfer to the Charlotte-based division of the company. Plaintiff also negotiated for and received an additional benefit; specifically, plaintiff and defendant agreed that while plaintiff worked out of the Charlotte-based division, U.S. Foods would deliver plaintiff's loaded trailer to him in Augusta, Georgia. The company's Human Resources Department, which was also located in Charlotte, approved the transfer in October 2002, thereby finalizing the new agreement.

Once he came under the supervision of the Charlotte-based division of the company, plaintiff's employment changed in several other ways as well. As plaintiff described in his testimony before the Industrial Commission, he drove a new route and his "customers changed completely." While he had previously made deliveries to health care facilities, convenience stores, and restaurants, the "bulk" of plaintiff's deliveries when he was based in Charlotte were to chain restaurants such as Sonic, KFC, Subway, and IHOP. In addition, the method by which plaintiff's pay was calculated was changed. When he was based in South Carolina, plaintiff was paid based on an hourly weight-based commission system, under which he earned approximately $400 to $500 per week. In North Carolina, however, he was first paid an hourly rate, then under a component-based system.[1] Under the component-based system, plaintiff eventually earned more than twice as much as under the commission-based system, up to $1400 per week.

In sum: When U.S. Foods merged with PYA Monarch, plaintiff was faced with either termination or transfer to a division based in another State. Plaintiff chose transfer to North Carolina and bargained for the inclusion of specific contractual terms under the new arrangement. Upon approval by defendant's Charlotte-based Human Resources Department, plaintiff had a new supervisor stationed in a new state. Plaintiff then drove a new route, served new customers, and earned significantly more

1. Under the commission system, delivery drivers' wages were based primarily on the weight of the cargo they delivered. In contrast, under the component system, in addition to receiving a base pay, drivers are paid based on a number of factors including a safety bonus, the hours worked, and the number of stops and items of cargo.

money through the use of a new method of calculating his pay. On the whole, it appears that the only characteristics of the employment relationship that remained the same were plaintiff's general duties and title as a delivery driver, and the name of his employer.

In my view, then, this was no mere modification, as when an employee accepts a modest pay increase in exchange for taking on modest new responsibilities. Rather, I conclude that the required break from the old employment arrangement, paired with significant changes in how plaintiff's employment would proceed moving forward, warrants treating this arrangement as a new contract—one finalized when defendant's Human Resources Department in Charlotte approved the arrangement. Based on these facts, and in light of the requirement that we liberally construe the Workers' Compensation Act in favor of awarding benefits, *see*, *e.g.*, *Essick*, 232 N.C. at 208, 60 S.E.2d at 112, I would hold that the contract in place when plaintiff suffered his work-related injury on 23 September 2009 was a contract "made" in North Carolina for purposes of N.C.G.S. § 97-36, and that the North Carolina Industrial Commission has jurisdiction over plaintiff's claim. On this basis, I would affirm the decision of the Court of Appeals. Therefore, I respectfully dissent.

Justices BEASLEY and ERVIN join in this dissenting opinion.

STATE v. GRAY

[368 N.C. 324 (2015)]

STATE OF NORTH CAROLINA
v.
ANTONIO NEAL GRAY

No. 237PA14

Filed 25 September 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 758 S.E.2d 699 (2014), finding no error after appeal from judgments entered on 5 April 2013 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Supreme Court on 31 August 2015.

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

Rudolph A. Ashton, III and Charles J. Cushman for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

USSERY v. BRANCH BANKING & TR.

[368 N.C. 325 (2015)]

WILLIAM T. USSERY AND WIFE, CAROLYN B. USSERY
v.
BRANCH BANKING AND TRUST COMPANY

No. 277A13

Filed 25 September 2015

Loans—refinancing—no misrepresentation by lender—small business loan not available

BB&T was entitled to summary judgment in its favor as to all of plaintiff's claims and as to all but the interest claim stated in BB&T's counterclaim in a contract and tort action arising from a commercial loan from BB&T to plaintiff. The small business, government-backed loan that plaintiff expected was not available and BB&T made a new commercial loan to plaintiff, with subsequent modifications, thereby consolidating plaintiff's debts and giving him additional cash. It was undisputed that this occurred several months after plaintiff became aware that the desired government-backed loan was not available. The record reveals no misrepresentation inducing plaintiff to obtain this second loan, and plaintiff then executed a series of six modifications, all of which unambiguously reaffirmed the obligation and expressly waived any offsets and defenses against the indebtedness or the bank.

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. ___, 743 S.E.2d 650 (2013), reversing and remanding an order granting summary judgment for defendant entered on 16 April 2012 by Judge W. David Lee in Superior Court, Richmond County. Heard in the Supreme Court on 7 January 2014.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Stacey E. Tally and Steven C. Lawrence, for plaintiff-appellees.

Bell, Davis & Pitt, P.A., by Michael D. Phillips and Kevin G. Williams, for defendant-appellant.

NEWBY, Justice.

In this case we consider whether a plaintiff may recover against his bank for its failure to provide a government-backed business loan when,

after learning no such loan was available, plaintiff sought and obtained a new commercial loan with the same bank and subsequently expressly waived all offsets and defenses. Plaintiff's claims arise in contract and in tort, and all of them rely upon one key date: the date on which plaintiff was made aware no government-backed loan was available. In his complaint plaintiff alleges that he incurred his indebtedness in anticipation of receiving a government-backed loan as promised by his bank. The undisputed facts, however, show that plaintiff chose to obtain a new commercial loan after learning no government-backed loan was available, and he repeatedly reaffirmed his obligations under the commercial loan and expressly waived any offsets and defenses to the loan and against the bank. Therefore, the trial court properly granted summary judgment for defendant, and the decision of the Court of Appeals is reversed.

Viewing the facts in the light most favorable to plaintiff, the nonmoving party, the record reveals the following: In 1998 plaintiff William "Pete" Ussery[1] and his business partner, D. Wayne Barker, launched a venture to establish a furniture assembling business. Barker had years of managerial experience at CAFCO Industries, Inc. (CAFCO), a local chair manufacturer, and plaintiff had greater financial resources, was a seasoned real estate developer and businessman, and sat on the board of a bank. In response to a decrease in sales, CAFCO was in the process of closure and liquidation, and the owners had approached plaintiff to discuss the sale of the company's old manufacturing building (the CAFCO building).

Plaintiff and Barker formed their business, Chair Specialists, Inc.,[2] with plaintiff holding sixty percent of the equity and Barker holding the remaining forty percent. According to their business plan, Barker would run the day-to-day operations and plaintiff would provide the startup capital to fund the enterprise. Plaintiff planned to individually purchase the CAFCO building and develop it into residential condominiums, and the operations of Chair Specialists would be housed in a different location. The long-range plan was for Barker to obtain a government-backed business loan with which to purchase plaintiff's interest in Chair Specialists and repay plaintiff for the startup expenses.

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1. Plaintiffs are William Ussery and his wife, Carolyn Ussery. The record reflects that William Ussery was the primary actor in the following events, and we refer to him in the singular as "plaintiff" for clarity.

2. The business is referred to as "Chair Specialists" and "Chair Specialties" interchangeably throughout the record.

In November 1999, plaintiff bought equipment from CAFCO to use at Chair Specialists. For $150,000 plaintiff also purchased the "Cheraw Road Building,"[3] a commercial facility in Hamlet, North Carolina, to house Chair Specialists' operations. The Cheraw Road Building had been contaminated with lead and required clean up and abatement; moreover, following remediation of the property, the building would serve as collateral for any future business loan. Plaintiff transferred ownership of the Cheraw Road Building to Chair Specialists and retained a deed of trust on the property. Plaintiff then purchased, individually, the CAFCO Building for approximately $100,000.

Plaintiff alleges that sometime in 1999, Barker and he first met with Wiley Mabe, a commercial lending officer for Branch Banking and Trust Company (BB&T), to discuss their business plan and learn about available government-backed loans. Mabe allegedly reviewed the business plan and assured plaintiff and Barker that Barker and Chair Specialists would qualify for and receive a $450,000 small business, government-backed loan.

Between 1999 and 2001, plaintiff obtained three commercial loans from BB&T for the startup of Chair Specialists and to reimburse himself for his purchases. The loans were in the amounts of (1) $100,000 on 6 December 1999, with plaintiff and Barker as debtors; (2) $50,000 on 25 February 2000, with Chair Specialists as debtor and plaintiff and Barker as guarantors; and (3) $125,000 on 21 February 2001, with plaintiff and his spouse as debtors.

By January 2002, Mabe notified all parties that no government-backed loan was available, nor would BB&T extend a long-term loan to them. According to plaintiff, Barker and he had inquired into the status of the application frequently and were repeatedly assured that they would receive the loan. Upon further inquiry, Barker discovered that neither he nor the business could qualify for a government-backed loan elsewhere because of the additional debt incurred between 1999 and 2001. The Small Business Administration (SBA) advised Barker that Mabe had not submitted the application documents to the SBA because Mabe did not believe Barker would qualify for a loan.

Knowing that no government-backed loan was available, plaintiff and Barker closed Chair Specialists in early 2002 and set about selling the accompanying real and personal property. According to Barker, plaintiff

3. The Cheraw Road Building is also referred to as the "Tartan Building" throughout the record.

then approached BB&T to inquire about a single loan to consolidate his debts associated with the business and reduce his monthly expenditures while he attempted to sell the company's assets. On 18 April 2002, fully aware that no government-backed loan was available and that he had various potential causes of action against BB&T, plaintiff nonetheless obtained a commercial loan of $425,000 from BB&T (the $425,000 Note). The $425,000 Note provided in part: "For value received, the undersigned . . . promises to pay to Branch Banking and Trust Company . . . the sum of . . . $425,000.00 . . . ." The $425,000 Note secured a one-year, interest-only loan, with accrued interest payments due quarterly, and was payable in full on 18 April 2003. As a condition of the loan, BB&T required Barker to issue a $122,000 promissory note to plaintiff. After paying off the antecedent debts, plaintiff personally received $99,187.75 in cash proceeds from the $425,000 loan.

On 15 April 2003, fifteen months after learning that no government-backed loan was available and one year after executing the $425,000 Note, plaintiff entered into the first of a total of six promissory note modification agreements. In the first modification BB&T agreed to extend the maturity date of the $425,000 Note by an additional year and allowed plaintiff to continue making quarterly, interest-only payments. In exchange, plaintiff reaffirmed his payment obligation and waived any offsets and defenses against the Note or the bank.

All six note modification agreements contained express and unambiguous language to this effect:

> [A]ll other terms, conditions, and covenants of [the $425,000 Note] remain in full force and effect, and . . . all other obligations and covenants of Borrower(s), except as herein modified, shall remain in full force and effect, and binding between Borrower(s) and [the] Bank . . . .
>
> . . . .
>
> . . . The original obligation of the Borrower(s) as evidenced by the [$425,000 Note] above described is not extinguished hereby. It is also understood and agreed that except for the modification(s) contained herein said [$425,000 Note] . . . shall be and remain in full force and effect. . . . Borrower and Debtor(s)/Grantor(s), if any, jointly and severally consent to the terms of this Agreement, *waive any objection thereto, affirm any and all obligations to Bank and certify that there are no*

> *defenses or offsets against said obligations or the Bank*, including without limitation the [$425,000 Note].

(Emphasis added.) Plaintiff was current on the interest-only payments required under the $425,000 Note at the time of his first loan modification, and he continued to make quarterly interest payments through 27 April 2006.

In May 2003, just over a month after the execution of plaintiff's first note modification, Barker filed suit against BB&T (the Barker litigation) for its alleged misrepresentations and failure to use reasonable efforts to obtain a government-backed loan for Chair Specialists. Barker's complaint stated claims of negligence, breach of contract, and breach of fiduciary duty. According to plaintiff, after the Barker litigation commenced, plaintiff discussed with BB&T that he was contemplating filing a separate suit against the bank or joining the Barker litigation as an additional party. Plaintiff alleges that BB&T, through its agent Charles Smith, told him "everything would be worked out in the Barker litigation" and there was no need to join the Barker litigation or bring a separate action. Plaintiff contends that BB&T further promised that "the [$425,000 Note] would be canceled upon resolution of the [Barker litigation]. . . . [T]he loan would be forgiven, and [plaintiff] would be reimbursed any expenses incurred related to BB&T's failure to obtain the [government-backed loan]." Plaintiff admits, however, that "no agents or employees of BB&T ever proposed a specific plan for resolving the issues."

Thereafter, on 25 May 2004, plaintiff executed his second modification of the $425,000 Note, which contained provisions identical to the first, but extended the maturity date to 25 February 2005. It allowed plaintiff to continue interest-only payments, affirmed plaintiff's continuing obligation to repay the debt, and waived any offsets and defenses. Plaintiff was current on his interest payments at that time.

On 21 March 2005, plaintiff executed his third modification of the $425,000 Note, which, except for extending the loan maturity date to 20 March 2006, contained provisions identical to the first two modifications, allowing plaintiff to continue quarterly interest-only payments, affirming plaintiff's obligation to repay the debt, and waiving any offsets and defenses. Plaintiff was current on his interest payments at that time.

Around 20 April 2006, the Barker litigation settled confidentially.

On 26 April 2006, plaintiff executed his fourth modification of the $425,000 Note, which extended the loan maturity date several months

to 25 June 2006 and now allowed plaintiff to accrue all interest due until maturity. The modification contained provisions identical to its three predecessors affirming plaintiff's obligation to repay the debt and waiving any offsets and defenses. Plaintiff remained current on his interest payments at that time.

In the summer of 2006, plaintiff consulted legal counsel, apparently for the first time. BB&T had not cancelled the $425,000 Note, and plaintiff was denied access to the terms of the Barker litigation settlement. On 5 July 2006, plaintiff and his counsel first met with BB&T representatives and agreed to discuss resolution of the matter.

On 24 July 2006, plaintiff executed his fifth modification of the $425,000 Note, which extended the loan maturity date several more months to 22 October 2006, allowed plaintiff to continue to accrue interest, and contained provisions identical to the former modifications affirming plaintiff's obligation to repay the debt and waiving any offsets and defenses. Plaintiff was current on his interest payments at that time.

According to plaintiff, on 17 October 2006, "having not received a settlement proposal from BB&T," his counsel wrote BB&T and demanded cancellation of the $425,000 Note, plus compensation for interest, costs, and expenses incurred in acquisition of the Cheraw Road Building and for startup and financing costs related to Chair Specialists. BB&T responded by e-mail on 20 October 2006. BB&T held a deed of trust on the Cheraw Road Building as collateral for the $425,000 Note, and the bank sought to conduct an environmental inspection and assess the value of the property. BB&T requested confirmation that the parties understood that they would "let the environmental inspections, appraisals, etc. run their course to see where we are," and, as related to the $425,000 Note, reiterated that "[a]nything of substance would have to come through the regional offices here first."

Plaintiff's counsel agreed to that understanding on 23 October 2006 and noted in his e-mail to BB&T's representative that he would await "completion of the environmental assessment and BB&T's decision relative to the subject transaction and [plaintiff's] position on the matter before acting further." Around this time and continuing into 2007, plaintiff allowed contractors retained by BB&T to have access to the Cheraw Road Building to conduct their environmental inspections and assessments.

On 21 November 2006, plaintiff executed his sixth and final modification of the $425,000 Note, which extended the loan maturity date several additional months to 19 February 2007, allowed plaintiff to continue

to accrue interest, and contained provisions identical to the former modifications affirming plaintiff's obligation to repay the debt and waiving any offsets and defenses.

In April 2007, in an unrelated, separate loan transaction, BB&T denied plaintiff's request to extend a loan on a different commercial property because, according to plaintiff, BB&T was "looking at writing off approximately '$160,000.00 on the [$425,000 Note].' "[4]

On 14 August 2007, over five and a half years after plaintiff's evidence shows he first became aware that no government-backed loan was available, plaintiff's counsel wrote BB&T and demanded that the bank "cancel the $425,000.00 Note as satisfied" and "reimburse [plaintiff] the sum of $192,812.00," for a total of $617,812.00, in exchange for which plaintiff would convey the Cheraw Road Building to BB&T; otherwise, plaintiff would initiate a lawsuit. Plaintiff's counsel noted that "this is a very reasonable settlement proposal." BB&T's counsel rejected plaintiff's demand outright, noting in a letter dated 14 January 2008 that plaintiff's claims are "without merit and clearly time-barred," but he expressed a willingness to work towards a resolution of BB&T's potential claims against plaintiff. Counsel's letter included a counterproposal giving plaintiff six months to sell the Cheraw Road Building and, after applying the proceeds from that sale to the $425,000 Note, allowing plaintiff to pay eighty-five percent of any deficiency balance remaining in twenty-four equal monthly installments, without interest.

On 25 June 2008, six years and five months after plaintiff first became aware that no government-backed loan was available, plaintiff filed his complaint asserting seven causes of action, each of which incorporates by reference and is based in part upon the following allegations:

> 9. On or about April 18, 2002, based upon the assurances that Barker and Chair Specialties would quality [sic] for a business loan, Plaintiffs obtained a $425,000 loan from BB&T, signing a promissory note in said amount payable to BB&T in full upon its maturity on April 18, 2003, with accrued interest payable on a quarterly basis through maturity. As collateral for the loan, the Plaintiffs granted a

4. For internal accounting purposes BB&T did write down the indebtedness by $180,000, but the internal entries did not alter plaintiff's $425,000 Note or his repayment obligations, and plaintiff has not alleged otherwise. As plaintiff has asserted in his complaint, any harm remains founded on BB&T's alleged failure to obtain the government-backed loan.

Deed of Trust to BB&T in the amount of $425,000.00, with the Cheraw Road building as collateral, and also entered into a Security Agreement with BB&T.

. . . .

11. Plaintiffs allege under information and belief that with the start up of Chair Specialties and the securing of a $450,000.00 [government-backed loan] by Barker and Chair Specialties, that Barker and Chair Specialties would be able to pay in full the Promissory Note issued by the Plaintiffs to Barker and his wife, and also pay off the $425,000.00 business loan obtained by the Plaintiffs for the start up of Chair Specialties.

12. On April 18, 2002 notes and closing documents were all executed with the knowledge of Mabe and BB&T, and under the full assurance to the Plaintiffs that the business loan for Chair Specialties would be approved.

13. Plaintiffs allege upon information and belief that within the weeks that followed the April 18, 2002 closing on the $425,000.00 loan from BB&T to the Plaintiffs, Barker contacted Mabe to obtain a status on the paperwork for the Chair Specialties business loan, and upon his inquiry, Mabe within the course and scope of his authority with BB&T, assured Barker that the loan paperwork was "on track" and that the loan would be approved.

14. Plaintiffs allege upon information and belief that in January of 2003, Mabe called Barker and informed him that he had bad news, and that much to Mabe's surprise, the [government-backed] loan had been denied.

. . . .

33. Defendants have failed and refused to cancel the [$425,000 Note] and reimburse the Plaintiffs for expenses incurred based upon the Defendant's breach and failure to procure original financing for Chair Specialties and Barker.

In essence, plaintiff argues in his complaint that he sought the $425,000 loan as a "bridge loan" to be repaid with the proceeds of the anticipated $450,000 government-backed loan. Unable to repay the $425,000 Note with funds from the expected $450,000 government-backed loan,

plaintiff asserts the following claims: (1) negligence, (2) negligent misrepresentation, (3) breach of contract, (4) unfair and deceptive trade practices, (5) breach of fiduciary relationship, (6) breach of BB&T's duty of good faith dealing, and (7) fraud. In addition to compensatory damages, plaintiff requested punitive damages and a declaratory judgment voiding the $425,000 Note and cancelling the bank's deed of trust on the Cheraw Road Property.

Despite the foundational allegation in the complaint that plaintiff obtained the $425,000 loan in reliance upon a representation that the government-backed loan was forthcoming, the actual facts established by plaintiff's own affidavit and discovery, and by the affidavit of his business partner Barker, are that BB&T had already notified plaintiff that no such government-backed loan was available by January 2002, several months before plaintiff obtained the $425,000 loan in April 2002. Plaintiff has not filed a motion to amend his pleading.

In its answer BB&T raised the statutes of limitation[5] as an affirmative defense and filed a compulsory counterclaim to collect the outstanding principal and interest owed on the $425,000 Note. In plaintiff's reply to BB&T's counterclaim, he pled, as one of his affirmative defenses, the claims from his complaint, stating that "Plaintiffs plead and rely upon the original claims set forth in their Complaint as a bar to the Counterclaim."[6]

On 15 December 2011, BB&T moved for summary judgment on the grounds that, *inter alia*, there is no genuine dispute of material fact regarding plaintiff's indebtedness under the $425,000 Note or that plaintiff's claims are time-barred. On 16 April 2012, the trial court granted summary judgment in favor of BB&T, concluding that BB&T is entitled to damages of $645,382.79, plus costs and interest, and attorney fees. On

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5. Plaintiff's claims for negligence, negligent misrepresentation, breach of contract, breach of fiduciary relationship, breach of duty of good faith and fair dealing, and fraud are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1), (5), (9) (2013). Plaintiff's unfair and deceptive trade practices claim is subject to a four-year statute of limitations. *Id.* § 75-16.2 (2013). Based on the purported claims having arisen in January 2002, the three-year statute of limitations would have run in January 2005, and the four-year statute of limitations would have run in January 2006.

6. Plaintiff raises seven defenses in his reply to BB&T's counterclaim. First, plaintiff does not dispute execution of the $425,000 Note or the accompanying six modification agreements or the benefits therein, but denies he is in default. He then asserts six affirmative defenses: (1) "unclean hands," (2) "modification and novation," (3) "laches," (4) "waiver and estoppel," (5) "Defendant's failure to mitigate," and (6) "the original claims set forth in [plaintiff's] Complaint."

appeal, plaintiff argued, *inter alia*, that the record establishes a genuine issue of material fact whether BB&T should be equitably estopped from asserting the statutes of limitation defense and whether the promissory note and deed of trust are enforceable. BB&T reiterated its argument that plaintiff's claims are in fact time-barred and that it is entitled to summary judgment on the $425,000 Note.

In a divided opinion, the Court of Appeals held that the events alleged by plaintiff raised an inference that BB&T was equitably estopped from asserting the statutes of limitation as a defense when its assurances to plaintiff may have induced his delay in filing suit and reversed the trial court's grant of defendant's motion for summary judgment. *Ussery v. Branch Banking & Trust Co.*, ___ N.C. App. ___, ___, 743 S.E.2d 650, 658 (2013). The dissent rejected the majority's equitable estoppel analysis, concluding that no genuine issue of material fact existed regarding plaintiff's claims and that BB&T's alleged "assurances" were "nothing more than mere 'promises' that Defendant would work to resolve Plaintiff's claims in the future." *Id.* at ___, 743 S.E.2d at 659 (Dillon, J., concurring in part and dissenting in part). The dissent noted that, in any event, "the alleged oral 'assurance' [by BB&T] that the [$425,000 Note] would not have to be paid back under any circumstance is in *direct contradiction* to the terms of the six written [modification] agreements executed by Plaintiff." *Id.* at ___, 743 S.E.2d at 661. Nonetheless, the dissent agreed with the majority that a genuine issue of material fact remained regarding the amount of interest accrued on the $425,000 Note, for which defendant sought recovery in its counterclaim.[7] *Id.* at ___, ___, 743 S.E.2d at 658-59, 662.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2013). The movant is entitled to summary judgment: (1) "where a claim or defense is utterly baseless in fact," or (2) when only a question of law arises based on undisputed facts. *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (citations omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . 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). This Court

7. This final issue was not appealed by either party and is not before this Court. *See, e.g.*, *Town of Midland v. Wayne*, ___ N.C. ___, ___, 773 S.E.2d 301, 305-06 (2015) (recognizing that when a party has not sought further review of an issue, the decision of the Court of Appeals on that matter is final).

reviews appeals from summary judgment de novo. *Dallaire v. Bank of Am.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citations omitted).

A genuine issue of material fact "is one that can be maintained by substantial evidence." *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835 (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (quoting *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)), and means "more than a scintilla or a permissible inference," *id.* at 414, 233 S.E.2d at 544 (quoting *State ex. rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 287 N.C. 192, 205, 214 S.E.2d 98, 106 (1975)). When the proof offered by either party establishes that no cause of action or defense exists, summary judgment may be granted. *Kessing*, 278 N.C. at 535, 180 S.E.2d at 830 (citation omitted).

It is undisputed that, several months after plaintiff became aware that the desired government-backed loan was unavailable and thus learned of his potential claims against BB&T, he nonetheless sought and obtained a new $425,000 loan from BB&T, thereby consolidating his existing debts and giving him $99,187.75 in additional cash. The record reveals no misrepresentation inducing plaintiff to obtain this loan. Plaintiff then executed a series of six modifications, all of which unambiguously reaffirmed the $425,000 Note obligation and expressly waived any offsets and defenses against the indebtedness or the bank.

BB&T is entitled to summary judgment on its counterclaim seeking repayment of the $425,000 Note because, relying on the contractual terms of the loan documents, plaintiff repeatedly reaffirmed his indebtedness and expressly waived his defenses and offsets. Likewise, because plaintiff's own claims incorporate and rely upon his indebtedness, comprised of both the $425,000 Note and subsequent modifications, plaintiff's waiver necessarily included his claims, and summary judgment for BB&T on that basis is proper. Moreover, plaintiff's claims as pled in his complaint rely upon the premise that the $425,000 Note was a "bridge loan" obtained before he knew the government-backed loan was not available, but his own evidence directly contradicts this assertion.

In interpreting contracts, we construe them as a whole. *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) ("The various terms of the [contract] are to be harmoniously construed . . . ." (alteration in original) (quoting *Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563

(2000))). Each clause and word is considered with reference to each other and is given effect by reasonable construction. *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965) ("[A] paragraph or excerpt must be interpreted in context with the rest of the agreement." (quoting 1 Strong's North Carolina Index: *Contracts* § 12, at 585 (1957))). We determine the intent of the parties by using "the plain meaning of the written terms." *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)). Contracting parties understand that "liability to the burden is a necessary incident to the right to the benefit." *Id.* at 428-29, 762 S.E.2d at 190 (quoting *Norfleet v. Cromwell*, 70 N.C. 510, 516, 70 N.C. 633, 641 (1874) (citations omitted)). "It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners . . . ." *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 693-94, 51 S.E.2d 191, 199 (1949) (Stacy, C.J., dissenting) (citations omitted). One who executes a written instrument is ordinarily charged with knowledge of its contents, *see, e.g.*, *Mills v. Lynch*, 259 N.C. 359, 362, 130 S.E.2d 541, 543-44 (1963), and he may not base his action on ignorance of the legal effect of its provisions in the absence of considerations such as fraud or mistake, *Pierce v. Bierman*, 202 N.C. 275, 279, 162 S.E. 566, 568 (1932).

"Parties are [generally] free to waive various rights, including those arising under statutes." *RL REGI*, 367 N.C. at 428, 762 S.E.2d at 190 (citations omitted). "Waiver is the intentional relinquishment of a known right," and as such, "knowledge of the right and an intent to waive it must be made plainly to appear." *Brady v. Funeral Benefit Ass'n*, 205 N.C. 5, 7, 169 S.E. 823, 824 (1933) (citation omitted). A debtor who, on the one hand, acknowledges his debt obligations and waives any defenses against that obligation cannot, at the same time, claim he reasonably relied on contemporaneous assurances that the very same debt would be canceled. *See Int'l Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 220, 316 S.E.2d 619, 621, *disc. rev. denied*, 312 N.C. 493, 322 S.E.2d 556 (1984) (holding the defendants' reliance unreasonable as a matter of law when the defendants signed a guaranty that expressly contradicted the creditor's assurance).

Recently, in *RL REGI North Carolina, LLC v. Lighthouse Cove, LLC*, we held that a spousal guarantor's execution of a forbearance agreement that "waiv[ed] all defenses" precluded her assertion of a statutory affirmative defense after she was sued for defaulting on the underlying loan. 367 N.C. at 428-30, 762 S.E.2d at 190-91. In reaching this

conclusion, we relied on traditional contract interpretation principles. *Id.* at 428-30, 762 S.E.2d at 190-91. The defendant in *RL REGI* executed a guaranty agreement with her bank to support financing for a real estate development project. *Id.* at 426, 762 S.E.2d at 189. The loan went into default, after which the parties entered into a restructuring arrangement; in conjunction with that transaction, the defendant executed an accompanying forbearance agreement. *Id.* at 426, 762 S.E.2d at 189. According to that arrangement, the bank agreed not to exercise its collection remedies under the loan documents and to forego payments on the principal debt during the forbearance period. *Id.* at 426, 762 S.E.2d at 189. In exchange, the defendant "waived 'any and all claims, defenses and causes of action.' " *Id.* at 426, 762 S.E.2d at 189. The plaintiff lender later sued the defendant seeking recovery of the indebtedness. *Id.* at 427, 762 S.E.2d at 189. In response, the defendant asserted an affirmative defense, arguing that the bank had obtained her guaranty in violation of the federal Equal Credit Opportunity Act. *Id.* at 427, 762 S.E.2d at 189.

Reading the plain language of the forbearance agreement, we held that, regardless of whether the bank had violated the Act, the defendant had waived that defense. *Id.* at 428, 762 S.E.2d at 190 ("We must decide the case, therefore, . . . by what is written in the contract actually made by them." (alteration in original) (quoting *Powers*, 186 N.C. at 338, 119 S.E. at 482)). The defendant acknowledged that she had freely and voluntarily signed the forbearance agreement after having adequate time to review, analyze, and discuss its provisions. *Id.* at 426-27, 762 S.E.2d at 189. Despite the defendant's later assertion to the contrary, we found "nothing facially illegal about this loan relationship," in which the lender agreed to modify a loan upon certain conditions. *Id.* at 429, 762 S.E.2d at 191 ("[P]arties routinely forego claims in settlement agreements."). The defendant's waiver "was not a precondition . . . to receive the . . . loan, but rather it was a negotiated settlement." *Id.* at 430, 762 S.E.2d at 191. The defendant guarantor chose to accept the benefits of the forbearance agreement, which provided leniency in repayment of her debt, and she thus "acknowledged the enforceability of her guaranty and waived a wide array of potential claims [or defenses]." *Id.* at 429, 762 S.E.2d at 190.

Here the language in both the $425,000 Note and accompanying modifications clearly and unambiguously establishes plaintiff's indebtedness. In exchange for incurring the $425,000 Note, plaintiff received benefits, including capital, an additional $99,187.75 in cash proceeds, consolidation of his debts, and reduction of his monthly expenses through interest-only payments. Likewise, plaintiff benefitted from the

six loan modification agreements, each of which extended the maturity date of the $425,000 Note and allowed him to make interest-only payments, or via the later modifications, accrue the interest until maturity. The language in the promissory note executed by plaintiff in conjunction with his receipt of the $425,000 states that "*[f]or value received, the undersigned . . . promises to pay*." Plaintiff later reaffirmed that his obligation to repay the debt "*shall remain in full force and effect*" on six different occasions. We accept the Note and modifications as accurate statements of the parties' contractual agreement.

Given that parties are generally free to waive various rights, *RL REGI*, 367 N.C. at 428-29, 762 S.E.2d at 190, plaintiff accepted the terms of the modification agreements, which benefitted him, in exchange for plaintiff's reaffirmation of his loan obligation and waiver of his offsets and defenses against BB&T. With each loan modification plaintiff again consented to the agreement, "waiv[ed] any objection thereto," and "certif[ied] that there are no defenses or offsets against" either the "obligations or the Bank." The text is clear and unambiguous. Plaintiff offers no contrary interpretation of his waiver. If plaintiff relied on verbal assurances contrary to the documents he signed, such reliance cannot be reasonable, and he was "misled through his own want of reasonable care and circumspection." *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 179, 77 S.E.2d 669, 673 (1953); *see RL REGI*, 367 N.C. at 429, 762 S.E.2d at 190. Plaintiff's waiver acknowledging his obligation and waiving any offsets or defenses against the $425,000 Note makes summary judgment proper for BB&T on its counterclaim seeking repayment of the indebtedness.

Each of plaintiff's claims as pled seeks to defeat the $425,000 Note based on plaintiff's bridge loan theory: that he would not have incurred the obligation but for BB&T's assurance that a government-backed loan would be available. By tying each of his claims to the $425,000 Note or to BB&T's refusal to cancel it, plaintiff acknowledges that his claims are efforts to defeat that indebtedness and, therefore, constitute defenses or offsets against that obligation.[8] Construing plaintiff's indebtedness

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8. Plaintiff's stated claims each incorporate by reference his bridge loan theory as outlined in his complaint, and each claim reveals, *inter alia*, the following reliance upon cancellation of the $425,000 Note and accompanying loan agreements:

(1) Plaintiff's negligence claim relies on BB&T's refusal to "cancel the Deed of Trust and Security Agreement" accompanying the $425,000 Note.

(2) Plaintiff's negligent misrepresentation claim provides that BB&T misrepresented that the "[$425,000 Note] would be canceled" and that, "based upon [BB&T's] refusal to

as a whole, and in light of established principles of reasonable construction and interpretation, we find the $425,000 indebtedness valid and conclude that plaintiff waived his claims and defenses as they are offsets or defenses to that indebtedness; therefore, summary judgment is proper for BB&T on plaintiff's claims.

Furthermore, plaintiff's claims as pled are logically flawed, and plaintiff fails to establish a genuine issue of material fact regarding his claims. Plaintiff cannot prove, even under his own asserted timeline, that he obtained the $425,000 Note in anticipation of the government-backed loan. In his complaint, plaintiff alleges that on 18 April 2002, he executed the $425,000 Note with BB&T in anticipation of securing a government-backed loan in the future. Plaintiff further alleges that in the weeks that followed, BB&T assured plaintiff that his government-backed loan was "on track" and that it would be approved. Nevertheless, by his own affidavit and interrogatories, plaintiff admits that by January 2002, BB&T had already notified him that no such government-backed loan would be available. Plaintiff further admits he had transitioned to closing Chair Specialists and was in the process of selling the associated equipment and other property "by the beginning of 2002." Plaintiff's business partner Barker, by his affidavit, acknowledged the same: "Mr. Mabe contacted me in January of 2002 and stated that . . . the [government-backed loan] had been denied. . . . In early 2002 . . . we were

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cancel the [accompanying] Deed of Trust," plaintiff has been "precluded from selling the property" serving as collateral for the loan.

(3) Plaintiff's breach of contract claim asserts that plaintiff "enter[ed] into the $425,000.00 Promissory Note . . . as the bridge loan for Chair Specialties," and requests that plaintiff "be indemnified on the $425,000.00 note and bridge loan."

(4) Plaintiff's unfair and deceptive trade practices claim relies in part on "representations to induce [plaintiff] to enter into the alleged [$425,000 Note]" and representations that "BB&T would cancel the [$425,000 Note]."

(5) Plaintiff's breach of fiduciary relationship claim relies on "[BB&T's] assurance to the Plaintiff[ ] that all matters involving the Plaintiff's $425,000.00 note, and any expenses incurred would be resolved," and BB&T's failure to "resolve the issue related to the $425,000.00 loan and damages" and its "refus[al] to cancel the [accompanying] Deed of Trust."

(6) Plaintiff's breach of duty of good faith dealing claim relies on BB&T's actions in "the various respects alleged above," referring to the allegations in the aforementioned claims, all of which rely in large part upon the $425,000 Note.

(7) Plaintiff's fraud claim relies on BB&T's "representations that the [$425,000 Note] and the associated business expenses would be resolved."

forced to close Chair Specialists." Barker characterized the transaction at issue as a "consolidation loan," stating that "[i]n early 2002, being unable to obtain [the government-backed] loan . . . [plaintiff] thereafter approached BB&T about a single loan of $425,000.00 to consolidate the debt on the building and reduce his monthly expenditures." Even taking the evidence in the light most favorable to plaintiff, BB&T could not have issued the $425,000 Note in anticipation of a future government-backed loan that the bank had already advised plaintiff would not be forthcoming. Plaintiff's blanket assertions cannot overcome his own evidence to the contrary. *See Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 26, 591 S.E.2d 870, 886 (2004) ("[A] party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." (quoting *Roberts v. Grogan*, 222 N.C. 30, 33, 21 S.E.2d 829, 830-31 (1942))); *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835 (providing that summary judgment is proper when "the opposing party cannot produce evidence to support an *essential element* of her claim" (emphasis added) (citations omitted)). Though a plaintiff may amend his complaint, and leave to do so "shall be freely given when justice so requires," N.C.G.S. § 1A-1, Rule 15(a) (2013), plaintiff failed to do so despite such fundamental, logical defects.

In conclusion, the $425,000 Note and modifications clearly establish plaintiff's indebtedness and his waiver of offsets and defenses against BB&T. Plaintiff's waiver necessarily included, and extended to, his claims against the $425,000 Note or the bank. Taking the evidence in the light most favorable to plaintiff, BB&T is entitled to summary judgment in its favor as to all claims set forth in plaintiff's complaint and all but the interest claim stated in BB&T's counterclaim; accordingly, the decision of the Court of Appeals which is before us is reversed. Regarding the interest claim, the Court of Appeals unanimously held that the trial court erred in calculating the amount of interest due on the $425,000 Note and remanded that issue for determination at trial. That matter was not before this Court on appeal, and therefore, the decision of the Court of Appeals as to that issue remains undisturbed. Accordingly, this case is remanded to the Court of Appeals for further remand to the Superior Court, Richmond County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA
v.
GREGORY ALDON PERKINS

No. 332PA14

Filed 25 September 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 928 (2014), finding no error after appeal from judgments entered on 4 December 2012 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 31 August 2015.

Roy Cooper, *Attorney General*, *by Amy Kunstling Irene*, *Assistant Attorney General*, *for the State.*

Glenn Gerding for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
DWAYNE ANTHONY ELLIS

No. 405PA14

Filed 25 September 2015

Indictment and Information—injury to personal property—owned by multiple entities

The Court of Appeals erred by holding that the indictment charging defendant with injury to personal property was fatally flawed for failure to allege that each owner of the property was an entity capable of owning property. When an indictment alleges that injury to personal property was committed against multiple entities, at least one of which was capable of owning property, the indictment is not facially invalid.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 574 (2014), finding no error in part and vacating in part a judgment entered on 2 August 2013 by Judge W. Osmond Smith, III, in Superior Court, Wake County, and remanding this case to the trial court. Heard in the Supreme Court on 22 April 2015.

Roy Cooper, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for defendant-appellee.*

ERVIN, Justice.

Defendant Dwayne Anthony Ellis was convicted of felonious larceny, injury to personal property causing damage in excess of $200.00, first degree trespass, and misdemeanor possession of stolen property. A unanimous panel of the Court of Appeals vacated defendant's injury to personal property conviction and remanded this case to the trial court for resentencing. We now reverse the decision of the Court of Appeals.

At around 4:30 a.m. on 23 April 2011, Sergeant Ian Kendrick of the North Carolina State University Police Department witnessed a vehicle with an attached trailer leaving a parking lot near an electrical substation located on the University's campus. After noting that the vehicle

had no visible tail lights and that the trailer was dragging the ground, Sergeant Kendrick stopped the vehicle, which was being driven by defendant. During the course of a pre-impoundment inventory search of the vehicle, investigating officers discovered, among other things, four large rolls of copper wire and a collection of wet, muddy clothing. Subsequently, investigating officers determined that the copper wire had been taken from a fenced-in area associated with the electrical substation. The remaining wire on the spool at the substation had been damaged to such an extent that it was no longer useable.

On 12 July 2011, the Wake County grand jury returned a bill of indictment in File No. 11 CrS 210130 that purported to charge defendant with felonious larceny, injury to personal property causing damage in excess of $200.00, and first degree trespass stemming from the 23 April 2011 incident and a separate bill of indictment in File No. 11 CrS 211154 that purported to charge defendant with felonious possession of stolen property stemming from his possession of a trailer that had allegedly been taken from Shaw University. On 25 July 2013, defendant consented to the filing of a pair of superseding informations that purported to allege the same offenses charged in the original bills of indictment, with the principal difference between the original indictment and the information in File No. 11 CrS 210130 being the manner in which the ownership of the property that defendant allegedly stole, damaged, and trespassed upon was stated. More specifically, the indictment returned against defendant in File No. 11 CrS 210130 alleged that the property in question was owned by "NC State University High Voltage Distribution," while the information filed against defendant in File No. 11 CrS 210130 alleged that the property was owned by "North Carolina State University (NCSU) and NCSU High Voltage Distribution."

On 2 August 2013, the jury returned a verdict convicting defendant of felonious larceny, misdemeanor injury to personal property, first degree trespass, and misdemeanor possession of stolen property. After accepting the jury's verdict and consolidating defendant's convictions in File No. 11 CrS 210130 for judgment, the trial court sentenced defendant to a term of six to eight months imprisonment in File No. 11 CrS 210130 and to a consecutive term of forty-five days imprisonment in File No. 11 CrS 211154. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In his sole challenge to the trial court's judgments before the Court of Appeals, defendant argued that "the trial court lacked subject matter jurisdiction over the injury to personal property charge because the information filed" in File No. 11 CrS 210130 "failed to allege that 'North

Carolina State University (NCSU) and NCSU High Voltage Distribution' were legal entities capable of owning property." *State v. Ellis*, ___ N.C. App. ___, ___, 763 S.E.2d 574, 575 (2014). After holding that the information did, in fact, adequately allege that North Carolina State University was an entity capable of owning property, a unanimous panel of the Court of Appeals held that the same could not be said for the ownership allegation relating to "NCSU High Voltage Distribution" given the absence of any indication that "NCSU High Voltage Distribution" was a legal entity capable of owning property. *Id.* at ___, 763 S.E.2d at 576-77. Acting in reliance upon its recent decision in *State v. Campbell*, ___ N.C. App. ___, 759 S.E.2d 380 (2014), *rev'd*, ___ N.C. ___, 772 S.E.2d 440 (2015), the Court of Appeals stated that, "when an indictment alleges that the property at issue has multiple owners, the indictment must also show that each owner is capable of owning property." *Ellis*, ___ N.C. App. at ___, 763 S.E.2d at 574. In view of the fact that the second count of the information filed in File No. 11 CrS 210130 failed to allege that "NCSU High Voltage Distribution" was capable of owning property, the Court of Appeals concluded that the trial court lacked jurisdiction over the injury to personal property charge, vacated defendant's conviction for committing that offense, and remanded this case to the trial court for resentencing. *Id.* at ___, 763 S.E.2d at 577.

"[A]n [information or] indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (citation omitted), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003); *see also* N.C.G.S. § 15A-924(a)(5) (2013) (requiring that a criminal pleading contain a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation"). A criminal pleading, such as an information, is fatally defective if it "fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (citations omitted).

An individual is guilty of injury to personal property in the event that: (1) personal property was injured; (2) the personal property was that "of another"; (3) the injury was inflicted "wantonly and willfully"; and (4) the injury was inflicted by the person or persons accused. N.C.G.S. § 14-160 (2013). The identity of the owner of the property that the defendant allegedly injured is a material element of the offense of injury to

personal property. *See State v. Eppley*, 282 N.C. 249, 259, 192 S.E.2d 441, 448 (1972). For that reason, a criminal pleading seeking to charge the commission of crimes involving theft of or damage to personal property, including injury to personal property, must "allege ownership of the property in a person, corporation, or other legal entity capable of owning property." *State v. Thornton*, 251 N.C. 658, 661-62, 111 S.E.2d 901, 903 (1960) (citation and quotation marks omitted).

As he candidly concedes, defendant did not challenge the sufficiency of the second count of the information filed against him in File No. 11 CrS 210130 in the trial court. However, since "a valid bill of indictment [or information] is essential to the jurisdiction of the trial court to try an accused," *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted), the facial validity of a criminal pleading may be challenged for the first time on appeal if the appellate court has jurisdiction over the underlying case. *State v. Pennell*, 367 N.C. 466, 469, 758 S.E.2d 383, 385 (2014) (citation omitted).

As we have already noted, the only issue before the Court in this case is the extent to which the second count in the information filed in File No. 11 CrS 210130 adequately alleged that the property that defendant was alleged to have injured was that "of another." Defendant does not appear to dispute that North Carolina State University is expressly authorized to own property by statute, N.C.G.S. § 116-3 (2013), and is, for that reason, an entity inherently capable of owning property. *See Campbell*, ___ N.C. at ___, 772 S.E.2d at 444 (holding that, because "our statutes recogniz[e] that churches are entities capable of owning property in North Carolina," "alleging ownership of property in an entity identified as a church or other place of religious worship . . . signifies an entity capable of owning property"). Thus, because North Carolina State University is, as the Court of Appeals correctly recognized, an entity capable of owning property, a criminal pleading that charges the defendant with injuring personal property owned by North Carolina State University adequately alleges "all the essential elements of the offense endeavored to be charged." *Hunt*, 357 N.C. at 267, 582 S.E.2d at 600 (citation and quotation marks omitted). Defendant contends, however, that the relevant count of the information is fatally defective because "NCSU High Voltage Distribution" was not alleged to be an entity capable of owning property. Assuming, without deciding, that the relevant count of the information did not adequately allege that "NCSU High Voltage Distribution" was an entity capable of owning property, that fact does not render the relevant count facially defective.

According to defendant, this Court's decisions establish that, where a criminal pleading purporting to charge the commission of an injury to personal property lists two entities as property owners, both entities must be adequately alleged to be capable of owning property for the pleading to properly charge the commission of the crime. Although defendant cites numerous cases in support of this position, each decision on which he relies involves a claim that a fatal variance existed between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial, rather than a challenge to the facial sufficiency of the underlying criminal pleading. For example, in *State v. Greene*, 289 N.C. 578, 585-86, 223 S.E.2d 365, 370 (1976), this Court held that there was no fatal variance between the indictment and the evidence in a case in which both men listed as property owners in the indictment were shown to have an ownership interest in the property. Similarly, we concluded in *State v. Hill*, 79 N.C. 656, 658-59 (1878), that a fatal variance did exist in a case in which the indictment alleged that the property was owned by "Lee Samuel and others" while the evidence showed that Lee Samuel was the sole owner of the property in question. Finally, in *State v. Burgess*, 74 N.C. 272, 272-73 (1876), we determined that a fatal variance existed in a case in which the indictment alleged that the property was owned by Joshua Brooks while the evidence tended to show that the property in question was owned by both Mr. Brooks and an individual named Hagler. As a result, none of the decisions upon which defendant relies stand for the proposition that all of the alleged victims named in a criminal pleading that purports to charge a defendant with the commission of certain property-related crimes must be alleged to have been capable of owning the property in order to preclude a finding of facial invalidity.

Although neither party has identified any prior decision of this Court that is directly on point with respect to this issue, our jurisprudence suggests, as the State argues, that a criminal pleading purporting to charge the commission of a property-related crime like injury to personal property is not facially invalid as long as that criminal pleading adequately alleges the existence of at least one victim that was capable of owning property, even if the same criminal pleading lists additional victims who were not alleged to have been capable of owning property as well. In *State v. Jessup*, 279 N.C. 108, 109, 181 S.E.2d 594, 595 (1971), an indictment alleged that the property taken in a larceny was owned by "the estate of W.M. Jessup." After concluding that the indictment was fatally defective because a decedent's estate is not a legal entity capable of owning property, *id.* at 111, 181 S.E.2d at 597, this Court favorably referenced a Texas decision upholding the validity of an indictment that

alleged that the property in question was owned by "the estate of Mary E. Rose" and possessed by an heir named "W.C. Shandley," *id.* at 114, 181 S.E.2d at 598. The implied distinction drawn in *Jessup* between the validity of an indictment alleging that property had been stolen from an entity that was not capable of owning property and an indictment alleging that property had been stolen from both an entity that was not capable of owning property and a person who was capable of owning property, with the former being invalid and the latter being valid, suggests that a criminal pleading like the second count of the information at issue here is not facially invalid as long as at least one person capable of owning property is named as the victim of the crime in question. *See also Greene*, 289 N.C. at 584-85, 223 S.E.2d at 369-70 (stating that, "[s]ince [*State v.*] *Jenkins*[, 78 N.C. 478 (1878),] was decided, the general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen"). Such a determination is fully consistent with the entire concept of facial invalidity, which should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading. As a result, given that injuring personal property owned by North Carolina State University would constitute a criminal offense, the second count of the information in File No. 11 CrS 210130 is not facially invalid.

Thus, we hold that, in the event that a criminal pleading alleges that injury to personal property was committed against multiple entities, at least one of which is capable of owning property, that pleading is not facially invalid. As a result, for the reasons set forth above, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
CHARLES STEVENS BLOW, JR.

No. 446A14

Filed 25 September 2015

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. ___, 764 S.E.2d 230 (2014), finding no error in part and vacating in part judgments entered on 31 July 2013 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Supreme Court on 1 September 2015.

Roy Cooper, Attorney General, by Anne M. Middleton and Christina E. Simpson, Assistant Attorneys General, for the State-appellant.

Paul F. Herzog for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed as to the appealable issue of right, and judgment entered upon defendant's conviction for first-degree rape of a child in case number 11 CRS 55728 is reinstated. The remaining issues addressed by the Court of Appeals are not before this Court and that court's decision as to these matters remains undisturbed.

REVERSED.

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

CARPENTER v. McKINNEY

[368 N.C. 349 (2015)]

ROBERT CARPENTER AND TAMMY CARPENTER, INDIVIDUALLY AND TAMMY CARPENTER AS ADMINISTRATOR OF THE ESTATE OF MONIQUE L. CARPENTER	)	
v.	)	From Guilford County
WILLIE McKINNEY, INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH WINDHAM HEATING AND AIR CONDITIONING, INC., INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH OLD REPUBLIC HOME PROTECTION COMPANY, INC., INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH PAUL EDWARD WINDHAM, INDIVIDUALLY AND D/B/A WINDHAM HEATING & AIR	)	

No. 266PA14

ORDER

After carefully reviewing all filings in this matter, the Court determines that the petition for writ of certiorari was improvidently allowed. Accordingly, it is ordered that the appeal is dismissed.

By Order of this Court, this 24th day of September, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of September, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Lee County
	)	
JUAN CARLOS BENITEZ	)	

No. 24PA15

ORDER

This case has come before the Court by way of the State's Petition for Discretionary Review pursuant to N.C.G.S. § 7A-31.

Pursuant to N.C.G.S. § 15A-1418, the decision of the Court of Appeals is vacated and this Court now ORDERS this case remanded to the Court of Appeals for remand to the Superior Court, Lee County, for an evidentiary hearing to make findings of fact necessary to determine whether the trial counsel's actions fell below an objective standard of reasonableness, *see State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998) (remanding a motion for appropriate relief to the trial court with instructions to conduct an evidentiary hearing), and, if so, whether defendant was prejudiced by any deficient performance by his trial counsel.

The time periods for perfecting or proceeding with the appeal are tolled. The Superior Court, Lee County, is ordered to transmit its order on the motion for appropriate relief within 120 days so that the Court of Appeals may proceed with the appeal or enter an order terminating the appeal, as appropriate.

By order of the Court in Conference, this 24th day of September, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 24th day of September, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. WALSTON

[368 N.C. 351 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Dare County
	)	
ROBERT TIMOTHY WALSTON SR.	)	

No. 392PA13-2

ORDER

The defendant's petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals to (1) determine, in light of our holding and analysis in *State v. King*, 366 N.C. 68, ___ S.E. 2d ___ (2012) (applying North Carolina Rules of Evidence 403 and 702), and other relevant authority, if the trial court's decision to exclude the expert testimony was an abuse of discretion and, if so, (2) determine if the erroneous decision to exclude the testimony prejudiced defendant. The petition is denied as to any remaining issues.

By Order of this Court, this 24th day of September, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

24 SEPTEMBER 2015

003P10-2	State v. Steven L. Peoples	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31	Dismissed
005PA15	Commscope Credit Union v. Butler and Burke, LLP, et al.	1. Plt's Motion to Remove James L. Wright, Third Party Defendant 2. Plt's Motion to Withdraw Motion to Remove	1. --- **09/02/2015** 2. Allowed **09/02/2015** **Beasley, J., recused**
008PA14	High Point Bank and Trust Company v. Highmark Properties, LLC, Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams	Plt's Motion for the Court to Take Judicial Notice	Dismissed as moot **Ervin, J., recused**
008PA14	High Point Bank and Trust Company v. Highmark Properties, LLC, Mitchell Blevins, Cynthia Blevins, Charles Williams, and Janice Williams	Defs' Motion to Strike	Dismissed as moot **Ervin, J., recused**
019PA14	State v. Randy Benjamin Bartlett	Def's Motion to Take Judicial Notice	Allowed
024PA15	State v. Juan Carlos Benitez	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Lee County 2. State's Motion to Strike Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed as moot
032PA15	Eastern Carolina Regional Housing Authority v. Sherbreda Lofton	Motion to Admit Erik R. Zimmerman *Pro Hac Vice*	Allowed **09/01/2015** **Ervin, J., recused**
050P12-3	Ovarias Verdad Criego-El v. State	1. Plt's *Pro Se* Motion for Judicial Notice 2. Plt's *Pro Se* Motion for Judicial Notice	1. Dismissed 2. Dismissed
071P15	State v. Christopher Allen Reese	Def's PDR Under N.C.G.S. § 7A-31 (COA14-593)	Denied
091P14-3	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion of Leave to File Individual *Writ of Certiorari* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

24 SEPTEMBER 2015

107P15	Branch Banking and Trust Company v. Hui S. Smith, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-554)	Denied
108P15	Michael C. Piro v. Karen Shapiro Piro (Now Karen Shapiro)	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-962) 2. Def's *Pro Se* Motion for Temporary Stay 3. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **05/11/2015** Dissolved **09/24/2015** 3. Denied
109P15	State v. Thomas Clay Friday	Def's PDR Under N.C.G.S. § 7A-31 (COA14-529)	Denied
144P15	State v. Calvin Lewis Moore, Jr.	1. State's Motion for Temporary Stay (COA14-1033) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/27/2015** Dissolved **09/24/2015** 2. Denied 3. Denied
164P15	State v. Charles Gilbert Gillespie	Def's PDR Under N.C.G.S. § 7A-31 (COA14-953)	Denied
171P15-2	Arthur Donald Darby, Jr. v. Jamie Christina Campbell, Jason Murphy, Attorney, Matthew Rothbeind, Attorney, and Fairmont Police Department, Hamlet Police Department, Robeson County Court, "John Doe"	1. Plt's *Pro Se* Motion for *Error Coram Vobis* 2. Plt's *Pro Se* Motion for *Error Coram Nobis*	1. Dismissed 2. Dismissed
172P15-2	State v. Mohammed Nasser Jilani	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
178P15	State v. Charles Shannon Harrison	Def's PDR Under N.C.G.S. § 7A-31 (COA14-859)	Denied
182A15-2	State v. Adam Jarmal Hodge	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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

24 SEPTEMBER 2015

188A15	Jeffrey Huggins, Employee v. Marlatex Corporation, Employer, and New Hampshire Insurance, Carrier	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1232) 2. Defs' Motion to Dismiss Appeal	1. --- 2. Allowed
192P15	Erin Isenberg v. North Carolina Department of Commerce, Division of Employment Security	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA14-808)	Denied
199P15	State v. Brent Tyler Miller	State's PDR Under N.C.G.S. § 7A-31 (COA14-1310)	Allowed
213P15	In the Matter of the Foreclosure of Deed of Trust Executed by Daryl O. Sutton and Shonda J. Sutton in the Original Amount of $136,000.00 Dated April 14, 2005, Recorded in Book 6297, Page 1933, Guilford County Registry, Substitute Trustee Services, Inc., Substitute Trustee	Respondents' PDR Under N.C.G.S. § 7A-31 (COA14-761)	Denied
224P15	In the Matter of Foreclosure of the Deeds of Trust Executed by Grover C. Brown and Wife, Margaret C. Brown Dated April 1, 1980, Recorded in Book 949, Page 109, and Book 949, Page 111 of the Buncombe County Registry	1. Petitioners' (Grover & Margaret Brown) PDR Under N.C.G.S. § 7A-31 (COA14-937) 2. First Choice Title, LLC's Conditional Motion for Leave to File Amicus Brief 3. Petitioners' (Grover & Margaret Brown) Motion to Amend PDR 4. Petitioners' (Grover & Margaret Brown) Second Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed 4. Allowed
225P15	State v. Connie Prentice Reaves	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1055)	Denied
230A15	Branch Banking & Trust Company v. Peacock Farm, Inc., et al.	Plt's Motion to Supplement the Record	Allowed **09/16/2015**

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

24 SEPTEMBER 2015

234P15	Jonathan Wilner, et al., and All Others Similarly Situated v. The Cedars of Chapel Hill, LLC, et al.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-380) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. North Carolina Association of Realtors' Conditional Motion for Leave to File *Amicus* Brief 4. Defs' Motion to Strike Motion for Leave to File *Amicus Curiae* Brief on Behalf of the North Carolina Association of Realtors	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot
235P15	Jimmy L. and Angela M. Allen v. Travelers Insurance Company	Plts' *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA15-427)	Denied
236P15	Jimmy L. and Angela M. Allen v. Travelers Insurance Company and The Charter Oak Fire Insurance Company	Plts' *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA15-428)	Denied
240P15-2	In the Matter of Appeal of Celeste G. Broughton, Trustee, from the Decision of the Wake County Board of Equalization and Review Regarding the Valuation and Taxation of Certain Property for Tax Year 2013	Taxpayer's *Pro Se* Motion for Notice of Appeal (COA15-519)	Dismissed *ex mero motu*
243P15	State v. Steven L. Lowery	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1306)	Denied
244A15	State v. Tanisha Decole Belcher	Def's Notice of Appeal Based Upon a Constitutional Question (COA15-31)	Dismissed *ex mero motu*
253P15	State v. Artie Stevenson Smith, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1314)	Denied
254P15	Donna Simmons v. Kathleen M. Waddell	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1214)	Denied

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

24 SEPTEMBER 2015

257A15	Joseph Michael Griffith v. Chaplain Hovis, et al.	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1411) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Defs' Motion to Dismiss the Appeal	1. --- 2. Allowed 3. Allowed **Jackson, J., recused**
258P15	State v. Rahul Rumar Mack	1. Def's *Pro Se* Motion for Notice of Appeal (COA13-1173) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition for *Writ of Certiorari*	1. Dismissed *ex mero motu* 2. Dismissed 3. Denied **Ervin, J., recused**
265P15	State v. Walter Timothy Gause	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA14-1085)	Denied
266PA14	Carpenter, et al. v. McKinney, et al.	Plts' Motion to Amend Record on Appeal (COA13-516)	Denied; Special Order
269P15	State v. Danny Lamont Avery	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-460)	Dismissed
270P15	State v. Terence D. Smith	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-441)	Dismissed
271P15	State v. Felix Ricardo Saldierna	1. State's Motion for Temporary Stay (COA14-1345) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/03/2015** 2. Allowed 3. Allowed
272P04-2	State v. James Allen Cook	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-290) 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

24 SEPTEMBER 2015

275P15	State v. Reco Kamson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
279P15	State v. Frederick D. Gibbs	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-1052) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
280P15	In re Foreclosure of Real Property Under Deed of Trust from Michael D. Gutowski and Mary Anne Gutowski, in the Original Amount of $286,000, Dated November 9, 2006 and Recorded on November 15, 2006 in Book 4367 at Page 502, Union County Registry; Trustee Services of Carolina, LLC, Substitute Trustee	1. Respondents' Notice of Appeal Based Upon a Constitutional Question (COA14-881) 2. Respondents' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Respondents' *Pro Se* Motion for Stay of Foreclosure Sale 4. Respondents' *Pro Se* Motion to Enjoin All Other State Actions 5. Petitioner's Motion to Dismiss Appeal 6. Respondents' *Pro Se* Motion for Stay in Light of Bankruptcy Filing	1. 2. 3. Denied **08/25/2015** 4. 5. 6.
282P15	Harvey D. Kohn, M.D. v. FirstHealth of the Carolinas, Inc. d/b/a Moore Regional Hospital	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1210)	Denied
283P15	State v. Robert Earl Wilkerson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-95)	Denied
290P15	State v. Jeffrey Tryon Collington	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1244)	Denied
293P15	State v. Steven Faison-El	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-543)	Dismissed
297P15	State v. Terrance Javarr Ross	1. State's Motion for Temporary Stay (COA15-87) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/21/2015** 2. 3.

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

24 SEPTEMBER 2015

299P15	State v. Jessica Rasheeda Jordan	1. State's Motion for Temporary Stay (COA114-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/24/2015** 2. 3.
301P15	House of Raeford Farms, Inc. v. North Carolina Department of Environmental and Natural Resources	1. Respondent's Motion for Temporary Stay (COA15-47) 2. Respondent's Petition for *Writ of Supersedeas* 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/2015** 2. 3.
307P14-2	State v. Donald G. Barnette, Jr.	1. Def's *Pro Se* Motion for Notice of Appeal (COA13-1076) 2. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
307P15	The Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue	Plt's PDR Prior to a Decision of the COA (COA15-896)	Denied
311P15	State v. Thedford Roy Rorie, Jr.	1. State's Motion for Temporary Stay (COA14-886) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/08/2015** 2.
318P15	State v. Edward Williams, III	1. Def's *Pro Se* Motion for Belated Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Denied 3. Dismissed as moot
319P15	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 (COA14-1016)	1. Allowed **09/10/2015** 2. 3.
322P15	State v. Raymond Alan Griffin	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied 0**9/18/2015**

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

24 SEPTEMBER 2015

323A92-10	Charles Alonzo Tunstall-Bey v. Frank W. Ballance, et al.	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of the COA 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
325P15	State v. Mohammed N. Jilani	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed 0**9/22/2015**
375P09-4	State v. Avenger Ridgeway	Def's *Pro Se* Motion for Petition to Toss Out Violent Habitual Law	Dismissed
392PA13-2	State v. Robert Timothy Walston, Sr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA12-1377-2) 2. Def's Petition for *Writ of Certiorari* to Review Order of COA	1. Special Order 2. Denied
409P05-3	State v. Sebastian X. Moore	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP14-690)	Dismissed
510P04-2	State v. Jose Luis Macias	1. Def's *Pro Se* Motion for Petition for Writ of Error 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **09/02/2015** 2. Allowed **09/02/2015** 3. Dismissed as moot **09/02/2015**

MORNINGSTAR MARINAS/EATON FERRY, LLC, PETITIONER
v.
WARREN COUNTY, NORTH CAROLINA AND KEN KRULIK, WARREN COUNTY PLANNING AND ZONING ADMINISTRATOR, IN HIS OFFICIAL CAPACITY, RESPONDENTS

No. 131A14

Filed 6 November 2015

Zoning—appeal from zoning officer—duty to transmit to board

The Court of Appeals correctly concluded that a zoning officer (Krulik) was bound by statute to transmit petitioner's appeal to the Board and that the legal determination of whether petitioner had standing fell within the province of the Board. N.C.G.S. § 153A-345(b) specifically states that "[t]he officer from whom the appeal is taken *shall forthwith transmit to the board* all the papers constituting the record upon which action appealed from was taken." It does not establish any exception or other circumstances in which the officer may decline to transmit the appropriate materials.

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. ___, 755 S.E.2d 75 (2014), affirming an order entered on 13 September 2012 by Judge Robert H. Hobgood in Superior Court, Warren County. Heard in the Supreme Court on 16 February 2015.

Robinson Bradshaw & Hinson, P.A., by John H. Carmichael, for petitioner-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, for respondent-appellants.

JACKSON, Justice.

In this case we consider whether a zoning officer may refuse to transmit an appeal from his own zoning determination to the county board of adjustment for its review. We conclude that a zoning officer does not have this authority and therefore that the Superior Court, Warren County, properly entered an order compelling respondents to place petitioner's appeal on the agenda of the Warren County Board of Adjustment (the Board).

Morningstar Marinas (petitioner) owns land abutting Lake Gaston in Warren County, where it operates a commercial marina known as Eaton

Ferry. Petitioner's property is zoned for business development pursuant to the Warren County Zoning Ordinance (the Ordinance). East Oaks, LLC (East Oaks) owns land approximately 145 feet away, across a small cove. Pursuant to the Ordinance, 8.5 acres of that property are zoned as residential and 1.91 acres are zoned for commercial use. The commercial portion of the property is improved with a boat storage building and a parking lot.

In April 2011, East Oaks filed a petition seeking a conditional use permit to develop a townhouse community (the Townhouse Project) on the residential portion of the property. The site plan for the Townhouse Project showed a proposed access easement for a driveway (the Drive) connecting the boat storage building on the commercial portion of the property to a boat launch area on Lake Gaston located on the residential portion of the property. The Drive was to be utilized to transport boats from the boat storage facility to the boat slips and launching area on the residential property.

On 21 April 2011, before the Board had an opportunity to rule on the petition, Warren County Planning and Zoning Administrator Ken Krulik issued a formal determination concluding that townhouses were a permitted use in the subject residential district and therefore, a conditional use permit was not required. As a result, East Oaks withdrew its application for a conditional use permit and obtained a zoning permit to develop the townhouses.

Petitioner appealed Krulik's 21 April formal determination to the Board and argued that the Townhouse Project did not constitute a permitted use in the East Oaks residential property pursuant to the Ordinance. As Krulik's formal determination did not specifically address the Drive portion of the site plan, petitioner wrote Krulik a letter requesting that he issue a formal determination pursuant to the Ordinance regarding whether the Drive constituted a commercial use of the East Oaks residential property in violation of the Ordinance. Krulik responded by e-mail that he would not make a determination on the Drive, explaining that it was "not a relevant issue to [his] determination on townhouses as a permitted use or issuing the zoning permit."

When the Board heard petitioner's appeal in August 2011, it overturned Krulik's interpretation of the Ordinance and revoked the zoning permit previously issued to East Oaks. On 12 September, East Oaks successfully petitioned the superior court for a writ of certiorari to review the Board's order. On 14 October 2011, East Oaks and Warren County entered into a consent order, approved by the court, in which East Oaks

and Warren County agreed that the zoning permit issued based upon Krulik's interpretation of the Ordinance would be reinstated, thereby allowing East Oaks to continue the Townhouse Project. The consent order, to which petitioner was not a party, also stated the trial court's conclusions of law that "Morningstar is not a 'person aggrieved' pursuant to N.C. Gen. Stat. §153A-345(b)" and that the Board "had no jurisdiction or authority to hear the appeal of Morningstar."

Meanwhile, on 7 October 2011, petitioner filed its first petition for writ of mandamus with the Superior Court, Warren County, in which it requested that the court compel Krulik to issue a formal determination regarding the Drive. Warren County and Krulik (respondents) filed an answer in which they contended that petitioner lacked standing to appeal and to petition for the writ of mandamus. Respondents also attached a determination letter from Krulik dated 16 November 2011, which stated in pertinent part:

> While I did not make a specific determination as to whether the use of the concrete drive/easement constitutes a commercial use of the East Oaks Property in violation of the Ordinance, my issuance of the East Oaks' zoning permit . . . necessarily required that I determine the submitted use of the entire property covered by the permit is not restricted by the Warren County Zoning Ordinance.
>
> The drive is shown as a "20 [foot] wide private access easement" on East Oaks' development plans. Warren County's Ordinance does not specifically regulate easements—whether or not they cross varying zoning jurisdictions . . . [T]o my knowledge, there has been no attempt by Warren County to regulate such easements through its zoning regulations.

In light of Krulik's determination regarding the Drive, petitioner voluntarily dismissed its mandamus action without prejudice and on 14 December 2011, noticed its appeal to the Board from Krulik's 16 November determination. Petitioner again asserted that "the Drive constitutes a commercial use of the East Oaks Property, which is zoned Residential District, in violation of the Ordinance."

In January 2012, the county attorney informed petitioner that she had advised Krulik not to place the December appeal from Krulik's November 2011 determination on the Board's agenda because, *inter alia*, the Board "has no authority or jurisdiction to hear an appeal by

[petitioner] because East Oaks' permit issue has been settled by" the 14 October 2011 consent order between East Oaks and Warren County.

Petitioner filed another petition for writ of mandamus in Superior Court, Warren County, requesting that the court compel respondents to place the 14 December 2011 appeal on the Board's next available agenda for a hearing. Petitioner asserted that the consent order, to which it was not a party and which dealt with a separate issue, did not concern the subject of the instant appeal, which involved the Drive. Respondents again argued in their response to the petition that "Petitioner-Morningstar was neither an aggrieved party to the 'Prior Action' nor an aggrieved party to this action . . . . As such Petitioner-Morningstar has no standing to appeal the actions of the Planning and Zoning Administrator, nor to bring this action for mandamus."

On 13 September 2012, the court granted the petition and issued a writ of mandamus ordering respondents to place the appeal on the Board's agenda for a hearing on the merits. The court added that its order "only direct[ed] that a hearing be conducted by the [Board] but [did] not direct that Board concerning the merits of the case." Respondents appealed the order to the Court of Appeals, which affirmed the trial court's order in a divided opinion. *Morningstar Marinas/Eaton Ferry, LLC v. Warren County*, 233 N.C. App. 23, 755 S.E.2d 75 (2014).

Notwithstanding respondents' contention that petitioner lacked standing, the majority determined that Krulik had a mandatory statutory duty to transmit petitioner's appeal to the Board pursuant to section 153A-345, and that "the existence—or nonexistence—of standing is a legal determination that must be made by the [Board]." *Id.* at 27, 755 S.E.2d at 78. The majority further concluded that petitioner had complied with the requirements for taking an appeal as set forth in the Ordinance and that petitioner thus had a right to have its appeal placed on the Board's agenda. *Id.* at 28-29, 755 S.E.2d at 79. In addition, the majority determined that "mandamus was [petitioner's] only available remedy." *Id.* at 29, 755 S.E.2d at 80. Accordingly, the majority held that the trial court did not err by granting the petition for writ of mandamus. *Id.* at 32, 755 S.E.2d at 81.

The dissent disagreed with the majority that section 153A-345 required Krulik to transmit the appeal to the Board and for that reason would have reversed the trial court's order. Relying upon *Smith v. Forsyth County Board of Adjustment*, 186 N.C. App. 651, 652 S.E.2d 355 (2007), the dissent asserted that a party must first demonstrate that it has standing to appeal pursuant to section 153A-345 in order for the

statute to compel a zoning officer to transmit an appeal to the Board. *Id.* at 33, 755 S.E.2d at 82. (Elmore, J., dissenting). According to the dissent, *Smith* suggests that a zoning officer "is vested with authority to refuse to transmit an appeal to the [Board] if the appealing party's application [does not allege any] special damages" demonstrating that it is "aggrieved" pursuant to section 153A-354. *Id.* at 33, 755 S.E.2d at 82. Therefore, the dissenting judge believed that a zoning officer "may unilaterally dismiss the appeal for want of standing." *Id.* at 33, 755 S.E.2d at 82. The dissent concluded that because petitioner neglected to allege special damages in its appeal from the 16 November determination, petitioner failed to show that it was "aggrieved" and thus had no standing to appeal to the Board. *Id.* at 33, 755 S.E.2d at 82. For that reason the dissent would have held that petitioner had not met the first requirement for issuance of a writ of mandamus that the party seeking relief "demonstrate a clear legal right to the act requested." *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (citation omitted). Nonetheless, the dissenting judge "concur[red] in all other aspects of the majority opinion."[1] *Id.* at 233 N.C. App. at 32, 755 S.E.2d at 81. Respondents filed their appeal of right based on the dissenting opinion.

"The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971) (citations omitted). A writ of mandamus is an appropriate remedy when the following circumstances are present: (1) the party seeking relief has "a clear legal right to the act requested"; (2) the respondent has "a legal duty to perform the act requested"; (3) performance of the act at issue is "ministerial in nature and [does] not involve the exercise of discretion"; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no "alternative, legally adequate remedy" is available. *In re T.H.T.*, 362 N.C. at 453-54, 665 S.E.2d at 59 (citations omitted).

Respondents argue based upon the dissent that the trial court erred by granting petitioner's request for writ of mandamus because petitioner lacks standing as a party "aggrieved" to appeal Krulik's 16 November determination; therefore petitioner does not have "a clear legal right" to have its appeal placed on the Board's agenda. We agree with the Court of

1. Accordingly, the other holding by the Court of Appeals dealing with attorney's fees is not before this Court on appeal. The Court denied respondents' petition for discretionary review of that and other issues.

Appeals' conclusion that Krulik is bound by statute to transmit petitioner's appeal to the Board and that the legal determination whether petitioner has standing falls within the province of the Board. As a result, we hold that petitioner has a clear legal right to have its appeal transmitted to the Board and placed on the agenda, and we affirm the Court of Appeals' determination that mandamus was proper. In reaching this conclusion, we do not decide whether petitioner, in fact, has standing because that decision first must be made by the Board of Adjustment.

Subsection 153A-345(b)[2] of the North Carolina General Statutes, which governed county board of adjustment appeals at all times relevant to this matter, states that

> the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. Appeals shall be taken within times prescribed by the board of adjustment by general rule, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which action appealed from was taken.

N.C.G.S. § 153A-345(b) (2012). "It is well established 'that the word "shall" is generally imperative or mandatory' " when used in our statutes. *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*,

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2. This statute was repealed by the General Assembly, effective 1 October 2013, but was in effect during the relevant time period of the present case. N.C.G.S. § 160A-388 now governs appeals to county boards of adjustment. *See* N.C.G.S. § 153A-345.1 (2013) (making the provisions of section 160A-388 applicable to counties). Significantly, the revised statute requires that

> [t]he official who made the decision shall transmit to the board all documents and exhibits constituting the record upon which the action appealed from is taken. The official shall also provide a copy of the record to the appellant and to the owner of the property that is the subject of the appeal if the appellant is not the owner.

Id. § 160A-388(b1)(5) (2013). In addition, the revisions now mandate that the appeal itself be filed "with the [county] clerk," *id.* § 160A-388(b1)(1), a procedure that is more analogous to notices of appeal filed pursuant to both Chapter 150B and in the General Court of Justice. *See* N.C. R. App. P. 3(a).

361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). Our reading of subsection 153A-345(b) does not deviate from this precedent. The statute specifically states that "[t]he officer from whom the appeal is taken *shall forthwith transmit to the board* all the papers constituting the record upon which action appealed from was taken." N.C.G.S. § 153A-345(b) (emphasis added). The statute does not establish any exception or other circumstances in which the officer may decline to transmit the appropriate materials. Accordingly, when Morningstar appealed Krulik's 16 November determination in its 14 December letter to Krulik, it was mandatory that Krulik immediately transmit the appeal to the Board.

Although subsection 153A-345(b) clearly includes the standing requirement that only a "person aggrieved . . . may take an appeal," neither the statute nor the Ordinance includes any language suggesting that this determination is to be made by a zoning officer. We have stated that, "[i]n general, the zoning administrator is a purely administrative or ministerial agent following the literal provisions of the ordinance." *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993) (citation omitted). Consistent with subsection 153A-345(b), the Ordinance states that "[a]ppeals from the enforcement and interpretation of this ordinance . . . shall be filed with the Zoning Administrator, who shall transmit all such records to the Board of Adjustment." Warren County, N.C., Zoning Ordinance § IX-4 (2010). The Ordinance further indicates that "[t]he Board of Adjustment shall fix a reasonable time, not to exceed 30 days, for the hearing of the appeal." *Id.* The plain language in both the statute and the Ordinance mandates that the zoning officer forward the documents constituting the record to the Board—an act that is ministerial in nature, involving no discretion. Conversely, "[w]hether a party has standing is a question of law." *McCrann v. Pinehurst LLC*, 225 N.C. App. 368, 372, 737 S.E.2d 771, 775, *disc. rev. denied*, 366 N.C. 593, 743 S.E.2d 221 (2013). In light of the ministerial role of the zoning officer in the appeal process, as designated and required by subsection 153A-345(b), we conclude that these officers are not vested with authority to dismiss or foreclose an appeal based upon their legal determination that the appealing party lacks standing. Moreover, we do not believe the statute was intended to permit zoning officers to single-handedly block appeals from their own zoning determinations. The county board of adjustment, not the zoning officer, determines the fate of such an appeal.

Our decision does not address the issue of whether petitioner in fact has standing, nor does it allow petitioner to evade the standing

requirement. Although subsection 153A-345(b) requires petitioner to demonstrate to the Board that it is an aggrieved party before its challenge can be heard on the merits, in any event, petitioner has a clear legal right to have its appeal transmitted to the Board. Respondents do not dispute that petitioner complied with the requirements for taking an appeal pursuant to both subsection 153A-345(b) and the Ordinance. Subsection 153A-345(b) requires a zoning officer to transmit an appeal to the applicable board of adjustment, without consideration of that zoning officer's judgment regarding whether or not the petitioner possesses standing to appeal. By refusing to place petitioner's appeal on the Board's agenda, Krulik failed to comply with this statutory mandate.

Accordingly, as to the issue on direct appeal based upon the dissenting opinion, we affirm the Court of Appeals' determination that the trial court did not err by granting mandamus and by ordering respondents to place petitioner's appeal on the Board's agenda. This case is remanded to the Court of Appeals for further remand to the trial court for any additional proceedings necessitated by and consistent with this opinion.

AFFIRMED AND REMANDED.

KEEN LASSITER, AS GUARDIAN AD LITEM FOR JAKARI BAIZE, A MINOR
v.
NORTH CAROLINA BAPTIST HOSPITALS, INCORPORATED A/K/A NORTH CAROLINA BAPTIST HOSPITAL, WAKE FOREST UNIVERSITY HEALTH SCIENCES, TERRY DANIEL, M.D., AND DAYSPRING FAMILY MEDICINE ASSOCIATES, PLLC

No. 330PA14

Filed 6 November 2015

Costs—expert witness fees—for actual time spent—not under subpoena

In a medical malpractice action, the trial court did not err by awarding expert witness fees as costs to defendants for the actual time the expert witnesses spent providing deposition testimony even though the expert witnesses were not under subpoena. N.C.G.S. § 7A-305(d)(11) allows the trial court to tax "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" whether or not the expert witnesses were subpoenaed.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 761 S.E.2d 720 (2014), reversing and remanding orders entered on 9 September 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Supreme Court on 1 September 2015.

Crabtree, Carpenter & Connolly, PLLC, by Charles F. Carpenter; and Edwards & Edwards, L.L.P., by Joseph T. Edwards and Sharron R. Edwards, for plaintiff-appellee.

Carruthers & Roth, P.A., by Norman F. Klick, Jr., Richard L. Vanore, and Robert N. Young, for defendant-appellants Terry Daniel, M.D. and Dayspring Family Medicine Associates, PLLC; and Wilson Helms & Cartledge, LLP, by G. Gray Wilson and Linda L. Helms, for defendant-appellants North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital and Wake Forest University Health Sciences.

ERVIN, Justice.

In this case we are required to determine whether defendants North Carolina Baptist Hospitals, Incorporated a/k/a North Carolina Baptist Hospital and Wake Forest University Health Sciences (collectively, "defendants NCBH and WFUHS"), and defendants Terry Daniel, M.D. and Dayspring Family Medicine Associates, PLLC (collectively, "defendants Daniel and Dayspring") were required to obtain the issuance of subpoenas directed to certain individuals who had been identified as planning to provide expert testimony on behalf of plaintiff Keen Lassiter, as guardian *ad litem* for Jakari Baize, as a prerequisite for being awarded the fees that defendants paid for the "actual time [that the expert witnesses] spent providing [deposition] testimony" as costs. N.C.G.S. § 7A-305(d)(11) (2013). On 5 August 2014, a unanimous panel of the Court of Appeals filed an opinion concluding that the trial court had erred by awarding the relevant expert witness fees as costs because defendants were statutorily required to subpoena the expert witnesses in question as a prerequisite for obtaining such relief. *Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc.*, ___ N.C. App. ___, ___, 761 S.E.2d 720, 724 (2014) (citing *Stark v. Ford Motor Co.*, 226 N.C. App. 80, 84, 739 S.E.2d 172, 176 (citing *Jarrell v. Charlotte–Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 563, 698 S.E.2d 190, 193 (2010) (concluding that N.C.G.S § 7A-314 "limits the trial court's broader discretionary power under [N.C.G.S.] § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena")), *disc. rev. denied*, 367 N.C. 240, 748 S.E.2d 321

(2013)). After reviewing the relevant statutory provisions, we conclude that the General Assembly eliminated the traditional subpoena requirement associated with the taxing of certain expert witness fees as costs in civil actions by adding subdivision (11) to N.C.G.S. § 7A-305(d) (stating that "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" are "assessable or recoverable" as costs) in 2007, *see* Act of July 3, 2007, ch. 212, sec. 3, 2007 N.C. Sess. Laws (Reg. Sess. 2007) 339, 339-40, and that the Court of Appeals' decision should be reversed.

On 8 December 2010, Chinatha Clark, as guardian *ad litem* for her son, Jakari Baize,[1] filed a complaint in Superior Court, Pitt County,[2] against defendants based on their alleged individual and collective failure to properly treat Jakari for a severe case of jaundice that resulted in serious complications and left Jakari permanently disabled. In February 2011, defendants NCBH and WFUHS and defendants Daniel and Dayspring, respectively, filed separate answers in which they denied that Jakari's injuries had resulted from any negligence on their part. Subsequently, defendants NCBH and WFUHS and defendants Daniel and Dayspring filed separate motions asking the trial court to schedule a discovery conference and enter a discovery scheduling order as required by N.C.G.S. § 1A-1, Rule 26(f1).

On 13 February 2012, a hearing was held before Judge Marvin K. Blount, III to address a number of issues, including the entry of a discovery scheduling order. Two days later, counsel for defendants Daniel and Dayspring sent a draft discovery scheduling order to the trial court coordinator for the Superior Court, Johnston County, for consideration by Judge Blount. On 25 April 2012, the trial court coordinator contacted counsel for the parties to inform them that, while Judge Blount had not yet entered a discovery scheduling order, he would do so as soon as possible.

According to the draft discovery scheduling order transmitted to Judge Blount by counsel for defendants Daniel and Dayspring, plaintiff was required to designate all expert witnesses whom he intended to call at trial on or before 1 May 2012 and to "make [his] expert witnesses available for deposition upon request by any party on or before August 15, 2012." Although Judge Blount had not, by that point, entered

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1. At some unspecified point before entry of the 28 November 2011 order, Keen Lassiter was substituted for Ms. Clark as Jakari's guardian *ad litem*.

2. On 28 November 2011, "upon motion of defendants," venue in this case was transferred to the Superior Court, Johnston County.

a discovery scheduling order, plaintiff identified ten expert witnesses whom he expected to call at trial during May 2012 before plaintiff withdrew one of those expert witnesses on 6 July 2012.

On 15 October 2012, Judge Blount entered a discovery scheduling order that, among other things, extended the date by which plaintiff's designated expert witnesses must be made available for deposition from 15 August 2012 to 15 November 2012. In addition, the discovery scheduling order provided that (1) "[e]xperts not designated and made available for deposition in accordance with this [o]rder shall not be permitted to testify at trial"; (2) "[a]ll designated expert witnesses shall reasonably be made available for a discovery deposition upon request by any party"; (3) "[a] party desiring to depose another party's expert witness shall pay the expert a reasonable hourly rate for the expert's actual time testifying at the deposition"; and (4), if a dispute concerning the amount of compensation to be paid to an expert witness for deposition-related testimony arises, "the deposition shall be taken, and thereafter the [c]ourt, upon motion filed by any party, shall establish a reasonable hourly rate for the expert's actual time testifying at the deposition." Moreover, the discovery scheduling order required that all discovery be completed by 3 October 2013, that the mandatory mediation conference be held by 17 October 2013, and that the case be set for trial on or after 20 January 2014. Finally, the discovery scheduling order permitted modification of the "schedule and deadline dates set forth [t]herein . . . only by the written consent of counsel for all parties with the [c]ourt's consent or by order of the [c]ourt for good cause shown."

Prior to the 15 November 2012 deadline, defendants deposed (1) Kitty Carter-Wicker, M.D. on 27 July 2012;[3] (2) Thomas Hegyi, M.D. on 3 August 2012; (3) Richard Inwood, M.D. on 22 August and 13 September 2012; and (4) Marcus Hermansen, M.D. on 25 September 2012. On 20 December 2012, plaintiff filed a Motion to Amend Discovery Scheduling Order in which he sought the entry of an order extending the deadline by which he could make his remaining experts available for deposition from 15 November 2012 to 31 January 2013. On 27 December 2012, all defendants filed a Motion to Strike and Exclude Certain Expert[ ] Witnesses Designated by Plaintiff in which they argued that plaintiff had violated the discovery scheduling order by failing to provide dates upon which defendants could depose Richard C. Lussky, M.D.; J.C. Poindexter, Jr., Ph.D.; Lois Johnson, M.D.; Ann T. Neulicht, M.D.; and Steven Shapiro, M.D. prior to 15 November 2012, and that these witnesses should be

3. Defendants also deposed Dr. Carter-Wicker on 4 December 2012.

precluded from testifying at trial "as expressly ordered in the Discovery Scheduling Order." In January 2013, plaintiff responded to defendants' motion by offering an explanation for the delays that had occurred during the discovery process and asserting that defendants had failed to make two important treating physicians available for deposition in a timely manner.

A hearing concerning the issues raised by these competing motions was held before Judge William R. Pittman at the 14 January 2013 term of the Superior Court, Johnston County. On the same date, Judge Pittman entered an order denying plaintiff's motion to amend and allowing defendants' motion to preclude certain of plaintiff's expert witnesses from testifying at trial. More specifically, Judge Pittman ordered that Drs. Lussky, Poindexter, and Neulicht be precluded from testifying at trial, allowed Dr. Shapiro to testify as a treating physician while precluding him from testifying as an expert witness, and stated that, if Dr. Johnson had not been made available for deposition by 1 March 2013, her trial testimony would be precluded as well.

On 4 February 2013, the trial court entered an amended discovery scheduling order, under which the 15 November 2012 deadline by which plaintiff was required to make his expert witnesses available for deposition remained in effect. On 21 February 2013, plaintiff filed a motion seeking to have the deadline by which Dr. Johnson had to be made available for deposition extended or, in the alternative, to have Dr. Johnson replaced with another expert witness. On 4 March 2013, defendants filed a motion to preclude Dr. Johnson from testifying at trial on grounds that plaintiff "has not offered any dates for Dr. Johnson's deposition and has not made her available for deposition by March 1, 2013." On 11 April 2013, Judge Pittman entered an order allowing defendants' motion.

On 22 July 2013, plaintiff voluntarily dismissed all claims against all defendants without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a). On 2 August 2013, defendants Daniel and Dayspring filed a motion seeking the entry of an order taxing costs against plaintiff in the dismissed case pursuant to N.C.G.S. § 1A-1, Rule 41(d)[4] including "reasonable and necessary expenses for stenographic and videographic services [related

4. Although costs in civil actions are ordinarily taxed to one party or the other pursuant to N.C.G.S. § 6-20, which provides that such an award is discretionary with the trial judge subject to the limitations set out in N.C.G.S. § 7A-305(d), the costs at issue here were subject to being taxed against plaintiff pursuant to N.C.G.S. § 1A-1, Rule 41(d), which makes the taxing of costs mandatory when a plaintiff has voluntarily dismissed an action pursuant to Rule 41(a). *See* N.C.G.S. §§ 1A-1, Rule 41, 6-20 (2013).

to the taking of depositions], the cost of deposition transcripts, travel expenses of defense counsel for depositions and expert witness fees for the depositions of plaintiff['s] expert witnesses in the total amount of $39,749.60." On the same date, defendants NCBH and WFUHS filed a motion seeking to have "reasonable and necessary costs in the amount of $29,609.80" incurred in "the preparation and defense of [plaintiff's] action" taxed against plaintiff pursuant to Rule 41(d).

After conducting a hearing to consider the issues raised by defendants' motions on 26 August 2013, the trial court entered orders on 9 September 2013[5] determining that (1) the "expenses [defendants had] incurred for video conferencing, stenographic preparation of a deposition summary and room rent" should not be taxed against plaintiff because those expenses "were not reasonable and necessary"; (2) defendants had "incurred expenses recoverable under [section] 7A-305 for stenographic and videographic services and expert witness fees for depositions of expert witnesses [that defendants had] taken"; and (3) "in light of the language of the Discovery Scheduling Orders," the expert witnesses "did not need to be subpoenaed" for these expert witness fee costs to be taxed against plaintiffs.[6] Based upon these determinations, the trial court taxed $23,799.61 in costs in favor of defendants NCBH and WFUHS, and $24,738.76 in costs in favor of defendants Daniel and Dayspring. Plaintiff appealed from the trial court's 9 September 2013 orders to the Court of Appeals.[7]

"The sole issue on appeal [before the Court of Appeals was] whether the trial court erred by granting expert witness fees" for the actual time that the experts plaintiff had designated spent testifying during their respective depositions "as costs to defendants pursuant to section 7A-305 of the North Carolina General Statutes." *Lassiter*, ___ N.C. App. at ___, 761 S.E.2d at 722. In resolving this issue, the Court of Appeals began by discussing the interplay between N.C.G.S. §§ 6-20, 7A-305(d)(11), and 7A-314, and concluded that under existing law "before a trial

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5. The language quoted in the text of this opinion is taken from the order that the trial court entered in response to the motion filed by defendants NCBH and WFUHS. The order entered in response to the motion filed by defendants Daniel and Dayspring, while substantively identical, is worded somewhat differently.

6. According to the 9 September 2013 orders, all defendants withdrew their requests "for taxation of . . . travel expenses."

7. More specifically, plaintiff appealed "from that portion of" the trial court's orders that "grant[ed] expert witness fees to" defendants for the time the experts actually spent testifying during the depositions and not from that portion of the trial court's orders that taxed the costs of the stenographic and videographic services to plaintiff.

court may assess expert witness testimony fees as costs, the testimony must be (1) reasonable, (2) necessary, and (3) given while under subpoena." *Id.* at ___, 761 S.E.2d at 723 (quoting *Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 741 (2011)).

After making this determination, the court addressed defendants' contention that the discovery scheduling orders "eliminated the need to subpoena [the] expert witnesses for deposition" as a precondition for taxing the expert witness fees incurred in the course of taking these depositions as costs. *Id.* at ___, 761 S.E.2d at 723. In plaintiff's view, since the discovery scheduling orders "did not modify or waive the [subpoena] requirement" and since "the parties [had] not [otherwise] waive[d] the subpoena requirement, the trial court erred by granting expert witness fees" at issue here given defendants' failure to subpoena these witnesses. *Id.* at ___, 761 S.E.2d at 723. Defendants, on the other hand, argued that the trial court had correctly concluded that the discovery scheduling orders had the effect of altering the traditional rule that a party is not entitled to recover costs associated with testimony given by a witness who had not been placed under subpoena.

In their briefs before the Court of Appeals, plaintiff and defendants relied upon *Jarrell v. Charlotte–Mecklenburg Hospital Authority*, in which the plaintiffs challenged an order awarding costs "associated with out-of-state expert witnesses" on the ground that the subpoenas sent to the expert witnesses in question were ineffective to compel their attendance. *Jarrell*, 206 N.C. App. 559, 560-61, 698 S.E.2d 190, 191 (2010). In response, the defendants in *Jarrell* asserted that the effectiveness of the subpoenas that had been served on these expert witnesses was irrelevant given that the discovery scheduling order governing the case provided that " '[a]ll parties agree that experts need not be issued a subpoena either for deposition or for trial and waive that requirement of the statute as it may affect the recovery of costs.' " *Id.* at 561, 698 S.E.2d at 192 (alteration in original). Although the Court in *Jarrell* agreed "that the express terms of the [discovery scheduling order] would render inapplicable the statutory provisions detailing recovery of expert witness costs," the Court of Appeals declined to decide the case on that basis because that argument had not been raised before the trial court. *Id.* at 561-62, 698 S.E.2d at 192. In addition, the Court of Appeals concluded that "[N.C.G.S.] § 7A-314 limits the trial court's broader discretionary power under [N.C.G.S.] § 7A-305(d)(11) to award expert fees as costs only when the expert is under subpoena." *Id.* at 563, 698 S.E.2d at 193. (citing *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997)). Instead, after finding that the plaintiffs

lacked standing to challenge the validity of the subpoenas served on the nonparty expert witnesses, the Court of Appeals upheld the taxing of the challenged expert witness fees to the plaintiffs as costs. *Id.* at 564-65, 698 S.E.2d at 194.

The Court of Appeals distinguished this case from *Jarrell* on the grounds that (1) subpoenas had been issued for the expert witnesses in *Jarrell* and (2) the discovery scheduling order in *Jarrell* explicitly waived the otherwise-applicable subpoena requirement. *Lassiter*, ___ N.C. App. at ___, 761 S.E.2d at 723-24. On the other hand, the expert witnesses at issue in this case were not placed under subpoena and the discovery scheduling orders merely required plaintiff to " 'make [his] expert witnesses available for deposition upon request by any party on or before November 15, 2012.' " *Id.* at ___, 761 S.E.2d at 724 (alteration in original). Given the absence of any indication "that the expert witnesses at issue did not need to be issued subpoenas for deposition or for trial," the Court of Appeals declined to treat the discovery scheduling orders "as a waiver of the statutory requirements detailing recovery of expert witness costs." *Id.* at ___, 761 S.E.2d at 724. Thus, the court held that the trial court erroneously awarded costs associated with fees paid to expert witnesses who had not been placed under subpoena and remanded this case to the trial court for a proper determination of the amount of costs that should be taxed in favor of defendants. *Id.* at ___, 761 S.E.2d at 724.

On 9 September 2014, defendants petitioned for discretionary review of the Court of Appeals' decision. On 9 April 2015, we allowed the petition. As was the case before the Court of Appeals, the sole issue before this Court is whether defendants' failure to subpoena the expert witnesses identified by plaintiff pursuant to the discovery scheduling orders precluded the trial court from taxing plaintiff with the costs of "[r]easonable and necessary fees of expert witnesses" incurred "solely for actual time spent providing testimony at . . . deposition" pursuant to N.C.G.S. § 7A-305(d)(11).

In their briefs before this Court, defendants argue that their failure to subpoena the relevant expert witnesses did not preclude an award of costs in their favor because (1) the discovery scheduling orders waived or eliminated the subpoena requirement that the Court of Appeals has deemed applicable in civil actions by virtue of N.C.G.S. §§ 7A-314(a) and 7A-314(d) and (2) N.C.G.S. § 7A-305(d)(11) obviates the necessity for the issuance of a subpoena as a prerequisite for an award of expert witness fees as costs pursuant to that statute. On the other hand, plaintiff contends that the discovery scheduling orders in this case did not

obviate the need for defendants to subpoena the expert witnesses at issue here because: (1) no language similar to that contained in the discovery scheduling orders before the Court of Appeals in *Jarrell* is present here and N.C.G.S. § 1A-1, Rule 26(f1) contains no indication that the General Assembly intended for the enactment of that provision to have the effect of eliminating the traditional subpoena requirement and (2) the enactment of N.C.G.S. § 7A-305(d)(11) did not, as *Jarrell* and its progeny indicate, have the effect of eliminating the traditional subpoena requirement either.[8]

> At common law neither party recovered costs in a civil action and each party paid his own witnesses. Today in this State, "all costs are given in a court of law [by] virtue of some statute." The simple but definitive statement of the rule is: "[C]osts in this State, are entirely creatures of legislation, and without this they do not exist."

City of Charlotte v. McNeely, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (second alteration in original) (citations omitted). As a result of the fact that "[a]n award of costs is an exercise of [the] statutory authority[,] if the statute is misinterpreted, the judgment is erroneous." *Id.* at 691, 190 S.E.2d at 185 (quoting *State ex rel. Morris v. Shinn*, 262 N.C. 88, 89, 136 S.E.2d 244, 245 (1964)). In other words, when the validity of an award of costs hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions, the issue before the appellate court is one of statutory construction, which is subject to de novo review. *See In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (stating that "[q]uestions of statutory interpretation are questions of law and are reviewed de novo" (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998))).

According to N.C.G.S. § 7A-305, which governs the recovery of costs in civil actions:

> (d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to [N.C.]G.S. [§] 6-20:

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8. Plaintiff does not appear to contend that the costs awarded by the trial court exceeded an amount that was "[r]easonable and necessary" under N.C.G.S. § 7A-305(d)(11) in the event that no subpoena was required as a prerequisite for the taxing of the relevant expert witness fees as costs.

> 1) Witness fees, as provided by law.
>
> . . . .
>
> (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

N.C.G.S. § 7A-305(d)(1), (11) (2013). Similarly, N.C.G.S. § 7A-314, which applies to all types of actions, provides, in pertinent part, that:

> (a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance . . . .
>
> (b) A witness entitled to the fee set forth in subsection (a) of this section . . . shall be entitled to receive reimbursement for travel expenses as [set forth in subsection (b)] . . . .
>
> . . . .
>
> (d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize.

Id. § 7A-314(a), (b), (d) (2013). In defendants' view, the General Assembly's decision to add subdivision (11) to N.C.G.S. § 7A-305(d), effective 1 August 2007, without including the reference to "as provided by law" contained in N.C.G.S. § 7A-305(d)(1), decoupled N.C.G.S. § 7A-305(d)(11) from N.C.G.S. § 7A-314 so as to explicitly allow trial judges to tax "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" as costs regardless of whether the expert witness in question had been placed under subpoena. Plaintiff, on the other hand, contends that defendants' argument is contrary to decisions by the Court of Appeals, such as *Jarrell*, and that interpreting the relevant statutory provisions so as to eliminate any link between N.C.G.S. § 7A-305(d)(11) and N.C.G.S. § 7A-314 would "effectively nullif[y]" the provisions of

N.C.G.S. § 7A-314 relating to expert witness fees discussed by this Court in *State v. Johnson*, 282 N.C. 1, 26-28, 191 S.E.2d 641, 658-59 (1972). We find defendants' argument to be the more persuasive of the two.

In *Johnson*, which arose from a condemnation proceeding initiated by the State and which was decided several decades before enactment of N.C.G.S. § 7A-305(d)(11), this Court considered, among other things, whether the trial court erred by taxing fees for four expert witnesses who had testified at trial without having been placed under subpoena as costs against the State. 282 N.C. at 26-28, 191 S.E.2d at 658-59. In reversing the trial court's award, we stated that N.C.G.S. § 7A-314(a) "makes a witness fee for any witness, except those specifically exempted therein, dependent upon his having been subpoenaed to testify in the case" and "fixes his fee at $5.00 per day"; that, with respect "to expert witnesses," N.C.G.S. § 7A-314(d) "modifies [N.C.G.S. § 7A-314(a)] by permitting the court, in its discretion, to increase . . . compensation and allowances" for expert witnesses; and that this "modification relates only to the amount of an expert witness's fee" and accordingly, "does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation" pursuant to N.C.G.S. § 7A-314. *Id.* at 27-28, 191 S.E.2d at 659 (citing N.C.G.S. § 7A-314 (Supp. 1971)).[9]

As noted in *Jarrell*, the Court of Appeals has consistently stated, in the aftermath of *Johnson*,[10] that even though such "fees were not specifically provided for under N.C.[G.S.] § 7A-305(d), . . . 'expert witness fees could be taxed as costs when a witness has been subpoenaed.' " *Jarrell*, 206 N.C. App. at 562, 698 S.E.2d at 192 (quoting *Bennett v. Equity Residential*, 192 N.C. App. 512, 516, 665 S.E.2d 514, 517 (2008)

9. In view of our determination that the expert witnesses whose fees were at issue in *Johnson* were not "entitled to compensation" for their testimony pursuant to N.C.G.S. § 7A-314 because their attendance had not been compelled by subpoena, we did not specify the statutory authority under which expert witness fees payable to subpoenaed witnesses could have been taxed as costs against the State. 282 N.C. at 28, 191 S.E.2d at 659.

10. Although *Johnson* marked the first occasion on which this Court analyzed the subpoena requirement in the context of N.C.G.S. § 7A-314, *Johnson* was only the latest in a long line of cases holding that witness fees were only recoverable as costs when the testimony in question was compelled by a subpoena. *E.g.*, *McNeely*, 281 N.C. at 692, 190 S.E.2d at 186 (stating that "[t]he losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered" (citing N.C.G.S. § 6-53 (1969)); *Chadwick v. Life Ins. Co. of Va.*, 158 N.C. 318, 320, 158 N.C. 380, 381, 74 S.E. 115, 116 (1912) (stating that, "[b]y statute, the losing party is taxed with the costs of the witnesses of the winning party, but to prevent oppression only two witnesses of the winning side to each material fact can be taxed against the losing side, and then only if subpoenaed and examined or tendered" (citations omitted)).

(emphasis omitted) (quoting *Vaden v. Dombrowski*, 187 N.C. App. 433, 440, 653 S.E.2d 543, 547 (2007))). More specifically, the Court in *Jarrell* noted that prior panels of the Court of Appeals had concluded that expert witness fees constituted recoverable costs pursuant to N.C.G.S. § 7A-305(d)(1), which allows taxing "witness fees . . . as costs as provided by law" and reasoned that the reference to "as provided by law" contained in N.C.G.S. § 7A-305(d)(1) referred to N.C.G.S. § 7A-314. *Id.* at 562, 698 S.E.2d at 192 (citing *Vaden*, 187 N.C. App. at 440, 653 S.E.2d at 547). The court further noted that the Court of Appeals had previously held that N.C.G.S. § 7A-305(d)(1) should "be read in conjunction with [N.C.G.S.] § 7A-314, which governs fees for witnesses" so as to limit awardable expert witness fees to amounts paid to witnesses who have testified subject to a subpoena. *Id.* at 562, 698 S.E.2d at 192 (quoting *Morgan v. Steiner*, 173 N.C. App. 577, 583, 619 S.E.2d 516, 520 (2005), *disc. rev. denied*, 360 N.C. 648, 636 S.E.2d 808 (2006)). In reliance on this line of authority, the Court in *Jarrell* determined that the 2007 General Assembly had amended N.C.G.S. § 7A-305(d) in response to " 'inconsistencies within [Court of Appeals'] case law' " regarding "the propriety of taxing certain costs" and had "supplement[ed] the witness fees allowed under" N.C.G.S. § 7A-305(d)(1) "by adding a specific provision for expert fees" in N.C.G.S. § 7A-305(d)(11). *Id.* at 562, 698 S.E.2d at 192 (quoting *Vaden*, 187 N.C. App. at 438 n.3, 653 S.E.2d at 546 n.3). As a result, the Court in *Jarrell* concluded that, like N.C.G.S. § 7A-305(d)(1), "[N.C.G.S.] § 7A-305(d)(11) must be understood in light of [N.C.G.S.] § 7A-314" so that, in order to recover amounts paid to expert witnesses for actual time spent testifying as authorized by N.C.G.S. § 7A-305(d)(11) as costs, the expert witness whose testimony generated the relevant fees had to have testified while subject to subpoena. *Id.* at 562-63, 698 S.E.2d at 192-93.

Although the General Assembly certainly intended for the 2007 amendments to N.C.G.S. § 7A-305(d) to clarify the identity and amounts of taxable costs in civil actions, we believe that the enactment of N.C.G.S. § 7A-305(d)(11) served an additional purpose, which was to establish that "[r]easonable and necessary [expert witness] fees . . . solely for actual time spent providing testimony at trial, deposition, or other proceedings" are taxable as costs in civil actions and that, given the omission of "as provided by law," such expert witness fees are taxable as costs even though the expert testimony is not compelled by a subpoena. *See* ch. 212, sec. 3, 2007 N.C. Sess. Laws (Reg. Sess. 2007) at 339-40 (captioned "An Act to Clarify the Court's Discretion to Allow Court Costs."). We do not believe, as plaintiff argues, that giving determinative effect to the omission from N.C.G.S. § 7A-305(d)(11) of any reference to "as provided by law" as contained in N.C.G.S. § 7A-305(d)(1) "effectively

nullifie[s]" the expert witness provisions of N.C.G.S. § 7A-314.[11] Unlike N.C.G.S. § 7A-305(d), which governs the taxing of costs in civil actions, N.C.G.S. § 7A-314 applies to other types of legal proceedings, including special proceedings and criminal actions, as well. As a result, the enactment of N.C.G.S. § 7A-305(d)(11) has no effect on the awarding of expert witness fees as costs or the taxing of costs in any proceeding other than in a civil action. In view of the fact that the General Assembly did not repeal or otherwise alter N.C.G.S. § 7A-305(d)(1) or N.C.G.S. § 7A-314, a trial court also has the authority in a civil action to award additional expert witness-related costs, such as amounts related to travel pursuant to N.C.G.S. § 7A-314(b) or incurred for time spent in attendance at trial or some other proceeding pursuant to N.C.G.S. § 7A-314(d), provided that the expert witness testified pursuant to subpoena.[12] As a result, adopting the construction of N.C.G.S. § 7A-305(d)(11) that we deem appropriate does not render N.C.G.S. § 7A-314 without any effect.

Thus, we conclude that the enactment of N.C.G.S. § 7A-305(d)(11) in 2007 allows for the taxing of "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" without requiring the party seeking to obtain the taxing of such costs to demonstrate that the expert witnesses in question testified subject to a subpoena.[13] To the extent that *Jarrell* and its progeny suggest that the subpoena requirement established in N.C.G.S. § 7A-314 applies to expert witness fees taxed as costs pursuant

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11. On the contrary, plaintiff's argument effectively adds the reference to "as provided by law" contained in N.C.G.S. § 7A-305(d)(1) into N.C.G.S. § 7A-305(d)(11) even though no such language appears in N.C.G.S. § 7A-305(d)(11).

12. The existence of multiple options for awarding costs associated with expert testimony discussed in the text was short-lived. With respect to "motions or applications for costs filed on or after" 1 October 2015, the General Assembly has amended N.C.G.S. § 7A-314(d) to provide that, "[s]ubject to the specific limitations set forth in [N.C.]G.S. [§] 7A-305(d)(11), an expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion may authorize." Act of July 15, 2015, ch. 153, sec. 2, 3, 2015 3 Adv. Legis. Serv. 12, 14 (LexisNexis) (captioned "An Act Amending the Rules of Civil Procedure to Modernize Discovery of Expert Witness and Clarifying Expert Witness Costs in Civil Actions.").

13. In light of our determination that the enactment of N.C.G.S. § 7A-305(d)(11) eliminated the requirement that expert witnesses be subpoenaed as a precondition for an award of expert witness fees as costs, we need not address the validity of defendants' contention that the trial court correctly determined that the discovery scheduling order and the provisions of N.C.G.S. § 1A-1, Rule 26(f1) obviated the necessity for the issuance of subpoenas to compel the deposition testimony of plaintiff's designated expert witnesses.

to N.C.G.S. § 7A-305(d)(11), those decisions are overruled. As a result, given that the trial court correctly taxed expert witness fees in accordance with N.C.G.S. § 7A-305(d)(11) against plaintiff, albeit for reasons other than those we have deemed persuasive in this opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
LESTER GERARD PACKINGHAM

No. 366PA13

Filed 6 November 2015

Sexual Offenders—unauthorized accessing of social networking website—Facebook—constitutionality of statute

The Court of Appeals erred by vacating defendant's conviction for accessing a social networking website as a registered sex offender based on its determination that N.C.G.S. § 14-202.5 was unconstitutional on its face and as applied to defendant. N.C.G.S. § 14-202.5 is constitutional on its face because it satisfies *O'Brien*'s four factors, *U.S. v. O'Brien*, 391 U.S. 367 (1968). N.C.G.S. § 14-202.5 is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Further, the incidental burden imposed upon this defendant, who was barred from Facebook but not from many other sites, was not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Finally, defendant's conduct defeated his vagueness claim.

Justice HUDSON dissenting.

Justice BEASLEY joining in dissent.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 748 S.E.2d 146

(2013), vacating a judgment entered on 30 May 2012 by Judge William Osmond Smith in Superior Court, Durham County. Heard in the Supreme Court on 8 September 2014.

Roy Cooper, Attorney General, by Anne M. Middleton and David L. Elliott, Assistant Attorneys General, for the State-appellant.

Glenn Gerding, Appellate Defender,[1] *for defendant-appellee.*

EDMUNDS, Justice.

The Court of Appeals vacated defendant's conviction for accessing a social networking Web site as a registered sex offender, finding that the applicable statute, N.C.G.S. § 14-202.5, is unconstitutional both on its face and as applied to defendant. We conclude that the statute is constitutional in all respects. Accordingly, we reverse the holding to the contrary of the Court of Appeals.

In 2008, the General Assembly enacted N.C.G.S. § 14-202.5, which bans the use of commercial social networking Web sites by registered sex offenders. In April 2010, Officer Brian Schnee of the Durham Police Department began an investigation to detect such sex offenders living in Durham who were illegally accessing commercial social networking Web sites. Officer Schnee identified defendant Lester Gerard Packingham (defendant), who had been convicted in 2002 of a sexual offense in Cabarrus County, North Carolina, as a registered sex offender subject to N.C.G.S. § 14-202.5. Officer Schnee located defendant's name and photograph on the North Carolina Department of Justice Sex Offender Registry. While investigating the Web site Facebook.com, Officer Schnee found a user profile page that, based upon the profile photo, he believed belonged to defendant. Although the name on the Facebook account was "J.R. Gerrard," Officer Schnee was able to confirm that the Facebook page in fact was defendant's. During a subsequent search of defendant's residence, officers recovered a notice of "Changes to North Carolina Sex Offender Registration Laws" signed by defendant describing commercial social networking Web sites that he was prohibited from accessing. This document was admitted into evidence at trial.

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1. Glenn Gerding was appointed to the position of Appellate Defender on 1 November 2015. His motion to withdraw as private assigned counsel was allowed by this Court on 5 November 2015. His motion to represent defendant through this Court's appointment of the Appellate Defender was also allowed on 5 November 2015.

On 20 September 2010, defendant was indicted by a Durham County grand jury for violating N.C.G.S. § 14-202.5. On 9 December 2010, defendant filed a motion to dismiss the charge in Superior Court, Durham County, contending that section 14-202.5 is unconstitutional on its face or as applied to him. On 19 April 2011, the trial court entered an order denying defendant's motion. The trial court's order included a finding of fact that both the State and defendant agreed that Facebook.com is a social networking Web site as contemplated by N.C.G.S. § 14-202.5. The trial court declined to address defendant's facial challenge but found that N.C.G.S. § 14-202.5 was constitutional as applied to defendant. On 22 June 2011, the Court of Appeals denied defendant's petition for certiorari.

The case went to trial and, after considering evidence that defendant maintained a Facebook page, a jury on 30 May 2012 found defendant guilty of one count of accessing a commercial social networking Web site by a registered sex offender. The trial court sentenced defendant to a term of six to eight months of imprisonment, suspended for twelve months, and defendant was placed on supervised probation.

Defendant appealed to the Court of Appeals, challenging the constitutionality of N.C.G.S. § 14-202.5. That court determined that N.C.G.S. § 14-202.5 "plainly involves defendant's First Amendment rights . . . because it bans the freedom of speech and association via social media" and concluded that intermediate scrutiny was appropriate. *State v. Packingham*, ___ N.C. App. ___, ___, 748 S.E.2d 146, 150 (2013). While acknowledging the legitimate state interest in protecting children from sex offenders, the Court of Appeals found that the statute "is not narrowly tailored, is vague, and fails to target the 'evil' it is intended to rectify" because it "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Id.* at ___, 748 S.E.2d at 154. The court further concluded that the language of N.C.G.S. § 14-202.5 "lacks clarity, is vague, and certainly fails to give people of ordinary intelligence fair notice of what is prohibited." *Id.* at ___, 748 S.E.2d at 153. Accordingly, finding that the statute violates the First Amendment, the Court of Appeals held the statute unconstitutional on its face and as applied, and vacated defendant's conviction. *Id.* at ___, 748 S.E.2d at 154. On 7 November 2013, this Court allowed the State's Petition for Discretionary Review.

Statutes are presumed constitutional, *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991), and the interpretation of a statute is

controlled by the intent of the legislature, *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294-95 (1975). We review challenges to the constitutionality of a statute de novo. *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citing *Libertarian Party of N.C. v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011)).

Defendant argues that N.C.G.S. § 14-202.5 is unconstitutional both on its face and as applied to him, contending that the statute violates his right to free speech as guaranteed by the United States and North Carolina Constitutions. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); N.C. Const. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . ."). As we begin our analysis, we note that while these constitutional provisions appear absolute, "[h]istory, necessity, and judicial precedent have proven otherwise: 'Freedom of speech is not an unlimited, unqualified right.' " *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012) (quoting *State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971)), *cert. denied*, ___ U.S. ___, 134 S. Ct. 99, 187 L. Ed. 2d 34 (2013). In addition, when analyzing alleged violations of our State Constitution's Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court. *See State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (adopting that Court's First Amendment jurisprudence "[i]n this case").

The issue before us is whether the proscription of access to some social networking Web sites violates the First Amendment. An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. *Id.* The constitutional standards used to decide either challenge are the same. *Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014).

We begin by considering defendant's facial challenge, cognizant that a facial attack on a statute imposes a demanding burden on the challenger. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987). This Court rarely upholds facial challenges because "[t]he fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100, 95 L. Ed. 2d at 707).

The First Amendment is triggered by regulations that burden speech, so we must make an initial determination whether N.C.G.S. § 14-202.5 is a regulation of speech or a regulation of conduct. The distinction is critical because a statute that regulates speech is "subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson v. Freeman*, 504 U.S. 191, 198, 112 S. Ct. 1846, 1851, 119 L. Ed. 2d 5, 14 (1992) (plurality) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794, 804 (1983)). First Amendment protection of speech is extended to conduct only when the conduct in question "is inherently expressive." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1310, 164 L. Ed. 2d 156, 175 (2006). In contrast, a regulation that governs conduct while imposing only an incidental burden upon speech "must be evaluated in terms of [its] general effect." *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 2906, 86 L. Ed. 2d 536, 548 (1985). An incidental burden on speech is permissible "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.*

The statute at issue provides in pertinent part:

> (a) **Offense.** — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.
>
> (b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:
>
> (1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

N.C.G.S. § 14-202.5 (2013).

This statute addresses the ability of registered sex offenders to access some social networking Web sites. We concluded in *Hest* that legislation banning the operation of sweepstake systems primarily regulated "noncommunicative conduct rather than protected speech." 366 N.C. at 296, 749 S.E.2d at 435. The plaintiff in *Hest* argued that video games which were used to announce the results of the sweepstakes should be protected by the First Amendment. We disagreed, finding that the statute at issue in that case prohibited not the video games but the underlying conduct of a sweepstakes whose outcome was announced through the video game. *Id.* at 297, 749 S.E.2d at 435. Unlike the statute in *Hest*, however, the statute here defines a "commercial social networking Web site" as one that facilitates social introduction between people, N.C.G.S. § 14-202.5(b)(2), and provides users with a means of communicating with each other, *id.* § 14-202.5(b)(4). As is apparent to any

who access them, social networking Web sites provide both a forum for gathering information and a means of communication. Even so, like the statute in *Hest*, the essential purpose of section 14-202.5 is to limit conduct, specifically the ability of registered sex offenders to access certain carefully-defined Web sites. This limitation on conduct only incidentally burdens the ability of registered sex offenders to engage in speech after accessing those Web sites that fall within the statute's reach. Thus we conclude that section 14-202.5 is a regulation of conduct.

Our next inquiry is whether N.C.G.S. § 14-202.5 governs conduct on the basis of the content of speech or is instead a content-neutral regulation. *See Brown v. Town of Cary*, 706 F.3d 294, 300 (4th Cir. 2013) ("Our first task is to determine whether the [statute] 'is content based or content neutral . . . .' ") (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 59, 114 S. Ct. 2038, 2047, 129 L. Ed. 2d 36, 50 (1994) (O'Connor, J., concurring)). The level of scrutiny we apply is based on this determination. Restrictions based upon the content of the speech trigger strict scrutiny, *see United States v. Playboy Entm't Grp.*, 529 U.S. 803, 814, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865, 880 (2000), and are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). To survive under strict scrutiny, the regulation "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, ___ U.S. ___, ___, 134 S. Ct. 2518, 2530, 189 L. Ed. 2d 502, 515 (2014) (citation omitted). In contrast, content-neutral regulations of conduct that impose an incidental burden on speech are subject to intermediate scrutiny because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497, 517 (1994).

The United States Supreme Court recently discussed the distinction between content-based and content-neutral regulations in *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Under *Reed*, a court initially must consider "whether the law is content neutral on its face." *Id.* at ___, 135 S. Ct. at 2228, 192 L. Ed. 2d at 246. Although *Reed* focused on the interpretation of content-based regulations of *speech*, while we concluded above that section 14-202.5 is a regulation of *conduct*, even under a *Reed* analysis we see that section 14-202.5 is a content-neutral regulation. On its face, this statute imposes a ban on accessing certain defined commercial social networking Web sites without regard to any content or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a

particular Web site are available for use by minors. Thus, we conclude, as the Court did in *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661, 675 (1989), that section 14-202.5 "involve[s] a facially content-*neutral* ban on the use [of commercial social networking Web sites]." *Reed*, ___ U.S. at ___, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247 (citing *Ward*, 491 U.S. at 792, 109 S. Ct. at 2754, 105 L. Ed. 2d at 676).

As to the intent of the General Assembly in passing section 14-202.5, the trial court found as a matter of law that the purpose of the statute is to "facilitate the legitimate and important aim of the protection of minors from sex offenders who are registered in accordance with Chapter 14, Article 27A of the General Statutes." The parties have not challenged this conclusion of law. *Reed* states that a law, though content neutral on its face, is "considered [a] content-based regulation[] of speech" if the law "cannot be 'justified without reference to the content of the regulated speech' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at ___, 135 S. Ct. at 2227, 192 L. Ed. 2d at 245 (fourth alteration in original) (quoting *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675). A court must address both prongs before concluding that a lower level of scrutiny applies to the law. *Id.* at ___, 135 S. Ct. at 2228, 192 L. Ed. 2d at 247. Assuming that these tests also apply to a regulation of conduct, we see that section 14-202.5 satisfies both. The justification of the statute—protecting minors from registered sex offenders—is unrelated to any speech on a regulated site. Nor does the statute have anything to say regarding the content of any speech on a regulated site. As a result, we conclude that, to the extent *Reed* applies to our analysis of section 14-202.5, the statute satisfies that case's requirements and strict scrutiny is not required. Although the statute may impose an incidental burden on the ability of registered sex offenders to engage in speech on the Internet, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754, 105 L. Ed. 2d at 675 (citation omitted). Accordingly, we conclude that N.C.G.S. § 14-202.5 is a content-neutral regulation requiring intermediate scrutiny.

"Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted). The Supreme Court

has provided guidance in applying intermediate scrutiny. In *United States v. O'Brien*, the defendant claimed that the statute forbidding destruction of his Selective Service registration card was unconstitutional as applied to him because such a ban on burning the card violated his right to free speech. 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The Supreme Court found that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," *id.* at 376, 88 S. Ct. at 1678, 20 L. Ed. 2d at 679, the regulation

> is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,

id. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680. Because the statute at issue here is a content-neutral regulation that imposes only an incidental burden on speech, we believe the four-factor test from *O'Brien* is instructive in evaluating defendant's facial attack on N.C.G.S. § 14-202.5.

Looking to the first two *O'Brien* factors, the parties agree that promulgating restrictions such as those contained in N.C.G.S. § 14-202.5 on registered sex offenders is within the constitutional power of the General Assembly and that protecting children from sexual abuse is a substantial governmental interest. We then consider *O'Brien*'s third factor, whether this governmental interest is related to the suppression of free expression. The State asserts that the statute was enacted to prevent registered sex offenders from prowling on social media and gathering information about potential child targets. Viewing this statute as a preventive measure apparently intended to forestall illicit lurking and contact, we see that it is distinguishable from other North Carolina statutes that criminalize communications which have already occurred. The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech. Accordingly, the statute satisfies *O'Brien*'s third factor.

Although the fourth *O'Brien* factor appears to reflect the strict scrutiny requirement that the regulation be the "least restrictive means" of carrying out a compelling state interest, *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2530, 189 L. Ed. 2d at 515, the United States Supreme Court has since explained that for content-neutral regulations, the statute should

be "narrowly tailored to serve a significant governmental interest," *Ward*, 491 U.S. at 796, 109 S. Ct. at 2756, 105 L. Ed. 2d at 678 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221, 227 (1984)) (finding that a narrowly tailored regulation controlling noise does not restrict free speech). Narrow tailoring requires the government to demonstrate that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2540, 189 L. Ed. 2d at 526.

Defendant argues that the statute is not narrowly tailored. Specifically, defendant contends that the statute's definition of a "commercial social networking Web site" is overbroad, that the statute does not take into account the underlying offense of conviction or the likelihood of recidivism, that the statute does not require criminal intent, that the statute is underinclusive because, *inter alia*, it applies only to commercial Web sites, that less burdensome laws already exist to protect children from baleful Internet contacts, and that sufficient alternatives allowing communication do not exist. Defendant's arguments are premised on the assumption that a statute regulating the manner of speech must be drawn as narrowly as possible, or at least more narrowly than this statute. However, the Supreme Court has stated explicitly that "[l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798, 109 S. Ct. at 2757-58, 105 L. Ed. 2d at 680. The Court went on to explain that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 109 S. Ct. at 2758, 105 L. Ed. 2d at 681.

Instead of imposing a blanket prohibition against Internet use, the statute establishes four specific criteria that must be met in order for a commercial social networking Web site to be prohibited. N.C.G.S. § 14-202.5(b). In addition, the statute entirely exempts Web sites that are exclusively devoted to speech, such as instant messaging services and chat rooms. *Id.* § 14-202.5(c). Thus we see that the General Assembly has carefully tailored the statute in such a way as to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors, thereby addressing

the evil that the statute seeks to prevent. While we acknowledge that defendant has identified some areas in which the statute could have been drafted even more narrowly, we conclude that the statute is sufficiently narrowly drawn to satisfy the requirements of *Ward*.

Our inquiry does not end here, however. A content-neutral statute not only must be narrowly tailored but must also "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791, 109 S. Ct. at 2753, 105 L. Ed. 2d at 675 (quoting *Cmty. for Creative Non-Violenc*e, 468 U.S. at 293, 104 S. Ct. at 3069, 82 L. Ed. 2d at 227). Subsection 14-202.5(c) allows such alternatives through specific exceptions for Web sites that provide discrete e-mail, chat room, photo-sharing, and instant messaging services. A Web site that requires one seeking access to provide no more than a username and an e-mail address to reach the page does not necessarily violate the statute. Only a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited. In addition, even if a site falls within the definition of a "commercial social networking Web site" found in subsection 14-202.5(b), in order to convict a registered sex offender of accessing the site, the State must prove that "the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site." N.C.G.S. § 14-202.5(a).

In his brief and argument to this Court, defendant lists numerous well-known Web sites that he contends he could not access legally. In considering those and other similar sites, we find that even where defendant is correct, the Web offers numerous alternatives that provide the same or similar services that defendant could access without violating N.C.G.S. § 14-202.5. For example, defendant would not violate N.C.G.S. § 14-202.5 by accessing the Paula Deen Network, a commercial social networking Web site that allows registered users to swap recipes and discuss cooking techniques, because its Terms of Service require users to be at least eighteen years old to maintain a profile. *Paula Deen Network Terms of Service*, http://www.pauladeen.com/terms-of-service/ (last visited 5 November 2015) ("This website is designed for and targeted to Adults. It is intended solely and exclusively for those at least 18 years of age or older."). Similarly, users may follow current events on WRAL.com, which requires users to be at least eighteen years old to register with the site and, as a result, is not prohibited. *Capitol Broadcasting Company Terms of Use*, http://www.capitolbroadcasting.com/terms-of-use/ (last visited 5 November 2015) ("[Y]ou must be at least 18 years old to register and to use the Services."). A sex offender engaging in an

on-line job search is free to use the commercial social networking Web site Glassdoor.com, which prohibits use by individuals under the age of eighteen. *Glassdoor Terms of Use*, http://www.glassdoor.com/about/terms.htm (last visited 5 November 2015) ("To access or use Glassdoor, you must be 18 years of age or older . . . ."). Finally, sex offenders permissibly may access Shutterfly to share photos, because that site limits its users to those eighteen and older. *Shutterfly Terms of Use*, http://shutterfly-inc.com/terms.html (last visited 5 November 2015) ("In order to create a member account with any of our Sites and Apps, you must be at least 18 years of age.").

While we leave for another day the question whether a site's terms of use alone are sufficient as a matter of law to impute knowledge of the site's limitations on access to a registrant, such terms of use provide specific and pertinent information to a registered sex offender seeking lawful access to the Internet. These examples demonstrate that the Web offers registered sex offenders myriad sites that do not run afoul of the statute. In addition, such methods of communication as text messages, FaceTime, electronic mail, traditional mail, and phone calls, which are not based on use of a Web site, are unrestricted. Accordingly, the regulation leaves open ample channels of communication that registered sex offenders may freely access.

Defendant cites cases from other jurisdictions faulting similar statutes. However, those cases are not binding on this Court, and the statutes under consideration in those cases are readily distinguishable from our own. For instance, a federal circuit court found unconstitutional an Indiana statute that sought to prevent most sex offenders from communicating with minors by prohibiting their use of commercial social networking Web sites, including instant messaging services and chat rooms. *See Doe v. Prosecutor, Marion Cty.*, 705 F.3d 694, 695-96 (7th Cir. 2013). The circuit court found that the law was not narrowly tailored to prevent illicit communications between sex offenders and minors. *Id.* at 695. Not only did the Indiana statute prohibit use of instant messaging and chat room services, both of which are exempted under N.C.G.S. § 14-202.5, Indiana's statute focused on preventing communications, while North Carolina's statute focuses on preventing registered sex offenders from gathering information about minors on the Internet. Similarly, while a federal court concluded that Louisiana's statute, which was analogous to Indiana's, was facially unconstitutional because it was vague and overbroad, *Doe v. Jindal*, 853 F. Supp. 2d 596, 607 (M.D. La. 2012), Louisiana thereafter amended that statute to a version more in

line with N.C.G.S. § 14-202.5, *see* La. Rev. Stat. Ann. 14:91.5 (2012), *available at* http://legis.la.gov/Legis/Law.aspx?d=78714.

Thus, we conclude that N.C.G.S. § 14-202.5 satisfies *O'Brien*'s four factors, is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Defendant has failed to meet the high bar necessary to mount a successful facial challenge. *See*, *e.g.*, *Thompson*, 349 N.C. at 496, 508 S.E.2d at 285 (holding defendant's facial challenge to a statute regulating pretrial release failed when defendant did not establish that no set of circumstances existed under which the act would not be valid). Accordingly, we conclude the statute is constitutional on its face.

We next consider defendant's as-applied challenge. A statute that is constitutional on its face nevertheless may be unconstitutional as applied to a particular defendant. Because Facebook does not limit users to those over the age of eighteen and otherwise fits the definition of a commercial social networking Web site set out in N.C.G.S. § 14-202.5, defendant is forbidden to access that site unless the statute is unconstitutional as applied to him. Earlier in this opinion we observed that the trial court made the uncontested finding that the government's interest here is protecting minors by preventing registered sex offenders from gathering information about them on social media. Although we also found that the statute is content-neutral, we observed that it imposes an incidental burden on speech on the Internet. We now consider whether this incidental restriction on defendant is no greater than is essential to further the government's interest. *O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679, 20 L. Ed. 2d at 680.

Beginning with consideration of the nature and severity of the incidental restriction, we have stated that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes." *Hest*, 366 N.C. at 298, 749 S.E.2d at 436 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 1595, 104 L. Ed. 2d 18, 25 (1989)). The United States Fourth Circuit Court of Appeals has held that, in the context of responding to a posting on a political campaign page maintained on Facebook.com, simply "liking" the post is speech protected by the First Amendment, an analysis with which we agree. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) ("[C]licking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."). Here, defendant posted the following on Facebook: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? . . . Praise be to GOD, WOW! Thanks JESUS!" If merely "liking" a post on

Facebook.com is speech protected by the First Amendment, we have no doubt that posting a message on that site falls within this category as well. Thus, the statutory restrictions on defendant's right to speech on Facebook, while incidental, are not trivial.

Considering next the governmental interest in protecting minors, when "a direct relationship between the regulation and the interest" exists, *Hest*, 366 N.C. at 298, 749 S.E.2d at 436, an incidental burden on speech can be justified if the governmental interest is being furthered, *see Turner Broad. Sys.*, 512 U.S. at 662, 114 S. Ct. at 2469, 129 L. Ed. 2d at 530. Nevertheless, "[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' " *Id.* at 664, 114 S. Ct. at 2470, 129 L. Ed. 2d at 531 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1995)). Instead, the State must demonstrate "that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citations omitted). The State argues that protection of minors from known sexual predators is a vital duty, one this Court has recognized in another context. *See Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 731 (2008) (discussing the risk of recidivism among sex offenders).

In considering this balance between the governmental interest and the incidental burden on this defendant's speech, we are mindful of our opinion in *Britt v. State*, in which we were confronted with a challenge to the constitutionality of N.C.G.S. § 14-415.1, which banned all convicted felons from possessing firearms. 363 N.C. 546, 681 S.E.2d 320 (2009). We held that the statute violated the North Carolina Constitution when applied to the plaintiff because his underlying offense (a nonviolent drug crime), his subsequent lawful behavior and demonstrated respect for the law, and his history of peaceable conduct following his conviction, all gave no indication that he posed any substantial threat to society. *Id.* at 550, 681 S.E.2d at 323. As a result, we concluded that the statute barring the plaintiff from possessing a firearm was "not fairly related" to the governmental purpose for which the statute was enacted, which was "the preservation of public peace and safety." *Id.* The statute was unconstitutional as applied to the plaintiff when prosecution would not further that governmental interest.

As indicated by our analysis in *Britt*, the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case. In ascertaining whether the government's interest in protecting children from registered sex offenders who are lurking on social networking Web sites and gleaning information on potential

targets is furthered by prosecution of this defendant, we observe that defendant has the status of a registered sex offender because he was convicted of indecent liberties with a minor, a sex crime against a child falling directly within the purview of section 14-202.5. Officers who searched his home found a signed written notice advising defendant of sites he could not legally access. Defendant set up his Facebook page under an alias, further indicating his awareness that he was indulging in forbidden behavior while simultaneously hiding his identity from investigators and parents. Thus defendant's case is readily distinguishable from *Britt*, in which the plaintiff's underlying conviction for drugs was considerably less directly related to the possession of "sporting rifles and shotguns" than is defendant's indecent liberties conviction to his use of Internet sites frequented by minors. Moreover, the plaintiff in *Britt* discussed the law's application to him with his local sheriff and thereafter voluntarily divested himself of all firearms before instituting his constitutional challenge to the statute, while defendant here deliberately disguised his identity. *Id.* at 547-48, 681 S.E.2d at 321-22. Unlike the plaintiff in *Britt*, defendant neither demonstrated respect for the law nor made good faith efforts to comply with the statute. These facts satisfy us that the incidental burden imposed upon this defendant, who is barred from Facebook.com but not from many other sites, is not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Thus, N.C.G.S. § 14-202.5 is not an unreasonable regulation and is constitutional as applied to defendant. *Cf. id.* at 550, 681 S.E.2d at 323.

Defendant also argues that N.C.G.S. § 14-202.5 is unconstitutionally overbroad. "In the First Amendment context, . . . this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435, 447 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 1190 n.6, 170 L. Ed. 2d 151, 160 n.6 (2008)). In *Broadrick v. Oklahoma*, the Court clarified the limited scope of the overbreadth doctrine, explaining that

> the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if

> expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18, 37 L. Ed. 2d 830, 842 (1973). Because the notion of striking a statute at the request of one to whom it otherwise unquestionably applies goes against the grain of "prudential limitations on constitutional adjudication," *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1130 (1982), the Supreme Court of the United States has recognized that the doctrine is "strong medicine" to be administered only with caution and as a "last resort," *id.* at 769, 102 S. Ct. at 3361, 73 L. Ed. 2d at 1130 (quoting *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916, 37 L. Ed. 2d at 814). A party raising such a challenge "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S. Ct. 2191, 2198, 156 L. Ed. 2d 148, 159 (2003) (alteration in original) (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1, 17 (1988)). When a statute's infringement on speech protected under the First Amendment is marginal, a finding of facial invalidity is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Ferber*, 458 U.S. at 770 n.25, 102 S. Ct. at 3362 n.25, 73 L. Ed. 2d at 1131 n.25 (alterations in original) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580-81, 93 S. Ct. 2880, 2898, 37 L. Ed. 2d 796, 817 (1973)).

In an overbreadth analysis, the reviewing court must "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650, 662 (2008). As detailed above in our analysis of the facial constitutionality of the statute, we see that the statute is drafted carefully to limit its reach by establishing four specific criteria that must be met before access to a commercial social networking Web site is prohibited to a registered sex offender, N.C.G.S. § 14-202.5(b); that the statute exempts sites that are exclusively devoted to speech, *id.* § 14-202.5(c); and that the statute requires the State to

prove that a registered sex offender knew the site permitted minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site, *id.* § 14-202.5(a). These factors ensure that registered sex offenders are prohibited from accessing only those Web sites where they could actually gather information about minors to target. Outside these limits, registered sex offenders are free to use the Internet.

Although this statute "may deter protected speech to some unknown extent," *Broadrick*, 413 U.S. at 615, 93 S. Ct. at 2917, 37 L. Ed. 2d at 842, that effect can be characterized "at best [as] a prediction," *id.*, 93 S. Ct. at 2917-18, 37 L. Ed. 2d at 842, and we "cannot, with confidence, justify invalidating [this] statute on its face," *id.*, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842, and prohibit the State from continuing to enforce a statute protecting such an important government interest, *id.* Given the reluctance with which courts administer the strong medicine of overbreadth, we conclude section 14-202.5 does not sweep too broadly in preventing registered sex offenders from accessing carefully delineated Web sites where vulnerable youthful users may congregate. As in *Broadrick*, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id.* at 615-16, 93 S. Ct. at 2918, 37 L. Ed. 2d at 842.

Finally, the State challenges the Court of Appeals holding that the statute is unconstitutionally vague. Laws that are not "clearly defined" are void for vagueness under the Due Process Clause. *See Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222, 227 (1972). Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," *id.* at 108, 92 S. Ct. at 2298-99, 33 L. Ed. 2d at 227, and must also provide sufficient clarity to prevent arbitrary and discriminatory enforcement, *see Petersilie*, 334 N.C. at 182, 432 S.E.2d at 839; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Vague laws chill free speech because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' " *Grayned*, 408 U.S. at 109, 92 S. Ct. at 2299, 33 L. Ed. 2d at 228 (second alteration in original) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 1323, 12 L. Ed. 2d 377, 385 (1964)).

Vagueness cannot be raised by a defendant whose conduct falls squarely within the scope of the statute. *See Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L. Ed. 2d 439, 458 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for

vagueness."); *see also Hoffman Estates*, 455 U.S. at 495, 102 S. Ct. at 1191, 71 L. Ed. 2d at 369 ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). The Court of Appeals "assume[d] that persons of ordinary intelligence would likely interpret the statute as prohibiting access to mainstream commercial social networking sites such as *Facebook.com*." *Packingham*, ___ N.C. App. at ___, 748 S.E.2d at 153. Whatever the status of other Web sites, no party disputes that Facebook.com, the site at issue here, falls under N.C.G.S. § 14-202.5's definition of "commercial social networking Web site." While an argument may be made that the statutory term "access" could be vague in other contexts, defendant's logging into his Facebook account and posting a message on his page is unquestionably "accessing" Facebook.com. Defendant's conduct defeats his vagueness claim.

Accordingly, we reverse the opinion of the Court of Appeals.

REVERSED.

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

Justice HUDSON dissenting.

The majority concludes that N.C.G.S. § 14-202.5 (2013), which bars any registered sex offender from accessing any commercial social networking site on which he knows a minor can create or maintain a profile, is constitutional on its face and as applied to defendant. Because I conclude that the statute is unconstitutional on its face, I disagree with the majority's reversal of the Court of Appeals. More specifically, I conclude that section 14-202.5 is not narrowly tailored enough to withstand even intermediate scrutiny and that it is facially overbroad under the First Amendment. Accordingly, I respectfully dissent.

As an initial matter, I agree with the majority opinion to the extent it concludes that N.C.G.S. § 14-202.5, by proscribing access to commercial social networking sites, targets sites which are used for "gathering information and [as] means of communication." However, I do not agree with the later assertion that the statute primarily regulates conduct and places only an "incidental" burden on speech. This statute completely bars registered sex offenders from communicating with others through many widely utilized commercial networking sites. Therefore, in my view, it primarily targets expressive activity usually protected by

the First Amendment. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) (observing that previous cases from that Court "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to online activities); *see also Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, ___, 131 S. Ct. 2729, 2733 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (citation and internal quotation marks omitted)).

The majority finds the "four-factor test from [*United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968)] instructive" in applying intermediate scrutiny to what it sees as an "incidental" burden on speech. *O'Brien* involved a regulatory ban on burning of a draft card, which the Court saw as conduct having a "communicative element." *Id.* at 376, 88 S. Ct. at 1678. Because I read *O'Brien* to apply only where the restriction primarily targets expressive conduct, and because the statute at issue here necessarily burdens speech directly, I would not apply *O'Brien*'s four-factor test here. *See id.*, 88 S. Ct. at 1678-79 ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). Instead, I would analyze this statute as one that, by design and in effect, primarily and directly regulates First Amendment-protected activity, not conduct.

Because this statute primarily regulates speech (and other protected activity), I would apply the scrutiny applicable to restrictions on speech. *See, e.g.*, *McCullen v. Coakley*, ___ U.S. ___, ___, 134 S. Ct. 2518, 2530 (2014); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26-28, 130 S. Ct. 2705, 2723-24 (2010). According to these cases, the next step would be to determine whether the statute is content-based or content-neutral. Content-based restrictions are "presumptively unconstitutional" and can stand only if they survive strict scrutiny, the most difficult test in federal constitutional law. *McCullen*, ___ at ___, 134 S. Ct. 2530. In contrast, content-neutral measures that burden speech are subject to a form of intermediate scrutiny—a still difficult but less exacting analysis. *See id.* at ___, 134 S. Ct. 2530.

Here, applying the United States Supreme Court's recent decision in *Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218 (2015), the majority concludes that N.C.G.S. § 14-202.5 is a content-neutral burden on conduct only incidentally affecting speech. While I think there is a strong

argument in light of *Reed* that the statute is content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites, I do not think we need to resolve this question because I conclude that the law cannot withstand even intermediate scrutiny.

The intermediate scrutiny standard applicable to content-neutral regulations on speech requires the government to demonstrate, *inter alia*, that the restriction is "narrowly tailored to serve a significant governmental interest." *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S.781, 796, 109 S. Ct. 2756, 2746 (1989)). More specifically,

> [f]or a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate [and significant] interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at ___, 134 S. Ct. at 2535 (citations and internal quotation marks omitted). In short, when a statute "burden[s] substantially more speech than necessary to achieve the [government's] asserted interests," it will fail this form of intermediate scrutiny. *Id.* at ___, 134 S. Ct. at 2537. Here, there is no dispute that the State's purported concern—protecting minors from exploitation by registered sex offenders using the Internet—qualifies as a legitimate and significant government interest. The central question, then, is whether section 14-202.5 "burden[s] substantially more speech than necessary" in support of that interest. *Id.* at ___, 134 S. Ct. at 2537.

I conclude that it does. First, the statute as written sweeps too broadly regarding who is subject to its prohibitions. As noted, the State's interest here is in protecting minors from registered sex offenders using the Internet. However, this statute applies to *all* registered offenders. *See* § 14-202.5(a) ("It is unlawful for a [registered] sex offender . . . to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site."). The statute is not restricted in application only to those whose offenses harmed a minor or in some way involved a computer or the

Internet, nor to those who have been shown to be particularly violent, dangerous, or likely to reoffend. This statute therefore groups together, without distinction, offenders whose history and past conduct directly implicate the State's concerns with those who do not. To the extent the statute does so, it "burden[s] . . . more speech than necessary to achieve the [State's] interests." *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2537.

Second, as written, the statute also sweeps far too broadly regarding the activity it prohibits. The majority asserts that the statute prohibits "registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." But in fact, the statute contains no such limitation. Section 14-202.5 defines the term "commercial social networking Web site" as a website that (1) is operated by someone who derives revenue from the site; (2) facilitates "social introduction" or "information exchanges" between two or more people; (3) allows users "to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, [or] other personal information about the user . . . that may be accessed by other users or visitors" to the site; and (4) provides "users or visitors mechanisms to communicate with other users." N.C.G.S. § 14-202.5(b). I note in particular that the statute's description of a "personal profile[ ]," and the language "such as" when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by going through the minimal process of creating a username and adding an email address or telephone number. As a result, this definition clearly includes sites that are normally thought of as "social networking" sites, like Facebook, Google+, LinkedIn, Instagram, Reddit, and MySpace. However, the statute also likely includes sites like Foodnetwork.com, and even news sites like the websites for *The New York Times* and North Carolina's own *News & Observer*. *See The News & Observer Terms of Service*, http://www.newsobserver.com/customer-service/terms-of-service/ (last visited Oct. 22, 2015) (stating that "[i]f you are under eighteen (18) then you may only use NewsObserver.com with the consent of a parent or legal guardian" but not limiting registration on the site to adults). Most strikingly, the statute may even bar all registered offenders from visiting the sites of Internet giants like Amazon[1] and Google.

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1. The statute does except from this definition any website that "[h]as as its primary purpose the facilitation of commercial transactions involving goods or services *between its members or visitors*." N.C.G.S. § 14-202.5(c)(2) (emphasis added). However, as defendant argues, "Amazon's primary purpose is to facilitate transactions *between Amazon*

In short, however legitimate—even compelling—the State's interest in protecting children might be, the plausible sweep of the statute as currently written "create[s] a criminal prohibition of alarming breadth," *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), and extends well beyond the evils the State seeks to combat. I therefore conclude that N.C.G.S. § 14-202.5 "burden[s] substantially more speech than necessary to achieve the [State's legitimate] interests," *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2537, and cannot survive even the intermediate scrutiny applied to content-neutral restrictions on speech.

In addition, for similar reasons, I conclude that this statute is also facially overbroad under the First Amendment. The overbreadth inquiry is very similar to the "narrow-tailoring" inquiry described above: First Amendment overbreadth doctrine requires a court to invalidate a statute that "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838 (2008). There is, however, one important nuance. Namely, while the Supreme Court of the United States has often invalidated specific applications of statutes under as-applied challenges, *see*, *e.g.*, *McCullen*, ___ U.S. at ___, 134 S. Ct. at 2528, 2541, that Court has also made clear that First Amendment doctrine specifically permits litigants to make facial challenges based on overbreadth, *see*, *e.g.*, *Stevens*, 559 U.S. at 473, 130 S. Ct. at 1587 ("In the First Amendment context, however, this Court recognizes a second type of *facial* challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (emphasis added) (citation and internal quotation marks omitted)); *Williams*, 553 U.S. at 292, 128 S. Ct. at 1838 ("According to our First Amendment overbreadth doctrine, a statute is *facially invalid* if it prohibits a substantial amount of protected speech."(emphasis added)). The Court has even noted that such a challenge is permitted when the challenger's own conduct would clearly fall within the scope of the statute's prohibition and the claim is based only on how that statute might apply to the activity of others. *See*, *e.g.*, *Humanitarian Law Project*, 561 U.S. at 20, 130 S. Ct. at 2719 ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. [But s]uch a plaintiff may have a valid overbreadth claim under the First Amendment . . . ."). In light of this precedent permitting such

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itself and its visitors, not between users of the Web site and other users." (Emphasis added.) Accordingly, it appears that this exception does not actually apply to websites like Amazon, but only covers websites like Craigslist or eBay.

challenges, and for the reasons noted above, I would hold that the statute at issue here, N.C.G.S. § 14-202.5, is facially overbroad and therefore unconstitutional, regardless of its application in this specific case.

For the foregoing reasons, I conclude that N.C.G.S. § 14-202.5 is both insufficiently narrowly tailored to satisfy intermediate scrutiny and facially overbroad under the First Amendment. Because I disagree with the majority's conclusions to the contrary, I respectfully dissent.

Justice BEASLEY joins in this opinion.

STATE OF NORTH CAROLINA
v.
STILLOAN DEVORAY ROBINSON

No. 398PA14

Filed 6 November 2015

Possession of stolen property—vehicle—jury instructions—lesser-included offense

The trial court did not err by denying defendant's request to instruct the jury on unauthorized use of a motor vehicle because that offense is not a lesser-included offense of possession of a stolen vehicle. The "use" offense contains an element—"taking or operating"—that is not included in the "possession" offense.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 178 (2014), finding no error after appeal from a judgment entered on 30 August 2013 by Judge Robert T. Sumner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 April 2015.

Roy Cooper, *Attorney General*, *by Hugh Harris*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Jon H. Hunt*, *Assistant Appellate Defender*, *for defendant-appellant.*

BEASLEY, Justice.

This case asks this Court to consider whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen vehicle. We hold that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle because the former offense contains an essential element that is not an essential element of the latter offense. Accordingly, we affirm the decision of the Court of Appeals, though on different grounds. In so doing, we overrule *State v. Oliver* to the extent that it is inconsistent with this opinion.

On 1 December 2011, defendant moved into a halfway house in Charlotte, North Carolina, after serving five years and two months in federal prison for a firearms conviction. At the halfway house, defendant shared a room with William James Markham and two other individuals. The details of the events that transpired on 10 January 2012 are disputed.

According to defendant, on 10 January 2012, he told Markham about his plan to leave the halfway house without permission and "take [his] stuff home and get stuff situated at the house." In exchange for one and one-half grams of cocaine, Markham agreed to let defendant use his car, a Lexus ES that the halfway house permitted Markham to have to drive himself to work. When defendant was unable to obtain the cocaine, he gave Markham counterfeit crack cocaine. Markham accepted the counterfeit cocaine, removed his car keys from his shoe, and replaced the keys with the counterfeit substance. Markham then gave defendant the keys to his car. Defendant testified that the two men agreed that he would leave Markham's car in front of a nearby McDonald's restaurant the next day.

According to Markham, he never gave defendant permission to use his car. Markham testified that when he returned to the halfway house after work on 10 January 2012, Markham went to his room, where his roommates, including defendant, were present. Markham changed clothes and placed his car keys in his shoe. Markham then left the room to use the telephone and upon returning, found that his car keys were missing. Defendant was no longer in the room. Markham reported his missing keys to staff members at the halfway house. A staff member testified that she witnessed defendant leaving the halfway house in a car, after which she completed escaped inmate paperwork and called the police. Later that evening, Markham's car was reported stolen to police.

Three days later, on 13 January 2012, defendant returned from Atlanta and parked the car near his home in Charlotte to unload his clothes. Officer Bryan Overman was driving in the neighborhood after responding to a call and observed a gold Lexus parked on the street.

Officer Overman ran the license plate through a database that confirmed that the vehicle had been reported stolen. While Officer Overman and other officers canvassed the area, Officer William Dotson saw defendant and arrested him. Markham claimed that the vehicle was damaged and personal items were missing from the vehicle. Defendant testified that the car was returned in the condition in which he received it and that he had not taken any property from the car.

On 6 February 2012, a grand jury indicted defendant for possession of a stolen vehicle and larceny of a motor vehicle. Then on 2 April 2012, defendant was indicted for having attained habitual felon status. In three superseding indictments, one dated 2 April 2012 and two dated 20 May 2013,[1] the grand jury indicted defendant for possession of a stolen vehicle, breaking and entering a motor vehicle, and larceny of a motor vehicle.[2]

Defendant pleaded not guilty and was tried before Judge Robert T. Sumner in Superior Court, Mecklenburg County, beginning on 28 August 2013. During the charge conference, defendant requested a jury instruction on the misdemeanor offense of unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen vehicle. The trial court denied the request.

On 30 August 2013, the jury found defendant guilty of possession of a stolen motor vehicle, but not guilty of breaking or entering a motor vehicle or larceny of a motor vehicle. Pursuant to a plea agreement, defendant pleaded guilty to having attained habitual felon status. The trial court sentenced defendant to an active term of 84 to 113 months of imprisonment, and defendant appealed from the judgment to the Court of Appeals making two arguments on appeal.

Defendant first argued that he received ineffective assistance of counsel because the questions defense counsel asked on direct examination required defendant to admit guilt to possession of a stolen vehicle, the only crime for which he was found guilty. *State v. Robinson*, ___ N.C. App. ___, ___, 763 S.E.2d 178, 180 (2014). The Court of Appeals disagreed, concluding that defendant's ineffective assistance of counsel

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1. The typewritten portion of the superseding indictment charging defendant with possession of a stolen vehicle is dated 20 March 2013; however, the grand jury foreman signed and dated the indictment 20 May 2013.

2. Two superseding indictments charge defendant with "breaking and entering" a motor vehicle in violation of N.C.G.S. § 14-56. We note that section 14-56 references "breaking *or* entering." *See* N.C.G.S. § 14-56 (2013) (emphasis added). The trial court instructed the jury using the statutory language.

claim failed because his responses on direct examination only established that defendant kept the car longer than allegedly agreed; however, defendant never testified that he knew or had reason to know that the car was stolen, which is an essential element of possession of a stolen vehicle. *Id.* at ___, 763 S.E.2d at 180-81.

Second, defendant argued that the trial court erred in denying his request for a jury instruction on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen vehicle. *Id.* at ___, 763 S.E.2d at 181. The Court of Appeals found no error on the grounds that it was bound by its decision in *State v. Oliver*, 217 N.C. App. 369, 718 S.E.2d 731 (2011), which held that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. *Id.* at ___, 763 S.E.2d at 181-82. The Court of Appeals noted that in *Oliver* the court relied on this Court's decision in *State v. Nickerson*, 365 N.C. 279, 715 S.E.2d 845 (2011). *Id.* at ___, 763 S.E.2d at 182. But the court explained that "in *Nickerson*, 'the principal question [wa]s whether the crime of unauthorized use of a motor vehicle is a lesser[-]included offense of *possession of stolen goods*.' " *Id.* at ___, 763 S.E.2d at 181 (brackets in original) (quoting *Nickerson*, 365 N.C. at 281, 715 S.E.2d at 846 (emphasis added)). The Court of Appeals concluded that "[t]hus, in *Oliver*, this Court mistakenly relied on *Nickerson* for a proposition not addressed, nor a holding reached, in that case." *Id.* at ___, 763 S.E.2d at 181 (italics added). The Court of Appeals further stated:

> However, we hope that by noting the clear discrepancy between *Oliver* and *Nickerson*, the Supreme Court may take this opportunity to clarify our case law and provide guidance on the issue of whether unauthorized use of a motor vehicle is in fact a lesser-included offense of possession of a stolen motor vehicle.

Id. at ___, 763 S.E.2d at 182 (citation omitted).

On 18 December 2014, this Court allowed defendant's petition for discretionary review on the issue of whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen vehicle.

Defendant maintains that *Oliver* was wrongly decided because that decision incorrectly interpreted *Nickerson*. The State contends that in *Oliver* the court properly applied the rule as stated in *Nickerson* when it concluded that unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. The rule in *Nickerson* establishes that an offense is not the lesser-included offense of another if the lesser-included offense contains an essential element not present in

the greater offense. We conclude that the *Oliver* court misapprehended this Court's decision in *Nickerson*.

In *Oliver* the defendant argued that the trial court should have instructed the jury on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen vehicle. 217 N.C. App. at 372, 718 S.E.2d at 733-34. The court in *Oliver* reasoned that

> [d]uring the pendency of defendant's appeal, our Supreme Court addressed this very issue of whether unauthorized use of a motor vehicle is a lesser included offense of possession of a stolen vehicle. *See State v. Nickerson*, 365 N.C. 279, 715 S.E.2d 845 (2011). Due to our Supreme Court's recent decision, we see no need to further discuss this issue. *Id.* Consequently, the trial court did not err in not instructing the jury on the crime of unauthorized use of a stolen vehicle as it is not a lesser included offense of possession of a stolen vehicle.

Id. at 372-73, 718 S.E.2d at 734. But contrary to the court's assessment in *Oliver*, *Nickerson* addressed whether unauthorized use of a motor vehicle is a lesser-included offense of possession of stolen goods. *Nickerson*, 365 N.C. at 282-83, 715 S.E.2d at 847 ("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 [*State v. Weaver*].") Possession of stolen goods is an offense distinct from possession of a stolen vehicle, and these offenses are codified in different chapters of the General Statutes. *See* N.C.G.S. §§ 14-71.1, 20-106 (2013). The court's reliance on *Nickerson* to support its holding in *Oliver* was erroneous. Consequently, to the extent that *Oliver* holds that the offense of unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle for the reasons stated in *Nickerson*, *Oliver* is expressly overruled.

As to the issue before this Court, defendant contends that all the essential elements of unauthorized use of a motor vehicle are covered by the elements of possession of a stolen vehicle, and as a result, unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen vehicle. We disagree.

This Court has adopted a definitional test for determining whether one offense is the lesser-included offense of another. In *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), 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 included 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 (internal citation omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

The statute proscribing "unauthorized use of a motor-propelled conveyance" states that "[a] person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another." N.C.G.S. § 14-72.2(a) (2013).

The statute proscribing unlawful possession of a stolen vehicle provides:

> Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, *or who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken*, and who is not an officer of the law engaged at the time in the performance of his duty as such officer shall be punished as a Class H felon.

Id. § 20-106 (emphasis added).

In applying the definitional test as prescribed in *Weaver*, this Court considers the elements of possession of a stolen vehicle and unauthorized use of a motor vehicle. The elements of possession of a stolen vehicle are: (1) possession; (2) of a vehicle; (3) while having knowledge or reason to believe that the vehicle has been stolen or unlawfully taken. *See id.*; *State v. Bailey*, 157 N.C. App. 80, 86, 577 S.E.2d 683, 688 (2003) (citation omitted). The elements of unauthorized use of a motor

vehicle are: (1) taking or operating; (2) a motor-propelled conveyance; (3) "without the express or implied consent of the owner or person in lawful possession." N.C.G.S. § 14-72.2(a). It is clear that the crime of unauthorized use of a motor vehicle contains an essential element that is not an element of possession of a stolen vehicle, namely that the State must prove that the offender *took or operated* a motor-propelled conveyance. Possession of a stolen vehicle requires the State to prove that the offender *possessed* a vehicle. While "taking or operating" necessarily infers possession, it does not follow that possession encompasses "taking or operating." Therefore, unauthorized use of a motor vehicle contains an essential element—"taking or operating"—that is not included in possession of a stolen vehicle. Because we conclude that the lesser offense contains at least one essential element that is not an essential element of the greater offense, we need not analyze the remaining elements. *Nickerson*, 365 N.C. at 282, 715 S.E.2d at 847 (citing *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378).

We hold, therefore, that the offense of unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle. As such, the trial court did not err in denying defendant's request to instruct the jury on unauthorized use of a motor vehicle. For the reasons stated, we affirm the opinion of the Court of Appeals as modified herein.

MODIFIED AND AFFIRMED.

BYRD v. FRANKLIN CTY.

[368 N.C. 409 (2015)]

AARON BYRD AND ERIC COOMBS, PETITIONERS
v.
FRANKLIN COUNTY, NORTH CAROLINA, RESPONDENT

No. 462A14

Filed 6 November 2015

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. ___, 765 S.E.2d 805 (2014), affirming in part and reversing in part an order entered on 24 September 2013 by Judge Robert H. Hobgood in Superior Court, Franklin County. Heard in the Supreme Court on 5 October 2015.

George B. Currin for petitioner-appellants.

Davis, Sturges & Tomlinson, by Aubrey S. Tomlinson, Jr., for respondent-appellee.

Williams Mullen, by Camden R. Webb, for Second Amendment Foundation, Inc., amicus curiae.

PER CURIAM.

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

REVERSED.

IN RE INQUIRY CONCERNING A JUDGE, NO. 14-169 & 14-192
JAMES T. HILL, RESPONDENT

No. 186A15

Filed 6 November 2015

Judges—discipline—improper courtroom conduct

In a judicial discipline case involving inappropriate conduct by a district court judge in the courtroom, the North Carolina Supreme Court concluded that the Judicial Standards Commission's findings of fact were supported by clear, cogent, and convincing evidence in the record and that its findings of fact supported its conclusions of law. The Supreme Court concluded and adjudged that the judge should be publicly reprimanded.

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 6 May 2015 that Respondent James T. Hill, a Judge of the General Court of Justice, District Court Division, Judicial District 14, State of North Carolina, be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(1), 3A(3), 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. This matter was calendared for argument in the Supreme Court on 2 September 2015, 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

By the recommendation of the North Carolina Judicial Standards Commission (Commission), the issue before this Court is whether James T. Hill (Respondent), a Judge of the General Court of Justice, District Court Division, Judicial District 14, should be publicly reprimanded for conduct in violation of Canons 1, 2A, 3A(1), 3A(3), 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. Respondent does not contest

the facts or oppose the Commission's recommendation that he be publicly reprimanded.

On 2 February 2015, the Commission's Counsel filed a statement of charges alleging that Respondent had engaged in inappropriate conduct while presiding over divorce proceedings in the matter of *Morrison v. Morrison*, Durham County File No. 14-CVD-0047, by

> exhibiting a failure to remain patient, dignified, and courteous to the parties appearing before him; making inappropriate comments to the parties before him; misstating the law when threatening future contempt proceedings; improperly exercising his contempt powers thereby denying multiple parties their fundamental rights of due process; and failing to maintain order and decorum in the proceedings before him.

Respondent filed a motion on 5 February 2015 to extend time to file an answer, which the Commission granted on the same day, thereby allowing Respondent until 30 March 2015 to file his response. Opposing counsel did not object to the motion. On 24 March 2015, the Commission notified Respondent that a hearing would take place on 10 April 2015. On 10 April 2015, Respondent and the Commission Counsel filed joint evidentiary and disciplinary stipulations under Commission Rule 22.

On 6 May 2015, the Commission made its recommendation, which contained the following stipulated findings of fact:

STIPULATED EVIDENTIARY FACTS

> 1. The investigative panel of the Commission alleged that, in the matter of Durham County File No. 14-CVD-47, Morrison v. Morrison, Respondent engaged in conduct inappropriate to his judicial office by:
>
> a. exhibiting a failure to remain patient, dignified, and courteous to the parties appearing before him;
>
> b. making inappropriate comments to the parties before him;
>
> c. misstating the law when threatening future contempt proceedings;
>
> d. improperly exercising his contempt powers thereby denying multiple parties their fundamental rights of due process.

2. Respondent presided over a contentious multi-day custody hearing in Morrison v. Morrison, which concluded on 7 August 2014[.] Durham County routinely records each of its domestic court sessions with audio and visual equipment. The recording in Durham County File No. 14-CVD-47 shows, after hearing all the evidence and before announcing a decision, Respondent[ ]was not patient, dignified, nor courteous with the parties before him. In a raised voice and sharp tone, Respondent proceeded to lecture both Mr. and Mrs. Morrison. During this soliloquy, Respondent made several inappropriate comments including repeatedly and loudly chastising the parties that they were acting like idiots. Respondent admitted during his 22 December 2014 interview with Commission staff, that he "said all of those things."

3. When Respondent addressed the parties on 7 August 2014, he threatened them with contempt if either party violated the Court's order. "And I better not hear either of you saying anything negative about the other party or y'all gonna get a little trip to the Durham County Bed and Breakfast for contempt of court. And there is no appeal, you stay until I say you get out."

4. Respondent's frequent references to the local jail facility as the "Durham County Bed and Breakfast" were inappropriate for court. Respondent's statement that there is no appeal and the parties would not be released until Respondent said so, is a misstatement of the law. A person found in criminal or civil contempt may appeal in the manner provided for appeals in other criminal or civil actions. See N.C.G.S. § 5A-17 and § 5A-24 (italics omitted). During his interview with Commission staff, Respondent admitted, "that was not accurate and I should not have said that." Respondent has acknowledged that he misstated the law when he threatened the parties with future contempt stating that there would be no appeal, but was attempting to warn the parties that future conduct could be punished by the contempt powers of the Court and Respondent wanted the parties to be aware of the consequences of future conduct.

5. Respondent, when addressing Ms. Morrison's contemptuous behavior following a heated verbal exchange

[between Ms. Morrison and Respondent][1], failed to respect and comply with Chapter 5A of the N.C. General Statutes. Respondent has indicated his intention was to hold Ms. Morrison in direct criminal contempt, though he used a civil commitment form that was available in the courtroom. However, Respondent failed to follow proper procedure for either civil or criminal contempt. In the mishandling of his contempt powers, Respondent did not afford Ms. [Morrison] the full right to be heard according to the law, which resulted in a substantial violation to Ms. Morrison's due process rights.

6. Respondent also failed to respect and comply with the applicable law when handling the disruptive behavior of Ms. Morrison's family members in court on August 7, 2014. Again, Respondent did not follow proper procedure for either civil or criminal contempt when he filed Commitment Orders for Civil Contempt for both Gloria Woods and Sherrod Smith.

7. The effects from Respondent's misconduct in this matter have been exacerbated by the video footage capturing the events of this hearing. Because Respondent's comments and Ms. Morrison's outburst were captured on video, this incident was highly publicized with media coverage both locally and nationwide. In addition to the facts as set forth in this Stipulation, Respondent agrees the Durham County court video recording of this matter will also be included in the evidentiary record for these Judicial Standards inquiries.

8. Respondent has a good reputation in his community. In the most recent Judicial Performance Evaluation, Respondent received an overall performance rating of 4.19. Of the 120 Judges evaluated, the average was 3.56. The actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct. Respondent has been fully cooperative with the Commission's investigation, voluntarily providing information about the underlying legal matter and fully and openly admitting error.

---

1. Here, the video recording of the hearing shows that Respondent and Ms. Morrison engaged in a verbal exchange.

9. Respondent, as a trial judge in a custody action, is to be guided by the principal [sic] of the "best interest of the child." Respondent acknowledges that during his "soliloquy" that he made several inappropriate comments including repeatedly telling the parties that they were acting like idiots. The comments by Respondent, though inappropriate, were an attempt by Respondent to make the parties aware the most important person involved in the hearing was the minor child. Respondent's comments, though inappropriate, were an attempt by Respondent to act in the best interest of the minor child.

10. Respondent agreed to stipulations of fact and disposition to bring closure to this matter and because of his concern for protecting the integrity of the court system. While Respondent believed he was acting within the scope of his discretion and that he was acting to preserve the integrity of the Court, with the benefit of hindsight, he now admits and understands his error and that in fact his actions, even if unintentional and not motivated by malice or ill-intent, did constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute although he did not intend for that to happen. Respondent believed he was punishing Ms. Morrison and her family for direct criminal contempt which may be summarily implemented pursuant to N.C.G.S. § 5A-13. Respondent now understands every person held in contempt under this statute is entitled to both notice and an opportunity to respond. In all future dealings, Respondent will make every effort to ensure that every person legally interested in a contempt proceeding receives their opportunity to be heard according to the law.

11. Respondent was represented by counsel in these proceedings and entitled to go forward with the hearing scheduled for 9:30 a.m. on 10 April 2015. However, after having discussed the matter with his counsel and reflected upon the circumstances that have brought us to this juncture, Respondent agreed to accept a recommendation of public reprimand from the Commission and to acknowledge that the conduct set out in the stipulation establishes by clear and convincing evidence that

> this conduct is in violation of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice that brings the judicial office into disrepute in violation of [N.C.]G.S. § 7A-376[(b)].
>
> 12. Respondent acknowledges the ultimate jurisdiction for the discipline of judges is vested with the NC Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendation from the Commission. (citations to Commission Exhibits omitted).

The Commission adopted stipulations that addressed certain procedural issues and established the Commission's jurisdiction over the hearing. In addition to findings of fact, the Commission made the following conclusions of law based on clear and convincing evidence:

> 1. In his adjudication of the matter of Durham County File No. 14-C VD-47, Morrison v. Morrison, Respondent exhibited a failure to remain patient, dignified, and courteous to the parties appearing before him; made inappropriate comments to the parties before him; misstated the law when threatening future contempt proceedings; and acted in violation of Chapter 5A of the North Carolina General Statutes, effectively denying those he held in contempt of their due process rights.
>
> 2. Respondent's actions, as described in stipulated Findings of Fact One (1) through Seven (7), constitute violations of Canon 1, Canon 2A, Canon 3A(1), Canon 3A(3), and Canon 3A(4) of the North Carolina Code of Judicial Conduct. Respondent's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. [§ 7A- 376].
>
> 3. Respondent's conduct, as described in stipulated Findings of Fact Eight (8) through Twelve (12), is recognized by the Commission as evidence of his cooperation with the Commission in its investigation, his recognition and acknowledgement that his actions were inappropriate and his promise to avoid similar inappropriate conduct in the future.

When reviewing a recommendation from the Commission, the Supreme Court "acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court." *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order) (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d. 346, 349 (2008) (order)). We have discretion 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.* at 428, 722 S.E.2d at 503 (alterations in original) (quoting *In re Badgett*, 362 N.C. at 206, 657 S.E.2d at 349). The scope of our review is to "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." *Id.* at 429, 722 S.E.2d at 503 (quoting *In re Badgett*, 362 N.C. at 207, 657 S.E.2d at 349).

After careful review, this Court concludes that the Commission's findings of fact are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. We therefore 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 should be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent James T. Hill be PUBLICLY REPRIMANDED 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 that violates Canons 1, 2A, 3A(1), 3A(3), and 3A(4) of the North Carolina Code of Judicial Conduct.

By order of the Court in Conference, this the 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. DAVIS

[368 N.C. 417 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cleveland County
	)	
RANDY CARTER DAVIS	)	

No. 132P15

ORDER

The pending motions and petitions in this case are resolved as follows: N.C.R. App. P. 27(c) provides that "[c]ourts may not extend the time for taking an appeal or for filing a petition for discretionary review." For that reason, defendant's "Motion to Deem Petition [and Notice of Appeal] Timely Filed" is denied, the State's "Motion to Dismiss Defendant's Notice of Appeal (Constitutional Question)" is allowed, and defendant's "Petition for Discretionary Review" is dismissed. Defendant's "Petition for Writ of Certiorari" is allowed in part and denied in part. Defendant's "Petition for Writ of Certiorari" is allowed with respect to the issue of "whether the trial court erred in admitting the opinion testimony of witnesses Shukla and Chrysler." Except as otherwise allowed, defendant's "Petition for Writ of Certiorari" is denied.

By Order of the Court in Conference, this 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. LANE

[368 N.C. 418 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wayne County
	)	
ERIC GLENN LANE	)	

No. 606A05-3

AMENDED ORDER

Defendant's motion for an extension of thirty days to prepare the transcript on appeal is allowed.

As to defendant's motion in the alternative to declare "that the one hundred twenty-five day deadline in N.C. R. App. P. 7(b)(1) for capitally tried cases applies in this procedural posture," the State is directed to file a response within ten days from the date of this order.

By Order of this Court, this 18th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of March, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. TAYLOR

[368 N.C. 419 (2015)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
RODNEY NIGEE PLEDGER TAYLOR	)	

No. 317PA14

ORDER

This case comes before the Court by way of defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31. We also allowed the State's conditional petition for discretionary review as to additional issues.

We reverse the decision of the Court of Appeals in part and remand this case to the Court of Appeals to consider defendant's Fifth Amendment argument on the merits. As to all other issues in defendant's petition for discretionary review, and as to all issues in the State's conditional petition for discretionary review, we conclude that discretionary review was improvidently allowed.

By order of the Court in Conference, this 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

TOWN OF BOONE, PLAINTIFF	)	
v.	)	From Wake County
STATE OF NORTH CAROLINA, DEFENDANT	)	
COUNTY OF WATAUGA, INTERVENOR-DEFENDANT	)	

No. 93A15

Appeal and Error—constitutionality of an act of General Assembly—required holding—record on appeal

Appeals from orders by a three-judge panel in Wake County concerning the constitutionality of the Boone Act were dismissed where two orders entered on 29 December 2014 did not hold that an act of the General Assembly was facially unconstitutional, as required by the plain text of the statute under which appeal was sought, N.C.G.S. § 7A-27(a1) (2014). Appeal of a subsequent July order that was otherwise appealable by right under that statute was premature because the parties had not settled and filed an appropriate record on appeal.

ORDER

The State of North Carolina and the County of Watauga seek to appeal to this Court pursuant to N.C.G.S. § 7A-27(a1). First, the State seeks to appeal two orders entered on 29 December 2014 by a three-judge panel of the Superior Court in Wake County, the first of which denied the State's and the County's motions to dismiss a challenge to Chapter 33 of the 2014 Session Laws, Act of June 26, 2014, ch. 33, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 139 (the "Boone Act"), and the second of which issued a preliminary injunction enjoining any enforcement of the Boone Act. Next, the State and the County also seek to appeal the panel's 29 July 2015 order declaring that the Boone Act violates Article II, Section 24 of the North Carolina Constitution and entering summary judgment in favor of the Town of Boone.

On 31 March 2015, the Town filed a "Motion to Dismiss Appeal" of the December orders; the State filed a response on 10 April 2015. On 16 June 2015, the Town also filed a "Motion to Supplement the Record on Appeal" to include a Notice of Voluntary Dismissal Without Prejudice of Count 2 of the Town's complaint; the State filed a response to this motion

on 18 June 2015. In addition, on 19 August 2015, the Town of Boone filed a "Motion to Supplement the Record with Final Judgment of Three-Judge Panel and to Expedite Settlement of the Record on Appeal"[1] and a "Motion to Submit the Case for Oral Argument Under the Summary Judgment Standard." The State filed responses to these 19 August 2015 motions on 24 August 2015. Oral arguments were held before this Court on 6 October 2015.

According to the plain text of the statute under which appeal has been sought, N.C.G.S. § 7A-27(a1) (2014), appeal of right lies directly to this Court only "from [an] order or judgment of a court, either final or interlocutory, that *holds* that an act of the General Assembly is facially" unconstitutional. (Emphasis added.) Here, however, neither December order included such a holding: The order denying the State's and the County's motions to dismiss did not provide the panel's rationale for denying the motions, and the order issuing the preliminary injunction concluded that the Town "has shown a likelihood of success on the merits of its case." We therefore dismiss the State's appeal of the December 2014 orders with prejudice.

Because the State's appeal from the December orders of the panel was not statutorily authorized, that appeal did not divest the three-judge panel of jurisdiction to enter the July 2015 order granting summary judgment in favor of the Town of Boone. *See, e.g.*, *Veazey v. City of Durham*, 231 N.C. 357, 363-64, 57 S.E.2d 377, 382-83 (1950); *cf.* N.C.G.S. § 1-294 (2013) (stating that a "perfected" appeal "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein"). Unlike the December orders, the July order states that the Boone Act, which "revo[ked] . . . the Town of Boone's power of extraterritorial jurisdiction . . . is unconstitutional pursuant to the prohibition on local acts contained in Article II, Section 24 of the North Carolina Constitution." Therefore, the July order would appear to be appealable by right to this Court under N.C.G.S. § 7A-27(a1). Nonetheless, our consideration of an appeal from the 29 July 2015 order would be premature at this time because, *inter alia*, the parties have yet to settle and file an appropriate record on appeal. Therefore, we dismiss the Town's motion to supplement the record, filed 19 August 2015, without prejudice to the parties' rights to perfect an appeal of the July order, to settle and file the record on appeal, and to file appropriate briefs in accordance with the North Carolina Rules of Appellate Procedure. The

1. Although these motions were included in a single filing by the Town, they are treated as separate motions and dealt with as such in this order.

time periods within which to proceed with the record on appeal shall begin on the date of this order.

The Town of Boone's 31 March 2015 "Motion to Dismiss Appeal" is ALLOWED and the appeal from the orders entered on 29 December 2014 is DISMISSED with prejudice; the portion of the Town's 19 August 2015 motion which seeks to supplement the record with the final judgment of the three-judge panel is DISMISSED without prejudice to the parties' rights to perfect an appeal of the panel's July order in accordance with this order; the Town's 16 June 2015 "Motion to Supplement the Record on Appeal," the portion of its 19 August 2015 motion which seeks to expedite settlement of the record on appeal, and its 19 August 2015 "Motion to Submit the Case for Oral Argument Under the Summary Judgment Standard" are DISMISSED AS MOOT.

By order of the Court in Conference, this 5th day of November, 2015.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of November, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

5 NOVEMBER 2015

040P15-4	State v. Napoleon Junior Rankin	1. Def's *Pro Se* Motion for Production and Disclosure 2. Def's *Pro Se* Motion for Appeal of Judgments	1. Dismissed 2. Dismissed
084P15-2	State v. Curtis Louis Sangster	1. Def's *Pro Se* Motion to Remand 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **10/21/2015** 2. Denied **10/21/2015**
088P15-2	Mason W. Hyde v. State	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Petition for Prohibition 3. Def's *Pro Se* Motion for Petition for Writ of Error Coram Nobis 4. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 5. Def's *Pro Se* Motion for Petition for *Certiorari*	1. Denied **10/09/2015** 2. Denied **10/09/2015** 3. Denied 10/09/2015 4. Denied **10/09/2015** 5. Denied **10/09/2015**
093A15	Town of Boone v. State of North Carolina and County of Watauga	Plt's Motion to Dismiss Appeal	Special Order
093A15	Town of Boone v. State of North Carolina and County of Watauga	Plt's Motion to Supplement the Record on Appeal	Special Order
093A15	Town of Boone v. State of North Carolina and County of Watauga	1. Plt's Motion to Supplement the Record with Final Judgment of Three-Judge Panel 2. Plt's Motion to Expedite Settlement of Record on Appeal 3. Plt's Motion to Submit the Case for Oral Argument Under the Summary Judgment Standard	1. Special Order 2. Special Order 3. Special Order
099P15-2	State v. Jonathan Lavon Friend	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
126P15	Johnny L. Stoutamire v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-322)	Denied

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

5 NOVEMBER 2015

132P15	State v. Randy Carter Davis	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-547) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem Notice of Appeal and PDR Timely Filed 4. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 5. State's Motion to Dismiss Notice of Appeal	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order
162P95-5	State v. Isaac Jackson Stroud	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-522)	Dismissed
172P15-3	State v. Mohammed Nadder Jilani	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
174P15	Carlton Clark, Jr. v. Susan Belmain Dyer	1. Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA13-1230) 2. Plt's Petition for *Writ of Certiorari* to Review Order of District Court of Hoke County	1. Denied 2. Denied
175P12-2	State v. Aaron Pittman	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP14-452)	Dismissed **Ervin, J., recused**
180P15	State v. William Anthony Barnes	Def's PDR Under N.C.G.S. § 7A-31 (COA14-632)	Denied
184P15	State v. Jose Edis Carranza	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-318) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed
186P10-3	State v. David Felton	1. Def's *Pro Se* Motion for Notice of Appeal 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

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

5 NOVEMBER 2015

187P15	State v. Aleksandr Sergeyevich Kiselev	1. State's Motion for Temporary Stay	1. Allowed **06/08/2015** Dissolved **11/05/2015**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31 (COA14-1020)	3. Denied
190P13-2	State v. Michael Ray King	1. Def's *Pro Se* Motion for PDR (COAP15-570)	1. Dismissed
		2. Def's *Pro Se* Motion in the Alternative for *Coram Noblis/ Certiorari* Petition	2. Dismissed
		3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	3. Allowed
		4. Def's *Pro Se* Motion to Appoint Counsel	4. Dismissed as moot **Ervin, J., recused**
190P15	Jill Crabtree, Employee v. EVP Properties, LLC, Employer, Non-Insured North Carolina Industrial Commission v. EVP Properties, LLC, Employer, Non-Insured, and James Malatesta and Brian J. Dempsey, Individually	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-928)	Denied
193A15	State v. Allen Ray West	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-983)	1. ---
		2. State's Motion to Dismiss Appeal	2. Allowed
200P15-2	State v. Kevin Mitchell	Def's *Pro Se* Motion to Dismiss	Dismissed

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

5 NOVEMBER 2015

201P15-2	Twan Bey (Antwan L. Burns) v. Harnett County District Court Jacquelyn L. Lee	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
202P15	State v. Charles Jacob Rumley	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1162)	Denied
209P15	State v. Keeandus Rashad Barnes aka Keeblocka El Rashad Ali	Def's PDR Under N.C.G.S. § 7A-31 (COA14-840)	Denied
223PA15	State v. Robert Bishop	1. Motion to Admit Eugene Volokh *Pro Hac Vice* 2. Electronic Frontier Foundation's Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed
227P08-4	State v. Sabas Ibarra	Def's *Pro Se* Motion for PDR (COAP15-569)	Denied
232P15	State v. Edward Durant Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1175)	Denied
241P15	State v. Rashawn Mackey	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-883) 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
246P15	Lisa Green-Hayes v. Handcrafted Homes, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-904)	Denied
252P15	In the Matter of D.L.W., D.L.N.W., V.A.W.	1. Petitioner and GAL's Motion for Temporary Stay (COA14-1341) 2. Petitioner and GAL's Petition for *Writ of Supersedeas* 3. Petitioner and GAL's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/22/2015** 2. Allowed 3. Allowed

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264P15	State v. Beamon Fowler	Def's *Pro S*e PDR Under N.C.G.S. § 7A-31 (COA14-1205)	Denied
268P15	State v. Delwood Earl Shelly	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court Order of Cumberland County (COAP14-294) 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
272P15	Susan Vaughan, Grandmother, Caretaker, Custodian v. Currituck DSS, et al.	1. Petitioner's *Pro Se* Motion for Temporary Stay (COAP14-997) 2. Petitioner's *Pro Se* Petition for *Writ of Supersedeas* 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **08/06/2015** 2. Denied 3. Denied
273P15	State v. Drew Martin	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1375) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Pitt County 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed
274P15	Robert K. Stewart v. Maureen H. Krueger and Peter B. Strickland	1. Petitioner's *Pro Se* Motion for Complaint Obstructing Justice 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
282P08-3	State v. Farley L. Bernard	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County	Dismissed
283P13-2	State v. Windsor Devone Ingram	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot

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285P15	Department of Transportation v. BB&R, LLC; Kenneth W. Fromknecht, II, Trustee; Andy Berry & Sons, Inc.; United Community Bank (Georgia); Marcia J. Ringle, Trustee; and Macon Bank, Inc.	Defs' (BB&R, LLC, and Andy Berry & Sons, Inc.) PDR Under N.C.G.S. § 7A-31 (COA14-1185)	Denied
287A15	State v. Warith Farad Muhammad	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1350) 2. State's Motion to Dismiss Appeal	1. — 2. Allowed
288P15	Neusoft Medical Systems, USA, Inc., Plaintiff v. NeuIsys, LLC, Defendant NeuIsys, LLC, Counterclaim-Plaintiff v. Neusoft Medical Systems, USA, Inc., Tom Buse, and Keith Mildenberger, Counterclaim-Defendants NeuIsys, LLC, Third-Party Plaintiff v. Neusoft Medical System Company, Ltd., Third-Party Defendant	1. Third-Party Def's Notice of Appeal Based Upon a Constitutional Question (COA14-779) 2. Third-Party Def's PDR Under N.C.G.S. § 7A-31 3. North Carolina Association of Defense Attorneys' Motion for Leave to File Amicus Brief 4. Plt and Counterclaim Def's (Neusoft Medical Systems, USA, Inc.) PDR Under N.C.G.S. § 7A-31 5. Counterclaim Defs' (Tom Buse and Keith Mildenberger) PDR Under N.C.G.S. § 7A-31 6. Third-Party Plt's (NeuIsys, LLC) Motion To Dismiss Appeal (of Third-Party Defendant) 7. Third-Party Plt's (NeuIsys, LLC) Conditional PDR Under N.C.G.S. § 7A-31 8. Third-Party Plt's (NeuIsys, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. — 2. Denied 3. Dismissed as moot 4. Denied 5. Denied 6. Allowed 7. Dismissed as moot 8. Dismissed as moot
291P15	John Richard Jordan and Danny Dwight Jordan v. Raymond Baxter Jordan	Plt's (John Richard Jordan) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-108)	Denied
294P15	Mark Charles v. Norma Charles aka Norma Graciano	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-196)	Denied

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298A15	Good Neighbors of Oregon Hill Protecting Property Rights and Ashley M. Wyatt v. County of Rockingham	1. Def's Notice of Appeal Based Upon a Dissent (COA15-121) 2. Def's PDR as to Additional Issues	1. Dismissed *ex mero motu* 2. Denied
299P15	State v. Jessica Rasheeda Jordan	1. State's Motion for Temporary Stay (COA14-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/24/2015** Dissolved **11/05/2015** 2. Denied 3. Denied
301P15	House of Raeford Farms, Inc. v. North Carolina Department of Environmental and Natural Resources	1. Respondent's Motion for Temporary Stay (COA15-47) 2. Respondent's Petition for *Writ of Supersedeas* 3. Respondent's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion to Amend 5. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/26/2015** Dissolved **11/05/2015** 2. Denied 3. Denied 4. Allowed 5. Dismissed as moot
302P15	State v. Harley David Hamlin	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1191)	Denied
308A15	State v. Zachary David Thomsen	1. Def's Notice of Appeal Based Upon a Dissent (COA14-1235) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
310P15	State v. Stephanie Jean Holanek	Def's PDR Under N.C.G.S. § 7A-31 (COA14-951)	Denied
313P15	Bruce Fletcher Nelson and Jan Nelson MacInnis v. State Employees' Credit Union and Gwyn R. Parsons	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-1393) 2. Def's (State Employees' Credit Union) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
314P15	State v. Omar Kareem Sellers	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1272)	Denied

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315P15	Quality Built Homes Incorporated and Stafford Land Company, Inc. v. Town of Carthage	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-115) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Motion of the N.C. Home Builder's Association for Leave to File *Amicus Curiae* Brief 4. Motion of the Leading Builders of America for Leave to File *Amicus Curiae* Brief	1. Allowed 2. Allowed 3. Allowed 4. Allowed
316P15	The Estate of Jerry Jacobs, The Estate of Ann Shepard, The Estate of Connie Tindall, and The Estate of Joe (William Dallas) Wright v. State of North Carolina	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-146)	Denied
317P15	David W. Thompson v. Bank of America, N.A.; PRLRAP, Inc.; Nationwide Trustee Services, Inc.; BAC Home Loans Servicing, LP; Saxon Mortgage Services, Inc.; Wendy B. Cole; and Mattressa R. Morris	1. Plaintiff's *Pro Se* NOA Based Upon a Constitutional Question (COA15-20) 2. Plaintiff's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
319P15	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR (COA14-1016)	1. Allowed **09/10/2015** Dissolved **11/05/2015** 2. Denied 3. Denied
322P15-2	State v. Raymond Alan Griffin	Petitioner's *Pro Se* Motion for Appeal of *Habeas Corpus*	Denied **10/21/2015**
323P15	Robert A. Izydore v. Alade Tokuta, Caesar Jackson, Bernice D. Johnson, North Carolina Central University and the State of North Carolina	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1220) 2. Plt's Conditional Motion to Treat His PDR as a Petition for *Certiorari*	1. Denied 2. Allowed

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324P15	East Town Market, L.P. v. 550 Foods, LLC	Def's PDR Under N.C.G.S. § 7A-31 (COA15-46)	Denied
326P15	Burl Anderson Howell v. North Carolina Wayne County Department of Health and Human Services, by and through, Resee Phelps; Lou Jones	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Office of Administrative Hearings 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
327P15	In the Matter of P.S.	1. Respondent-Mother's Petition for *Writ of Certiorari* (COA15-18) 2. Respondent-Mother's Petition for *Writ of Certiorari* to Review Order of District Court of Alleghany County	1. Denied 2. Dismissed
329P15	John Doe 1K and John Doe 2K v. Roman Catholic Diocese of Charlotte, NC	Plt's (Doe 1K) PDR Under N.C.G.S. § 7A-31 (COA15-102)	Denied
330P15	Derrick Lamont Taylor v. Harnett County Superior Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
332P15	State v. Roddie P. Dumas	Def's *Pro Se* Motion for *Writ of Error Coram Nubis* Pursuant to Miscarriage of Justice	Dismissed
333P15	State v. Dominique Alexander Jones	Def's *Pro Se* Motion to Expedite (COAP14-734)	Dismissed
335P15	Robert K. Stewart v. Moore Family Care, Dr. Thomas Leonard, M.D., and Vonda Reeves	1. Plt's *Pro Se* Motion for Medical Malpractice Civil Action 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
336P15	State v. Melissa Amber Dalton	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/06/2015** 2.

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337P15	State v. Aron Harper	1. Def's Motion for Temporary Stay (COA14-1182) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied **10/08/2015** 2. 3.
338P14-3	Waddell Bynum, Jr. v. Progressive Ins. Group, Inc.; Mark A. Valentine, Agent	Plt's *Pro Se* Motion to Appeal	Dismissed
343P15	State v. Ron Fitzgerald Kenney	Def's *Pro Se* Motion for PDR (COAP15-621)	Denied **10/07/2015**
344P14	State v. Gary Maurice Walters	1. State's Motion for Temporary Stay (COA14-51) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR of an Additional Issue	1. Allowed **09/19/2014** 2. Allowed 3. Allowed 4. Denied **Ervin, J., recused**
345P15	State v. Jonathan Lavon Friend El	1. Def's *Pro Se* Motion for Writ of Error 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed
346P15	In the Matter of the Estate of John Wesley Cash	Petitioner's *Pro Se* Motion for Emergency Injunctive Relief	Dismissed **10/14/2015**
347P15	State v. Antone Lamont Bell	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/14/2015**
351P04-5	State v. Robert Lee Thacker	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-637)	Dismissed

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353P15	Carolyn Joyner Driggers, Individually and as Co-Trust and Co-Beneficiary of the Barney G. Joyner Family Trust, and Phyllis M. Joyner, by and through Carolyn Driggers as Attorney-in-Fact v. David Lee Joyner and Ronald Dorrestein	1. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of COA 2. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County 3. Defs' Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	1. 2. 3. Allowed **10/27/2015**
355P15	State v. Derrick Aundra Huey	1. State's Motion for Temporary Stay (COA15-100) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/26/2015** 2. 3.
356P15	Terry Wayne Stephenson, II v. Terry L. Palmatier, Linda G. Wideman, Rachel M. Jones, Virginia Campbell Zalman, James F. Ray, and Judy T. Ray	1. Plt's *Pro Se* Motion for PDR (COA15-515) 2. Plt's *Pro Se* Motion for Petition for Preliminary Injunction	1. Dismissed 2. Dismissed
359P15	Lorine Spence v. Laura Wasco	Plt's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/27/2015**
360P15	State v. Jorge Juarez	1. State's Motion for Temporary Stay (COA15-152) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/27/2015** 2. 3.
362P15	Bryant T. Dennings v. Earl R. Butler, Cumberland Co., and State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **10/29/2015**
366PA13	State v. Lester Gerard Packingham	1. Def's Motion to Withdraw as Private Assigned Counsel 2. Def's Motion to Appoint the Appellate Defender	1. Allowed 2. Allowed **Ervin, J., recused**

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368P12-2	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D. and Ralph Whatley, M.D., Sanjay Patel, M.D. and Cynthia Brown, M.D.	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1372) 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
374P13-5	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Rule 15 Discretionary Review 2. Def's *Pro Se* Motion for Exculpatory Evidence Information Record	1. Dismissed 2. Dismissed **Ervin, J., recused**
375P09-5	State v. Avenger Ridgeway	Def's *Pro Se* Motion for *En Banc*	Dismissed
378P11-2	Stephen C. Nicholson, Individually and as Administrator of the Estate of Geraldine Anne Nicholson v. Arleen Kaye Thom, M.D.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA13-1053) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot **Ervin, J., recused**
398P08-2	Wesley Foust-Graham Goodwin, Surviving Spouse of James Lester Goodwin v. Norman B. Smith	1. Plt's *Pro Se* Motion to Toll the 30 Days Filing Rule (COA04-1206) 2. Plt's *Pro Se* Motion for PDR 3. Plt's *Pro Se* Motion for New Trial 4. Plt's *Pro Se* Motion to Correct the Original Complaint 5. Plt's *Pro Se* Motion to Deny Defendant's Prayer for Dismissal	1. Denied 2. Dismissed 3. Dismissed 4. Allowed 5. Dismissed
427P11-2	State v. Freddie Robinson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-525)	Dismissed **Ervin, J., recused**
462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	Respondent's Motion to Strike Second Amendment Foundation, Inc.'s *Amicus Curiae* Brief	Dismissed as moot

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462A14	Aaron Byrd and Eric Coombs v. Franklin County, North Carolina	1. Petitioners' Motion to Amend Record on Appeal 2. Respondent's Motion to Strike Proposed Amendment to Record on Appeal 3. Respondent's Motion to Strike Reply Brief	1. Dismissed as moot 2. Dismissed as moot 3. Dismissed as moot
542P05-2	State v. Larry Eugene Allred	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-673)	Dismissed
667P03-05	Kenneth D. Bobbitt v. Danny Safrit, Administrator, Alexander Correctional Institution and Roy A. Cooper, III, Attorney General, State of North Carolina	1. State's Motion for Temporary Stay (COAP14-766) 2. State's Petition for *Writ of Supersedeas* 3. State's PWC to Review Decision of the COA	1. Allowed **10/17/2014** 2. Allowed 3. Allowed

MARIA ALVAREZ, MOLLY BAILEY-GOGA, JOHN BARTON, PAMELA BARTON, BONNIE BARY, THOMAS BARY, CAROL BIDDINGTON, WILLIAM BIDDINGTON, MARTIN BOCOCK, JR., NATHANIEL BOCOCK, CRAIG BRIGHAM, NANCY BRIGHAM, JOANN BUZEK, JOHN BUZEK, ROGER CARNIE, DIANE COUSINS, JOHN COUSINS, DANIEL D'ALESSANDRO, KELLY D'ALESSANDRO, PATRICIA DEMATTIA, DIANA FAICCHIO, NICHOLAS FAICCHIO, MARK FAIRNEY, JAMES GANDY, LOIS GANDY, EMMANUEL GEROLAMO, JOANNE GEROLAMO, THOMAS GILMARTIN, THOMAS GOGA, DORIS GUAY, JAMES HENNESSY, FREDERICK HORAK, JOANNE HORAK, JAY JONES, RUTH PAISKER JOSKO, WILLIAM JOSKO, DANIELLE KARNS, JASON KARNS, BRAD KIEL, MARK KIEL, ROBERT KIEL, MEREDITH KISNER, WILLIAM KISNER, MICHAEL KOWALSKI, BRUCE LEWIS, KIRA LEWIS, JAMES LOUY, JR., KATHLEEN MARTIN-WEIS, CHRISTOPHER MENIER, JAYME MENIER, MIDLANTIC COASTAL PROPERTIES, LLC, MRB STOCKTON PARTNERSHIP, CATHARYN NOSEK, JOHN NOSEK, ERIC OLSEN, KRISTEN OLSEN, DESIREE PATNO, DAVID POWERS, VICKIE POWERS, RBW PROPERTIES, SANDRA REYNOLDS, JANICE RIMER, JOHN RIMER, AMARANTHA RUOCCO, FREDDIE SHIVDAT, SANDRA SHIVDAT, JOHN SPICER, KATHLEEN SPICER, LARRY STAHL, MARIE STAHL, ELI TATE, PATRICIA SUE WAGNER, DEANNA SUE WATTERS, JOHN WEIS, MICHAEL WHITLOCK, AND ROBERT WHITLOCK, II

v.

COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, INC., COASTAL COMMUNITIES AT SEAWATCH PLANTATION, LLC, SEAWATCH AT SUNSET HARBOR, INC., SEAWATCH AT SUNSET HARBOR, LLC, COASTAL COMMUNITIES AT SEAWATCH, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, ALAN KARG, MAS PROPERTIES, LLC, OLD DOCK LAND AND TIMBER, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY[1]

No. 377A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

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1. The trial court referred to this case as "*Barton*" in the orders on appeal to this Court. Plaintiffs' amended complaint filed on 28 April 2010 added Alvarez and Bailey-Goga as plaintiffs in the instant action.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

BERRY ANDERSON, JONATHAN BREAREY, JUDITH BURNETTE, STEPHEN BURNETTE, YVONNE BURNETTE, EARLIE JAMES BUTLER, LINDA BUTLER, SARA COURTNEY, MICHAEL DONOVAN, SUE DEE DUNCAN, EAG PROPERTIES, LLC, JOANNE ESSLING, WILLIAM ESSLING, WILLIAM ESSLING, JR., EILEEN FAGAN, GARY FAGAN, EDMOND GIROUX, MICHAEL GRANDINETTI, ROBIN GRANDINETTI, SETH JOHNSON, LINDA KASS, ROBERT KASS, JESSICA KEENAN, SHANE KEENAN, DAVID KUKURZA, DEBORAH KUKURZA, LUCKY 7 HOLDING CORPORATION, FRANCES MACCALLUM, JOHN MACCALLUM, JOHN MALAN, MARIAN MALAN, MICHAEL MCCABE, SHEILA MCCABE, BARBARA NARDELLA, MICHAEL NARDELLA, JOAN PARKIN, ROBERT PARKIN, BRENDA PICKERING, PHILIP PICKERING, JOHN PRICE, VIRGINIA PRICE, CHRISTINE RIGNEY, PATRICK RIGNEY, CHRISTOPHER ROCCO, JYOTI CHATLANI ROCCO, ELAINE ROWINSKI, STEVEN ROWINSKI, ALLISON SEN, ROHAN SEN, DAVID SHERMAN, SANDRA SHERMAN, DANNY WALKER, JEAN WALKER, JEFF WEBB, LAURIE WEBB, CAROLE WERKING, NOEL WERKING, CLARENCE WHICHARD, III, LINDA WHICHARD, GERALD WOLF, AND MARY WOLF

v.

COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, INC., COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, FOUR OAKS BANK AND TRUST COMPANY, CLIFTON L. PAINTER, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 376A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

KENNETH ARNESEN, KRISTEN CHANEY, STEVE CHANEY, DEBORAH CHARUK, WILLIAM CHARUK, MARIA CURATOLO, KATHLEEN JORDAN, THOMAS JORDAN, TANNER MARKLEY, JOHN MERRITT, BARRY McGOFF, JOEL SCHENKEL, JOHN SWAN, LINDA SWAN, AUDREY VARNUM, RICHARD VARNUM, ALAN WALBAUM, CAMILLE WALBAUM, AND LUCAS WILSON

v.

RIVERS EDGE GOLF CLUB & PLANTATION, INC., RIVERS EDGE GOLF CLUB & PLANTATION, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DONALD HOWARTH, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 375A14

Filed 18 December 2015

Loans—appraisal—alleged wrongful omissions—failure to plead justifiable reliance

The trial court did not err by dismissing plaintiff's claim based on its conclusion that all claims against BB&T were premised upon wrongful omissions by BB&T regarding the loan and appraisal process. Because no legal duty exists at law between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims, as pled, failed. Moreover, because plaintiffs failed to sufficiently allege justifiable reliance upon the faulty appraisal information, or lack thereof, or that plaintiffs' injuries were proximately caused by either the bank or the appraisers, dismissal was proper.

Justice HUDSON concurring in part and dissenting in part.

Justice BEASLEY joins in this concurring in part, dissenting in part opinion.

Justice EDMUNDS concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

NEWBY, Justice.

In this case we consider whether plaintiffs, individual investors in undeveloped real estate, may recover against a bank and its appraisers for their alleged participation in a scheme to defraud investors by artificially inflating property values in the years preceding the national real estate crisis. Plaintiffs allege, essentially, that they would not have purchased certain real property but for faulty appraisal information and that, in any event, the bank should have discovered and disclosed the inflated appraised property values to them. The complaint reveals that plaintiffs did not view, receive, order, or even inquire about an appraisal before purchasing the property, nor that their purchases were contingent upon an appraisal, faulty or not. Because no legal duty exists at law between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims, as pled, fail. Moreover, because plaintiffs fail to sufficiently allege justifiable reliance upon the faulty appraisal information, or lack thereof, or that plaintiffs' injuries were proximately caused by either the bank or the appraisers, dismissal is proper.

Plaintiffs are purchasers of undeveloped real property located in one of several planned residential communities in Brunswick County, North Carolina, developed and marketed by defendant Mark A. Saunders (collectively, Coastal Communities).[1] Like many others throughout the nation, plaintiffs invested in real property shortly before the collapse of the real estate market. Taking the well-pled allegations in plaintiffs' complaint as true, the record reveals the following:

1. The communities include the following residential subdivisions located in Brunswick County, North Carolina: Ocean Isle Palms, Ocean Ridge Plantation, Rivers Edge, and SeaWatch at Sunset Harbor. Plaintiffs allege Saunders acted individually and through his various corporate entities.

In 2004 Saunders, a real estate developer, began marketing lots in the Coastal Communities. Saunders purchased unimproved real property through his company, MAS Properties, LLC, subdivided the property into lots, and then deeded the parcels to various corporate entities for sale to investors. During the "pre-development stage" of the proposed subdivisions, Saunders marketed the undeveloped lots with plans to improve them within two years after purchase.

On 8 August 2005, Saunders, acting through MAS Properties, purchased approximately one hundred acres of land in Shallotte Township, Brunswick County, North Carolina. Eleven days later, MAS Properties transferred the property to Rivers Edge Golf Club & Plantation, Inc. (Rivers Edge),[2] which became the basis for the investments at issue here. Rivers Edge recorded various subdivision plats thereafter, continuing through 2006.

Saunders marketed the Rivers Edge property to potential investors through various promotional materials and sales events, including invitation packages, brochures, community maps, and artistic representations. These artistic renditions included maps and sketches of planned community amenities, like "a southern style clubhouse," "pool, outdoor hot tub, [and] fitness center," "walking/nature trails and sidewalks," and "other recreational amenities." Saunders invited investors to special pre-development marketing events designed to drive sales. For example, he hosted a "big tent" event with food and music to kick off the Rivers Edge development and implemented a lottery system to give interested investors priority selection over lots. "[P]rospective purchasers were urged to execute a 'Homesite Reservation' and submit a 'Reservation Deposit' amounting to up to 10% of the purchase price of the property selected in order to have their names placed in the Priority Selection drawings." According to the Homesite Reservation document, the ten-percent deposit would be applied toward an earnest-money down payment for the purchase of the underlying property.

Saunders offered various financial incentives to promote business, including "pre-development pricing," payment by the developer of two years of interest on lot financing, "and $400 to $500 toward closing costs." Saunders furnished prospective investors a detailed "HUD Property Report" and additional materials that disclosed a variety of details including the development plans, construction guidelines, and

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2. Rivers Edge Golf Club & Plantation, LLC and Rivers Edge Golf Club & Plantation, Inc. are referred to interchangeably as "Rivers Edge" throughout the complaint.

estimated timelines. All of these documents were provided in a large binder containing several hundred pages. A series of property reports included the current status of construction and amenities and many of these documents disclosed significant delays. Investors were asked to sign a document acknowledging "that they had received a copy of the Property Report and [had been] given an opportunity to read the Property Report before signing any contract or agreement." Plaintiffs state that they purchased the vacant properties from Saunders, marketed for their "good investment potential," and relied on his representations that the undeveloped properties were "a financially sound investment that offered little risk."

Plaintiffs characterize Saunders's marketing strategies as creating a "false sense of urgency for potential buyers to purchase the undeveloped property with seemingly little risk." Plaintiffs assert that Saunders's agents and employees "encouraged the Plaintiffs and other prospective buyers to purchase more than one lot" and that Saunders marketed the invitation events as "exclusive," when in reality "hundreds, if not thousands," were invited. Plaintiffs allege Saunders "pushed" his sales assistants "to go out in teams and pretend to be sales agents and interested buyers during sales events and property showings" and that Saunders "required [his sales assistants] to drive Range Rovers or other expensive Sports Utility Vehicles."

From 2004 to 2007, defendant Branch Banking and Trust Company (BB&T)[3] served as primary lender for the majority of Saunders's real estate investors who sought bank financing, including plaintiffs. As Saunders's business grew, he established The Mortgage Company of Brunswick, Inc. (TMC), a private mortgage brokerage, to help facilitate the lending process. TMC thereafter assisted Saunders's investors through the loan application process and referred them to BB&T, which then paid TMC a fee for each referral. Internally, BB&T engaged a local firm, James Powell Appraisals, LLC (the Appraisers),[4] to prepare appraisals on some of the properties. The bank did not require full appraisals on the early lot sales with transaction values less than $250,000. Of the limited number of appraisals that BB&T did obtain, the bank used them for its own internal underwriting purposes.

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3. BB&T Collateral Service Corporation served as trustee on the deeds of trust securing the loans issued by Branch Banking and Trust Company and also is a named defendant. Both defendants are collectively referred to as "BB&T" throughout this opinion.

4. James Powell Appraisals, LLC was formed in 2007. Prior to that time James Powell Appraisals operated as a sole proprietorship. James Powell employed defendant Lynn Rabello. Collectively these parties are referred to as "the Appraisers."

From May 2005 through the summer of 2006, each plaintiff reserved one or more properties during a sales event at Rivers Edge and executed a sales contract. After executing the sales contract and obligating themselves to purchase the property, each plaintiff financed his or her investment with a loan through BB&T. Plaintiffs received a full Property Report sometime during the transaction but deny having the opportunity to read it before signing a sales contract. Rivers Edge provided plaintiffs financial incentives consisting of payments for two years of interest and $400 to $500 credits at closing.

On 26 March 2010, two years after the collapse of the national real estate market and four to five years after their initial investment, plaintiffs commenced this action asserting eighteen claims against Saunders, his various companies, BB&T, and the Appraisers.[5] Each of plaintiffs' claims as stated incorporates by reference and is based in part upon the following allegations:

> 40. The Defendant Saunders, through the corporate identity of the Defendant MAS Properties, purchased undeveloped and unimproved parcels of real property throughout Brunswick County, North Carolina and thereafter partitioned the property into lots of proposed subdivisions. The Defendants Saunders and MAS Properties then deeded the property to one of the Defendant Saunders' various corporate entities, including the Defendant Rivers Edge. Under the control and direction of the Defendant Saunders, the agents and employees of the various corporate entities, including the Defendants Rivers Edge and/or Coastal Communities, thereafter marketed the subdivisions and immediately resold the lots to purchasers at grossly inflated prices.
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> 84. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and Rivers Edge, made an arrangement with a local appraiser, James Powell of James Powell Appraisals, LLC, to ensure that appraisals would

5. Plaintiffs' amended complaint includes eighteen causes of action. The Chief Justice designated the action as a mandatory complex business case on 7 April 2010.

be generated as described above, using comparable sales of other properties marketed and sold by the Defendant Coastal Communities, including property in Rivers Edge, at the inflated prices.

. . . .

90. Upon information and belief, the Defendants Powell and Rabello thereby engaged in the fabrication and use of fraudulently overstated appraisals to justify the financing of Coastal Communities properties.

. . . .

98. The Plaintiffs and other property owners relied upon the Defendants' misrepresentations when purchasing property, and paying inflated prices for the property, within one or more of the undeveloped subdivisions. Absent the Defendants' misrepresentations, Plaintiffs and other property owners would not have purchased the property from the Defendants.

. . . .

99. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, made an arrangement with local lenders, including the Brunswick County, North Carolina, regional office of BB&T, to ensure that the lenders would rely upon the previously described appraisals which manipulated property values.

Plaintiffs assert the following claims against BB&T: (1) fraud, (2) unjust enrichment, (3) violation of North Carolina's RICO statute, (4) breach of duty of good faith and fair dealing/negligent supervision, (5) unfair and deceptive trade practices, (6) civil conspiracy, and (7) violation of North Carolina's Mortgage Lending Act. Plaintiffs assert the following claims against the Appraisers: (1) negligence, (2) negligent misrepresentation, (3) fraud, (4) unjust enrichment, (5) violation of North Carolina's RICO statute, (6) civil conspiracy, and (7) unfair and deceptive trade practices. In addition to compensatory damages, plaintiffs seek a preliminary injunction to prevent foreclosure on the subject properties, rescission of the underlying sales contracts, treble damages

for unfair and deceptive trade practices, and punitive damages against both parties.

Plaintiffs premise each of their claims against BB&T on allegations that the bank wrongfully omitted information about the loan and appraisal process, most specifically, that faulty appraisals significantly overstated the value of the investment properties and that the bank had a duty to discover and disclose this information.[6] Plaintiffs do not allege that BB&T or the Appraisers made any direct representations to them. Plaintiffs do not allege that they received, requested, or inquired about an appraisal at any time before purchasing the investment properties or that they were prevented from so doing. Plaintiffs do not allege that the sales were contingent on financing or an appraisal. In fact, of the

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6. The complaint reveals, *inter alia*, that each of plaintiffs' stated claims is "premised upon wrongful omissions by BB&T regarding the loan and appraisal process" and relies upon faulty appraisal information therein as follows:

(1) Plaintiffs' Mortgage Lending Act violation claim relies on allegations of BB&T's "misrepresenting or concealing material facts for the purpose of influencing, persuading, or inducing the Plaintiffs to take a loan" and that BB&T "improperly influenc[ed] the . . . reporting, result, and/or review of real estate appraisals."

(2) Plaintiffs' duty of good faith and fair dealing claim relies on allegations that "BB&T was aware, or should have been aware, of the fact that the Plaintiffs were being misled and/or induced to enter into the contracts in ignorance of facts materially increasing the risks," and that BB&T was aware of "fraudulent and inflated appraisals," but "failed to inform the Plaintiffs of such facts as required by its duty of good faith and fair dealing."

(3) Plaintiffs' RICO claim relies on allegations that BB&T's "misrepresentations, acts of concealment and failures to disclose were knowing and intentional, and made for the purpose of deceiving the Plaintiffs and obtaining their money for . . . pecuniary gain," and that BB&T "rel[ied] upon fraudulent . . . appraisals of the property."

(4) Plaintiffs' conspiracy claim relies on allegations that BB&T entered into an agreement "to commit . . . unlawful acts, practices, plans, schemes, and transactions to defraud and mislead Plaintiffs," that the agreement ensured that BB&T "would rely upon the [fraudulent] appraisals," and that defendants would "control the appraisal and lending process."

(5) Plaintiffs' fraud claim relies on allegations that BB&T was "under a duty to disclose the truth regarding all defendants' misrepresentations and concealed material facts of which only they knew or could have known, and to make a full and open disclosure of all such information," and that BB&T approved and disbursed money at closing "notwithstanding their knowledge of and dependence upon the fraudulently overstated appraisals."

(6) Plaintiffs' unfair and deceptive trade practices claim relies on allegations that BB&T's "conduct, as alleged [in the aforementioned claims by reference], constitutes unfair and/or deceptive acts or practices."

(7) Plaintiffs' unjust enrichment claim relies on allegations that "inequitable enrichment, benefits, and ill-gotten gains [were] acquired as a result of the" omissions alleged in the aforementioned claims, and that plaintiffs' purchases were at "inflated prices."

remaining properties at issue in this action, the complaint reveals that BB&T ordered only two appraisals for its own internal purposes.

On 28 June 2010, BB&T and the Appraisers moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 1 June 2011, the trial court denied plaintiffs' motion for a preliminary injunction to prevent foreclosure proceedings, concluding, *inter alia*, that plaintiffs failed to demonstrate a likelihood of success on the merits of their claims because a lender does not generally owe its borrower a duty beyond the lender's contractual obligations. *Anderson v. Coastal Cmtys. at Ocean Ridge Plantation, Inc.*, No. 09 CVS 1042, ¶¶ 14-24 (N.C. Super. Ct. Brunswick County June 1, 2011).

On 27 June 2011, the trial court entered an opinion and order concluding that all claims against BB&T were "premised upon wrongful omissions by BB&T regarding the loan and appraisal process," but that "BB&T did not owe Plaintiffs a duty to disclose the details of the loan process not required to be disclosed under state or federal law or under the terms of the loan agreements." The trial court granted BB&T's motion to dismiss. *Anderson*, 2011 WL 2381781, ¶¶ 16-20 (N.C. Super. Ct. June 3, 2011). On 13 June 2012, the trial court entered an opinion and order concluding, *inter alia*, that plaintiffs could not have relied upon appraisals they did not receive, or that did not in fact exist, at the time of their decisions to purchase and thus granted the Appraisers' motion to dismiss on all claims. *Anderson*, 2012 WL 1948767, ¶¶ 59-61, 124 (N.C. Super. Ct. May 30, 2012).[7] On 16 May 2014, plaintiffs appealed, and on 10 October 2014, this Court certified the case for review prior to determination in the Court of Appeals. N.C.G.S. § 7A-31(a), (b)(2) (2013); N.C. R. App. P. 15(e)(2).

In essence, plaintiffs argue that they would not have purchased the properties but for faulty appraisal information. Plaintiffs claim that the underlying appraisals were the key to Saunders's complex scheme to sell undeveloped real estate to investors at "grossly inflated prices"

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7. The record indicates the following plaintiffs were voluntarily dismissed from this action without prejudice: John Merritt on 10 July 2012; John Swann and Lisa Swann (referred to in the amended complaint as plaintiffs "Swan"), Audrey Varnum, Richard Varnum, and Lucas Wilson on 15 February 2013; and Steve Chaney and Barry McGoff on 21 March 2014. Deborah Charuk, William Charuk, Maria Curatolo, Kathleen Jordan, Thomas Jordan, Tanner Markley, and Joel Schenkel voluntarily dismissed without prejudice their claims against Saunders, TMC, and his corporate entities in April 2014. We take notice of plaintiffs' attorneys' motion to withdraw as counsel for Kenneth Arnesen, Alan Walbaum, and Camille Walbaum dated 3 May 2013, which appears to remain pending at the trial court. N.C. R. App. P. 14(c)(1).

and that, using this faulty information, Saunders controlled the entire loan process from application to appraisal to closing. Plaintiffs argue, essentially, that BB&T owed them a legal duty, resembling a fiduciary duty, created either by the general relationship between a bank and its borrower, the duty of good faith and fair dealing, or by the Mortgage Lending Act (MLA). Plaintiffs argue BB&T breached this duty by, *inter alia*, "concealing material facts for the purpose of influencing, persuading, or inducing the Plaintiffs to take a loan." Similarly, plaintiffs assert that the Appraisers breached a duty of care owed to them when they prepared faulty appraisals for the bank.

It is undisputed, however, that plaintiffs decided to purchase the investment properties without consulting an appraisal. Moreover, plaintiffs obligated themselves to purchase the properties independent of the loan process. Plaintiffs have not alleged that they ordered, viewed, or requested appraisal information at any time, or that they were prevented from doing so. Furthermore, of the properties remaining at issue in this action, the complaint reveals that BB&T obtained only two appraisals for its own internal underwriting purposes. As alleged, all misrepresentations during the sales process, if any, were made by Saunders, not by BB&T or the Appraisers.

As such, BB&T is entitled to dismissal of all claims because plaintiffs' complaint reveals an absence of both law and facts necessary to establish that the bank owed a duty to disclose the information that plaintiffs contend was wrongfully omitted. Moreover, plaintiffs have failed to sufficiently allege justifiable reliance on any omission by the bank before they purchased the investment properties and have failed to sufficiently establish that any action by BB&T was the proximate cause of their harm.

Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint "fail[s] to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (2013). "[T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.08 (2d ed. 1968)). When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper. *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). We review appeals from dismissals under Rule 12(b)(6) de novo. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

In an ordinary debtor-creditor transaction, the lender's duties are defined by the loan agreement and do not extend beyond its terms. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014) (citations omitted). This Court has held on many occasions that "[o]ne who executes a written instrument is ordinarily charged with knowledge of its contents." *Ussery v. Branch Banking & Trust Co.*, ___ N.C. ___, ___, 777 S.E.2d 272, 279 (2015) (citation omitted). A fiduciary duty generally arises when one reposes a special confidence in another, and the other "in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266 (quoting, *inter alia*, *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)). "[T]he law does not typically impose on lenders a duty to put borrowers' interests ahead of their own," *id.* at 368, 760 S.E.2d at 267, though "it is possible, at least theoretically, for a particular bank-customer transaction to 'give rise to a fiduciary [relationship] given the proper circumstances,' " *id.* at 368, 760 S.E.2d at 267 (quoting *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699, *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992)). Here plaintiffs fail to allege any special circumstances that could establish a fiduciary relationship. Plaintiffs' allegations establish nothing more than a typical debtor-creditor relationship, wherein any duty would be created by contract through the loan agreement.

Even if a plaintiff can show circumstances giving rise to a duty beyond the four corners of the loan agreement, absent a sufficient allegation and showing of justifiable reliance, a plaintiff's negligence claims fail. *See id.* at 369, 760 S.E.2d at 267. "Reliance is not reasonable if a plaintiff fails to make any independent investigation," *id.* at 369, 760 S.E.2d at 268 (quoting *State Props., LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002), *disc. rev. denied*, 356 N.C. 694, 577 S.E.2d 889 (2003)), or fails to demonstrate he was "prevented from doing so," *id.* at 370, 760 S.E.2d at 268. Further, a plaintiff must establish that the lender proximately caused his injury. *See*, *e.g.*, *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88-90, 747 S.E.2d 220, 226-27 (2013).

The MLA, which was enacted by the General Assembly in 2001,[8] applied solely to loans "primarily for personal, family, or household use,

8. Act of Aug. 23, 2001, ch. 393, sec. 2, 2001 N.C. Sess. Laws 1425, 1425-40, *repealed and recodified by* Act of July 22, 2009, ch. 374, 2009 N.C. Sess. Laws 681 (titled "North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act") (codified as amended at N.C.G.S. §§ 53-244.010 to 53-244.121).

primarily secured by either a mortgage or a deed of trust on residential real property located in North Carolina." N.C.G.S. § 53-243.01(15) (2005) (repealed 2009); *see also Fazzari v. Infinity Partners, LLC*, ___ N.C. App. ___, ___, 762 S.E.2d 237, 243 (2014) ("The MLA applied to residential loans and was intended to protect residential borrowers." (citation omitted)). The operative provisions of the MLA during the relevant period here are:

> § 53-243.11. Prohibited activities.
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> In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any mortgage loan transaction:
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> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
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> . . . .
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> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making of, or purchase or sale of, any mortgage loan.
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> (11) To influence or attempt to influence . . . the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan.

N.C.G.S. § 53-243.11 (2005) (repealed 2009).

The MLA does not apply here because plaintiffs fail to allege that they purchased the properties for "personal, family, or household use," and the complaint indicates they purchased nothing more than undeveloped real estate, characterized as an "investment." *See Fazzari*, ___ N.C. App. at ___, 762 S.E.2d at 243 (finding the MLA inapplicable when the "Plaintiffs' own complaint describes the sale of the founders' lots as an 'Investment Scheme' and consistently refers to the investment purchasers as 'investors' "). Plaintiffs purchased the undeveloped lots from Saunders, marketed as an "investment" and for its "good investment potential." In fact, some individual plaintiffs purchased multiple,

noncontiguous lots. Further, plaintiffs could not have used the property for residential purposes at the time of purchase, or for some time thereafter, because infrastructure and amenities had yet to be built and were delayed well into the future. Saunders informed plaintiffs of these delays before plaintiffs closed on their loans with BB&T, as expressly acknowledged in their signed receipts of the Property Reports. Plaintiffs' assertions that they did not read the Property Reports, or that the Reports were buried in hundreds of pages of disclosure material, are insufficient to bring their investment purchases within the ambit of the MLA. *See Ussery*, ___ N.C. at ___, 777 S.E.2d at 279.

BB&T could not have violated the MLA by acting in bad faith when it did not disclose information it did not have, was not asked to provide, or was not contractually obligated to produce. *See Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (concluding that the bank did not breach the covenant of good faith and fair dealing when the claimant failed to establish breach of the contract), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 180 (2012); *see also Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) ("There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of *the benefits of the contract*." (emphasis added) (quoting *Harm v. Frasher*, 5 Cal. Rptr. 367, 374, 181 Cal. App. 2d 405, 417 (1960))). Accordingly, plaintiffs' attempts to establish a breach of duty under the MLA or the duty of good faith and fair dealing fail.

In sum, plaintiffs' allegations are insufficient to establish that BB&T owed or breached any duty. Plaintiffs have not alleged that their investment purchases were contingent on an appraisal nor have they alleged breach of contract by the bank. The complaint reveals that plaintiffs obligated themselves to purchase the properties without consulting an appraisal. Because plaintiffs' claims depend upon BB&T's alleged omission of appraisal information, which BB&T had no duty to provide, plaintiffs' claims, as pled, fail.

Even if we were to find here, for the first time, that debtor-creditor relationships give rise to some heightened duty, plaintiffs have not alleged that they inquired, or were prevented from inquiring, about the appraisal information, and thus they have not established justifiable reliance. *Dallaire*, 367 N.C. at 370, 760 S.E.2d at 268 (concluding that when the borrowers "put forth no evidence that they made inquiry or were prevented from doing so, they have failed to demonstrate [ ] justified reliance"); *see also Calloway v. Wyatt*, 246 N.C. 129, 135, 97 S.E.2d 881, 886 (1957) ("A sale of land will not be vitiated by false representations

of the seller . . . where the purchaser had sufficient opportunity to examine the subject of the representations but made no examination or investigation, and was not prevented from so doing by any artifice of the seller . . . ." (quoting *Hays v. McGinness*, 208 Ga. 547, 547, 67 S.E.2d 720, 720 (1951) (syllabus by the court))).

Moreover, plaintiffs fail to allege actual reliance upon an appraisal at all and therefore, fail to establish proximate cause. *Fazzari*, ___ N.C. App. at ___, 762 S.E.2d at 243-45 (finding it well established that "the plaintiff must show actual reliance on the alleged misrepresentation in order to establish [proximate cause]" and denying relief when "the purchase contracts were not subject to any appraisal contingencies"). Accordingly, without establishing justifiable reliance or proximate cause, plaintiffs' claims fail. *See Bumpers*, 367 N.C. at 88-90, 747 S.E.2d at 226-27 (requiring actual reliance to establish proximate cause element of an unfair and deceptive trade practices claim); *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568-71, 374 S.E.2d 385, 391-93 (1988) (noting that reasonable reliance must be shown to make a case for actionable fraud); *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56 (1988) (requiring a "measurable" benefit conferred upon and accepted by the defendant for an unjust enrichment claim); *Reid v. Holden*, 242 N.C. 408, 414-15, 88 S.E.2d 125, 130 (1955) (implying that proximate cause is required for civil conspiracy claim seeking damages caused by acts done by one or more conspirators); *Hoke v. E.F. Hutton & Co.*, 91 N.C. App. 159, 162-63, 370 S.E.2d 857, 859-60 (1988) (requiring actual reliance on the "predicate act" alleged in a complaint to establish proximate cause for federal RICO claim). Accordingly, BB&T is entitled to dismissal on all claims.

Similar to the allegations against BB&T, each of plaintiffs' claims against the Appraisers, as pled, depends on an alleged duty of care owed by the Appraisers, coupled with assertions that plaintiffs justifiably relied on their faulty appraisals and that the Appraisers proximately caused plaintiffs' injury.[9] Because plaintiffs' complaint reveals an absence of both law and facts necessary to sufficiently allege that the Appraisers owed them a duty of care or to establish the substantive elements of a legally recognized claim, dismissal for the Appraisers on all claims is proper.

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9. The complaint reveals, *inter alia*, that each of plaintiffs' stated claims against the Appraisers seeks to impose a duty, assert justifiable reliance, or establish proximate cause as follows:

(1) Plaintiffs' negligence claim relies on allegations that the Appraisers "owed a duty to the Plaintiffs to exercise due care in the performance of the appraisals," that the

In *Raritan River Steel Co. v. Cherry, Bekaert & Holland* we reviewed in depth the duty an accountant owes to nonclients who make use of an accountant's prepared financial reports, and we find that case instructive here. 322 N.C. 200, 207-16, 367 S.E.2d 609, 613-18 (1988); *see also Ballance v. Rinehart*, 105 N.C. App. 203, 206-08, 412 S.E.2d 106, 108-09 (1992) (applying the tenets of *Raritan* to liability in the real estate appraisal context). An accountant who prepares financial reports for his client clearly owes a duty of care to his client, *Raritan*, 322 N.C. at 210, 214, 367 S.E.2d at 614, 617; however, the duty may extend to "persons . . . whom [the accountant] knows and intends will rely on his opinion, or whom [the accountant] knows his client intends will so rely," *id.* at 214, 367 S.E.2d at 617. In the latter circumstance, "the accountant must know of his client's intent at the time the accountant audits or prepares the information." *Id.* at 210, 367 S.E.2d at 614. The duty does not extend "liability to all persons whom the accountant should reasonably foresee might obtain and rely on the accountant's work." *Id.* at 210, 367 S.E.2d at 615; *see id.* at 214, 367 S.E.2d at 617.

Further, liability will only extend if there is justifiable reliance. *Id.* at 209-10, 214, 367 S.E.2d at 614, 617. "[A] party cannot show justifiable

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Appraisers "communicat[ed] a misleading or fraudulent report," and that plaintiffs' "damages were reasonably foreseeable to the [Appraisers] and were proximately cause [sic] by the[ir] negligence."

(2) Plaintiffs' negligent misrepresentation claim relies on allegations that their "interest in their . . . transaction places them within a limited class to whom the [A]ppraisers . . . owe a duty of due care," that plaintiffs "relied on the false and misleading information supplied by the [Appraisers]," and that their "reliance was justifiable."

(3) Plaintiffs' fraud claim relies on allegations that the Appraisers were "under a duty to disclose the truth regarding their misrepresentations" and that they delivered "false and misleading [appraisals]."

(4) Plaintiffs' RICO claim relies on allegations that, "[a]s a direct and proximate result [of the Appraisers' participation in the RICO scheme], the Plaintiffs have been injured in their business or property" and that the Appraisers "conduct[ed] . . . misleading and inflated appraisals of the property."

(5) Plaintiffs' unfair and deceptive trade practices claim relies on allegations that plaintiffs suffered damages "[a]s a proximate and direct result of the [Appraisers'] unfair and/or deceptive acts or practices" as alleged in the aforementioned claims.

(6) Plaintiffs' unjust enrichment claim relies on allegations that "inequitable enrichment, benefits, and ill-gotten gains [were] acquired as a result of the wrongful conduct" alleged in the aforementioned claims and that plaintiffs' purchases were "at inflated prices."

(7) Plaintiffs' conspiracy claim relies on allegations that the damages they sustained were "a direct and proximate result of the acts committed" by the Appraisers and that the Appraisers "artificially manipulat[ed] the values of the properties."

reliance on information contained in audited financial statements without showing that he relied upon the *actual financial statements* themselves . . . ." *Id.* at 206, 367 S.E.2d at 612 (emphasis added). As discussed previously, to establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he "was denied the opportunity to investigate or that he could not have learned [. . . the true facts] by exercise of reasonable diligence." *Dallaire*, 367 N.C. at 369, 760 S.E.2d at 267 (quoting *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 192 (2001), *disc. rev. denied*, 356 N.C. 438, 572 S.E.2d 788 (2002)). Similarly, proximate cause in the appraisal context requires that "plaintiffs *actually relied* on defendant's appraisal report." *Alva v. Cloninger*, 51 N.C. App. 602, 611, 277 S.E.2d 535, 541 (1981). These limitations "hold accountants to a standard that accounts for their contemporary role in the financial world . . . [while balancing] the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking." *Raritan*, 322 N.C. at 215, 367 S.E.2d at 617.

Plaintiffs here fail to establish that the Appraisers owed them a duty of care. The complaint reveals that BB&T, not plaintiffs, hired the Appraisers to evaluate properties for the bank's own internal underwriting purposes; thus, BB&T, not plaintiffs, was the Appraisers' client. *See Fazzari*, ___ N.C. App. at ___, 762 S.E.2d at 242 ("[A]ppraisals and underwriting are for the benefit of the lenders, not for the borrowers."). At no time did plaintiffs engage, communicate with, or deal with the Appraisers directly, nor did plaintiffs receive, review, or request any information from the Appraisers. Likewise, plaintiffs have not sufficiently alleged that the Appraisers knew that BB&T intended to use the appraisals to benefit or influence plaintiffs in any way when they prepared them. *See Raritan*, 322 N.C. at 213, 367 S.E.2d at 616 ("[A]ccountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put."). Because plaintiffs fail to establish a legal duty, their negligence claims against the Appraisers fail.

Moreover, even if we were to find that the Appraisers did owe plaintiffs a duty of care, plaintiffs fail to sufficiently allege that they justifiably relied upon any representation by the Appraisers, or lack thereof, or that the Appraisers proximately caused injury to plaintiffs. Plaintiffs assert, essentially, that they indirectly relied upon the Appraisers' faulty information because BB&T chose to close on their loans. Plaintiffs' complaint fails to establish that they relied on *actual appraisals*; thus, plaintiffs fail to establish justifiable reliance and their negligence claims must fail. *See id.* at 205-07, 367 S.E.2d at 612-13. Further, because the

complaint reveals that plaintiffs chose to purchase the properties independent of an appraisal and independent of their decision on whether and how to finance their purchases, plaintiffs' allegations are insufficient to establish that the Appraisers proximately caused injury to plaintiffs. Accordingly, plaintiffs' remaining claims fail. *See Alva*, 51 N.C. App. at 611, 277 S.E.2d at 541; *see also Bumpers*, 367 N.C. at 88-90, 747 S.E.2d at 226-27; *Myers & Chapman*, 323 N.C. at 568, 374 S.E.2d at 391; *Booe*, 322 N.C. at 570, 369 S.E.2d at 555-56; *Reid*, 242 N.C. at 414-15, 88 S.E.2d at 130; *Hoke*, 91 N.C. App. at 162-63, 370 S.E.2d at 859-60. In sum, dismissal of plaintiffs' claims against the Appraisers, as pled, was proper.

In conclusion, the complaint reveals that plaintiffs chose to invest in undeveloped real property without consulting an appraisal. For the properties at issue here, the bank ordered only a limited number of appraisals, which were for its own internal use. It is undisputed that plaintiffs did not view, request, or inquire about an appraisal before deciding to purchase the properties. Any representations regarding property development, investment potential, or the like were made by developer Saunders, not the bank or the Appraisers. Taking the well-pled material allegations of the complaint as true, BB&T and the Appraisers are entitled to dismissal on all claims set forth in plaintiffs' complaint. Accordingly, we affirm the decision of the trial court.

AFFIRMED.

Justice HUDSON, concurring in part and dissenting in part.

I agree with the majority that these cases arose out of plaintiffs' purchase of certain real estate and that many of plaintiffs' claims were properly dismissed under Rule 12(b)(6). However, with respect to plaintiffs' claims against the appraiser defendants (James Powell, James Powell Appraisals, LLC, and Lynn Rabello) and the BB&T defendants (Branch Banking and Trust Company, and BB&T Collateral Service Corporation), I conclude that the claims for negligent misrepresentation (against appraiser defendants only), for unfair and deceptive acts and practices (UDAP) under Article 1 of N.C.G.S. Chapter 75 (against BB&T defendants only), and for fraud (against both groups) were sufficiently pleaded to survive dismissal. Finally, the trial court dismissed plaintiffs' claims for civil conspiracy against both sets of defendants because no underlying claims remained. Because I would hold that several claims do survive, I would allow the civil conspiracy claims against these defendants to go forward as well. Accordingly, I respectfully dissent as to these claims only.

Plaintiffs' Claims against Appraisers

Among other claims against the appraiser defendants, plaintiffs alleged negligent misrepresentation and fraud, both of which include reliance as an element.[1] The majority repeatedly states that plaintiffs have failed to allege reliance; however, review of the complaint shows otherwise. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citations omitted). In asserting fraud claims plaintiffs must allege that the actions were "made with intent to deceive," *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658-59 (1992) (citations omitted). Defendants here argue that without reliance, there can be no actionable deception.

First, we must look at the critical allegations in the complaint related to plaintiffs' claims for negligent misrepresentation and fraud against the appraiser defendants. For purposes of our Rule 12(b)(6) analysis, we take these allegations as true:

SEVENTH CLAIM FOR RELIEF

(Negligent Misrepresentation— Alternative Claim - Defendants Powell, James Powell Appraisals and Rabello)

> 366. Plaintiffs reallege and incorporate by reference all prior allegations of this Amended Complaint.
>
> 367. Alternatively, in the course of their business and profession, and in a transaction in which they had a financial interest, the Defendants James Powell Appraisals, Powell and Rabello supplied information to the Plaintiffs' lender for the benefit of the Plaintiffs, and the Defendants James Powell Appraisals, Powell and Rabello intended for the Plaintiffs and the Plaintiffs' lender to rely on that information for guidance or benefit in the business transaction.
>
> 368. The Plaintiffs' interest in their overall purchase transaction places them within a limited class to whom

1. Plaintiffs also alleged claims against the BB&T defendants for fraud and unfair acts and practices under N.C.G.S. Chapter 75. These claims are discussed more extensively below, but any reliance elements contained in them should survive based on the following discussion.

the appraisers, the Defendants James Powell Appraisals, Powell and Rabello, owe a duty of due care.

369. The information supplied by the Defendants James Powell Appraisals, Powell and Rabello, in the form of appraisals conducted, was false and misleading.

370. The Defendants James Powell Appraisals, Powell and Rabello failed to exercise reasonable care or competence in obtaining or communicating this false and misleading information.

371. Injury to the Plaintiffs and the other property purchasers in the Coastal Communities subdivisions, as a result of the appraisals conducted, was foreseeable to the Defendants James Powell Appraisals, Powell and Rabello.

372. Through the acceptance of the appraisals by their lender, the Defendant BB&T, the Plaintiffs relied on the false and misleading information supplied by the Defendants James Powell Appraisals, Powell and Rabello, and the Plaintiffs' reliance was justifiable.

373. The Defendants James Powell Appraisals, Powell and Rabello were aware and/or should have been aware of the importance of the appraisals to the Plaintiffs and the other property purchasers/borrowers in the Coastal Communities subdivisions and the reliance that the Plaintiffs and the other property purchasers/borrowers in the Coastal Communities subdivisions would place thereon.

374. The Plaintiffs' reliance caused the Plaintiffs to incur financial damage. Had the Defendants James Powell Appraisals, Powell and Rabello disclosed the true facts, including the actual market value of the properties, the Plaintiffs would not have purchased the properties.

375. As a direct and proximate result of the negligent misrepresentation of the Defendants James Powell Appraisals, Powell and Rabello, the Plaintiffs have been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00), with the precise amount to be determined at the trial of this matter.

EIGHTH CLAIM FOR RELIEF

(Fraud — All Defendants)

376. The Plaintiffs reallege and incorporate by reference all prior allegations of this Amended Complaint.

377. Under the control and direction of the Defendant Saunders, the agents and employees of various planned residential subdivisions in Brunswick County, North Carolina, including, but not limited to, Rivers Edge sections 9-11, 13-15, 17-19, promised and promoted seemingly legitimate investments in real estate while in actuality operating a highly successful scheme designed for the benefit of the Defendants Saunders, Gordon, Powell, Rabello, certain employees and/or executives of the Defendant BB&T and the various corporate entities of the Defendant Saunders, including the Defendants Rivers Edge, Coastal Communities, MAS Properties, and TMC, to the damage of the Plaintiffs and countless other property owners.

378. The Plaintiffs were individually approached and specifically targeted by the Defendants Coastal Communities and/or Rivers Edge by direct mail solicitation and special events as promotional techniques to induce likely and prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot in the subdivision.

. . . .

381. In order to accomplish this scheme, under the control and direction of the Defendant Saunders, the agents and employees of the various corporate entities, including the Defendants Rivers Edge, Coastal Communities, TMC, James Powell Appraisals and BB&T, mislead [sic] potential purchasers throughout one or more of the various facets of purchasing the property, arranged for and/or procured the financing for the fraudulent transactions.

382. Each Defendant is joined in this action as a co-conspirator. Liability arises from the fact that each Defendant entered into an agreement with the other Defendants to commit or to participate in the commission of all or part of the unlawful acts, practices, plans, schemes, and transactions to defraud and mislead Plaintiffs and other Coastal Communities property purchasers by: (i)

artificially manipulating the values of the properties; (ii) entering into an arrangement with a local appraiser and lender in order to control the appraisal and lending process; (iii) using a fraudulent marketing strategy to create the false appearance of high demand and a false sense of urgency to purchase unimproved and undeveloped property with seemingly little risk; (iv) controlling the loan application and settlement process; and (v) misrepresenting the infrastructure and amenities to be developed.

383. Upon information and belief, the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, employed a marketing strategy to fraudulently lure buyers through the *misrepresentation* of: (i) the infrastructure and amenities to be developed, (ii) the availability of the property, and (iii) the degree of interest in the property.

384. Upon the Coastal Communities property owners' visits to the subdivision of Rivers Edge prior to their execution of the Sales Contracts, the Defendants Coastal Communities and/or Rivers Edge presented the Plaintiffs with various marketing materials, community maps, plats and other artistic representations outlining the Master Plan of the development. The information and representations provided by the Defendants Coastal Communities and/or Rivers Edge or their authorized agents, including, but not limited to, the marketing materials exhibited by the Defendants Coastal Communities and/or Rivers Edge at the location and presented to the Plaintiffs, upon which the Plaintiffs relied, indicated *inter alia* that the subdivision of Rivers Edge offered various amenities, including a southern style clubhouse, property owners clubhouse with outdoor Jr. Olympic sized pool and heated indoor pool, outdoor hot tub, fitness center with steam room and sauna, tennis courts, 27 acre fresh water Palmer Lake with canoeing and kayaking, walking/nature trails and sidewalks through the community, private beach club, and other recreational amenities. Specifically, the new sections of Rivers Edge to be referred to as "Fairway Crossing" would contain an entrance gate, Palmer Lake and surrounding ponds, walking/nature trails and

sidewalks surrounding the 11th, 12th, 13th and 14th holes of the Arnold Palmer golf course at Rivers Edge.

. . . .

386. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, made an arrangement with a local appraiser, the Defendant Powell of the Defendant James Powell Appraisals, to ensure that appraisals would be generated using comparable sales of other properties marketed and sold by the Defendants Coastal Communities and/or Rivers Edge, at inflated prices.

387. Upon information and belief, in order to justify these sales prices for the Coastal Communities properties, the Defendants Powell, Rabello and James Powell Appraisals purposefully failed to consider sales prices for comparable lots outside of the Coastal Communities developments when establishing the appraised value of the lots and appraisals were performed on the property as-is, rather than subject to the extraordinary assumption that the developments would be completed as planned and promised, with infrastructure and amenities.

388. Upon information and belief, the Defendants Powell, Rabello and James Powell Appraisals thereby engaged in the fabrication and use of fraudulently overstated appraisals to justify the financing of Coastal Communities properties.

389. Upon information and belief, the Defendant Saunders conducted and controlled the appraisal process with the Defendants Powell, Rabello and James Powell Appraisals, through the Defendant TMC, a private mortgage brokerage and corporate entity under the control and direction of the Defendant Saunders and the Defendant Gordon, Vice President and managing principal of the Defendant TMC.

390. Upon information and belief, the Defendants concealed their practice of manipulating appraised values from the Plaintiffs and other Coastal Communities

property purchasers and utilized this practice at each one of their developments. Therefore, the Plaintiffs and other Coastal Communities property purchasers did not know and had no reason to know that the Defendants had manipulated the appraised value of the property.

. . . .

393. Because the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, only offered the advertised financial incentives to Plaintiffs who used the services of the Defendants TMC and Gordon and thereafter controlled the lending process through the Defendants TMC and Gordon, it was certain that the Defendant BB&T, the lender participating in the agreement to generate the inflated and manipulated appraisals, would be used.

394. Upon information and belief, the Defendant BB&T approved, funded and handled the loans for the Plaintiffs and the vast majority of Coastal Communities property purchasers from 2004 until 2007 and distributed over 400 million dollars in lot loans to Coastal Communities property purchasers in Brunswick County, North Carolina during this time.

395. Upon information and belief, the Defendant BB&T did not follow either industry standards or their own internal guidelines governing loan origination and underwriting when handling the loan applications of the Plaintiffs or other Coastal Communities property purchasers. The Defendant BB&T approved the majority of the loans without any contact to the applicants to justify the information received and paid the Defendant TMC for the referrals for each loan application, upon information and belief.

396. For several years, from on or about 2004 until on or about 2007, BB&T regional bankers continued issuing loans for Coastal Communities property owners in the lot loan program in order to meet their own BB&T expanding growth goals regardless of whether the loans should have been approved and/or the properties were being developed

by the Defendant Saunders and his various corporate entities as represented to property owners.

397. The Defendant BB&T ensured that the vast majority of lot loans were approved and money disbursed at the closing of the Coastal Communities lot sales, notwithstanding their knowledge of and dependence upon the fraudulently overstated appraisals performed by the Defendant Rabello of the Defendant James Powell Appraisals to justify the inflated amounts of the lot loans, upon information and belief.

398. Upon information and belief, the Defendant BB&T's regional branch managers and/or loan officers then continued in bad faith to issue loans to the Plaintiffs and other Coastal Communities property purchasers in the lot loan program, relying on fraudulent appraisals, knowing that the loans were under-collateralized and knowing that the infrastructure and amenities of the developments were not being completed as promised, in order to meet their own BB&T expanding growth goals regardless of whether the loans should have been approved and/or whether the properties were being developed by the Defendant Saunders and his various corporate entities as represented to property owners.

399. All of the Defendants were under a duty to disclose the truth regarding their misrepresentations and concealed material facts of which only they knew or could have known, and to make a full and open disclosure of all such information.

400. The silence and/or omission of the Defendants related to material matters known by the Defendants which they had a legal duty to disclose to the Plaintiffs and other Coastal Communities property purchasers.

401. In addition, the Defendants have taken affirmative steps to conceal material facts regarding the property purchase, appraisal process, and loan process from the Plaintiffs and other Coastal Communities property purchasers, who were unaware and unable to discover these material facts through their reasonable diligence.

402. With regard to the Defendant BB&T, the regional executives mentioned above (Glen Heintz, the regional retail banking manager and Jeff Etheridge, the regional president for BB&T) and local Brunswick County branch managers and/or loan officers (specifically, Brian Walker, Vi Jones, Connie Norton, and others) were under a duty to make such disclosures to the Plaintiffs and other Coastal Communities property purchasers. Instead, the executives, branch managers, and/or loan officers forced through the loan applications and benefited from the increased production from the "lot loan program," and received higher salaries and/or large yearly bonuses (anywhere from 30% to 100% of their salaries) through the Defendant BB&T's bonus system.

403. By concealing their conduct designed to artificially inflate the market for the sale of lots in the subdivision, including but not limited to the high-pressure and misleading sales tactics, appraisals that reached a pre-determined result and were otherwise deficient and designed to support an inflated purchase price, irregular and deceptive brokerage and lending practices, and affixing of excess revenue stamps to recorded deeds, as alleged herein, all Defendants, in essence, together and by their own acts and omissions, perpetrated a fraud on the market, including the Plaintiffs, which in fact inflated the market.

404. All of the Defendants' misrepresentations and/or concealments were reasonably calculated to deceive the Plaintiffs and other Coastal Communities property purchasers, in that all of the Defendants knew their representations and/or concealments were false or were made recklessly, without any knowledge of truth or falsity, as a positive assertion, and where all of the Defendants knew there was a duty to disclose all material facts, or where all of the Defendants were recklessly indifferent to their duty to disclose.

405. The Defendants' misrepresentations and/or concealments were done with the intent to deceive the Plaintiffs, and the Plaintiffs were in fact deceived by these misrepresentations and/or concealments. The Plaintiffs' reliance on the Defendants' false representations was reasonable.

> 406. The Plaintiffs have suffered actual damages as a result of their reliance on all of the Defendants' false representations and/or concealments. Had any of the Defendants disclosed the true facts, the Plaintiffs would not have purchased the property.
>
> 407. As a direct and proximate result of the Defendants' fraudulent conduct, the Plaintiffs have been damaged in an amount in excess of Ten Thousand Dollars ($10,000.00), with the precise amount to be determined at the trial of this matter.

In my view, these allegations are sufficient to withstand dismissal under existing North Carolina law.

The trial court found as follows:

> [52] Plaintiffs in this case allege in substance that they indirectly relied on the appraisal reports. However, the North Carolina Supreme Court, in *Raritan*, held that indirect reliance will not support a claim for negligent misrepresentation. . . . (Footnote call number omitted.)
>
> . . . .
>
> [Trial Court summarizes our opinion in *Raritan*.]
>
> [54] In sum, the court in *Raritan* affirmed dismissal of the plaintiff's negligent misrepresentation claim because the plaintiff did not *directly* rely upon the audit report in [sic] which it asserted was defective. Applying *Raritan* to the present case, Plaintiffs must allege that they relied directly on the appraisal reports themselves in order to plead sufficiently a claim for negligent misrepresentation. 322 N.C. at 205-06. Post-*Raritan*, claims for negligent misrepresentation that have failed to allege direct reliance have been susceptible to dismissal. (Internal citations omitted.)
>
> . . . .
>
> [Trial Court summarizes the precedent of the Court of Appeals on this issue.]
>
> [59] Similar to the purchasers in *Williams* [*v. United Community. Bank*, 218 N.C. App. 361, 724 S.E.2d 543 (2012)], Plaintiffs in the instant case purchased lots in

undeveloped, proposed residential communities. Further, Plaintiffs allege that Coastal Defendants and the banks controlled the loan and appraisal process. Indeed, the banks procured the appraisals and subsequently approved Plaintiffs' loan applications. Plaintiffs do not allege that they ever viewed or read the appraisal reports prior to signing their purchase contracts or closing on their loans. Instead, Plaintiffs' [sic] argue, in conclusory fashion, that they relied on the appraisals "regardless of whether they viewed the appraisal report" because "if the appraisal reports reflected fair market values below the purchase price, none of the Plaintiffs would have moved forward and closed the loan." More specifically, Plaintiffs allege that "[t]hrough the acceptance of the appraisals by their lender [BB&T], the Plaintiffs relied on the false and misleading information supplied by [Appraiser Defendants], and the Plaintiffs' reliance was justifiable." In other words, Plaintiffs contend that they indirectly relied on the appraisal reports because BB&T presumably reviewed the reports and decided to close on their loans, implying that the lots appraised for the value of the loans. Thus, because BB&T decided to close on their loans, Plaintiffs assumed that the appraisal reports supported the loans and were not defective. (Footnote call numbers omitted.)

[60] Plaintiffs also allege, like the purchasers in *Williams*, that if Appraiser Defendants had disclosed any of the flaws in their appraisal reports or if Plaintiffs knew that the lots were overvalued, they would not have closed on their loans, and that they subsequently lost money as a result of the purchases. However, Plaintiffs' Complaint makes it clear that they were not involved in the appraisal process, which was instead controlled by Coastal Defendants and BB&T. Further, Plaintiffs do not allege that they viewed any of the appraisals prior to signing the purchase contracts, which in any event were not contingent upon the appraised values for the lots. Consequently, Plaintiffs do not, and cannot, allege that they ever relied upon any appraisal of the property before they agreed to purchase said property. Moreover, Plaintiffs do not allege that they viewed the appraisals before closing on their loans with BB&T. Actual reliance is particularly lacking as to certain Plaintiffs who allege that their appraisal was

> performed after they closed on the loans. (Footnote call numbers omitted.)

I do not agree with the trial court's interpretation of *Raritan River Steel*, although I recognize that it is the interpretation adopted by the Court of Appeals. However, we are not bound by that precedent, and I conclude that common sense and the plain language of our precedent lead to a contrary result. Consequently, I would hold that the allegations of reliance here are adequate to support these claims.

In 1981 the Court of Appeals decided *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981). The plaintiffs there bought a house that turned out to have serious structural defects. *Id.* at 603-05, 277 S.E.2d at 536-37. They filed suit against the appraiser, seeking damages. *Id.* at 603, 277 S.E.2d at 536. The defendant argued that he could not be liable for negligence because the plaintiffs were not in privity of contract with him. *Id.* at 604, 277 S.E.2d at 537. The Court of Appeals disagreed, noting that

> [t]he evidence established prima facie that plaintiffs' reliance upon the appraisal was, or should reasonably have been, expected by defendant. The evidence also warrants an inference that plaintiffs actually relied on defendant's appraisal report to NCNB and that defendant's failure to discover and disclose the alleged defects in the house was a proximate cause of plaintiffs' injury. Dr. Alva testified that the contract to purchase the house was conditioned upon his obtaining financing. . . . Dr. Alva also testified that he understood the loan was conditioned upon the appraisal and "assumed everything was all right when the loan was approved." Dr. Alva's assumption as to the import of the appraisal was substantiated by the testimony of witness McGhee, the lending officer, who said "[e]ither the repair work had to be done or we would have had to decline the loan application."

Id. at 611, 277 S.E.2d at 541 (alteration in original). Under the reasoning in *Alva*, plaintiffs here would have a claim against the appraiser defendants.

The question then becomes whether this Court's decision in *Raritan River Steel* overturned *Alva*. In my view, the answer is no. First, the facts of each case are distinguishable: *Alva* dealt with a situation similar to the one we have here—real estate appraisals—whereas *Raritan* involved auditors and financial reports. In *Raritan*, the plaintiff alleged that it obtained the information it used to value a company not from

an actual audit of that company, but from information contained in a report prepared by a third party. *Raritan*, 322 N.C. at 205, 367 S.E.2d at 612. Given those facts, this Court "conclude[d] that a party cannot show justifiable reliance on information contained in audited financial statements without showing that he relied upon the actual financial statements themselves to obtain this information." *Id.* at 206, 367 S.E.2d at 612. Second, that conclusion was based

> in part from an understanding of the audit report. . . . Isolated statements in the report, particularly the net worth figure, do not meaningfully stand alone; rather, they are interdependent and can be fully understood and justifiably relied on only when considered in the context of the entire report, including any qualifications of the auditor's opinion and any explanatory footnotes included in the statements.

Id. at 207, 367 S.E.2d at 613.

While the Court of Appeals has subsequently interpreted this precedent as requiring direct reliance in all negligent misrepresentation claims, *see*, *e.g.*, *Fazzari v. Infinity Partners, LLC*, ___ N.C. App. ___, 762 S.E.2d 237 (2014), I am not convinced our holding in *Raritan* should be read so narrowly. Instead, I am more inclined to follow the reasoning in *Alva*. Nothing in *Raritan* mandates direct reliance—*Raritan* only mandates actual reliance. There the auditor relied on a summary of the information contained in the report. Here the complaint alleges that the appraiser defendants fabricated and overstated appraisals, and concealed from plaintiffs this conduct, all of which became the basis for the approval of financing for plaintiffs' purchases. In this way, plaintiffs allege they relied on the appraisals, regardless of whether they personally viewed them. Additionally, unlike the summary report relied upon by the plaintiff in *Raritan*, the appraisals here are more like the audit of the original company that we concluded the plaintiff must have actually relied upon there in order to establish a claim. Plaintiffs here did not rely on "[i]solated statements" from a summary but rather on "the entire report." *See Raritan*, 322 N.C. at 207, 367 S.E.2d at 613.

Additionally, in *Raritan*, *id.* at 203, 209-10, 214-16, 367 S.E.2d at 611, 614-15, 617-18, this Court referenced the Restatement (Second) of Torts, a comment to which is pertinent here and states:

> g. *Information supplied directly and indirectly.* The person for whose guidance the information is supplied is often the person who has employed the supplier to

> furnish it, in which case, if it is supplied for a consideration paid by that person, he has at his election either a right of action under the rule stated in this Section or a right of action upon the contract under which the information is supplied. In many cases, however, the information is supplied directly to the person who is to act upon it although it is paid for by the other party to the transaction. Thus, when a vendor of beans employs a public weigher to weigh beans, the weigher, who gives to the vendee a certificate which through his carelessness overstates the weight of the beans, is subject to liability to the vendee for the amount that he overpays in reliance upon the certificate. *However, direct communication of the information to the person acting in reliance upon it is not necessary.* In the situation above the liability of the weigher would not be affected by his giving the certificate to the vendor for communication to the vendee.

Restatement (Second) of Torts § 552 (titled "Information Negligently Supplied for the Guidance of Others") (cmt. g (Am. Law Inst. 1977)) (emphasis added). Here the appraisers are comparable to the "weigher" and their liability is "not . . . affected by [their] giving the certificate [appraisal] to the vendor [BB&T] for communication to the vendee [plaintiffs]."

Further, this conclusion is bolstered by common sense and everyday experience. When buying a house, parties commonly understand that unless the house appraises for the contract price (at least), the lender will not approve a loan to finance the purchase. Therefore, even though the appraisers here were hired by the lender, to which it supplied the appraisals, plaintiffs allege that the appraisals were essential to the transaction and were relied upon by the parties to the purchase. In my view, the better reasoned approach allows such reliance to be either direct, if the buyer actually sees the appraisal, or indirect, as here. And when, as here, the plaintiffs have specifically and repeatedly alleged such reliance, I would hold that the claims can proceed.

Applying these principles here, I would allow plaintiffs' claims for negligent misrepresentation and fraud to go forward because plaintiffs have sufficiently pleaded all necessary elements, including reliance.[2] In

2. This reasoning does not apply to plaintiffs who closed on their loans before the appraisal was completed. In that case, I do not include these plaintiffs as those who can show reliance (even indirectly).

my opinion, these allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss.

Plaintiffs' Claims against BB&T

Because it appears that under the Mortgage Lending Act (MLA), N.C.G.S. 53-243.11, the lender here owed a duty to these plaintiffs, I would allow several of plaintiffs' claims which allege this duty as a basis for liability on the part of BB&T to go forward. N.C.G.S. § 53-243.11 (2005) (repealed 2009 and recodified as amended at N.C.G.S. §§ 53-244.010 to 53-244.121).

Initially, I disagree with the majority's assertions that plaintiffs' purchases of these properties in residential communities fall outside the scope of the MLA. As amended and recodified in N.C.G.S. § 53-244.020, the purpose of the MLA is as follows:

> (a) Purpose. – A primary purpose of this Article is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators. Therefore, the General Assembly establishes within this Article an effective system of supervision and enforcement of the mortgage lending industry by giving the Commissioner of Banks broad administrative authority to administer, interpret, and enforce this Article and adopt rules implementing this Article in order to carry out the intentions of the General Assembly.
>
> (b) Construction. – It is the intent of the General Assembly that provisions of this Article be liberally construed to effect the purposes stated or clearly encompassed by the Article.

Id. § 53-244.020 (2013).[3] Plaintiffs allege in their complaint that they sought mortgage loans for these purchases and that "BB&T at all times relevant herein was acting as a mortgage lender pursuant to [the MLA]."

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3. Although this language was not included in the version of the MLA in effect at the times pertinent to these events, most of the remaining language is identical or similar, tending to indicate a similar remedial purpose. *See, e.g.*, *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) ("A remedial statute must be construed broadly 'in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.' *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952).").

The statute in effect during the events at issue here defined "[r]esidential real property" as "[r]eal property located in the State of North Carolina upon which there is located or is to be located one or more single-family dwellings or dwelling units." *Id.* § 53-243.01(19) (2005). The majority opinion, as well as the complaint and the trial court, repeatedly refer to plaintiffs' purchases of real property in planned residential developments. The majority's assertion that the MLA does not apply because plaintiffs "could not have used the property for residential purposes at the time of purchase" cannot be accurate; people frequently buy lots upon which to build residences, and the MLA surely applies to them. Additionally, despite the majority's repeated characterization of plaintiffs as "investors," the complaint alleges no such thing. None of the plaintiffs are described as an "investor" in the complaint; instead each of the plaintiffs is described as an individual "citizen and resident" who purchased property in a Brunswick County "subdivision" at issue here. The only instances in which "investments" are mentioned are in plaintiffs' allegations that defendants marketed the lots as a "good investment." That the lots, if properly developed, could have been a sound investment does not deprive these purchases of their residential nature, nor does it remove them from within the scope of the MLA. In fact, for most people, their residence is their largest "investment," and the MLA is designed to protect that. Any duty arising out of the MLA should apply to the facts alleged here.

On this issue the trial court concluded:

> [16] The gravamen of Plaintiffs' Claims against BB&T is that the Bank had a duty under the MLA to appraise the collateral for the loans and inform Plaintiffs of the details of the loan process including Saunders' alleged involvement and selection of JPA as the appraiser. All of the Claims against BB&T are premised upon wrongful omissions by BB&T regarding the loan and appraisal processes, including Saunders' alleged involvement and control over both.
>
> [17] In the Preliminary Injunction Order, the court concluded that Plaintiffs failed to allege facts sufficient to show that BB&T acted improperly in issuing loans to purchasers of Coastal Communities Properties. The court noted that in an ordinary debtor-creditor relationship, a lender does not owe any duty to its borrower beyond the terms of the loan agreement. "[P]arties to a contract do not thereby become each others' fiduciaries; they

> generally owe no special duty to one another beyond the terms of the contract . . . ." *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61 (1992). "A lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party." *Lassiter v. Bank of North Carolina*, 146 N.C. App. 264, 268 (2001). (Footnote call numbers omitted.)
>
> [18] BB&T did not owe Plaintiffs a duty to disclose the details of the loan process not required to be disclosed under state or federal law or under the terms of the loan agreements. BB&T acted properly in issuing loans to Plaintiffs and did not violate any duties owed to Plaintiffs under the terms of the loan agreements. The court CONCLUDES that when measured under the standards of Rule 12(b)(6), the allegations in Plaintiffs' Amended Complaints can not support their Claims against BB&T.

I disagree. Under N.C.G.S. § 53-243.11, it was prohibited for a lender

> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
>
> . . . .
>
> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person, in connection with the brokering or making of, or purchase or sale of, any mortgage loan.
>
> . . . .
>
> (11) To influence or attempt to influence through coercion, extortion, or bribery, the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan.

N.C.G.S. § 53-241.11 (2005). The Court of Appeals has held that this statute created a legal duty owed to buyers. *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009). There the conduct alleged was that the lender had withheld information that the property purchased by the plaintiffs lay in a flood plain. The plaintiffs sued for

fraud, negligent misrepresentation, and unfair and deceptive trade practices. *Id.* at 33, 681 S.E.2d at 469. The Court of Appeals reasoned that, "[a]lthough N.C. Gen. Stat. § 53-243.11 does not directly address the specific set of factual circumstances present in this case, we conclude that this statutory provision was intended to protect buyers against the sort of activity that is alleged to have occurred here." *Id.* at 43, 681 S.E.2d at 475. The court concluded:

> Assuming that Defendant did, in fact, engage in the conduct described in Plaintiffs' complaint, Defendant would have clearly violated N.C. Gen. Stat. § 53-243.11. As a result, there is ample basis in North Carolina law . . . for concluding that Defendant would have violated a legal duty owed to Plaintiffs if it acted as described in Plaintiffs' complaint.

Id. at 44, 681 S.E.2d at 476. This reasoning equally applies here.

Plaintiffs assert claims for fraud and unfair and deceptive trade practices against BB&T, alleging that:

> 99. Upon information and belief, the Defendant Saunders and/or the agents and employees of the various corporate entities under the control and direction of the Defendant Saunders, including the Defendants Coastal Communities and/or Rivers Edge, made an arrangement with local lenders, including the Brunswick County, North Carolina, regional office of BB&T, to ensure that the lenders would rely upon the previously described appraisals which manipulated property values.
>
> 100. In addition, the Defendant BB&T financed early lot sales in the various undeveloped subdivisions with transactional values under $250,000.00, waiving the requirement of a full appraisal in most cases.
>
> 101. Upon information and belief, the Defendant BB&T's waiver of a full appraisal for the lots with transactional values of under $250,000.00 did not comply with the requirements of the North Carolina Administrative Code and/or the Defendant BB&T's own internal underwriting guidelines.
>
> . . . .

112. Upon information and belief, the Defendant BB&T approved, funded and handled the loans for the vast majority of Coastal Communities property purchasers from 2004 until 2007 and distributed over 400 million dollars in lot loans to Coastal Communities property purchasers in Brunswick County, North Carolina during this time.

113. Upon information and belief, the Defendant BB&T did not follow either industry standards or their own internal guidelines governing loan origination and underwriting when handling the loan applications of the Coastal Communities property purchasers.

114. The Defendant BB&T employs a standard practice whereby all loan applications submitted must be approved through their Central Underwriting department in Winston[-]Salem, North Carolina, upon information and belief. Nevertheless, upon information and belief, the decisions of the Defendant BB&T's Central Underwriting department may be overridden by the regional branches if deemed necessary on a case-by-case basis.

115. In the instant case, upon information and belief, many of the loan applications of the Coastal Communities property purchasers were turned down at BB&T's Central Underwriting department as a result of gaps in information, debt to income ratio and/or credit history in the loan applications of the Coastal Communities property purchasers submitted by TMC.

116. However, upon information and belief, Glen Heintz, the regional retail banking manager for the Defendant BB&T (for the region encompassing Brunswick County, North Carolina) and/or Jeff Etheridge, the regional president for the Defendant BB&T (for the region encompassing Brunswick County, North Carolina), chose to override the majority of the declines and approve the loan applications regardless of any issues or concerns noted in the applications by the Defendant BB&T's Central Underwriting department.

117. As a result, in or about 2005, the Defendant BB&T's Central Underwriting department declined to

review the loan applications of the Coastal Communities property purchasers from the Brunswick County region altogether because they determined that the Brunswick County region would override the majority of the declines and approve the loan applications regardless of their decisions, upon information and belief.

118. Upon information and belief, following this change in policy, BB&T Branch Managers throughout Brunswick County, specifically, Brian Walker, Vi Jones and Connie Norton, employed a "no phone call" policy in order to handle the numerous faxed applications being submitted by the Defendants TMC and Gordon (referred to hereinafter as "the lot loan program").

119. Upon information and belief, the loan applications were thereafter "forced through" and approved by the Defendant BB&T without any contact to the applicants to justify the information received.

120. The Defendant BB&T thereafter paid the Defendant TMC for the referrals for each loan application, upon information and belief. At the height of the program, the Defendant BB&T paid the Defendant TMC as much as $15,000.00 to $20,000.00 per month for the referrals, upon information and belief.

121. The above mentioned BB&T executives purposefully shifted the work with the "lot loan program" to younger retail lenders that were less inclined to question the internal adjustments made specifically for the program, upon information and belief.

. . . .

125. Thereafter, upon information and belief, the Defendant BB&T's regional branch managers/loan officers continued issuing loans for Coastal Communities property owners in the lot loan program in order to meet their own BB&T expanding growth goals regardless of whether the loans should have been approved and/or the properties were being developed by the Defendant Saunders and his various corporate entities as represented to property owners

. . . .

> 127. Upon information and belief, the Defendant BB&T continued in bad faith to provide loans to the Plaintiffs and other Coastal Communities property owners in the lot loan program, relying on fraudulent appraisals and knowing that the infrastructure and amenities in all of the developments were not being completed as promised.
>
> . . . .
>
> 135. Instead, the Defendant BB&T failed to maintain adequate and appropriate compliance reviews of the appraisals which would have easily alerted the Defendant BB&T that the appraisals were flawed and the lot prices were inflated, upon information and belief. If, in fact, compliance reviews were performed, the Defendant BB&T knew or should have known that the reviews were performed in an inadequate and inappropriate manner, upon information and belief.

Like in *Guyton*, if we take these allegations as true, they certainly suffice to support a conclusion that BB&T breached a duty to plaintiffs here and therefore, any claims requiring such a duty as an element, as well as claims under Chapter 75, should be allowed to go forward.[4]

In sum, for the above reasons, I would allow plaintiffs' claims against the appraiser defendants for negligent misrepresentation and fraud to proceed, as well as plaintiffs' claims for fraud and for unfair and deceptive acts or practices under Chapter 75 to go forward against the BB&T defendants. Moreover, based on reviving these claims, I would allow the claims of civil conspiracy to proceed as to both sets of defendants.

Accordingly, I respectfully dissent from the majority opinion as to these claims only. I concur with the majority's decision regarding the remaining claims asserted by plaintiffs and addressed in the majority opinion.

Justice BEASLEY joins in this concurring in part, dissenting in part opinion.

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4. I am not inclined to go so far as to hold that the Mortgage Lending Act creates its own cause of action, however. Thus, I would hold that plaintiffs' claims on that cause were properly dismissed.

Justice EDMUNDS concurring in part; and dissenting in part.

I join with that portion of the dissent that addresses plaintiffs' claims against defendants James Powell, James Powell Appraisers, LLC, and Lynn Rabello.

I also join that portion of the dissent that would find that the MLA applies to plaintiffs' purchase of real property, even if made primarily for investment purposes. However, because I do not believe that issue is dispositive of plaintiffs' claims against the BB&T defendants, I concur in the remainder of the majority opinion.

JOHN BARRY, III, KEVIN BESTICK, SUSAN BESTICK, GEORGE BRADY, PAMELA BRADY, BOBBY BROWN, CATHY BROWN, JOHN CARUSO, LAURA CARUSO, BARBARA KARINA CASSELL, JEFF CASSELL, FRANK CATANIA, LUDWIKA CERF, WILLIAM CERF, CHRISTINA CHAPPELL, DELANE CHAPPELL, JOE CHRISTENSEN, LAURA CLARK, SUZANNE DILLMAN, SUSAN EYERMANN, TIMOTHY EYERMANN, BRIAN FARRELL, MEGAN FARRELL, TIMOTHY FOLEY, KAY GREEN, ROBIN GREEN, TANNER GREEN, DANA JONES, KRISTI JONES, MEREDITH KISNER, WILLIAM KISNER, CHRISTOPHER LEE, MICHAEL LEWIS, TINA LEWIS, MICHAEL LUVUOLO, CLEVE THOMAS MASSON, PAULINE MARIE MASSON, FRAN METKIFF, WILLIAM METKIFF, DONNA NEELY, KEVIN NEELY, PAMELA O'BRYAN, WILLIAM O'BRYAN, CHARLES OTIS, ELAINE OTIS, DENNIS POWERS, ERIKA POWERS, GEORGE POWERS, LILLIAN POWERS, KATHLEEN ROBERTS, WILLIAM ROBERTS, JULIE ROOKSTOOL, DAVID CRAIG SALMON, NANCY SALMON, LINDA SCHUELLER, DONALD SLOVER, ELIZABETH SLOVER, SPECTRUMAX, LLC, MICHAEL STOPCZYNSKI, MICHELLE STOPCZYNSKI, SCOTT SWANN, ANDREY VARNUM, RICHARD VARNUM, JILL VOSS, JANE WALTER, AND RUSSELL WALTER

v.

OCEAN ISLE PALMS, INC., OCEAN ISLE PALMS, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, DONALD HOWARTH, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, FOUR OAKS BANK AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, CLIFTON L. PAINTER, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 378A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and

Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalie K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

BRANCH BANKING AND TRUST COMPANY
v.
PEACOCK FARM, INC., RODOLPHE T. LYNCH, AND WILLARD A. RHODES

No. 230A15

Filed 18 December 2015

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. ___, 772 S.E.2d 495 (2015), dismissing an interlocutory appeal from an order entered on 5 June 2012, as certified under Rule of Civil Procedure 54(b) by an order entered on 16 April 2014, both by Judge Anderson D. Cromer in Superior Court, Moore County. Heard in the Supreme Court on 17 November 2015.

Howard, Stallings, From, Hutson, Atkins, Angell & Davis, P.A., by John N. Hutson, Jr. and Matthew M. Lawless, for plaintiff-appellee.

Van Camp, Meacham & Newman, PLLC, by William M. Van O'Linda, Jr., for defendant-appellant Rodolphe T. Lynch.

PER CURIAM.

For the reasons stated in the majority opinion, the decision of the Court of Appeals is affirmed. We remand this case to the Court of Appeals for further remand to the trial court so that additional proceedings may be held not inconsistent with the opinion.

AFFIRMED AND REMANDED.

BEADNELL v. COASTAL CMTYS. AT OCEAN RIDGE PLANTATION, INC.

[368 N.C. 479 (2015)]

KATHLEEN BEADNELL, RAYMOND BEADNELL, RICHARD BEMIS, DAWN BENNETT, MICHAEL BENNETT, DONNA BERRY, WILLIAM BERRY, JUDY BLOODWORTH, DARLENE BROYLES, WILLIAM BROYLES, PATRICIA CALDERONE, READ CALDERONE, JANET CAMERON, PAUL CAMERON, WAYNE CAMERON, MICHELE CARDNO, THOMAS CARDNO, JAMES CARY, JR., LISA CARY, JOSEPH CIPRIANI, KAREN CIPRIANI, CATHERINE COLELLA, CHARLES COLELLA, FITZGERALD FAMILY TRUST, CHARLES FITZGERALD, MARY FITZGERALD, NANCY FLAHERTY, THOMAS FLAHERTY, DEBRA FREEDMAN, RICHARD FREEDMAN, BLAIR HANSON, JEFF HANSON, BLANEY HARPER, SHARON HARPER, ARLENE JUROW, LESTER JUROW, PATRICIA KARL, CHRISTINE KENT, JAY KENT, STEPHEN LUNN, DANIEL LOWNES, SHARON LOWNES, DOROTHY MANCUSO, RICHARD MANCUSO, WILLIAM MCENROE, MICHAEL MCGARRY, MILLIKEN FAMILY TRUST, JOHN MILLIKEN, LINDA MILLIKEN, PETER MITCHELL, SUSAN MITCHELL, JACQUE MUNROE, SCOTT MUNROE, DIANE NEALE, PETER NEALE, BONNIE PASSARELLA, DAVID PATTERSON, DEBORAH PATTERSON, TAMARA PETRILLO, MICHAEL RATCHFORD, VALERIE RATCHFORD, MARGARET RIDGE, ANGELINA SANDOLO, MARIO SANDOLO, PAUL SANDOLO, DAVID SHERMAN, SANDRA SHERMAN, JOELENE SLOCUM, DOLORES SMITH, MARY SMITH, ROBERT SMITH, KAREN SPINELLI, MICHAEL SPINELLI, JANET STEWART, PETER STEWART, GLEN TALLEY, VIRGINIA TALLEY, ROBERT TUGYA, SUZANNE TUGYA, ERIC VAN SLYKE, KARIN VAN SLYKE, GORDON C. WICKE, JR., GORDON C. WICKE, JR. TRUST, KATHLEEN WICKE, JERRY WICKERSHAM, KATHLEEN WICKERSHAM, EMILY WILSON, LUCAS WILSON, AND JOANNA ZUMALT-MCGARRY

v.

COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, INC., COASTAL COMMUNITIES AT OCEAN RIDGE PLANTATION, LLC, COASTAL COMMUNITIES, INC., MARK A. SAUNDERS, DEBORAH BOODRO, MAS PROPERTIES, LLC, THE MORTGAGE COMPANY OF BRUNSWICK, INC., BRENDAN GORDON, JAMES POWELL, JAMES POWELL APPRAISALS, LLC, LYNN RABELLO, BRANCH BANKING AND TRUST COMPANY, BB&T COLLATERAL SERVICE CORPORATION, BAXLEYSMITHWICK PLLC, AND DOUGLAS BAXLEY

No. 379A14

Filed 18 December 2015

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from opinions and orders granting motions to dismiss entered on 27 June 2011 and 13 June 2012 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. On 10 October 2014, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), and Rule 15(e)(2) of the North Carolina Rules of Appellate Procedure, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Heard in the Supreme Court on 18 March 2015.

Hodges & Coxe, P.C., by C. Wes Hodges, II and Sarah R. Buzzard, for plaintiff-appellants.

Teague, Campbell, Dennis & Gorham, LLP, by Jacob H. Wellman and Natalia K. Isenberg, for defendant-appellees James Powell, James Powell Appraisals, LLC, and Lynn Rabello.

Poyner Spruill LLP, by J. Nicholas Ellis and Caroline P. Mackie, for defendant-appellees Branch Banking and Trust Company and BB&T Collateral Service Corporation.

PER CURIAM.

For the reasons stated in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14), the decision of the trial court is affirmed.

AFFIRMED.

Justice EDMUNDS concurs in part and dissents in part for the reasons stated in his opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

Justice HUDSON and Justice BEASLEY concur in part and dissent in part for the reasons stated in Justice Hudson's opinion in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, ___ N.C. ___, ___ S.E.2d ___ (2015) (375A14).

DICKSON v. RUCHO

[368 N.C. 481 (2015)]

MARGARET DICKSON, ALICIA CHISOLM, ETHEL CLARK, MATTHEW A. McLEAN, MELISSA LEE ROLLIZO, C. DAVID GANTT, VALERIA TRUITT, ALICE GRAHAM UNDERHILL, ARMIN JANCIS, REBECCA JUDGE, ZETTIE WILLIAMS, TRACEY BURNS-VANN, LAWRENCE CAMPBELL, ROBINSON O. EVERETT, JR., LINDA GARROU, HAYES McNEILL, JIM SHAW, SIDNEY E. DUNSTON, ALMA ADAMS, R. STEVE BOWDEN, JASON EDWARD COLEY, KARL BERTRAND FIELDS, PAMLYN STUBBS, DON VAUGHAN, BOB ETHERIDGE, GEORGE GRAHAM, JR., THOMAS M. CHUMLEY, AISHA DEW, GENEAL GREGORY, VILMA LEAKE, RODNEY W. MOORE, BRENDA MARTIN STEVENSON, JANE WHITLEY, I.T. ("TIM") VALENTINE, LOIS WATKINS, RICHARD JOYNER, MELVIN C. McLAWHORN, RANDALL S. JONES, BOBBY CHARLES TOWNSEND, ALBERT KIRBY, TERRENCE WILLIAMS, NORMAN C. CAMP, MARY F. POOLE, STEPHEN T. SMITH, PHILIP A. BADDOUR, AND DOUGLAS A. WILSON

v.

ROBERT RUCHO, IN HIS OFFICIAL CAPACITY ONLY AS THE CHAIRMAN OF THE NORTH CAROLINA SENATE REDISTRICTING COMMITTEE; DAVID LEWIS, IN HIS OFFICIAL CAPACITY ONLY AS THE CHAIRMAN OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES REDISTRICTING COMMITTEE; NELSON DOLLAR, IN HIS OFFICIAL CAPACITY ONLY AS THE CO-CHAIRMAN OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES REDISTRICTING COMMITTEE; JERRY DOCKHAM, IN HIS OFFICIAL CAPACITY ONLY AS THE CO-CHAIRMAN OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES REDISTRICTING COMMITTEE; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY ONLY AS THE PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; THOM TILLIS, IN HIS OFFICIAL CAPACITY ONLY AS THE SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE BOARD OF ELECTIONS; AND THE STATE OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DEMOCRACY NORTH CAROLINA, NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, REVA McNAIR, MATTHEW DAVIS, TRESSIE STANTON, ANNE WILSON, SHARON HIGHTOWER, KAY BRANDON, GOLDIE WELLS, GRAY NEWMAN, YVONNE STAFFORD, ROBERT DAWKINS, SARA STOHLER, HUGH STOHLER, OCTAVIA RAINEY, CHARLES HODGE, MARSHALL HARDY, MARTHA GARDENHIGHT, BEN TAYLOR, KEITH RIVERS, ROMALLUS O. MURPHY, CARL WHITE, ROSA BRODIE, HERMAN LEWIS, CLARENCE ALBERT, JR., EVESTER BAILEY, ALBERT BROWN, BENJAMIN LANIER, GILBERT VAUGHN, AVIE LESTER, THEODORE MUCHITENI, WILLIAM HOBBS, JIMMIE RAY HAWKINS, HORACE P. BULLOCK, ROBERTA WADDLE, CHRISTINA DAVIS-McCOY, JAMES OLIVER WILLIAMS, MARGARET SPEED, LARRY LAVERNE BROOKS, CAROLYN S. ALLEN, WALTER ROGERS, SR., SHAWN MEACHEM, MARY GREEN BONAPARTE, SAMUEL LOVE, COURTNEY PATTERSON, WILLIE O. SINCLAIR, CARDES HENRY BROWN, JR., AND JANE STEPHENS

v.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; THOM TILLIS, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE

No. 201PA12-3

Filed 18 December 2015

1. Appeal and Error—redistricting plan—three-judge panel—appellate review—standard

The North Carolina Supreme Court's review of a three-judge panel trial court decision in a challenge to a redistricting plan was limited. Unchallenged findings were binding, as were findings supported by competent evidence. Conclusions of law were reviewed de novo to determine whether they were supported by the findings.

2. Elections—redistricting—federal and state constitutional requirements—on remand

Where a previous decision of the North Carolina Supreme Court in a redistricting case was remanded by the U.S. Supreme Court for further consideration in light of its decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ____ (2015) (*Alabama*), the North Carolina Supreme Court held that the three-judge panel trial court decision fully complied with *Alabama*. In North Carolina, the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by the N.C. Supreme Court, whereas in *Alabama* the redistricting plan was drawn according to guidelines adopted by legislative committee; in *Alabama* the state was considered as a whole rather than district by district, as in N.C.; there was a standing issue as to one plaintiff which was not relevant here; the Alabama legislature placed great emphasis on ensuring that no district deviated by more than a theoretical equal population ideal, while in North Carolina equal population criteria are a component of and intertwined with the state constitution's Whole County Provision and equal population is a part of the redistricting background but is not a factor to be weighed against the use of race to determine whether race predominates; and, lastly, in *Alabama* the U.S. Supreme Court held that the district court misinterpreted the requirements of section 5 of the Voting Rights Act in finding that the challenged districts were "narrowly tailored" to satisfy strict scrutiny, while the North Carolina three-judge panel's conclusion here that the twenty-six challenged VRA districts survive strict scrutiny was consistent with the U.S. Supreme Court's clarification of the section 5 narrow tailoring analysis.

3. Elections—redistricting—federal requirements—primary concern—federal law rather than race

When making redistricting decisions, federal and state law must be read in harmony, although a redistricting plan that does

not satisfy federal requirements fails even if it is consistent with the law of North Carolina. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, essentially prohibits consideration of race during redistricting; however, at the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution. Despite a cat's cradle of factors facing the General Assembly, the three-judge trial court panel in this case found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming twenty-six Voting Rights Act districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, the Court did not believe that this concession established that race ipso facto was the predominant motive driving the General Assembly. It appeared from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se.

4. Elections—redistricting—gerrymandering

In a redistricting case which challenged four districts as being the result of racial gerrymandering, the General Assembly's actions in creating these districts were rationally related to all its expressed goals. The U.S. Supreme Court has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests.

5. Elections—redistricting—process

Considering redistricting issues under the Whole County Provision of the North Carolina Constitution, the General Assembly first must create all necessary Voting Rights Act districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on.

6. Elections—redistricting—splitting districts—lack of compactness

A purported lack of compactness of legislative districts created by the General Assembly and the harm resulting from splitting precincts may be valid considerations, but neither constitutes

an independent legal basis for finding a constitutional violation, and there is no justiciable standard by which to measure these local factors.

7. Elections—redistricting—state constitution—Good of the Whole Clause

Enacted redistricting plans did not violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. Plaintiffs proffered maps representing their good faith understanding of a plan they believed to be best for the State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," plaintiffs' claims failed.

Justice BEASLEY concurring in part and dissenting in part.

Justices HUDSON and ERVIN join in this dissenting opinion.

On order of the United States Supreme Court entered 20 April 2015 granting plaintiffs' petition for writ of certiorari to review our decision reported in 367 N.C. 542, 766 S.E.2d 238 (2014), vacating said judgment, and remanding the case to this Court for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015). Heard in the Supreme Court on 31 August 2015.

Poyner Spruill LLP, by Edwin M. Speas, Jr., John W. O'Hale, and Caroline P. Mackie, for Dickson plaintiff-appellants; and Southern Coalition for Social Justice, by Anita S. Earls and Allison Riggs, and Tin Fulton Walker & Owen, PLLC, by Adam Stein, for NC NAACP plaintiff-appellants.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and Phillip J. Strach, for legislative defendant-appellees; and Roy Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for all defendant-appellees.

Michael E. Casterline, P.A.; Paul, Weiss, Rifkind, Wharton & Garrison LLP, by Theodore V. Wells, Jr., pro hac vice, Robert A. Atkins, pro hac vice, Jaren Janghorbani, pro hac vice, Farrah

R. Berse, pro hac vice, and Pietro Signoracci, pro hac vice; and Brazil & Burke, P.A., by Meghann K. Burke, for Congressional Black Caucus, amicus curiae.

H. Jefferson Powell for North Carolina Law Professors Michael Curtis, Walter Dellinger, William P. Marshall, and H. Jefferson Powell, amici curiae.

NEWBY, Justice.

Following the 2010 Decennial Census, the General Assembly of North Carolina enacted redistricting plans for the North Carolina Senate and House of Representatives, and for the North Carolina districts for the United States House of Representatives. Plaintiffs challenge the legality of these plans, arguing that they violate the Constitutions of the United States and of North Carolina, controlling federal statutes, and applicable decisions of the Supreme Court of the United States (the Supreme Court) and the Supreme Court of North Carolina. The three-judge panel[1] reviewing the plans unanimously concluded that the General Assembly applied traditional and permissible redistricting principles to achieve partisan advantage and that no constitutional violations resulted. On plaintiffs' direct appeal, this Court affirmed the three-judge panel's ruling. *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014). Thereafter, the Supreme Court vacated this Court's opinion and remanded the case to this Court for further consideration in light of its recent decision in *Alabama Legislative Black Caucus v. Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015) (*Alabama*). *Dickson v. Rucho*, ___ U.S. ___, 135 S. Ct. 1843, 191 L. Ed. 2d 719 (2015) (mem.).

In compliance with the Supreme Court's mandate, we have reconsidered this case in light of *Alabama*. Specifically, *Alabama* requires a district-by-district analysis in which the federal equal population requirement is simply a "background" rule that does not influence the predominant motive analysis. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332-33. After rebriefing and a careful review of the record in this case, we observe that the three-judge panel conducted the required

1. The three-judge panel, appointed by then-Chief Justice Sarah Parker of the North Carolina Supreme Court, consisted of Superior Court Judges Joseph Crosswhite, Alma Hinton, and Paul Ridgeway. In their order, the three judges describe themselves as each being "from different geographic regions and each with differing ideological and political outlooks" and state that they "independently and collectively arrived at the conclusions that are set out [in their order]."

detailed district-by-district analysis without giving improper weight to population equalization. *See id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332-33. The panel detailed its extensive findings and conclusions in a one hundred seventy-one page Judgment and Memorandum of Decision. Our careful review of that document leads us to conclude that, as to the twenty-six districts drawn to comply with the federal Voting Rights Act of 1965 ("Voting Rights Act" or "VRA"), the three-judge panel erred when it applied strict scrutiny prematurely; however, because these districts survive this most demanding level of review, plaintiffs were not prejudiced by the three-judge panel's error. As to the remaining challenged districts, we affirm the ruling of the three-judge panel that the predominant factors in their creation were the traditional and permissible redistricting principles encompassed within the mandatory framework as established by precedents of the Supreme Court and this Court.[2]

I. Procedural Background

The Constitution of North Carolina requires decennial redistricting of the North Carolina Senate and North Carolina House of Representatives, subject to several specific requirements. The General Assembly is directed to revise the districts and apportion Representatives and Senators among those districts ("House Districts" and "Senate Districts" or, collectively, "State House and Senate Districts"). N.C. Const. art. II, §§ 3, 5. Similarly, consistent with the requirements of the Constitution of the United States, the General Assembly establishes North Carolina's districts for the United States House of Representatives (Congressional Districts) after every decennial census. U.S. Const. art. I, §§ 2, 4; 2 U.S.C. §§ 2a, 2c (2012).

Redistricting in North Carolina has been challenged in this Court on multiple occasions.[3] As a result, redistricting in this State does not proceed upon preferences or guidelines determined by the General

2. Our opinion incorporates the parts of our prior opinion that are unaffected by or are consistent with the *Alabama* opinion.

3. For example, regarding the 2010 redistricting, in addition to the two cases consolidated here, two cases currently pending in the United States District Court for the Middle District of North Carolina involve challenges to many of the same districts that are challenged here. *See Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C. heard Oct. 13-15, 2015) (challenging Congressional Districts 1 and 12); *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. filed May 19, 2015); *see also, e.g.*, *Dean v. Leake*, 550 F. Supp. 2d 594 (E.D.N.C.), *appeal dismissed*, 555 U.S. 801, 129 S. Ct. 94, 172 L. Ed. 2d 6 (2008); *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001); *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D.N.C. 1998), *rev'd*, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996);

Assembly. Instead, the legislature's priorities in drawing new district lines must be implemented within the mandatory framework recognized by this Court as required by federal law, federal and state constitutional mandates, and prior decisions of this Court. *Pender County v. Bartlett*, 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007) (*Pender County*), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality) (*Strickland*); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*).

The North Carolina Constitution "enumerates several limitations on the General Assembly's redistricting authority." *Pender County*, 361 N.C. at 493, 649 S.E.2d at 366. In particular, Sections 3 and 5 of Article II of the North Carolina Constitution, which address State House and Senate Districts, both include an equal population requirement and a Whole County Provision (collectively referred to as the "Whole County Provision"). Specifically, those sections of the constitution provide:

> Sec. 3. Senate districts; apportionment of Senators.
>
> The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;
>
> (2) Each senate district shall at all times consist of contiguous territory;

Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), *aff'd mem.*, 506 U.S. 801, 113 S. Ct. 30, 121 L Ed. 2d 3 (1992); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part*, *rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); *Pender County v. Bartlett*, 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002).

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

Sec. 5. Representative districts; apportionment of Representatives.

The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:

(1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;

(2) Each representative district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a representative district;

(4) When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

N.C. Const. art. II, §§ 3, 5.

While the federal one-person, one-vote standard addresses every district statewide, our state law instructs that the state constitution's equal population requirement must be read in the context of the geographic boundaries of counties, the state-recognized political subdivisions. In other words, the Whole County Provision, as recognized by this Court, requires that each State House and Senate District be confined to a single

county or minimum grouping of contiguous counties. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 397. In effect, North Carolina's Whole County Provision, of which equal population is a component, establishes a framework to address the neutral redistricting requirement that "political subdivisions" be respected.[4] *Shaw v. Reno*, 509 U.S. 630, 646-47, 113 S. Ct. 2816, 2826-27, 125 L. Ed. 2d 511, 528-29 (1993) (*Shaw I*); *Stephenson I*, 355 N.C. at 364, 371, 562 S.E.2d at 385, 389 (recognizing "the importance of counties as political subdivisions of the State of North Carolina" and "observ[ing] that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed 'traditional districting principles' . . . such as 'compactness, contiguity, and *respect for political subdivisions*' " (citation omitted) (quoting *Shaw I*, 509 U.S. at 647, 113 S. Ct. at 2827, 125 L. Ed. 2d at 528)). Our state constitution's Whole County Provision establishes requirements not just for the number of voters, but for their identity as well. Thus, the approach to redistricting used here, required by the state constitution's Whole County Provision, is fundamentally different from the federal one-person, one-vote requirement addressed in *Alabama*, which spoke only to the number of voters. *See Alabama*, ___ U.S. at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332 (explaining that equal population goals play a role in determining the number of persons placed in a district, but do not necessarily control "*which* persons were placed in *appropriately apportioned districts*"); *see also Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (distinguishing the "traditional districting principles" found in the North Carolina Constitution, including the Whole County Provision, from the federal "one-person, one-vote" standard).

In addition, the General Assembly followed the mandatory framework of our decision in *Stephenson I*, which harmonized the

4. We note that the principles articulated in the Whole County Provision, including state equal population requirements, have been reflected in our various state constitutions since 1776. *See Stephenson I*, 355 N.C. at 364-72, 562 S.E.2d at 385-90. In our opinion in *Stephenson I*, we discussed the historical importance of counties as vital "political subdivisions" of our state. *Id.* at 364, 562 S.E.2d at 385. For example, we recognized that "[i]t is through [the counties], mainly, that the powers of government reach and operate directly upon the people" and that the counties "are indeed a necessary part and parcel of the subordinate instrumentalities employed in carrying out the general policy of the state in the administration of government." *Id.* at 365, 562 S.E.2d at 386 (quoting *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884)).

requirements of federal and state law and set out nine criteria that the General Assembly must follow in drawing new district lines. 355 N.C. at 383-84, 562 S.E.2d at 396-97. These nine criteria may be summarized as follows: First, "legislative districts required by the VRA shall be formed" before non-VRA districts are created. *Id.* at 383, 562 S.E.2d at 396-97. Second, "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent" to ensure "compliance with federal 'one-person, one-vote' requirements." *Id.* at 383, 562 S.E.2d at 397. Third, "[i]n counties having a . . . population sufficient to support the formation of one non-VRA legislative district, . . . the physical boundaries" of the non-VRA district shall "not cross or traverse the exterior geographic line of [the] county." *Id.* at 383, 562 S.E.2d at 397. Fourth, "[w]hen two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within [the] county," "shall be compact, and shall not traverse the [county's] exterior geographic boundary." *Id.* at 383, 562 S.E.2d at 397. Fifth, for non-VRA counties that "cannot support at least one legislative district," or "counties having a non-VRA population pool, which, if divided into [legislative] districts, would not comply with" one-person, one-vote requirements, the General Assembly should "combin[e] or group[ ] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 383, 562 S.E.2d at 397. Moreover, "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping." *Id.* at 383-84, 562 S.E.2d at 397. "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 384, 562 S.E.2d at 397. Sixth, "only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* at 384, 562 S.E.2d at 397. Seventh, "communities of interest should be considered in the formation of compact and contiguous [legislative] districts." *Id.* at 384, 562 S.E.2d at 397. Eighth, "multi-member districts shall not be" created "unless it is established that such districts are necessary to advance a compelling governmental interest." *Id.* at 384, 562 S.E.2d at 397. Ninth, "any new redistricting plans . . . shall depart from strict

compliance with" these criteria "only to the extent necessary to comply with federal law." *Id.* at 384, 562 S.E.2d at 397. Within this mandatory framework, the General Assembly may consider permissible and traditional redistricting principles such as compactness, contiguity, and respect for political subdivisions and communities of interest. *See Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488, 132 L. Ed. 2d 762, 779-80 (1995).

Following the 2010 census, leaders of the North Carolina House of Representatives and the North Carolina Senate independently appointed redistricting committees. Each committee was responsible for recommending a plan applicable to its own chamber, while the two committees jointly were charged with preparing a redistricting plan for North Carolina's Congressional districts for the United States House of Representatives.

Guided by the United States Supreme Court's redistricting principles, in addition to the state constitution and the mandatory framework of this Court's prior decisions, the redistricting committees sought information and suggestions from numerous sources, including the North Carolina Legislative Black Caucus and the North Carolina delegation to the United States Congress. In addition, these committees solicited input from various constituencies; invited public comment and conducted public hearings in multiple counties, including twenty-four of the forty counties then covered by section 5 of the Voting Rights Act;[5] heard both lay and expert testimony regarding such matters as racially polarized voting; solicited and received advice from the University of North Carolina School of Government; commissioned reports from independent experts to fill gaps in the evidence; and considered written submissions, including proposed redistricting maps submitted by the Southern Coalition for Social Justice.

The General Assembly convened on 25 July 2011 to deliberate the redistricting plans drawn by the House and Senate committees. That same day, the leaders of the Democratic Party and the Legislative Black Caucus submitted other alternative maps. On 27 July, the General Assembly ratified the 2011 North Carolina Senate redistricting plan and the 2011 plan for the federal House of Representatives districts. On

5. Effective 1 September 2014, section 5 of the VRA is codified at 52 U.S.C.S. § 10304 (LexisNexis 2014). Section 5 previously was codified at 42 U.S.C.S. § 1973c.

28 July, the General Assembly ratified the 2011 North Carolina House of Representatives redistricting plan. On 2 September 2011, the General Assembly submitted the three plans to the United States Department of Justice (USDOJ) for preclearance under section 5 of the Voting Rights Act. That same day, the General Assembly filed a suit also seeking preclearance in the United States District Court for the District of Columbia. The General Assembly dismissed this suit upon receiving preclearance from the USDOJ on 1 November 2011.[6]

On 3 November 2011, Margaret Dickson and forty-five other registered voters filed a complaint seeking to have the three redistricting plans declared invalid on both constitutional and statutory grounds. These plaintiffs filed an amended complaint on 12 December 2011. On 4 November 2011, the North Carolina State Conference of Branches of the NAACP, joined by three organizations and forty-six individuals, filed a complaint seeking similar relief. These plaintiffs filed an amended complaint on 9 December 2011. Following the filing of the original complaints, then-Chief Justice Sarah Parker of the Supreme Court of North Carolina appointed a panel of three superior court judges to hear these actions, pursuant to N.C.G.S. § 1-267.1. On 19 December 2011, the three-judge panel consolidated both cases for all purposes.

Plaintiffs argue that the redistricting violated their federal and state equal protection rights as well as the state constitution's Whole County Provision. Underlying all of plaintiffs' complaints is the implicit argument that the Supreme Court incorrectly decided *Strickland* and that the General Assembly impermissibly utilized a fifty percent plus one black voting age population in the challenged VRA districts.

On 6 February 2012, the three-judge panel allowed in part and denied in part defendants' motion to dismiss. Plaintiffs filed a motion for partial summary judgment on 5 October 2012, and defendants filed a motion for summary judgment on 10 December 2012. The three-judge panel heard arguments on these motions on 25 and 26 February 2013.

While a ruling on the motions for summary judgment was pending, the three-judge panel issued an order determining that genuine issues of material fact existed as to two issues that could not be resolved by

6. Because a computer software glitch caused the State's initial submission to the Department of Justice to be incomplete, the General Assembly enacted curative statutes on 7 November 2011. These statutes were precleared on 8 December 2011.

summary judgment.[7] The panel conducted a trial on these two issues on 4 and 5 June 2013. On 8 July 2013, the three-judge panel issued its unanimous Judgment and Memorandum of Decision denying plaintiffs' motion for partial summary judgment and entering judgment for defendants on all claims asserted by plaintiffs, including those related to the issues addressed at trial.

In rendering its ruling, the three-judge panel conducted a district-by-district review of the constitutionality of each challenged district. After considering thousands of pages of evidence and testimony from numerous witnesses, the panel produced a detailed, one hundred seventy-one page document setting out its findings of fact and conclusions of law. In upholding the General Assembly's redistricting plans, the panel recognized that:

> Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . .
>
> Political losses and partisan disadvantage are not the proper subject for judicial review. . . . Rather, the role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights – not their political rights or preferences – are secure.

The three-judge panel first considered plaintiffs' claims that the General Assembly's redistricting plans violated the equal protection guarantees of the United States and North Carolina Constitutions. The panel's first step was to determine which level of scrutiny to apply to each challenged district. It recognized that while generally "*all* racial classifications [imposed by a government] . . . must be analyzed by a reviewing court under strict scrutiny," *see Johnson v. California*, 543 U.S. 499, 505, 125 S. Ct. 1141, 1146, 160 L. Ed. 2d 949, 958 (2005)

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7. The two issues separated for trial were:

> A. Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged Voting Rights Act ("VRA") district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?
>
> B. For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?

(alterations in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158, 182 (1995)), mere "consciousness of race" is insufficient to trigger strict scrutiny in redistricting cases, *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 1951, 135 L. Ed. 2d 248, 257 (1996) (plurality). Instead, the three-judge panel explained that strict scrutiny is only appropriate when plaintiffs establish that "all other legislative districting principles were subordinated to race and that race was the predominant factor motivating the legislature's redistricting decision." *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 425 (E.D.N.C. 2000) (citing, *inter alia*, *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (*Cromartie II*).

The three-judge panel determined that twenty-six[8] of the thirty districts challenged by plaintiffs were created by the General Assembly to be VRA districts. The General Assembly intended to draw each of these districts so as to include at least fifty percent Total Black Voting Age Population (TBVAP). The three-judge panel concluded that, "even though legislative intent may have been remedial and the districts may have been drawn to conform with federal and state law," these VRA districts were "predominantly determined by a racial objective." Therefore, the three-judge panel determined that strict scrutiny was the appropriate level of review for these twenty-six VRA districts. The panel acknowledged, however, "that a persuasive argument can be made that compliance with the VRA is but one of several competing redistricting criteria balanced by the General Assembly and that a lesser standard of review might be appropriate." Nonetheless, the three-judge panel employed strict scrutiny because that standard provides a "convenient and systematic roadmap for judicial review," and because, if the plans survive strict scrutiny, in which the evidence is considered in a light most favorable to the non-prevailing party, then the plans would necessarily survive a lesser level of scrutiny, such as rational basis review.

The three-judge panel made specific findings of fact for each of the twenty-six VRA districts. Based on its findings, the three-judge panel concluded that the twenty-six VRA districts survive strict scrutiny because they were narrowly tailored to achieve a compelling governmental interest in "avoiding *future* liability under § 2 of the VRA and ensuring *future*

8. The twenty-six districts are: Senate Districts 4, 5, 14, 20, 21, 28, 38, and 40; House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 48, 57, 99, 102, 106, and 107; and Congressional District 1.

preclearance of the redistricting plans under § 5 of the VRA." *See Shaw v. Hunt*, 517 U.S. 899, 915-16, 116 S. Ct. 1894, 1905-06, 135 L. Ed. 2d 207, 225-26 (1996) (*Shaw II*).

The three-judge panel concluded that avoiding section 2 liability was a compelling governmental interest because, based upon the panel's exhaustive review of the entire record, "the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina," *see Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), "and that, based upon the totality of the circumstances, VRA districts were required to remedy against vote dilution."[9] In considering whether compliance with section 5 provided a compelling governmental interest, the three-judge panel explained that "the newly-enacted plan may not undo or defeat rights afforded by the most recent legally enforceable redistricting plan in force or effect in the covered jurisdiction (the 'benchmark' plan)." *See Riley v. Kennedy*, 553 U.S. 406, 128 S. Ct. 1970, 170 L. Ed. 2d 837 (2008) (cited by the panel in support of this statement). Because "the General Assembly had a strong basis in evidence to conclude that [its plans] must be precleared" under section 5, the three-judge panel determined that preclearance under section 5 provided "a compelling governmental interest."

The three-judge panel next concluded that each of the twenty-six VRA districts was narrowly tailored to avoid section 2 liability and to ensure section 5 preclearance. *See Shaw I*, 509 U.S. at 645, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534 (quoted by the panel and providing that in responding to the compelling interests in complying with sections 2 and 5, the General Assembly is not granted "*carte blanche* to engage in racial gerrymandering"). The panel recognized "that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests." *Vera*, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268.

First, the unanimous panel found that the enacted plans do not contain a greater number of VRA districts than are reasonably necessary to comply with the VRA because "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably

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9. The three-judge panel noted that the Supreme Court has required state legislatures to present a strong basis in the record of the three *Gingles* preconditions, but it has never imposed the "totality of the circumstances" requirement upon a state legislature. Nonetheless, in its thorough and exhaustive review of the record, the three-judge panel considered both requirements in its analysis.

necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA." *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438, 126 S. Ct. 2594, 2621, 165 L. Ed. 2d 609, 643-44 (2006) (*LULAC*); *Shaw II*, 517 U.S. at 915-16, 116 S. Ct. at 1905-06, 135 L. Ed. 2d at 225-26; *Johnson v. De Grandy*, 512 U.S. 997, 1000, 114 S. Ct. 2647, 2651, 129 L. Ed. 2d 775, 784 (1994) ("[N]o violation of § 2 can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population.").

Second, the panel found that the General Assembly did not unnecessarily "pack" VRA districts with black voters when it endeavored to create all VRA districts with at least fifty percent TBVAP in order to avoid liability under section 2. *See Strickland*, 556 U.S. at 13, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 (plurality) (opinion of Kennedy, J.) (stating that compliance with section 2 allows creating majority-minority districts that contain "a numerical, working majority of the voting age population" of a specific minority group and that it does not mandate creating or preserving crossover districts). The three-judge panel explained that under *Strickland*, "the State must be afforded the leeway to avail itself of the 'bright line rule' and create majority-minority districts, rather than cross-over districts, in those areas where there is a sufficiently large and geographically compact minority population and racial polarization exist[s]." As a result, the three-judge panel found that, "notwithstanding the racial classification inherent in the creation of >50% TBVAP VRA districts, the Enacted Plans substantially address the threat of anticipated § 2 liability and challenges to preclearance under § 5 of the VRA."

Third, the three-judge panel heard evidence on the following issue:

> Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged VRA district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?

Based on this evidence the panel made numerous detailed findings of fact, including one hundred eighty-eight findings on this issue set out in Appendix A of its judgment. The three-judge panel conducted an individualized analysis of each of the VRA districts, setting out how racially polarized voting was found in the locales. For example, the court noted

that a study conducted by Thomas Brunell, Ph.D., found "statistically significant racially polarized voting" in fifty out of fifty-one counties examined.[10] The three-judge panel then determined that "the General Assembly had a strong basis in evidence for concluding that [ ] each of the VRA districts in the Enacted Plans were placed in a location that was reasonably necessary to protect the State from anticipated liability under" sections 2 and 5 of the VRA.

Finally, the three-judge panel found that the VRA districts are sufficiently compact and regular in shape to meet the requirement that they be narrowly tailored. Quoting Justice Kennedy, the panel stated: " 'Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one,' provided that the bizarre shapes are not 'attributable to race-based districting unjustified by a compelling interest.' " *Vera*, 517 U.S. at 999, 116 S. Ct. at 1972, 135 L. Ed. 2d at 284 (Kennedy, J., concurring). The three-judge panel further found that plaintiffs' retained expert testified that the shape of a district is irrelevant, as are traditional notions of communities of interest.

Ultimately, the three-judge panel concluded that plaintiffs failed to produce alternative plans that (1) contain VRA districts in rough proportion to the black population in North Carolina, (2) comply with the General Assembly's decision, as supported by *Strickland*, to populate each VRA district with more than fifty percent TBVAP, or (3) comply with the state constitution's Whole County Provision.

Accordingly, the three-judge panel concluded that

> based upon the law and the undisputed facts, and allowing for the limited degree of leeway that permits the General Assembly to exercise political discretion in its reasonable efforts to address compelling governmental interests, the trial court finds that the General Assembly had a strong basis in evidence for concluding that the VRA districts in the Enacted Plans, as drawn, were reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA.

Because it found that the twenty-six VRA districts were narrowly tailored to achieve a compelling governmental interest, the three-judge

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10. There was insufficient information for Dr. Brunell to determine whether racially polarized voting occurred in Camden County.

panel concluded that these districts survive strict scrutiny. Alternatively, the panel noted "that under a lesser standard of review, such as a rational relationship test, the creation of the VRA districts as drawn was supported by a number of rational bases."

Next, the three-judge panel considered the constitutionality of the four remaining challenged districts, which were non-VRA districts.[11] The panel explained that if these non-VRA districts were "unexplainable on grounds other than race" and "the legislature neglected all traditional redistricting criteria such as compactness, contiguity, respect for political subdivisions and incumbency protection," then strict scrutiny would apply. *See id.* at 976, 116 S. Ct. at 1959-60, 135 L. Ed. 2d at 268 (plurality). Otherwise, if the legislature was not motivated predominantly by race in drawing these four districts, the three-judge panel must apply rational basis review. The panel stated that whether race was the General Assembly's predominant motive is a factual question. *See Hunt v. Cromartie*, 526 U.S. 541, 549, 119 S. Ct. 1545, 1550, 143 L. Ed. 2d 731, 740 (1999) (*Cromartie I*) (citing *Shaw II*, 517 U.S. at 905, 116 S. Ct. at 1900, 135 L. Ed. 2d at 218-19). Thus, the three-judge panel held a trial to determine the following issue: "For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?" Although Senate District 31 and House District 51 were not challenged by plaintiffs as racial gerrymanders, the three-judge panel heard evidence on these two districts as well because they are neighboring districts that are part of the same contiguous-county grouping required under the North Carolina Constitution's Whole County Provision. Therefore, these two unchallenged districts are necessarily intertwined with those that were challenged, making consideration of the motivation for the creation of each unchallenged district relevant to a determination of the motivation for the creation of the counterparts, the challenged districts.

As it did for the twenty-six VRA districts, based upon the evidence received, the three-judge panel made specific findings of fact as to each non-VRA district, including Senate District 31 and House District 51. After conducting a detailed, district-by-district analysis, the panel made numerous specific findings of fact on whether race was the General Assembly's predominant motive in drawing these districts.

11. The non-VRA districts were Senate District 32, House District 54, and Congressional Districts 4 and 12.

The three-judge panel found, in addition to complying with federal and state law and applying nonracial traditional redistricting criteria, the General Assembly desired to create districts "more competitive for Republican candidates." The panel noted the "undisputed" fact "that in North Carolina, racial identification correlates highly with political affiliation." But, the goal to create State House and Senate Districts more competitive for Republicans could only be realized while following the requirements of the state constitution's Whole County Provision. Thus, while the three-judge panel recognized the General Assembly's desire "to equalize population among the districts," for state redistricting purposes, this finding must be viewed in the context of the Whole County Provision requirement.

Based upon its findings, the three-judge panel concluded that rational basis review was the appropriate level of scrutiny for each of the non-VRA districts and that "the General Assembly has articulated a reasonably conceivable state of facts, other than a racial motivation, that provides a rational basis for creating the non-VRA districts." Moreover, the three-judge panel determined that plaintiffs failed to proffer, as required by *Cromartie II*, "any alternative redistricting plans that show that the General Assembly could have met its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *See Cromartie II*, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Accordingly, the three-judge panel concluded that plaintiffs' racial gerrymandering claims failed.

The three-judge panel next addressed plaintiffs' claim that the Senate and House plans violated the Whole County Provision of the North Carolina Constitution. The panel concluded that the enacted plans conform to the Whole County Provision, as interpreted and applied by this Court in *Stephenson I* and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), and that plaintiffs' alternative proposed plans failed to comport with the Whole County Provision.

Plaintiffs entered timely notice of appeal pursuant to N.C.G.S. § 120-2.5. On 19 December 2014, this Court affirmed the three-judge panel's decision, holding "that the General Assembly's enacted plans do not violate plaintiffs' constitutional rights." *Dickson*, 367 N.C. at 575, 766 S.E.2d at 260. Plaintiffs petitioned the Supreme Court for a writ of certiorari on 16 January 2015. On 25 March 2015, while plaintiffs' petition was pending, the Supreme Court issued its decision in *Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314. The Supreme Court subsequently vacated our decision and remanded the case to this Court for reconsideration in light of *Alabama*. *Dickson*, ___ U.S. ___, 135 S. Ct.

1843, 191 L. Ed. 2d 719. The parties filed briefs, and we heard oral arguments regarding the applicability of *Alabama* to this case.

[1] Our review of the three-judge panel's unanimous decision is limited. Though "[o]ur standard of review of an appeal from summary judgment is de novo," *In Re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), unchallenged findings of fact are binding on appeal, *see, e.g.*, *Keeter v. Town of Lake Lure*, 264 N.C. 252, 257, 141 S.E.2d 634, 638 (1965). Likewise, regarding issues tried by the panel, its findings of fact are binding on this Court if not challenged at trial or on appeal, *see e.g.*, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), or if supported by competent evidence found by the three-judge panel, *e.g.*, *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991). Conclusions of law are reviewed de novo to determine if they are supported by the findings of fact. *E.g.*, *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013). After a careful review of the *Alabama* decision and the record in this case, we conclude that the three-judge panel's Judgment and Memorandum of Decision complied with the standards articulated in *Alabama* as well as other pertinent federal and state laws.

II. Overview of *Alabama* and Its Impact Here

[2] Like the case before us, the *Alabama* case involved a challenge to the state legislature's redistricting plans following the 2010 decennial census. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1262-63, 191 L. Ed. 2d at 323-24. The Alabama Code requires the creation of a legislative committee known as the Permanent Legislative Committee on Reapportionment "to prepare for and develop a reapportionment plan for the state." Ala. Code 1975 § 29-2-50 to -51 (2015). Unlike North Carolina, where the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by this Court, the Alabama legislative committee adopted "guidelines for drawing the new district lines." *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1245 (2013), *vacated*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314. These guidelines provided that new districts should be drawn in a manner to achieve numerous traditional redistricting objectives, including compactness, not splitting counties or precincts, minimizing change, and protecting incumbents. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324; *Legislative Black Caucus*, 989 F. Supp. 2d at 1245. The guidelines acknowledged, however, "that not all of the redistricting goals could be accomplished," *Legislative Black Caucus*, 989 F. Supp. 2d at 1245, and the guidelines placed the greatest emphasis on two of these goals: (1) minimizing the extent to which

any district deviated by more than one percent from the theoretical precisely equal population ideal; and (2) avoiding retrogression under section 5 of the VRA by maintaining roughly the same black population percentage in existing majority-minority districts, *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. To achieve population equalization while avoiding retrogression, the legislature adjusted existing, underpopulated, majority-minority districts by adding massive numbers of minority voters. *Id.* at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. For example, to maintain a 72.75% black population in Senate District 26, the legislature added 15,785 individuals, all but 36 of whom are black. *Id.* at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324.

The plaintiffs in *Alabama* claimed that the legislature's new districts created "racial gerrymanders" that violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at ___, 135 S. Ct. at 1262, 191 L. Ed. 2d at 323. A federal district court panel ruled in favor of the State. *Id.* at ___, 135 S. Ct. at 1262, 191 L. Ed. 2d at 323. In vacating that decision and remanding the case for further proceedings, the Supreme Court identified four problems with the district court's ruling. *Id.* at ___, 135 S. Ct. at 1264, 191 L. Ed. 2d at 325.

First, the Supreme Court in *Alabama* held that the district court erred by considering the state "as a whole," rather than conducting a "district-by-district" analysis of the racial gerrymandering claims. *Id.* at ___, 135 S. Ct. at 1265-68, 191 L. Ed. 2d at 326-30. This ruling does not affect our case because North Carolina's three-judge panel conducted the required individualized, district-by-district analysis.

Second, the Supreme Court held that the district court erred in ruling that one of the plaintiffs lacked standing without giving that plaintiff an opportunity to prove that it had standing. *Id.* at ___, 135 S. Ct. at 1268-70, 191 L. Ed. 2d at 330-31. This is a fact-specific issue that has no relevance to or effect on our case.

Third, as previously noted, the Alabama legislative committee placed great emphasis on ensuring that no district deviated by more than one percent from the theoretical equal population ideal. The Supreme Court held that the district court improperly concluded that "[r]ace was not the predominant motivating factor" in the creation of any of the challenged districts because the court "placed in the balance, among other nonracial factors, legislative efforts to create districts of approximately equal population." *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 331. The Supreme Court observed that equal population goals might explain the number of persons placed in a district, but they do not address "*which*

persons were placed in *appropriately apportioned districts*." *Id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332. As a result, an equal population goal is not a factor "to be weighed against the use of race to determine whether race 'predominates' "; rather, equal population "is part of the redistricting background" that should be "taken as a given, when determining whether race, or other factors, predominate" in the creation of new districts. *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332. The Supreme Court concluded that "had the District Court treated equal population goals as background factors, it might have concluded that race was the predominant boundary-drawing consideration," *id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 333, given that the record contained "strong, perhaps overwhelming, evidence that race did predominate as a factor," *id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 333.

This portion of the *Alabama* decision supports our holding here. The legislative committee in Alabama adopted guidelines that included compliance with the federal one-person, one-vote standard. In contrast, North Carolina's constitutional equal population criteria are a component of and intertwined with the state constitution's Whole County Provision, as explained above. *See* N.C. Const. art. II, §§ 3(1), 5(1); *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397 (providing, for example, that for non-VRA counties that "cannot support at least one legislative district," or counties "having a non-VRA population pool which, if divided into [legislative] districts, would not comply with" one-person, one-vote requirements, the General Assembly should "combin[e] or group[ ] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard," and that "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping"). Unlike the situation in *Alabama*, the General Assembly here did not place special emphasis on compliance with federal one-person, one-vote standards; rather, equal population was a "background" criterion that entered into formulating the challenged congressional and state legislative districts in conjunction with meeting the Whole County Provision of the state constitution. Nevertheless, to ensure compliance with *Alabama*, we have carefully reviewed the record, the transcripts, and the three-judge panel's findings to ensure that federal population equalization is treated as a "background rule" in conducting the predominance test. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332-33. The three-judge panel's finding that race was a predominant factor in forming the VRA districts

is unaffected. In its predominance analysis of the non-VRA districts, the three-judge panel properly weighed the relevant facts and made its findings, and the findings support its conclusion that race was not the predominant factor in drawing these districts.

Last, in *Alabama* the Supreme Court held that the district court misinterpreted the requirements of section 5 of the VRA in finding that the challenged districts were "narrowly tailored" to satisfy strict scrutiny.[12] *Id.* at ___, 135 S. Ct. at 1272-74, 191 L. Ed. 2d at 334-36. The Court instructed that section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in order to avoid retrogression. *Id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 334 (pointing to evidence in the record reflecting Alabama's belief that section 5 "forbids, not just *substantial* reductions, but *any* reduction in the percentage of black inhabitants of a majority-minority district" (quoting *id.* at ___, 135 S. Ct. at 1289, 191 L. Ed. 2d at 337 (App. B))). Instead, "[section] 5 is satisfied if minority voters retain the ability to elect their preferred candidates." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 334. As an example, the Court explained that "Congress did not mandate that a 1% reduction in a 70% black population district would be necessarily retrogressive." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. The Court concluded that, in "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression," *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335, the district court failed to ask the right question with respect to narrow tailoring: "To what extent must [the legislature] preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" *Id.* at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336.

The three-judge panel's conclusion here that the twenty-six challenged VRA districts survive strict scrutiny is consistent with the Supreme Court's clarification of the section 5 narrow tailoring analysis. Our conclusion that the VRA districts are constitutional is not dependent on a section 5 analysis. Each of the challenged VRA districts subject to strict scrutiny was created because the State had a compelling interest in compliance with section 2, and each was narrowly tailored to accomplish that goal; therefore, each of the VRA districts is constitutional on

12. Because the Court expressly declined to "decide whether, given *Shelby County v. Holder* . . . , continued compliance with § 5 remains a compelling interest," *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336, it appears this portion of the *Alabama* decision impacts only the narrow tailoring prong of the strict scrutiny analysis.

the basis of a section 2 analysis alone. Regardless, as explained below, the Supreme Court and this Court have stated that the legislature's requirement that each of the challenged districts consist of a TBVAP exceeding fifty percent of the total voting age population in that district is permissible. *See Strickland*, 556 U.S. at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190. The TBVAP was not greater than necessary to avoid retrogression, while also avoiding liability under section 2, even considering the Supreme Court's warning against a "mechanical interpretation" of section 5. Therefore, the challenged VRA districts survive strict scrutiny under either a section 2 or section 5 analysis.

Significantly, the United States Supreme Court in *Alabama* did not modify its prior holding in *Strickland*, where it made clear that a state legislature may create majority-minority VRA districts with a fifty percent plus one TBVAP. *Id.* at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190. In the case *sub judice* plaintiffs persistently argue that the General Assembly must create crossover or coalition districts and that the General Assembly violated section 2 by drawing districts with a fifty percent plus one TBVAP. Essentially, plaintiffs argue that the Supreme Court wrongly decided *Strickland*, in which Justice Kennedy stated for the plurality that "[section] 2 does not require the creation of influence districts." *Id.* at 13, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 (citing *LULAC*, 548 U.S. at 445, 126 S. Ct. at 2625, 165 L. Ed. 2d at 648 (opinion of Kennedy, J.)). In fact, none of the alternative plans proposed by plaintiffs or supported by them complied with *Strickland*. Accordingly, plaintiffs' arguments implicitly premised upon revisiting the Supreme Court's decision in *Strickland* are without merit.

III. Plaintiffs' Federal Claims

[3] We now consider plaintiffs' claims brought under federal law. If a redistricting plan does not satisfy federal requirements, it fails even if it is consistent with the law of North Carolina. *See* U.S. Const. art. VI, § 2; N.C. Const. art. I, § 3. Nonetheless, as emphasized by *Stephenson I*, in making redistricting decisions, federal and state law must be read in harmony. 355 N.C. at 363, 562 S.E.2d at 384. Plaintiffs argued first to the three-judge panel, and now to us, that the redistricting plans violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because they impermissibly classify individuals based upon their race. In other words, plaintiffs contend that the redistricting plans constitute impermissible racial gerrymandering that has denied them equal protection under the law.

A. Levels of Scrutiny

A court considering allegations of racial gerrymandering first must determine the appropriate level of scrutiny. Strict scrutiny, the highest tier of review, applies "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) (citations omitted). "Race is unquestionably a 'suspect class,' " *Phelps v. Phelps*, 337 N.C. 344, 353, 446 S.E.2d 17, 23 (1994), and if a court finds that race is the "predominant, overriding factor" behind the General Assembly's plans, the plans must satisfy strict scrutiny to survive, *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782. "Under strict scrutiny [review], a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (citation omitted). If, on the other hand, the plans are not predominantly motivated by improper racial considerations, the court applies the rational basis test. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1, 12 (1992) ("[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification" satisfy rational basis review.). Under rational basis review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985) (citations omitted).

A party challenging a redistricting plan has the burden of establishing that race was the predominant motive behind the state legislature's action. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80. In *Miller* the Supreme Court stated that

> [t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined

> by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Id. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80 (quoting *Shaw I*, 509 U.S. at 647, 113 S. Ct. at 2827, 125 L. Ed. 2d at 529). In *Alabama* the Court clarified that federal "equal population" requirements cannot serve as a "traditional race-neutral districting principle[ ]" in the predominant motive analysis. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1270-71, 191 L. Ed. 2d at 332-33.

As a court considers which level of scrutiny is appropriate, it should be mindful of the Supreme Court's observation that "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.' " *Cromartie II*, 532 U.S. at 242, 121 S. Ct. at 1458, 149 L. Ed. 2d at 443 (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779). At least three factors lie behind this admonition. First, in light of the interplay detailed below between the Fourteenth Amendment, which virtually forbids consideration of race, and the VRA, which requires consideration of race, the Supreme Court has acknowledged that the existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Shaw I*, 509 U.S. at 646, 113 S. Ct. at 2826, 125 L. Ed. 2d at 528 ("[T]he legislature always is *aware* of race when it draws district lines . . . . That sort of race consciousness does not lead inevitably to impermissible race discrimination."). Second, the Supreme Court has recognized the importance of the states' own traditional districting principles, holding that states can adhere to them without being subject to strict scrutiny so long as those principles are not subordinated to race. *Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269. Finally, the Supreme Court has accepted that some degree of deference is due in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities. *Miller*, 515 U.S. at 915, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *Vera*, 517 U.S. at 1038, 116 S. Ct. at 1991, 135 L. Ed. 2d at 308 (Stevens, Ginsburg & Breyer,

JJ., dissenting) ("[I]n fashioning a reapportionment plan or in choosing among plans, a district court should not preempt the legislative task nor 'intrude upon state policy any more than necessary." (quoting *White v. Weiser*, 412 U.S. 783, 795, 93 S. Ct. 2348, 2355, 37 L. Ed. 2d 335, 346 (1973)); *see also Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 542 (E.D. Va. 2014) (recognizing that redistricting is "possibly 'the most difficult task a legislative body ever undertakes' " (quoting *Smith v. Beasley*, 946 F. Supp. 1174, 1207 (D.S.C. 1996))), *vacated and remanded*, *Cantor v. Personhuballah*, ___ U.S. ___, 135 S. Ct. 1699, 191 L. Ed. 2d 671 (2015) (mem.) (remanded for further consideration in light of *Alabama*, ___ U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015)).

A court's determination of the predominant motive underlying a redistricting plan is factual in nature. *Cromartie I*, 526 U.S. at 549, 119 S. Ct. at 1550, 143 L. Ed. 2d at 740 (citations omitted). Factual findings are binding on appeal if not challenged at trial or on appeal, *e.g.*, *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, or if supported by competent evidence found by the three-judge panel, *e.g.*, *In re Estate of Trogdon*, 330 N.C. at 147-48, 409 S.E.2d at 900. Conclusions of law are reviewed de novo. *E.g.*, *Cully's Motorcross Park*, 366 N.C. at 512, 742 S.E.2d at 786 (citation omitted). Here, before the three-judge panel, plaintiffs challenged thirty House, Senate, and Congressional Districts.[13] The three-judge panel concluded that the twenty-six VRA districts were predominantly motivated by race and thus subject to strict scrutiny review. The three-judge panel concluded that the remaining four challenged non-VRA districts were not predominantly motivated by race and thus were subject to rational basis review. We consider each group in turn.

B. The VRA Districts

We turn first to the twenty-six state legislative VRA districts that the three-judge panel subjected to strict scrutiny. As to these districts, the panel reached two significant conclusions. First, the panel unanimously found that "it is undisputed that the General Assembly intended to create 26 of the challenged districts to be 'Voting Rights Act districts' " that would include a TBVAP of at least fifty percent. This unchallenged finding of fact is binding on us. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The three-judge panel then reached a second conclusion that drawing VRA districts "necessarily requires the drafters of districts to classify residents by race," that "the shape, location and racial composition of

13. It is unclear if plaintiffs continue to challenge all thirty districts. In their brief filed subsequent to the *Alabama* remand, plaintiffs only specifically question two of the non-VRA districts. Nonetheless, we proceed with our analysis as if all thirty districts are challenged.

each VRA district was predominantly determined by a racial objective," and that the process of creating such districts resulted in "a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." While the three-judge panel recognized that a "persuasive argument" could be made that other non-racial factors could have predominated, it chose to apply strict scrutiny because (1) strict scrutiny provides a "convenient and systematic roadmap for judicial review," and (2) if the plans withstand strict scrutiny, when the evidence is considered in a light most favorable to plaintiffs, then they would necessarily withstand a lesser level of scrutiny, such as rational basis review. Although the three-judge panel's determination that race predominated is neither purely factual nor purely legal, we are mindful that federal precedent cited above instructs that the General Assembly's consideration of race to the degree necessary to comply with section 2 does not rise to the level of a "predominant motive" as a matter of course. Accordingly, before reviewing the three-judge panel's application of strict scrutiny, we believe it necessary to review its conclusion as to the General Assembly's predominant motive.

1. Predominant Motive

The challenges faced by the General Assembly while redistricting are easy to express but persistently difficult to resolve. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, essentially prohibits consideration of race during redistricting. U.S. Const. amend. XIV, § 1. Yet the Voting Rights Act, passed "to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude,' " *Voinovich v. Quilter*, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L. Ed. 2d 500, 510 (1993) (alteration in original) (citations omitted), specifically requires consideration of race. For instance, section 2 "prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.' " *Id.* at 152, 113 S. Ct. at 1155, 122 L. Ed. 2d at 510 (alteration in original) (quoting 42 U.S.C. § 1973(a) (effective 1 September 2014, recodified as 52 U.S.C.S. § 10301(a) (LexisNexis 2014))). At the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution, including the "background rule" of plus or minus five percent as required by our constitution. *Stephenson I*, 355 N.C. at 382-84, 562 S.E.2d at 395-97. Moreover, the Supreme Court has acknowledged other legitimate considerations, such as compactness,

contiguity, and respect for political subdivisions, *see Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 780; *Shaw I*, 509 U.S. at 646, 113 S. Ct. at 2826, 125 L. Ed. 2d at 528; *Reynolds v. Sims*, 377 U.S. 533, 578, 84 S. Ct. 1362, 1390, 12 L. Ed. 2d 506, 537 (1964); political advantage, *see Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741; and accommodation of incumbents, *see Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663, 77 L. Ed. 2d 133, 147 (1983). Thus, "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779.

Despite this cat's cradle of factors facing the General Assembly, the three-judge panel found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming the twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, we do not believe that this concession established that race *ipso facto* was the predominant motive driving the General Assembly. The three-judge panel assumed that because federal law requires racial considerations, race then predominates. Yet, it appears from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se. In other words, race was only a factor insomuch as required by federal law. Because of the three-judge panel's truncated findings of fact on this issue, we do not know which additional factors may have influenced the creation and shape of these twenty-six districts and the extent of any such influence. As a result, we do not know whether race fairly can be described as the predominant factor in the formation of these districts and whether, in turn, strict scrutiny was the appropriate level of scrutiny. Moreover, in future cases such an assumption—that deliberate creation of VRA-compliant districts equates to race as the predominant motive in creating the districts—may well shortcut the fact-finding process at which trial courts excel, resulting in scanty records on appeal. Accordingly, we hold that the three-judge panel erred in concluding as a matter of law that, just because the twenty-six districts were created to be VRA-compliant, the General Assembly was motivated predominantly by race.

Nonetheless, this error is not fatal and does not invalidate the three-judge panel's decision. First, the panel itself concluded that, "[t]o the extent that the most exacting level of review, strict scrutiny, is not warranted . . . [,] under a lesser standard of review, such as a

rational relationship test, the creation of the VRA districts as drawn was supported by a number of rational bases." Further, a similar scenario occurred in *Cromartie I*, in which the courts reviewed the General Assembly's creation of North Carolina's Twelfth Congressional District. 526 U.S. at 543, 119 S. Ct. at 1547, 143 L. Ed. 2d at 736. The plaintiffs filed suit in federal court, arguing that the district was the result of an unconstitutional racial gerrymander. *Id.* at 544-45, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The three-judge panel of the United States District Court heard arguments pertaining to pending motions, but did not conduct an evidentiary hearing. *Id.* at 545, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. The panel majority, finding that the General Assembly used race-driven criteria in drawing the district and that doing so violated the Equal Protection Clause of the Fourteenth Amendment, granted the plaintiffs' motion for summary judgment and entered an injunction. *Id.* at 545, 119 S. Ct. at 1548, 143 L. Ed. 2d at 737. On appeal, the Supreme Court reversed, finding that the General Assembly's motivation in drawing district lines is a factual question that, when contested, should not be resolved by summary judgment. *Id.* at 549, 553, 119 S. Ct. at 1550, 1552, 143 L. Ed. 2d at 739, 742.

The posture of the litigants here is distinguishable because plaintiffs, unlike their counterparts in *Cromartie I*, lost at summary judgment and are the appealing party; however, even if we were to follow *Cromartie I*'s lead and reverse, plaintiffs could gain nothing on remand. The basis for our reversal would be that the three-judge panel erred in applying strict scrutiny before making adequate findings of fact. As the panel noted in its Judgment, if defendants' plans survived strict scrutiny, they would surely survive a less rigorous review. On the other hand, if the three-judge panel on remand found facts and determined once more that strict scrutiny is proper, the panel has already conducted its analysis under that standard. If these plans survive strict scrutiny, they survive rational basis review.

2. Compelling Governmental Interest

We begin this analysis by considering the factors that defendants contend constitute a "compelling governmental interest." *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (citation omitted). Defendants argue that the General Assembly drafted the twenty-six districts both to avoid liability under section 2 of the VRA and to obtain preclearance under section 5 of the VRA by avoiding retrogression, which has been defined as "a change in voting procedures which would place the members of a racial or language minority group in a less favorable position than they had occupied before the change with respect to the

opportunity to vote effectively." *Id.* at 363-64, 562 S.E.2d at 385 (citations omitted). Defendants' brief acknowledges that three principles guided the General Assembly: (1) Compliance with the Whole County Provision of the Constitution of North Carolina, as set out in *Stephenson I* and *Stephenson II*; (2) Where possible, establishment of VRA districts having a TBVAP above fifty percent, in accord with *Pender County*; and (3) Exploration of "the possibility of establishing a sufficient number of VRA legislative districts to provide [black] voters with rough proportionality in the number of VRA districts in which they have a reasonable opportunity to elect their candidates of choice."

Although the Supreme Court has never held outright that compliance with section 2 or section 5 can be a compelling state interest, that Court has issued opinions that expressly assumed as much. To be specific, the Supreme Court in *Shaw II* assumed *arguendo* that compliance with section 2 could be a compelling state interest, 517 U.S. at 915, 116 S. Ct. at 1905, 135 L. Ed. 2d at 225, and adopted a similar approach in *Miller*, where the issue was the State's desire to comply with section 5 of the Voting Rights Act, 515 U.S. at 921, 115 S. Ct. at 2490-91, 132 L. Ed. 2d at 783. In addition, the Supreme Court has observed that "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269. The three-judge panel here, citing several federal cases addressing the issue, stated that "[i]n general, compliance with the Voting Rights Act can be a compelling governmental interest." Faced squarely with the issue, we agree with the three-judge panel. The Equal Protection Clause of the Fourteenth Amendment requires equal treatment regardless of race, while the Voting Rights Act requires consideration of race. Because a federal statute may not violate the Constitution of the United States, a State's efforts to comply with the Voting Rights Act create tension with the Fourteenth Amendment. An alleged violation of the Fourteenth Amendment based on race triggers strict scrutiny, mandating that the State demonstrate a compelling interest. Because the Supreme Court and the United States Congress have indicated without ambiguity that they expect states to comply with the Voting Rights Act, state laws passed for the purpose of complying with the Act must be capable of surviving strict scrutiny, indicating that such compliance is a compelling state interest.[14] This analysis applies equally to a State's efforts to comply with sections 2 and 5 of the Voting Rights Act.

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14. "If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause." *LULAC*, 548 U.S. at 518, 126 S. Ct. at 2667, 165 L. Ed. 2d at 694 (Scalia, J., Thomas, J., Roberts, C.J. & Alito, J., dissenting in part).

Moreover, the General Assembly's desire to comply with the Voting Rights Act is justifiable for other reasons. Holding elections is a core State function, fundamental in a democracy. Establishing voting districts is an essential component of holding elections. In doing so, a State is subject to federal mandates in addition to those found in the Voting Rights Act and the Fourteenth Amendment, such as the "one-person, one-vote" requirement. *Stephenson I*, 355 N.C. at 363-64, 383, 562 S.E.2d at 384-85, 397. A determination that the State does not have a compelling interest in complying with federal mandates would invite litigation by those claiming that the State could never satisfy the requirements of strict scrutiny, undermining the General Assembly's efforts to create stable districts between censuses and citizen expectations that existing election districts are valid. On a level no less practical, we also assume that North Carolina, and all states for that matter, would prefer to avoid the expense and delay resulting from litigation. Accordingly, we hold that compliance with sections 2 and 5 of the Voting Rights Act may be a compelling state interest.

We next consider whether compliance with either section 2 or section 5 constitutes a compelling state interest under the facts presented here. Those goals may reach the level of a compelling state interest if two conditions are satisfied. First, the General Assembly must have identified past or present discrimination with some specificity before it could turn to race-conscious relief. *Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504, 109 S. Ct. 706, 727, 102 L. Ed. 2d 854, 889 (1989)). Second, before acting, the General Assembly must also have "had 'a strong basis in evidence' " on which to premise a conclusion that the race-based remedial action was necessary. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277, 106 S. Ct. 1842, 1849, 90 L. Ed. 2d 260, 271 (1986) (plurality)).

a. Compelling Interest Under Section 2 of the Voting Rights Act

Before we turn our attention to consideration of individual districts, we consider the application of section 2 of the VRA in the instant case. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S. Ct. at 2764, 92 L. Ed. 2d at 44; *see* 52 U.S.C.S. §§ 10301-10702 (LexisNexis 2014). The question of voting discrimination *vel non*, including vote dilution, is determined by the totality of the circumstances. *Gingles*, 478 U.S. at 43-46, 106 S. Ct. at 2762-64, 92 L. Ed. 2d at 42-44 (discussing section

2(b) of the VRA, now codified at 52 U.S.C.S. § 10301(b)). Under *Gingles*, however, a reviewing court does not reach the totality of circumstances test unless the challenging party is able to establish three preconditions. *Id.* at 50-51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 46-47. First, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46. Second, the minority group must "show that it is politically cohesive." *Id.* at 51, 106 S. Ct. at 2766, 92 L. Ed. 2d at 47. Finally, the minority group must "be able to demonstrate that the majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S. Ct. at 2766-67, 92 L. Ed. 2d at 47. Although *Gingles* dealt with multi-member districts, the same preconditions must be met when a claim of vote dilution is made regarding a single-member district. *Growe v. Emison*, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 403-04 (1993); *see also De Grandy*, 512 U.S. at 1006-07, 114 S. Ct. at 2654-55, 129 L. Ed. 2d at 788.

Unlike cases such as *Gingles*, in which minority groups use section 2 as a sword to challenge districting legislation, here we are considering the General Assembly's use of section 2 as a shield. Defendants argue that, because the *Gingles* test considers race, the State has a compelling interest in preemptively factoring race into its redistricting process to ensure that its plans would survive a legal challenge brought under section 2. To establish that this state interest is legitimate, defendants must show a strong basis in evidence that the possibility of a section 2 violation existed at the time of the redistricting. *See Shaw II*, 517 U.S. at 910, 916, 116 S. Ct. at 1903, 1905-06, 135 L. Ed. 2d at 222, 225-26. But because this inquiry addresses only the possibility of a section 2 violation, and because a totality of the circumstances inquiry is by its nature fact-specific, defendants' evidence need only address "the three *Gingles* preconditions" to establish a compelling governmental interest. *See Vera*, 517 U.S. at 978, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269 (citing *Growe*, 507 U.S. at 40, 113 S. Ct. at 1084, 122 L. Ed. 2d at 403-04).

Thus, to establish a compelling interest in complying with section 2 when the redistricting plans were developed, the legislature at that time must have had a strong basis in evidence that the TBVAP in a geographically compact area was fifty percent plus one of the area's voting population. Such evidence would satisfy the first *Gingles* precondition. *Pender County*, 361 N.C. at 503, 649 S.E.2d at 372. In addition, a strong basis in evidence of racially polarized voting in that same geographical area would satisfy the second and third preconditions set out in *Gingles*. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637 (majority).

Against this background, we consider the three-judge panel's application of these standards in discerning whether defendants here could legitimately claim a compelling interest in complying with section 2.

The three-judge panel's decision included two extensive appendices. In the body of the Judgment and Memorandum, the panel described the legislative record that existed when the plans were enacted, then referred to Appendix A, where this information was presented in detail. Appendix A, titled "Findings of Fact Relevant to the Issue of Racial Polarization in Specific Locations where Voting Rights Act Districts were Placed in the Enacted Plans," is incorporated by reference into the three-judge panel's decision.

Appendix A is broken into three parts. Part I, titled "General Findings of Fact," opens with a summary of the background of the case, then notes results of recent elections. For instance, the three-judge panel observed that all black incumbents elected to the North Carolina General Assembly or the United States Congress in 2010 were elected in districts that were either majority black or majority-minority coalition districts. In addition, no black candidate elected in 2010 was elected from a majority white crossover district, and two black incumbent state senators running in majority white districts were defeated in that election. No black candidate for the United States Congress was elected in a majority white district between 1992 and 2010, while from 2004 through 2010, no black candidate was elected to office in a statewide partisan election.

In this Part I of Appendix A, the court also considered an academic study of racially polarized voting conducted by Ray Block, Jr., Ph.D. This study, prepared for the Southern Coalition of Social Justice, is titled "Racially Polarized Voting in 2006, 2008, and 2010 in North Carolina State Legislative Contests." Dr. Block employed Justice Brennan's conclusion in *Gingles* that racially polarized voting occurs when there is a consistent relationship between the race of the voter and the way in which that person votes, and found that such a relationship existed in the areas examined. He added that he also found evidence that "majority-minority districts facilitate the election of [black] candidates." The court determined that Dr. Block's study provided "substantial evidence regarding the presence of racially polarized voting in almost all of the counties[15] in which the General Assembly enacted the 2011 VRA districts."

15. These counties were Beaufort, Bertie, Chowan, Craven, Cumberland, Durham, Edgecombe, Gates, Guilford, Granville, Greene, Halifax, Hertford, Hoke, Jones, Lenoir, Martin, Mecklenburg, Nash, Northampton, Pasquotank, Perquimans, Pitt, Robeson, Sampson, Scotland, Vance, Wake, Warren, Washington, Wayne, and Wilson.

Nevertheless, the three-judge panel observed that the North Carolina General Assembly identified a few limitations in Dr. Block's study. For instance, the study did not pinpoint the percentage of white voters in majority black or majority-minority districts who voted for the candidate of choice of black voters. In addition, his study could analyze a legislative election only when the black candidate had opposition. As a result, the General Assembly commissioned Dr. Brunell to prepare a supplementary report. Dr. Brunell's study, titled "Report on Racially Polarized Voting in North Carolina," examined the forty North Carolina counties covered by section 5 of the Voting Rights Act, plus Columbus, Duplin, Durham, Forsyth, Jones, Mecklenburg, Richmond, Sampson, Tyrrell, Wake, and Warren Counties. Dr. Brunell found "statistically significant racially polarized voting" in fifty of these fifty-one counties.[16]

The three-judge panel made additional findings of fact in Part I of Appendix A that we believe would be pertinent to a *Gingles* totality of circumstances test and that, by extension, indicate a strong basis in evidence that the *Gingles* preconditions existed. At the beginning of the redistricting process, the General Assembly noted that North Carolina had been ordered to create majority black districts as a remedy for section 2 violations in Bertie, Chowan, Edgecombe, Forsyth, Gates, Halifax, Martin, Mecklenburg, Nash, Northampton, Wake, Washington, and Wilson Counties. *See Gingles v. Edmisten*, 590 F. Supp. 345, 365-66, 376 (E.D.N.C. 1984), *aff'd in part*, *rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. at 80, 106 S. Ct. at 2782, 92 L. Ed. 2d at 65. Faculty at the North Carolina School of Government advised the chairs of the General Assembly's redistricting committees that North Carolina is still bound by the holding in *Gingles*. In addition, the United States District Court noted on remand from the decision in *Cromartie I* that the parties there had stipulated that legally significant racially polarized voting was present in North Carolina's First Congressional District. *Cromartie v. Hunt*, 133 F. Supp. 2d at 422-23. The three-judge panel found that consideration of race in the construction of the First District was reasonably necessary to protect the State from liability under the Voting Rights Act. *Id.* at 423. This finding by the three-judge panel was not appealed and thus is not affected by the holding in *Cromartie II* and remains valid.

In addition, the three-judge panel found as fact that the documents submitted by plaintiffs included a law review article prepared by an attorney for the North Carolina NAACP. Anita S. Earls et al., *Voting Rights in North Carolina 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 577 (2008).

16. There was insufficient information for Dr. Brunell to determine whether racially polarized voting occurred in Camden County.

The court observed that this article "also provided evidence of racially polarized voting as alleged or established in voting rights lawsuits filed in many of the counties[17] in which 2011 VRA districts were enacted." The court added as a finding of fact that no witness testified that racial polarization had disappeared either statewide or in those areas in which the General Assembly previously had created VRA districts.

In Part II of Appendix A, the three-judge panel conducted an individualized analysis of each of the VRA districts created by the General Assembly in 2011. Generally, each finding of fact relates to one district. While four of the findings of fact deal with more than one district, in each such instance those districts are situated within the same county. Each finding of fact in this Part II follows a similar pattern. The finding of fact begins with data that explain how the information in Part I of the Appendix applies to the district under examination. The finding of fact lists the counties included in the district, along with that district's TBVAP. This information is pertinent to the first *Gingles* precondition, that the minority group is able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *See Pender County*, 361 N.C. at 503, 649 S.E.2d at 372 (discussing *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766, 92 L. Ed. 2d at 46). Subsequent sections of each finding of fact set out how racially polarized voting was found in many of the counties contained within the district or districts, under either Dr. Block's analysis or Dr. Brunell's analysis, or both. This information is pertinent to both the second and third *Gingles* preconditions: that the minority group is politically cohesive and that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Additional information in the findings of fact conveys how many counties within the district or districts are affected by *Gingles* or *Cromartie II*, or both. This information is useful in determining the totality of circumstances.

Plaintiffs have not challenged any of the three-judge panel's findings of fact relating to the twenty-six VRA districts, and thus those findings are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The three-judge panel's findings of fact indicate that each of the challenged districts had a TBVAP exceeding fifty percent, thus satisfying the first *Gingles* precondition. *See Pender County*, 361 N.C. at 503, 649 S.E.2d

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17. The article included references to cases involving the following counties: Beaufort, Bladen, Cumberland, Duplin, Forsyth, Franklin, Granville, Halifax, Lenoir, Montgomery, Pasquotank, Person, Pitt, Richmond, Sampson, Scotland, Tyrrell, Vance, Wayne, and Washington.

at 372. The facts found by the three-judge panel also indicate that the maps are sufficient to satisfy the second and third *Gingles* preconditions, as each district demonstrates racially polarized voting according to Dr. Brunell's analysis. *See LULAC*, 548 U.S. at 427, 126 S. Ct. at 2615, 165 L. Ed. 2d at 637. Although Dr. Block's analysis did not cover some of the counties in some of the challenged districts, they reached the same conclusions where the two studies overlapped.

Moreover, the three-judge panel made additional findings of fact, recited above, that would be relevant to the *Gingles* totality of circumstances test for twenty-two of the challenged VRA districts.[18] Specifically, of the twenty-six VRA districts challenged here, fifteen include counties lying within the area where the *Gingles* court found section 2 violations; nine include counties lying within the area which the parties in the *Cromartie* litigation stipulated to have racially polarized voting; and thirteen include counties that were subject to various section 2 lawsuits filed between 1982 and 2006 in which plaintiffs alleged or established racially polarized voting.[19] While we assume from the Supreme Court's language in *Vera*, 517 U.S. at 978, 116 S. Ct. at 1960-61, 135 L. Ed. 2d at 269, that satisfaction of the *Gingles* preconditions is sufficient to trigger a State's compelling interest in avoiding section 2 liability, we believe that this additional evidence, while pertaining to only some of the covered districts, is consistent with and reinforces the three-judge panel's conclusions of law.

Based upon the totality of this evidence, we are satisfied that the three-judge panel correctly found that the General Assembly identified past or present discrimination with sufficient specificity to justify the creation of VRA districts in order to avoid section 2 liability. *See Shaw II*, 517 U.S. at 909, 116 S. Ct. at 1902, 135 L. Ed. 2d at 221. In addition, we see that the General Assembly, before making its redistricting decisions, had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary for each VRA district. *Id.* at 910, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222. Accordingly, we conclude that the three-judge panel's findings of fact as to these VRA districts support its conclusion of law that defendants established a compelling state interest in creating districts that would avoid liability under section 2 of the Voting Rights Act. While avoiding liability under section 2

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18. The districts not affected by this evidence are Senate 28, House 29, House 31, and House 57.

19. The only districts not affected by at least one of these three pieces of evidence are Senate 28, House 29, House 31, and House 57.

is sufficient to establish a compelling state interest, we now turn to the State's additional desire to comply with section 5.

b. Compelling Interest Under Section 5 of the Voting Rights Act

As noted above, forty of North Carolina's one hundred counties were covered by section 5 at the time of redistricting. This section, which prevents retrogression, forbids "[a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." 52 U.S.C.S. § 10304(b).[20] Section 5 requires preclearance, either by the USDOJ or by a three-judge panel of the United States District Court for the District of Columbia, of any election procedure that is different from that in force on the relevant coverage date. *See Perry v. Perez*, ___ U.S. ___, ___, 132 S. Ct. 934, 939, 181 L. Ed. 2d 900, 904 (2012) (per curiam) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S 193, 198, 129 S. Ct. 2504, 2509, 174 L. Ed. 2d 140, 147 (2009)). The Supreme Court has left no doubt, however, that in fashioning its redistricting plans, a State must comply with the substantive requirements of section 5, not merely obtain preclearance from the Department of Justice. *Miller*, 515 U.S. at 922, 115 S. Ct. at 2491, 132 L. Ed. 2d at 783. As the Supreme Court intimated in *Miller*, the Department of Justice is not infallible, so courts have "an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.* at 922, 115 S. Ct. at 2491, 132 L. Ed. 2d at 783.

We concluded above that compliance with section 5 was a compelling state interest at the time the plan was adopted. Turning then to the facts of this case, we take into account the evidence recited above in our discussion regarding the State's concern about possible section 2 liability. In addition, the appendices to the three-judge panel's Judgment and Memorandum of Decision indicate that all of North Carolina Senate Districts 5, 21, and 28, and all of North Carolina House Districts 5, 7, 12, 24, 42, and 57 are in counties covered by section 5. Also, section 5 covers most of the territory contained in Congressional District 1, Senate Districts 4 and 20, and House Districts 21, 32, and 48. Moreover, all of the

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20. In light of *Shelby County v. Holder*, in which the Supreme Court declared section 4(b)'s "coverage formula" unconstitutional, this statute no longer applies in North Carolina. ___ U.S. ___, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). Because *Shelby County* was decided after the General Assembly enacted the current redistricting plans, however, section 5 is still relevant to our analysis in this case.

twenty-six challenged districts contain areas that previously have been part of majority-minority districts. As a result of their connection with counties covered under section 5, these districts may become subject to nonretrogression analysis. Accordingly, we conclude from the totality of the evidence that a history of discrimination justified the General Assembly's concern about retrogression and compliance with section 5. We further conclude that the General Assembly had a strong basis in evidence on which to reach a conclusion that race-based remedial action was necessary.

3. Narrow Tailoring

Having determined that defendants had a compelling interest both in avoiding section 2 liability and in avoiding retrogression under section 5, we now consider whether the redistricting was sufficiently narrowly tailored to advance those state interests as to the twenty-six districts created to comply with the Voting Rights Act. *See Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393.

a. Narrow Tailoring Under Section 2 of the Voting Rights Act

In the context of redistricting,

> the "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests [as VRA compliance]. If the State has a "strong basis in evidence" for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," it satisfies strict scrutiny.

Vera, 517 U.S. at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 268 (internal citations omitted). Thus, while a State does not have a free hand when crafting districts with the intent of avoiding section 2 liability, the Supreme Court has acknowledged that "[a] § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.' " *Id.* at 977, 116 S. Ct. at 1960, 135 L. Ed. 2d at 269.

As discussed above, the three-judge panel found that the General Assembly designed each of the challenged districts to consist of a TBVAP exceeding fifty percent of the total voting age population in that district. The Supreme Court and this Court have held that doing so is permissible as a method of addressing potential liability under section 2.

Strickland, 556 U.S. at 19-20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 187; *Pender County*, 361 N.C. at 503, 649 S.E.2d at 372. Unlike redistricting plans that have been faulted for setting arbitrary thresholds for TBVAP, *see, e.g.*, *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996) (order declaring certain majority-minority districts required to have at least 55% TBVAP unconstitutional), the target of fifty percent plus one of the TBVAP chosen by North Carolina's General Assembly is consistent with the requirements of the first *Gingles* precondition. *See Strickland*, 556 U.S. at 19-20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 187 ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). Nevertheless, because section 2 limits the use of race in creating remedial districts by allowing race to be considered only to the extent "reasonably necessary" for compliance, the question arises whether the percentages of TBVAP in each of North Carolina's challenged districts are higher than "reasonably necessary" to avoid the risk of vote dilution. *See Vera*, 517 U.S. at 979, 116 S. Ct. at 1961, 135 L. Ed. 2d at 269.

The TBVAP percentage ranges from a low of 50.45% to a high of 57.33% in the twenty-six districts in question; however, the *average* TBVAP of the challenged districts is only 52.28%. Twenty-one of the twenty-six districts have TBVAPs of less than 53%, and only two of these districts, Senate District 28 and House District 24, exceed 55% TBVAP. We are mindful that a host of other factors were considered in addition to race, such as the Whole County Provision of the Constitution of North Carolina, protection of incumbents, and partisan considerations, and these factors were considered against a backdrop of the state constitutional requirement of plus or minus five percent population deviation. As a result, we are satisfied that these districts are sufficiently narrowly tailored. They do not classify individuals based upon race to an extent greater than reasonably necessary to comply with section 2 of the VRA, while simultaneously taking into account traditional districting principles.

Plaintiffs argue that creating districts with a TBVAP percentage exceeding fifty percent constitutes impermissible racial packing, citing *id.* at 983, 116 S. Ct. at 1963, 135 L. Ed. 2d at 272; *Missouri v. Jenkins*, 515 U.S. 70, 88, 115 S. Ct. 2038, 2049, 132 L. Ed. 2d 63, 80 (1995); and *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534. Plaintiffs also argue that districts with a TBVAP exceeding fifty percent are not automatically necessary because minority voters in crossover and coalition districts have elected candidates of their choice where the TBVAP was between forty and fifty percent. This Court previously has considered,

but declined to adopt, similar arguments. *Pender County*, 361 N.C. at 502-04, 649 S.E.2d at 371-73. We concluded in *Pender County* that applying a bright line rule—that the presence of more than fifty percent of the TBVAP satisfied the first *Gingles* prong—was logical and gave the General Assembly "a safe harbor for the redistricting process." *Id.* at 505, 649 S.E.2d at 373; *see Strickland*, 556 U.S. at 13, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 ("This Court has held that § 2 does not require the creation of influence districts." (citation omitted)).

Although the burden is upon the State under strict scrutiny, the parties challenging the redistricting must also make a showing.

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Cromartie II, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453. Here, when the evidence is undisputed that racial identification correlates highly with party affiliation, plaintiffs have failed to meet this obligation. The General Assembly's plans fall within the safe harbor provisions of *Pender County* while respecting, to the extent possible, the Whole County Provision, as mandated by *Stephenson I*. In contrast, plaintiffs' proposals would effectively invite the type of litigation over section 2 claims envisioned in *Pender County*, *see* 361 N.C. at 505-06, 649 S.E.2d at 373, while failing to provide for the legitimate nonracial political goals pursued by the General Assembly in its plans.

We are aware of the Supreme Court's warning that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Strickland*, 556 U.S. at 24, 129 S. Ct. at 1249, 173 L. Ed. 2d at 190 (citations omitted). In addition, we acknowledge the Supreme Court's caution in *Alabama* against a "mechanical interpretation" of the VRA. *Alabama*, ___ U.S. at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. In addressing these concerns, we note that the legislature adopted a TBVAP threshold of fifty percent plus one, a baseline number that allowed for flexibility within each

district. The average TBVAP in the twenty-six VRA districts is 52.28% of the total voting age population, and no district's TBVAP is higher than 57.33%. This figure indicates that minority voters were moved out of other districts only to the extent necessary to meet *Pender County*'s safe harbor provision, while simultaneously pursuing other legitimate nonracial political goals, including those mentioned above. Unlike in *Alabama*, where it was "difficult to explain just why . . . maintain[ing] the black population at 70% is 'narrowly tailored' to" ensure that the minority community can maintain its ability to elect its candidate of choice, *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335, the TBVAP here was well within a reasonable range to ensure that a section 2 district was drawn where a minority community was actually a majority of the population. Where racial identification correlates highly with party affiliation, placing additional Democratic voters in districts that already vote Democratic is not forbidden as long as the motivation for doing so is not primarily racial. *See Cromartie I*, 526 U.S. at 551-52, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741; *see also Strickland*, 556 U.S. at 20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 188 ("Section 2 does not guarantee minority voters an electoral advantage."). Accordingly, we conclude that plaintiffs have failed to demonstrate improper packing or gerrymandering based upon race and that the districts are narrowly tailored to comply with section 2.

b. Narrow Tailoring Under Section 5 of the Voting Rights Act

We first note that, as discussed above, the twenty-six challenged VRA districts survive strict scrutiny on the basis of section 2 alone. Nevertheless, we conclude that the challenged VRA districts are also narrowly tailored to advance the State's compelling interest in avoiding retrogression under section 5.

The "purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364, 47 L. Ed. 2d 629, 639 (1976). Section 5, however, does not "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655, 113 S. Ct. at 2831, 125 L. Ed. 2d at 534.

In *Alabama*, the Supreme Court made it clear that section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage" in covered jurisdictions. ___ U.S. at ___, 135 S. Ct. at 1272,

191 L. Ed. 2d at 334. But section 5 does require a covered "jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." *Id.* at ___, 135 S. Ct. at 1272, 191 L. Ed. 2d at 334. The Court explained that "we do not insist that a legislature guess precisely what percentage reduction a court or the Justice Department might eventually find to be retrogressive." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. Rather, "the legislature must have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Id.* at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336. As an example, the Court noted that a "[one percent] reduction in a [seventy percent] black population district" is not "necessarily retrogressive." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335. The Court cautioned against heavy reliance "upon a mechanically numerical view as to what counts as forbidden retrogression," as opposed to "the more purpose-oriented view reflected in the statute's language." *Id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335.

Plaintiffs argue that by increasing the TBVAP in the challenged VRA districts to at least fifty percent plus one, the legislature improperly relied upon section 5 to unnecessarily augment, not just maintain, black voters' ability to elect their preferred candidate of choice. *See Vera*, 517 U.S. at 983, 116 S. Ct. at 1963, 135 L. Ed. 2d at 272 (concluding that an increase in TBVAP from 40.8% to 50.9% was unnecessary to ensure nonretrogression). Plaintiffs argue that such a substantial increase in TBVAP in districts where black voters were already able to elect their candidates of choice goes beyond what was necessary to ensure nonretrogression. Plaintiffs essentially ask us to force the State to "unpack" majority-minority districts and replace them with coalition, crossover, and influence districts. In enacting amendments to the VRA in 2006, however, Congress made clear that section 5 was designed to prevent legislatures from "unpacking majority-minority districts" and that it did not "lock into place coalition or influence districts." S. Rep. No. 109-295, at 18-19 (2006); *see Miller*, 515 U.S. at 923, 115 S. Ct. at 2492, 132 L. Ed. 2d at 784 ("Wherever a plan . . . increas[es] the number of majority-minority districts, it 'cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." (quoting *Beer*, 425 U.S. at 141, 96 S. Ct. at 1364, 47 L. Ed. 2d at 639)); *see also Strickland*, 556 U.S. at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190 (stating that the VRA "does not mandate creating or preserving crossover districts"). "[T]he various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole." *Walker v. Am. Bakeries Co.*, 234 N.C. 440, 442, 67 S.E.2d 459, 461 (1951) (quoting 50 Am. Jur. *Statutes*

§ 363 (1944)); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301, 146 L. Ed. 2d 121, 134 (2000). As discussed above, the legislature adopted a fifty percent plus one threshold to avoid liability under section 2. That threshold is the exact number that the Supreme Court approved in *Strickland* for a State to use in creating districts to comply with section 2. If, on the one hand, a TBVAP exceeding fifty percent is required to avoid section 2 liability, we cannot, on the other hand, conclude that this percentage is higher than necessary to avoid retrogression under section 5. In other words, section 5 cannot forbid what section 2 requires. While the legislature may have chosen a threshold of fifty plus one percent, such a deliberate decision was not arbitrary and was made with the "purpose-oriented view" of complying with section 2. *See Alabama*, ___ U.S. at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335.

Plaintiffs' argument seeks to undo the Supreme Court's holding in *Strickland*, which affirmed this Court's decision in *Pender County*. In *Strickland* the Supreme Court explicitly rejected State election officials' claim that "[section] 2 required them to override state law and split Pender County, drawing District 18 with [a black] voting-age population of 39.36 percent rather than keeping Pender County whole and leaving District 18 with [a black] voting-age population of 35.33 percent." 556 U.S. at 14, 129 S. Ct. at 1243, 173 L. Ed. 2d at 184. The Supreme Court stated that "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a coalition," *id.* at 15, 129 S. Ct. at 1244, 173 L. Ed. 2d at 185, and the Court made it clear that the creation of crossover districts is "a matter of legislative choice or discretion," to be exercised within the bounds of state law, *id.* at 23, 129 S. Ct. at 1248, 173 L. Ed. 2d at 190.

As the Supreme Court stated in *Alabama*, "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." ___ U.S. at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336 (citation and quotation marks omitted). Here the legislature had a strong basis in evidence of racially polarized voting to justify creating majority-black districts with a TBVAP in excess of fifty percent even though that same action resulted in an increase in the TBVAP in former coalition districts. Accordingly, we conclude that the challenged VRA districts were narrowly tailored to achieve a compelling interest in complying with both section 2 and section 5 of the VRA. Therefore, they survive strict scrutiny.

4. Proportionality

Finally, because plaintiffs challenge the General Assembly's consideration of proportionality, the three-judge panel analyzed whether the legislature used proportionality in the enacted plans improperly to "link[ ] the number of majority-minority voting districts to minority members' share of the relevant population." *See De Grandy*, 512 U.S. at 1014 n.11, 114 S. Ct. at 2658 n.11, 129 L. Ed. 2d at 792 n.11. The three-judge panel found as fact that "the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a 'roughly proportionate' number of Senate, House and Congressional districts as compared to the Black population in North Carolina," adding that each VRA district had to be at least fifty percent black in voting age population. The three-judge panel specifically found that the General Assembly's enacted plans

> endeavored to create VRA districts in roughly the same proportion as the ratio of Black population to total population in North Carolina. In other words, because the 2010 census figures established that 21% of North Carolina's population over 18 years of age was 'any part Black,' the corresponding rough proportion of Senate seats, out of 50 seats, would be 10 seats, and hence 10 VRA Senate districts. Likewise, of the 120 House seats, 21% of those seats would be roughly 25 House seats, and hence 25 VRA districts.

Based on these and other findings, the three-judge panel concluded that "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA."

Plaintiffs argue that this conclusion is erroneous as a matter of law because racial proportionality is neither a compelling governmental interest nor a requirement of the VRA. They contend that, because "[t]he VRA was not designed to guarantee majority-minority voting districts, but to guarantee that the processes, procedures, and protocols would be fair and free of racial discrimination," the legislature's redistricting was based upon an unconstitutional premise. Plaintiffs contend that, by focusing on proportionality at the statewide level, the General Assembly necessarily predetermined how many VRA districts to draw without first considering where potential liability existed for section 2 violations. Plaintiffs maintain that, as a result, the General Assembly's

process sought " 'outright racial balancing,' " which is "patently unconstitutional" under such cases as *Fisher v. University of Texas at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2419, 186 L. Ed. 2d 474, 486 (2013); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 729-30, 127 S. Ct. 2738, 2757, 168 L. Ed. 2d 508, 529 (2007) (plurality); and *Grutter v. Bollinger*, 539 U.S. 306, 330, 123 S. Ct. 2325, 2339, 156 L. Ed. 2d 304, 333 (2003), and thus can neither be required by section 2 nor constitute a compelling state interest.

The VRA provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C.S. § 10301(b). Consistent with this proviso, the Supreme Court has repeatedly held that proportionality does not provide a safe harbor for States seeking to comply with section 2. *LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642-43 (citing *De Grandy*, 512 U.S. at 1017-21, 114 S. Ct. at 2660-62, 129 L. Ed. 2d at 794-97). Such a rule "would be in derogation of the statutory text and its considered purpose . . . and of the ideal that the Voting Rights Act of 1965 attempts to foster," *De Grandy*, 512 U.S. at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795, and could allow "the most blatant racial gerrymandering . . . so long as proportionality was the bottom line," *id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Even so, the Court has also held that proportionality can be an element of the "totality of circumstances" test under *Gingles*. *Id.* at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784. When considered in this manner, the Court has instructed that the "probative value assigned to proportionality may vary with other facts" and "[n]o single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21, 114 S. Ct. at 2661-62, 129 L. Ed. 2d at 797; *see also LULAC*, 548 U.S. at 436, 126 S. Ct. at 2620, 165 L. Ed. 2d at 642.

In light of these standards, the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population. We believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause. *See De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2658-62, 129 L. Ed. 2d at 794-98. Instead, the General Assembly considered rough proportionality in a manner similar to its precautionary consideration of the *Gingles* preconditions, as a means of protecting the redistricting plans from potential legal challenges under section 2's totality of the circumstances test. Proportionality was not a dispositive factor, but merely

one consideration of many described in the materials and other contributions from numerous organizations, experts, and lay witnesses. The General Assembly's consideration of rough proportionality was a means of ensuring against voter dilution and potential section 2 liability, not an attempt to trade "the rights of some minority voters under § 2 . . . off against the rights of other members of the same minority class." *Id.* at 1019, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796. Accordingly, we conclude that this factor does not constitute grounds for a violation of section 2.

Thus, with regard to the VRA districts, we hold that, while the General Assembly considered race, the three-judge panel erred by concluding prematurely that race was the predominant factor motivating the drawing of the districts without first performing adequate fact finding. Nonetheless, because we held above that the three-judge panel correctly found that each of the twenty-six districts survives strict scrutiny, we need not remand the case for reconsideration under what may be a less demanding level of scrutiny.

C. Non-VRA Districts

[4] We now turn to the four districts that the three-judge panel found were not drawn as VRA districts but which were challenged by plaintiffs as being the result of racial gerrymandering. For trial, the three-judge panel characterized the issue as follows: "For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominant factor in the drawing of those districts?" Although the plaintiffs did not challenge Senate District 31 or House District 51, the three-judge panel found an examination of Senate District 32 and House District 54 to be intertwined with the associated districts because of the groupings required under the state constitution's Whole County Provision. Thus, the three-judge panel recognized that, because of the Whole County Provision, a determination of the predominant motive necessarily included the motivation in creating the required county pairings.

After receiving evidence, the three-judge panel made numerous specific findings of fact, district by district, as to whether race was the General Assembly's predominant motive in drafting these districts. Looking first at the challenged Congressional Districts, the court found that race was not a factor in drawing Congressional Districts 4 or 12. In fact, the record indicates that the drafters of these two districts did not consider any racial data. The panel found that political goals were a factor in drawing these two Congressional Districts, as well as compliance with *Cromartie II*.

Turning to the two challenged state legislative districts, Senate District 32 and House District 54, the three-judge panel received evidence and made a number of uncontested specific factual findings regarding the creation of each of these non-VRA districts. The three-judge panel found that, in addition to complying with federal and state law, the General Assembly desired to create districts "more competitive for" the majority party. The panel noted the "undisputed" fact that in North Carolina "racial identification correlates highly with political affiliation." The desire to create districts more competitive for the majority party had to occur within the requirements of the state constitution's Whole County Provision. Thus, while the three-judge panel noted the General Assembly's desire "to equalize population among the districts," for state redistricting purposes, this finding must be viewed in the context of the Whole County Provision, which recognizes political subdivisions. *See Stephenson I*, 355 N.C. at 366, 562 S.E.2d at 386 (recognizing "the importance of the county to our system of government" and that "[i]t is through [counties], mainly, that the powers of government reach and operate directly upon the people" (quoting *White v. Comm'rs of Chowan Cty.*, 90 N.C. 437, 438 (1884))). In light of the Whole County Provision, equalizing population is not simply a matter of deciding how many voters are placed in each district; the districting proceedings also determine which voters are included in the joined counties. In addition, the Whole County Provision establishes a hierarchy regarding the required number of contiguous counties to be joined.

Ultimately, regarding the four challenged non-VRA districts, the three-judge panel concluded "that race was not the predominant motive in the creation of [these] districts." The panel then applied rational basis review and concluded that the General Assembly's creation of the non-VRA districts was constitutional. The three-judge panel noted that plaintiffs

> have not proffered, as they must in this instance, any alternative redistricting plans that show that the General Assembly could have met its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles, and that any such alternative plan would have brought about significantly greater racial balance. (Citations omitted.)

The Supreme Court has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests, *see Shaw I*, 509 U.S. at 654, 113 S. Ct. at 2830, 125 L. Ed. 2d at 533 (compliance with federal law); *Karcher*, 462 U.S.

at 740, 103 S. Ct. at 2663, 77 L. Ed. 2d at 147 (incumbency protection); *Cromartie I*, 526 U.S. at 551, 119 S. Ct. at 1551, 143 L. Ed. 2d at 741 (partisan interests), as is honoring traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80, which is embodied in our state constitution's Whole County Provision, *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 ("We observe that the State Constitution's limitations upon redistricting and apportionment [the Whole County Provision] uphold what the United States Supreme Court has termed 'traditional districting principles.' These principles include factors such as 'compactness, contiguity, and *respect for political subdivisions*.' The United States Supreme Court has 'emphasize[d] that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.' " (internal citations omitted)). In light of this authority and the three-judge panel's findings of fact, we agree that plaintiffs failed to establish that race was the dominant factor in drafting these districts and conclude that the panel's application of the rational basis test was appropriate. The court's findings of fact support its conclusions of law. The General Assembly's actions in creating these districts were rationally related to all its expressed goals. Accordingly, we affirm the three-judge panel as to these non-VRA districts.

IV. Plaintiffs' State Claims

[5] We now consider plaintiffs' claims brought under state law. Initially, we note that our analysis here is unaffected by the holding in *Alabama*. Plaintiffs argue that the three-judge panel erred when it failed to find that the enacted Senate and House plans violate the Whole County Provision of the North Carolina Constitution. Article II, Section 3(3) of the Constitution of North Carolina provides that "[n]o county shall be divided in the formation of a senate district," while Article II, Section 5(3) contains a similar provision with regard to each representative district.

The tension between the Whole County Provision and federal requirements is apparent. In 1983, a three-judge panel of the United States District Court for the Eastern District of North Carolina held that the Whole County Provision was unenforceable anywhere in the state. *Cavanagh v. Brock*, 577 F. Supp. 176, 181-82 (E.D.N.C. 1983). This Court subsequently rejected *Cavanagh*'s analysis and held that the Whole County Provision remained enforceable to the extent that it could be harmonized with federal law. *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391. This Court provided a roadmap to compliance with the Whole

County Provision, requiring each created district to be contained within a single county or be part of a pairing with other districts containing as few contiguous counties as possible. *Id.* at 383-84, 562 S.E.2d at 396-97. As a result, the Whole County Provision remains in effect but must accommodate both the one-person, one-vote mandate and the requirements of the VRA. Because the Constitution of North Carolina requires that each senator and each representative represent "as nearly as may be" an equal number of inhabitants, N.C. Const. art. II, §§ 3(1), 5(1), the former federal requirement is met by definition. Thus, we consider plaintiffs' contentions that the challenged House and Senate Districts violate the Whole County Provision, as harmonized with the VRA.

As previously noted, this Court has set out nine criteria for ensuring that House and Senate Districts satisfy both the Whole County Provision and the Voting Rights Act. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97. These criteria may be summarized as follows: First, "legislative districts required by the VRA shall be formed" before non-VRA districts. *Id.* at 383, 562 S.E.2d at 396-97. Second, "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent" to ensure "compliance with federal 'one-person, one-vote' requirements." *Id.* at 383, 562 S.E.2d at 397. Third, "in counties having a . . . population sufficient to support the formation of one non-VRA legislative district," "the physical boundaries" of the non-VRA district shall "not cross or traverse the exterior geographic line of" the county. *Id.* at 383, 562 S.E.2d at 397. Fourth, "[w]hen two or more non-VRA legislative districts may be created within a single county," "single-member non-VRA districts shall be formed within" the county, "shall be compact," and "shall not traverse" the county's exterior geographic line. *Id.* at 383, 562 S.E.2d at 397. Fifth, for non-VRA counties that "cannot support at least one legislative district," or counties "having a non-VRA population pool" that, "if divided into" legislative "districts, would not comply with" one-person, one-vote requirements, the General Assembly should combine or group "the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 383, 562 S.E.2d at 397. Moreover, "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping." *Id.* at 383-84, 562 S.E.2d at 397. "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote'

standard." *Id.* at 384, 562 S.E.2d at 397. Sixth, "only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* at 384, 562 S.E.2d at 397. Seventh, "communities of interest should be considered in the formation of compact and contiguous [legislative] districts." *Id.* at 384, 562 S.E.2d at 397. Eighth, "multi-member districts shall not be" created "unless it is established that such districts are necessary to advance a compelling governmental interest." *Id.* at 384, 562 S.E.2d at 397. Ninth, "any new redistricting plans . . . shall depart from strict compliance with" these criteria "only to the extent necessary to comply with federal law." *Id.* at 384, 562 S.E.2d at 397.

In their discussion of the Whole County Provision, plaintiffs contend that the test of a plan's compliance with *Stephenson I*'s fifth and sixth criteria is the number of counties left undivided. They argue that the current plan violates *Stephenson I* because it divides counties and traverses county lines to an unnecessary extent. In support of their argument, plaintiffs submit charts indicating that their suggested "House Fair and Legal" plan results in five fewer divided counties and six fewer county line traversals than the enacted House plan, while maintaining the same number of groupings. Similarly, plaintiffs' charts indicate that their suggested "Senate Fair and Legal" plan divides five fewer counties and contains eleven fewer traversals of county lines than the enacted Senate plan.

Defendants respond that plaintiffs have misinterpreted the requirements of *Stephenson I*. According to defendants, *Stephenson I* is satisfied by minimizing the number of counties contained within each multi-county grouping. In other words, a proper plan maximizes the number of possible two-county groupings before going on to create three-county groupings, maximizes the number of possible three-county groupings before creating four-county groupings, and so on. Defendants argue that plaintiffs have misread *Stephenson I* because, under *Stephenson I*, divisions of counties and traversals of county lines are relevant only if plaintiffs' alternative maps are comparable to the State's maps in terms of the number of counties within each grouping. In support of its argument, the State provides charts showing that the enacted House and Senate plans result in a greater number of groupings that contain fewer counties, as compared with the various proposed alternative plans, all of which create groupings that contain more counties than the enacted plans. To illustrate, the enacted House district plan contains eleven groupings consisting of one county and fifteen groupings consisting of two counties. The closest comparable alternative plan proposed by

plaintiffs, House Fair and Legal, also contains eleven groupings consisting of one county but only nine groupings consisting of two counties. Similarly, while both the enacted Senate plan and plaintiffs' proposed Senate Fair and Legal contain one grouping consisting of one county and eleven groupings consisting of two counties, the enacted plan contains four districts consisting of three counties while Senate Fair and Legal contains only three groupings consisting of three counties.

While we are conscious of the efforts of the litigants to interpret *Stephenson I*'s requirements faithfully, after careful review of our opinions in *Stephenson I* and *Pender County*, we are satisfied that defendants' interpretation is correct. *Stephenson I*'s fifth factor states that, when combining two or more counties to comply with the one-person, one-vote standard, "the requirements of the [Whole County Provision] are met by combining or grouping the minimum number of whole, contiguous counties necessary" for compliance. 355 N.C. at 384, 562 S.E.2d at 397. Only after these groupings have been established does *Stephenson I* state that "the resulting interior county lines . . . may be crossed or traversed . . . only to the extent necessary to comply with the . . . 'one-person, one-vote' standard." *Id.* at 384, 562 S.E.2d at 397. Thus, the process established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly first must create all necessary VRA districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on. As shown by the charts provided by defendants, plaintiffs have not produced an alternative plan that complies with a correct reading of *Stephenson I*'s fifth and sixth factors better than the plans enacted by the General Assembly. Because the enacted plans result in groupings containing fewer whole, contiguous counties than do any of plaintiffs' plans, we need not discuss the number of counties divided or county lines traversed.

In addition, the maps that plaintiffs employ to support their arguments regarding the Whole County Provision are not helpful because they are inconsistent with our holding in *Pender County* as affirmed by the Supreme Court in *Strickland*. In *Strickland* the Supreme Court held that the first *Gingles* precondition can be shown only where the minority population is fifty percent plus one of the TBVAP. *Strickland*, 556 U.S. at 19-20, 129 S. Ct. at 1246, 173 L. Ed. 2d at 187 ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority

population in the potential election district is greater than 50 percent."); *Pender County*, 361 N.C. at 502, 649 S.E.2d at 371 (The "minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group."). Here, like the plaintiffs in *Strickland*, plaintiffs argue that we should adopt a standard that allows VRA requirements to be satisfied by other forms of minority districts, such as coalition and crossover districts. Not only is plaintiffs' argument inconsistent with the Supreme Court's holding in *Strickland*, but this flawed approach adversely affects the first step of the process required by *Stephenson I*, the formation of VRA districts. As a result, plaintiffs' maps are distorted *ab initio* and the distortion is compounded at each subsequent step. Consequently, even if plaintiffs' proposed alternative plans were comparable to the enacted plans in terms of the number and composition of county groupings, their incompatibility with *Pender County* means that they cannot serve as an adequate basis for comparison with the enacted plans.

Plaintiffs have also compared the General Assembly's enacted plans with earlier redistricting plans approved in North Carolina; however, those plans were tailored to a particular time and were based upon then-existing census numbers and population concentrations. The requirement that the State maintain its one-person, one-vote standard as populations shift makes comparisons between current and previous districting plans of limited value. The utility of prior plans is further diminished by subsequent clarifications of the legal standards in effect when these earlier plans were promulgated. *See*, *e.g.*, *Pender County*, 361 N.C. at 503-04, 649 S.E.2d at 372 (explaining the requirements of the first *Gingles* precondition). As a result, no meaningful comparisons can be made in this case.

[6] Separately, plaintiffs argue that this Court should consider the purported lack of compactness of the districts created by the General Assembly and the harm resulting from splitting precincts. While these may be valid considerations, neither constitutes an independent legal basis for finding a violation, and we are unaware of any justiciable standard by which to measure these local factors. *See Vera*, 517 U.S. at 999, 116 S. Ct. at 1972, 135 L. Ed. 2d at 284 (Kennedy, J., concurring) ("Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one," so long as "the bizarre shape . . . is [not] attributable to race-based districting unjustified by a compelling interest.").

[7] Finally, plaintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan they believe to be best for our State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

V. Conclusion

We agree with the unanimous three-judge panel that the General Assembly's enacted plans do not violate plaintiffs' constitutional rights. We hold that the enacted House and Senate plans, as well as the federal Congressional plan, satisfy state and federal constitutional and statutory requirements and, specifically, that the three-judge panel's decision fully complies with the Supreme Court's decision in *Alabama*. Accordingly, we reaffirm the three-judge panel's Judgment and Memorandum of Decision.

AFFIRMED.

Justice BEASLEY, concurring in part and dissenting in part.

I agree with the judgment of the Court as to plaintiffs' challenge under the "Good of the Whole" Clause in Article I, Section 2 of the North Carolina Constitution; however, because I would conclude that the parties and the jurisprudence of this State would be better served by vacating the trial court's Judgment and remanding this case to the trial court for more complete findings of fact consistent with the guidance provided in *Alabama Legislative Black Caucus v. Alabama*, I respectfully dissent.

The order of the United States Supreme Court (the Supreme Court) vacating and remanding this Court's judgment in *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014), directed this Court to *reconsider* the case in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015) (ALBC). *See Dickson v. Rucho*, 575 U.S. ___, 135 S. Ct. 1843, 191 L. Ed. 2d 719 (2015). The majority reads *ALBC* so narrowly that its implications for the case before this Court are negligible at best. In my view, if the Supreme Court saw fit to vacate and remand the previous judgment for reconsideration

in light of *ALBC*, this Court would do well to give credence to the legal principles imparted in that decision.[1]

To that end, I am of the opinion that *ALBC* bolsters all the points made in my previous dissent, particularly with respect to the General Assembly's use of proportionality as a benchmark, and provides authoritative guidance on how the trial court should have viewed the record of evidence before it. I stand by everything espoused in that dissent, and for that reason, portions of my previous dissent appear in this opinion.

The *ALBC* plaintiffs, like plaintiffs here, contended that their state legislature's enacted redistricting plans constituted racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. *ALBC*, 575 U.S. at ___, 135 S. Ct. at 1262, 191 L. Ed. 2d at 323. Alabama defended its enacted plans by arguing that the plans reflected its goals of coming close to a one-person, one-vote ideal, with no more than a 1% deviation from that ideal, and avoiding retrogression under § 5 of the Voting Rights Act of 1965.[2] *Id.* at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. The federal district court held that the plaintiffs "had failed to prove their racial gerrymandering claims." *Id.* at ___, 135 S. Ct. at 1264, 191 L. Ed. 2d at 325. The Supreme Court vacated the district court's judgment, citing errors in the district court's application and interpretation of the pertinent law. *Id.* at ___, 135 S. Ct. at 1264, 191 L. Ed. 2d at 325-26. Although the arguments made by the parties in *ALBC* are somewhat different from the arguments made by the parties here, *ALBC* illuminates errors in the trial court's analysis of plaintiffs' racial gerrymandering claims in this case, and as stated above, provides guidance

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1. The State took a contrary view of the Supreme Court's order vacating our previous judgment. During oral arguments, in response to Justice Hudson's question, "What do you think that the U.S. Supreme Court wants us to do?", the State replied: "The Supreme Court often remands cases when a landmark decision like *Alabama* comes out and quite often the court that gets the remand reaffirms their decision and the Supreme Court doesn't take review of it. So, the Supreme Court did not make any opinions or judgments on the North Carolina plans. They just asked this Court to take a look at it as an initial matter and based upon the standards that they articulated in *Alabama*. . . . They want you to look to see if the test in *Alabama* is the same one that you applied in your previous decision. And whether under that test should these plans still be reaffirmed. They are giving you the first chance to make that decision instead of them taking the time to look through the case. And again, that's quite common in Supreme Court jurisprudence for remand to take place and for the lower court to reaffirm its decision and for the Supreme Court of the United States not to take the appeal back." Data disc: Oral Argument 31 August 2015 201PA12-3 *Dickson v. Rucho*.

2. The Supreme Court declined to speak to the plaintiffs' § 2 vote dilution claim. *ALBC*, 575 U.S. ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336.

on how the trial court should approach the analysis on remand. This Court's majority does not give the trial court the opportunity to get it right and fails to require the trial court to make conclusions of law resting on adequate findings of fact that reflect a correct application of the law. I cannot agree with this decision.

I.

"Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' " *Shaw v. Reno*, 509 U.S. 630, 643, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511, 526 (1993) (*Shaw I*) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774, 1786 (1943)). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S. Ct. 1044, 1057, 145 L. Ed. 2d 1007, 1026 (2000). "Furthermore, '[i]t is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.' These principles apply to the drawing of electoral and political boundaries." *Johnson v. De Grandy*, 512 U.S. 997, 1029-30, 114 S. Ct. 2647, 2666, 129 L. Ed. 2d 775, 802 (1994) (Kennedy, J., concurring in part and concurring in the judgment) (alteration in original) (internal citations omitted) (quoting *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 1370, 113 L. Ed. 2d 411, 425 (1991)). Accordingly, the Supreme Court has held that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw I*, 509 U.S. at 643, 113 S. Ct. at 2825, 125 L. Ed. 2d at 526 (citations omitted). "Applying traditional equal protection principles in the voting-rights context is 'a most delicate task' . . . because a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S. Ct. 1894, 1900, 135 L. Ed. 2d 207, 218 (1996) (*Shaw II*) (quoting *Miller v. Johnson*, 515 U.S. 900, 905, 115 S. Ct. 2475, 2483, 132 L. Ed. 2d 762, 772 (1995)). Therefore, race must be "the predominant factor motivating the legislature's decision" in order to trigger strict scrutiny. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779.

The burden to make this showing falls to the plaintiff:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that

> race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Id. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80.

If the plaintiff satisfies this initial burden of production,[3] the redistricting legislation "cannot be upheld unless it satisfies strict scrutiny, [the] most rigorous and exacting standard of constitutional review." *Id.* at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782. Once strict scrutiny review is triggered, the burden shifts to the State to "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " *Shaw II*, 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782).

a.

In my earlier dissent, I questioned this Court's handling of the apparent deficiencies in the trial court's findings of fact with respect to whether race was the predominant motivating factor for the General Assembly in the creation of the twenty-six VRA districts. *See Dickson v. Rucho*, 367 N.C. 542, 578-79, 766 S.E.2d 238, 262-63 (2014) (Beasley, J., concurring in part and dissenting in part). The trial court found that

> [t]he Plaintiffs collectively challenge as racial gerrymanders 9 Senate, 18 House and 3 U.S. Congressional districts created by the General Assembly in the Enacted Plans. Of those 30 challenged districts, it is undisputed that the General Assembly intended to create 26 of the challenged districts to be "Voting Rights Act districts" [hereinafter

3. "If, however, [the] plaintiff[ ] cannot show that race was the 'predominant factor' to which traditional districting principles were 'subordinated,' and thus cannot meet the threshold for triggering strict scrutiny, it follows that the facially neutral classification (the electoral district) will be subject, at most, to rational basis review." *Quilter v. Voinovich*, 981 F. Supp. 1032, 1050 (N.D. Ohio 1997) (citing *Miller*, 515 U.S. at 915-16, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80), *aff'd mem.*, 523 U.S. 1043, 118 S. Ct. 1358, 140 L. Ed. 2d 508 (1998).

> "VRA districts"] and that it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population [hereinafter "TBVAP"]. Moreover, the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a "roughly proportionate" number of Senate, House and Congressional districts as compared to the Black population in North Carolina. To draw districts based upon these criteria necessarily requires the drafters of districts to classify residents by race so as to include a sufficient number of black voters inside such districts, and consequently exclude white voters from the districts, in an effort to achieve a desired racial composition of >50% TBVAP and the desired "rough proportionality." This is a racial classification.

(Footnote call numbers omitted.) Accordingly, the trial court "conclude[d] . . . that in drawing [the] VRA districts . . . [,] the shape, location and racial composition of each VRA district was predominantly determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law."

On remand, this Court holds, just as it did before, that the trial court's finding that "no factual inquiry was required regarding the General Assembly's predominant motivation in forming the twenty-six VRA districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant" was insufficient to show "whether race fairly can be described as the predominant factor." The majority then proceeds under the assumption that race was the predominant motivating factor and, accordingly, embarks on a strict scrutiny analysis. I maintain that, instead of perpetuating the trial court's mistake in making "truncated findings of fact," this Court should remand this case to the trial court to correct the deficiency because the citizens of this state would be better served if we held to our usual course and vacated the trial court's Judgment and remanded the case to the trial court for proper findings of fact and conclusions of law based upon a correct interpretation of the law. When viewed in light of the guidance provided in *ALBC*, the deficiencies in the trial court's findings with respect to predominance and the error of this Court in ignoring the same are clear.

One of the Alabama legislature's goals in developing its redistricting plan was to come as close as possible to the ideal one-person, one-vote population with a deviation of no more than 1%. *ALBC*, 575 U.S.

at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. In other words, Alabama endeavored to create districts of approximately equal population. The district court concluded that race was not a predominant motivating factor because, on balance, the plans reflected nonracial motivations, such as an attempt to equalize population. *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 331. The Supreme Court took issue with the district court's "calculat[ion]" of predominance, reasoning that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332. Further, the Supreme Court explained that predominance has a special meaning in the context of racial gerrymandering claims because "[i]t is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is, as we said, whether the legislature placed race above traditional districting considerations in determining which persons were placed in appropriately apportioned districts." *Id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 332 (citation, emphasis, and quotation marks omitted). The Supreme Court noted that, if the district court had applied the predominance test correctly, its conclusions may have been different, *id.* at ___, 135 S. Ct. at 1271, 191 L. Ed. 2d at 333, and, hence reconsideration on remand was appropriate.

While the precise issue identified in *ALBC* is not present in the case before us, the takeaway is relevant: the predominance test—whether "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488, 132 L. Ed. 2d at 779-80—must be applied correctly. The lower court in *ALBC* balanced race against traditional redistricting principles, but improperly included equal population as a traditional principle, and the Supreme Court took exception to the court's misapplication of the law. Here the trial court skipped the balancing of race against traditional redistricting principles entirely and instead concluded that it could "bypass this factual inquiry" for the twenty-six VRA districts. The Supreme Court acknowledged that a misapplication of the law can lead to erroneous conclusions and, therefore, remand under those circumstances is necessary to ensure proper application. Remand is also necessary here. But, as I noted in my previous dissent, there is ample evidence that the General Assembly subordinated traditional redistricting principles to racial considerations, and thus, the record contains sufficient evidence to support a predominance finding.

Plaintiffs and *amici* point to evidence showing that State Senator Robert Rucho and State Representative David Lewis, the respective chairs of the Senate and House Redistricting Committees, instructed Dr. Thomas Brooks Hofeller, the "chief architect" of the redistricting plans, to draw the plans to provide "substantial proportional[ity]" between the percentage of the state's population that is Black and the percentage of districts that would be majority-Black. Dr. Hofeller was also told to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population" to do so. The public statements released by Senator Rucho and Representative Lewis also reflect these legislative goals, saying that, in order to comply with VRA § 2, the VRA districts are designed to provide Black voters with "substantial proportionality" and "must be established with a BVAP of 50% plus one." Because the Supreme Court has held that similar evidence demonstrated that race was the predominant motivating factor, the trial court would have ample justification for determining that strict scrutiny is the appropriate level of review to apply to the Enacted Plans.[4]

Assuming that the trial court makes a proper predominance finding on remand, the trial court must properly apply the strict scrutiny standard. In its decision the trial court states that, if plaintiffs meet the threshold burden of establishing that "race was the overriding consideration behind a redistricting plan," then

> the state . . . has the burden of "producing evidence that the plan's use of race is narrowly tailored to further a compelling state interest, and the plaintiffs bear the ultimate burden of persuading the court either that the proffered justification is not compelling or that the plan is not narrowly tailored to further it." *Shaw v. Hunt*, 861 F. Supp. 408, 436 (E.D.N.C. 1994).

4. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 958-59, 116 S. Ct. 1941, 1951-52, 135 L. Ed. 2d 248, 257 (1996) (plurality) (explaining that strict scrutiny applies when race is "the predominant factor" in a legislature's redistricting plan) (citation, emphasis, and internal quotation marks omitted); *Id.* at 1002-03, 116 S. Ct. at 1974, 135 L. Ed. 2d at 286 (Thomas & Scalia, JJ., concurring in the judgment) (explaining that Texas's admission that "it intentionally created majority-minority districts" in order to comply with the VRA was "enough to require application of strict scrutiny in this suit"); *Shaw II*, 517 U.S. at 906, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219 ("fail[ing] to see how" a court could reach any conclusion other than that "race was the predominant factor" in the General Assembly's drawing of redistricting lines when the State admitted that its "overriding purpose" was to obtain preclearance from DOJ) (citation, emphasis, and quotation marks omitted); *Miller*, 515 U.S. at 918-19, 115 S. Ct. at 2489, 132 L. Ed. 2d at 780-81 (concluding that Georgia's express "desire" to obtain preclearance was "powerful evidence that the legislature subordinated traditional districting principles to race when it ultimately enacted a plan creating three majority-black districts" and thus strict scrutiny applied).

In support of this proposition, the trial court quotes the district court's decision in *Shaw II*. In *Shaw II*, however, the Supreme Court reversed the trial court and, in doing so, held that under strict scrutiny, "*North Carolina . . . must show* not only that its redistricting plan was in pursuit of a compelling state interest, but also that 'its districting legislation is narrowly tailored to achieve [that] compelling interest.' " *Shaw II*, 517 U.S. at 908, 116 S. Ct. at 1902, 135 L. Ed. 2d at 220-21 (alteration in original) (emphasis added) (quoting *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d 782). This language from *Shaw II* clearly places the burden of proof on the State once strict scrutiny is triggered.

This conclusion is bolstered by the Supreme Court's earlier statement in *Miller* that, "[t]o satisfy strict scrutiny, *the State must demonstrate* that its districting legislation is narrowly tailored to achieve a compelling interest." 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782 (emphasis added) (citations omitted). More recently, in the affirmative action context, the Supreme Court has been more explicit on this point: Under strict scrutiny, "*it remains at all times the [government]'s obligation to demonstrate*, and the Judiciary's obligation to determine," that the challenged action is narrowly tailored to achieve a compelling governmental interest. *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2420, 186 L. Ed. 2d 474, 486-87 (2013) (emphasis added).

Here, the trial court attempted to distinguish *Fisher* on the ground that the General Assembly is entitled to some degree of deference given that redistricting is "an inherently political process." The Supreme Court, however, has declined to defer to political decision makers and apply something less than strict scrutiny to race-based classifications:

> But we have refused to defer to state officials' judgments on race in . . . areas where those officials traditionally exercise substantial discretion. For example, ... in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race.

Johnson v. California, 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 962-63 (2005) (citations omitted); *accord Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744, 127 S. Ct. 2738, 2766, 168 L. Ed. 2d 508, 539 (2007) (plurality) (explaining that "deference is fundamentally at odds with our equal protection jurisprudence" and that courts "put the burden on State actors to demonstrate that their

race-based policies are justified" (citations and quotation marks omitted)). Moreover, to whatever extent the legislature may be entitled to deference, that "limited degree of leeway in furthering [its] interests" in complying with the VRA relates to whether the state has met its burden of establishing "the 'narrow tailoring' requirement of strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 977, 116 S. Ct. 1941, 1960, 135 L. Ed. 2d 248, 268 (1996) (plurality). Nonetheless, this deference does not relieve the State of "the *burden to prove* 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.' " *Fisher*, ___ U.S. at ___, 133 S. Ct. at 2419, 186 L. Ed. 2d at 485 (alterations in original) (emphasis added) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 728, 102 L. Ed. 2d 854, 889 (1989)).

Even though the evidence, in my view, provides ample justification for the conclusion made by the trial court—that race predominated—it is important that the trial court do the work, as required by *Miller* and now *ALBC*, and properly determine whether the General Assembly subordinated traditional redistricting principles to racial considerations. Moreover, the trial court's misunderstanding and misapplication of the strict scrutiny analytical framework provides additional justification for a decision to vacate the trial court's decision and remand this case to the trial court for reconsideration in light of correct principles. *See Fisher*, *id.* at ___, 133 S. Ct. at 2421-22, 186 L. Ed. 2d at 487-89 (remanding after determining the trial court and court of appeals misapplied strict scrutiny standard so that challenged admissions policy could be "considered and judged under a correct analysis"). Failure to apply properly the operative constitutional test is, in itself, a sufficient basis for overturning the trial court's decision. *See id.* at ___, 133 S. Ct. at 2421-22, 186 L. Ed. 2d at 487-89. This Court should not forgive the misapplication of the law because, as the Court in *ALBC* confirmed, a misapplication of the law upon which a conclusion depends, infects the remainder of the analysis.

b.

After the trial court concluded that race predominated in the General Assembly's decision to create twenty-six VRA districts and that strict scrutiny applied, the trial court also side-stepped its compelling state interest analysis with respect to § 2. Specifically, the trial court's findings were insufficient as they relate to determining whether the challenged districts met all three *Gingles* preconditions. The trial court concluded "that the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of circumstances, VRA districts were required to remedy against vote dilution."

At the outset, the trial court's conceptualization of the *Gingles* preconditions analysis was faulty. The *ALBC* opinion explains that "[a] racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.' " *ALBC*, 575 U.S. at ___, 135 S. Ct. at 1265, 191 L. Ed. 2d at 326. The trial court's conclusion that the preconditions were present "in substantial portions of North Carolina" suggests that the trial court did not engage in a district-by-district analysis as required by law. The trial court must make findings of fact addressing the presence of *each* of the *Gingles* preconditions in *each* of the challenged districts.

Moreover, the trial court's findings of fact in the Judgment and Memorandum of Decision and in Appendix A of the Judgment related to the third precondition are deficient. In *Thornburg v. Gingles* the Supreme Court held that, in order to establish a § 2 voting dilution claim, the minority group must demonstrate that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-67, 92 L. Ed. 2d 25, 46-47 (1986) (citations omitted); *see De Grandy*, 512 U.S. at 1006, 114 S. Ct. at 2654, 129 L. Ed. 2d at 788 (majority) (confirming that vote dilution in the case of single-member districts likewise requires proof of the three preconditions (citing *Growe v. Emison*, 507 U.S. 25, 40-41, 113 S. Ct. 1075, 1084, 122 L. Ed. 2d 388, 403-04 (1993))). Furthermore, when defendants use § 2 as a defense against claims that redistricting plans are unconstitutional, defendants bear the burden of demonstrating the existence of all three mandatory preconditions. *Pender County v. Bartlett*, 361 N.C. 491, 496, 649 S.E.2d 364, 367 (2007) (*Pender County*), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (*Strickland*) (plurality).

The trial court summarized the evidence relevant to the three preconditions that was before the General Assembly when it enacted the plans. Most of the evidence related to the existence of racially polarized voting in North Carolina. To a certain extent, explaining the evidence of racial polarization was appropriate because, in *Gingles* the Supreme Court explained:

> The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc

> usually to defeat the minority's preferred candidates. . . . A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2. *And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting.*

Gingles, 478 U.S. at 56, 106 S. Ct. at 2769, 92 L. Ed. 2d at 50 (emphasis added) (citations omitted). The trial court found as fact that experts and community members had concluded that racially polarized voting exists in the challenged districts. Yet, neither the Judgment and Memorandum of Decision nor Appendix A to the Judgment makes a finding as to whether the majority usually bloc votes to defeat the minority's preferred candidate, the third precondition under *Gingles*. To the contrary, the third part of Appendix A is dedicated to describing the election results over time in the 2003 version of Senate Districts 14, 20, 21, 28, 38, and 40, the 2009 version of House Districts 12, 21, 29, 31, 48, 99, and 107, and the 2001 version of Congressional Districts 1 and 12.[5] The trial court found that each highlighted district was a majority-minority district in its pre-2011 form. The trial court also found that in each of these districts, an African-American Democratic candidate had been successful over a Republican opponent. This is evidence that voters in these majority-minority districts tended to elect African-American Democratic candidates, thereby suggesting that the minority group is politically cohesive in those districts. The findings do not establish, however, that the majority votes in a manner that usually defeats the minority group's preferred candidate of choice in those same districts.

The closest the findings come to demonstrating that the majority bloc votes in a way that usually defeats the minority group's preferred candidate is by recalling that

> [n]o African American candidate elected in 2010 was elected from a majority-white crossover district. . . . From 2006 through 2010, no African American candidate was elected to more than two consecutive terms to the legislature in a majority-white district. From 1992 through 2010,

5. The 2011 versions of each of these districts are challenged by plaintiffs as racial gerrymanders.

> no black candidate for Congress was elected in a majority-white district.
>
> From 2004 through 2010, no African American candidate was elected to state office in North Carolina in a statewide partisan election.

(Numeral and internal citations omitted.) These generalized findings have limited value. There is no indication that this set of data applies to the challenged VRA districts or reflects voting patterns over a period of time rather than the results of a single election. It is unlikely that the data would apply to the challenged VRA districts because they are all majority-minority districts, and many have been so under previous plans. In addition, generalized findings of fact do not constitute a district-by-district analysis as required by *ALBC*.

The trial court's findings clearly indicate racially polarized voting, and Supreme Court decisions establish that evidence of racially polarized voting is relevant to the second and third preconditions, *see Gingles*, 478 U.S. at 56, 106 S. Ct. at 2769, 92 L. Ed. 2d at 50; however, the fact remains that *Gingles* requires a showing of *all* three preconditions. Without adequate findings of fact related to the third precondition, the trial court's conclusion that all three preconditions have been met is unsupported by its findings. Therefore, I would remand this case to the trial court for adequate findings regarding the third precondition. It is worth noting that when one precondition is not satisfied, the General Assembly is not required to create a § 2 district. *See Pender County*, 361 N.C. at 499, 649 S.E.2d at 369. If the third precondition is not satisfied with respect to any district in a case such as this in which there is substantial evidence to suggest that race predominated the General Assembly's redistricting decisions for the twenty-six VRA districts, it follows that the General Assembly developed a race conscious redistricting plan that was not justified by § 2 as a compelling state interest.

c.

The trial court's narrow tailoring analysis also misses the mark in other respects. First, because the trial court failed to provide adequate findings of fact related to the third *Gingles* precondition, the trial court cannot rely on *Strickland* to conclude that creating VRA districts with a TBVAP greater than 50% was necessary to avoid liability under § 2. Second, *ALBC* disapproves of the use of mechanical numerical targets to avoid retrogression under § 5. Third, the General Assembly's use of racial proportionality to establish the total number of VRA districts was impermissible under *De Grandy*. I will discuss each in turn.

Plaintiffs argued at trial that drawing the VRA districts such that each would contain a TBVAP greater than 50%, thereby creating a majority-minority district, could not be narrow tailoring. The trial court rejected plaintiffs' argument and determined that "the General Assembly had a strong basis in evidence for concluding that it was reasonably necessary to endeavor to create all VRA districts within the Enacted Plans with 50% TBVAP to protect the state from anticipated liability under § 2 of the VRA and to ensure preclearance under § 5 of the VRA." The trial court relied upon this Court's decision in *Pender County v. Bartlett*.

In *Pender County* this Court considered "whether [the first *Gingles*] precondition, that a minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition." *Pender County*, 361 N.C. at 499, 649 S.E.2d at 370 (citation omitted). The majority of this Court answered that question by creating a bright line rule: "[A] minority group that otherwise meets the *Gingles* preconditions [must] constitute a numerical majority of citizens of voting age . . . ." *Id.* at 504, 649 S.E.2d at 373. The Court reasoned that "[a] bright line rule for the first *Gingles* precondition 'promotes ease of application without distorting the statute or the intent underlying it' " and serves as a "safe harbor" for the General Assembly in the redistricting process. *Id.* at 505, 649 S.E.2d at 373 (quoting *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989)). Affirming the majority's conclusion, the Supreme Court in *Strickland* reiterated that "the dispositive question is: What size minority group is sufficient to satisfy the first *Gingles* requirement?" *Strickland*, 556 U.S. at 12, 129 S. Ct. at 1242, 173 L. Ed. 2d at 183 (plurality). The Court reasoned, as this Court did in *Pender County*, that a majority-minority rule provided "workable standards and sound judicial and legislative administration." *Id.* at 17, 129 S. Ct. at 1244, 173 L. Ed. 2d at 186.

The trial court explained the *Strickland* holding as follows: "[W]hen the State has a strong basis in evidence to have a reasonable fear of § 2 liability, the State must be afforded the leeway to avail itself of the 'bright line rule' and create majority-minority districts, rather than cross-over districts, in those areas where there is a sufficiently large and geographically compact minority population and racial polarization exists." Writing for the plurality in *Strickland*, Justice Kennedy made the following crucial observations:

> *Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns.* States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. *In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.* States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts. Those can be evidence, for example, of diminished bloc voting under the third *Gingles* factor or of equal political opportunity under the § 2 totality-of-the-circumstances analysis. *And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.* There is no evidence of discriminatory intent in this case, however. *Our holding recognizes only that there is no support for the claim that § 2 can require the creation of crossover districts in the first instance.*

Id. at 23-24, 129 S. Ct. at 1248-49, 173 L. Ed. 2d at 190-91 (emphases added) (internal citations omitted). Justice Kennedy's qualification of the holding suggests that it is a mistake to interpret *Strickland* as requiring majority-minority districts in order to comply with § 2 under all circumstances. Taking into consideration the limitations of *Strickland*'s holding, it is not possible to determine whether all the majority-minority districts created by the General Assembly are required in this case because, as explained above, the trial court did not make adequate findings of fact regarding whether the third *Gingles* precondition was satisfied, necessitating the determination that there are inadequate findings of fact to support the conclusion that each of the VRA districts was justified.

Even assuming that the State had a compelling interest in avoiding liability under VRA § 2 and obtaining preclearance under VRA § 5,[6] and assuming that the factors set forth in *Thornburg v. Gingles* have been properly addressed, the trial court's findings with respect to the greater than 50% TBVAP threshold and proportionality do not support its ultimate conclusion that the redistricting plans pass strict scrutiny. Therefore, this Court should vacate and remand regarding the twenty-six VRA districts.

As explained in *ALBC*, "Alabama believed that, to avoid retrogression under § 5, it was required to maintain roughly the same black population percentage in existing majority-minority districts." 575 U.S. at ___, 135 S. Ct. at 1263, 191 L. Ed. 2d at 324. The Supreme Court rejected this view by establishing that, to avoid "forbidden retrogression," setting fixed percentages or pursuing a "mechanically numerical view" differs significantly from a "more purpose-oriented view," *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 335, which inquires whether "minority voters retain the ability to elect their preferred candidates," *id.* at ___, 135 S. Ct. at 1273, 191 L. Ed. 2d at 334. As the Supreme Court explained:

> [W]e conclude that the District Court and the legislature asked the wrong question with respect to narrow tailoring. They asked: "How can we maintain present minority percentages in majority-minority districts?" But given § 5's language, its purpose, the Justice Department Guidelines, and the relevant precedent, they should have asked: "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Asking the wrong question may well have led to the wrong answer. Hence, we cannot accept the District Court's "compelling interest/narrow tailoring" conclusion.

Id. at ___, 135 S. Ct. at 1274, 191 L. Ed. 2d at 336.

Similarly, the North Carolina General Assembly did not ask the right question. The trial court here found that "it is undisputed that

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6. The United States Supreme Court has repeatedly assumed, without deciding, that compliance with the VRA can be a compelling state interest in the strict scrutiny context, but that Court has not expressly decided the issue. *See Shaw II*, 517 U.S. at 915, 116 S. Ct. at 1905, 135 L. Ed. 2d at 225 ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest . . . ."); *Miller*, 515 U.S. at 921, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782 (assuming that satisfying "the Justice Department's preclearance demands" can be compelling interest).

the General Assembly intended to create 26 of the challenged districts to be [VRA districts] and that it set about to draw each of these VRA districts so as to include at least 50% [TBVAP].” Although Alabama and North Carolina sought to avoid retrogression differently—by drawing the challenged districts so as to maintain the same percentage of minority voters in Alabama, and to ensure at least 50% TBVAP in North Carolina—both legislatures used a mechanical numerical target in that effort. This is precisely what *ALBC* forbids.

Under a § 5 retrogression analysis conducted in accordance with *ALBC*, the trial court must consider to what extent the number of minority voters within each existing majority-minority district must change, if at all. If, within an existing majority-minority district, the minority group is able to elect the candidate of its choice, based on the record of evidence related to voting patterns and other indicia, there are no grounds to increase the minority voter percentages under § 5. Conversely, if the minority group within an existing majority-minority district is no longer able to elect the candidate of its choice because of demographic shifts or other changes, then § 5 requires an increase in the percentage of minority voters within that district to avoid retrogression. Without asking the correct question—“To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?”—the trial court authorized the legislature to move minority voters into certain districts based solely on their race without justification.

Finally, the General Assembly endeavored “to create as many VRA districts as needed to achieve a ‘roughly proportionate’ number of Senate, House and Congressional districts as compared to the Black population in North Carolina.” The General Assembly reasoned that, because 21% of North Carolina’s voting age population identified as any part Black, roughly 21% of the Senate, House, and Congressional seats should be filled by candidates elected by voters in VRA districts, *i.e.*, majority-minority districts. The trial court found that the General Assembly used rough proportionality as a “benchmark” for the number of VRA districts it would create, and the court concluded that this methodology was appropriate to avoid any potential § 2 liability. But as I noted in my previous dissent, this conclusion is based on a misapprehension of *De Grandy*.

In *De Grandy* the State of Florida argued “that as a matter of law no dilution occurs whenever the percentage of single-member districts in which minority voters form an effective majority mirrors the minority

voters' percentage of the relevant population." 512 U.S. at 1017, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795. The Supreme Court rejected this safe harbor rule because such a rule "would be in derogation of the statutory text and its considered purpose, however, and of the ideal that the Voting Rights Act of 1965 attempts to foster. An inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' " *Id.* at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795 (citation omitted). In addition, such a rule would lead to a tendency on the part of the State to create majority-minority districts even when they may not be necessary to achieve equal opportunity for a minority voter to elect his or her preferred candidate. *Id.* at 1019-20, 114 S. Ct. at 2661, 129 L. Ed. 2d at 796.

Here, however, defendants' public statements undermine their adherence to the applicable standards and demonstrate the central role proportionality played in the 2011 redistricting plan. On 17 June 2011, defendants announced a public hearing concerning redistricting issues, in which defendants expressed the intention to propose redistricting plans containing a sufficient number of majority-minority districts to provide substantial proportionality. Defendants proposed "that each plan include a sufficient number of majority African American districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidate of choice." Defendants explained that "proportionality for the African American citizens in North Carolina means the creation of 24 majority African American House districts and 10 majority Senate districts. . . . Unlike the 2003 benchmark plans, the Chairs' proposed 2011 plans will provide substantial proportionality for North Carolina's African American citizens."

In light of its misreading of *De Grandy*, the trial court cites approvingly defendants' use of proportionality as the "benchmark" for creating the Enacted Plans—beginning with proportionality as the goal and then working backwards to achieve that goal. Similarly, the trial court reasoned: "When the Supreme Court says 'no violation of § 2 can be found' under certain circumstances, prudence dictates that the General Assembly should be given the leeway to seek to emulate those circumstances in its Enacted Plans." (Quoting *De Grandy*, 512 U.S. at 1000, 114 S. Ct. at 2651, 129 L. Ed. 2d at 784.) But this approach is precisely what the Supreme Court rejected in *De Grandy*: proportionality is relevant as a *means* to an end (compliance with the VRA), but it is not an *end* in itself and it does not—contrary to the trial court's reasoning—provide a safe harbor for redistricting plans premised on race. The Court in

De Grandy centered its analysis on the role of proportionality in the totality-of-the-circumstances analysis in a § 2 claim. *See id.* at 1013-14, 114 S. Ct. at 2658, 129 L. Ed. 2d at 792-93 ("The court failed to ask whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." (footnote call number omitted)). The Court made clear that equal political opportunity is the focus of the inquiry, not proportionality. By not focusing on whether the Enacted Plans denied minority voters equal political and electoral opportunity, the trial court misapplied the law, resulting in an erroneous conclusion that defendants' use of proportionality as an end is constitutionally permissible.

The majority concludes that "the record here demonstrates that the General Assembly did not use proportionality improperly to guarantee the number of majority-minority voting districts based on the minority members' share of the relevant population." The majority is only able to draw this conclusion by overlooking the trial court's determination—based upon "the undisputed evidence"—that the General Assembly used proportionality as a "benchmark." The majority's conclusion becomes more confusing given its statement that "[w]e believe that such an effort, seeking to guarantee proportional representation, proportional success, or racial balancing, would run afoul of the Equal Protection Clause." (Citing *De Grandy*, 512 U.S. at 1017-22, 114 S. Ct. at 2658-62, 129 L. Ed. 2d at 794-98.) I agree "that such an effort . . . would run afoul of the Equal Protection Clause," and its use in this instance has that effect.

By characterizing the General Assembly's consideration of race as a "precautionary consideration" used "as a means of protecting the redistricting plans from potential legal challenges under section 2's totality of the circumstances test," the majority appears to join the trial court in using race as a legislative safe harbor in derogation of the clear prohibition against reliance upon such criteria set forth by the Supreme Court of the United States. *De Grandy*, 512 U.S. at 1018-20, 114 S. Ct. at 2660-61, 129 L. Ed. 2d at 795-97. In light of these errors, this Court should vacate the trial court's Judgment and remand the case for reconsideration under a correct understanding of the law.

Based on the foregoing, I would remand this case to the trial court for more complete findings of fact on the VRA districts with respect to whether the General Assembly subordinated traditional redistricting principles to racial considerations, with respect to the third *Gingles* precondition, and with respect to the proper application of the nonretrogression requirement. Even if race predominated the General Assembly's motivations and §§ 2 and 5 constitute compelling state

interests, the trial court's findings of fact do not suffice to support a conclusion that the Enacted Plans were narrowly tailored to achieve those interests and did not violate the Equal Protection Clause of the Fourteenth Amendment.

On remand, the trial court should begin by determining how many majority-minority districts, if any, need to be created and where those districts should be located in order to comply with § 2 and § 5. In addition, after determining the total number of majority-minority districts needed to comply with the VRA, the trial court should determine, where necessary, the percentages of TBVAP in each district needed to ensure the minority group's present ability to elect its candidate of choice and to avoid retrogression. In answering these questions on remand, the trial court should engage in the following district-by-district analysis in accordance with the directives provided in *ALBC* and existing law.

As to the former inquiry, the trial court must look to § 2 and consider whether defendants have established the existence of the three mandatory *Gingles* preconditions for each majority-minority district that defendants created, and if so, whether the totality of the circumstances establishes that each of these districts was required by § 2 (unless the creation of that district was mandated by a prior court order that remains in effect[7]). Again, proportionality may be considered in the totality-of-the-circumstances determination but must not be the starting point for a redistricting plan. To the extent that defendants fail to establish that any of the majority-minority districts were required by § 2 based on the existence of the three mandatory *Gingles* factors and the totality of the circumstances, or a valid court order, the creation of such a majority-minority district is not justified.

As to the latter inquiry, the trial court must look to § 5 and determine on a district-by-district basis which actions, if any, were necessary to ensure non-retrogression in any district created pursuant to § 5. In doing so, the court should look to the districts as they existed under the prior redistricting plan to discern the TBVAP of each district and whether the minority group had the ability to elect its candidate of choice in that district. In the event the answer to that question is in the negative, then the

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7. The trial court's findings suggest that the General Assembly believed that it was obligated to create and maintain certain majority-Black districts in accordance with *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984), *aff'd in part*, *rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), and *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 408 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001), based upon advice received from the University of North Carolina School of Government and other sources.

court needs to determine what TBVAP is needed to permit the election of the minority group's candidate of choice. In the event that the answer to that question is in the affirmative, then the court must determine whether defendants impermissibly increased the TBVAP in that district.

II.

Plaintiffs also challenged four non-VRA districts, which are districts with a TBVAP of less than 50%—Congressional Districts 12 and 4, Senate District 32, and House District 54. The discussion in *ALBC* concerning the proper analysis for determining whether race was the predominant motivating factor in drawing the districts supports the conclusion that the trial court viewed equalizing population among the districts as a traditional redistricting principle rather than as "part of the redistricting background, taken as a given." 575 U.S. at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332.

The Court in *ALBC* was clear in its instruction that "an equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to *how* equal population objectives will be met." *Id.* at ___, 135 S. Ct. at 1270, 191 L. Ed. 2d at 332. The majority, in its attempt to show that the principles articulated in *ALBC* do not apply to the case at bar, reasons that, "[i]n effect, North Carolina's Whole County Provision, of which equal population is a component, establishes a framework to address the neutral redistricting requirement that 'political subdivisions' be respected." In its framing of the Whole County Provision, the majority essentially concludes that equal population is a traditional redistricting principle in North Carolina and, in the process, ignores the Supreme Court's holding that equal population is not a traditional redistricting principle to be weighed among other such principles.

In concluding that the non-VRA districts were not drawn with race as the predominant motivation, the trial court explained:

> Based upon these findings of fact, the trial court concludes that the shape, location and composition of the four non-VRA districts challenged by the Plaintiffs as racial gerrymanders was dictated by a number of factors, which included a desire of the General Assembly to avoid § 2 liability and to ensure preclearance under § 5 of the VRA, but also included *equally dominant legislative motivations* to comply with the Whole County Provision,

> *to equalize population among the districts*, to protect incumbents, and to satisfy the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates than the plans used in past decades or any of the alternative plans.

(Emphases added.) This statement reflects the trial court's understanding that equalizing population was as relevant to its predominance analysis as other legislative motivations, including compliance with the Whole County Provisions, protection of incumbents, and creating districts in which Republicans would be more competitive. The trial court's more specific findings of fact in Appendix B of the Judgment related to Congressional Districts 4 and 12 provide further evidence of the trial court's view of equal population as a factor to be weighed. The trial court found that, in Congressional District 4, "[a]ll of the divisions were done to equalize population among the Fourth Congressional District and the adjoining Congressional districts, to make the district contiguous, or for political reasons. None of the [Vote Tabulation Districts] were divided based upon racial data." Similarly, the trial court found that, in the Twelfth Congressional District, "[a]ll of [the] divisions were done to equalize population among the Twelfth Congressional District and other districts or for political reasons." If the trial court were to remove equalizing population as a traditional redistricting factor in accordance with *ALBC*, it would be left to consider only whether these two factors were subordinated to racial considerations: making the Fourth Congressional District contiguous and political considerations. In the case of the Twelfth Congressional District, the trial court would be left with only political reasons to weigh against race. This balance is particularly troublesome in the case of Congressional District 12.

The shape of Congressional District 12 has been the subject of much litigation over the last two decades, and for good reason. *See, e.g.*, *Easley v. Cromarti*e, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (*Cromartie II*); *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999); *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207; *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511. In *Cromartie II* the Supreme Court observed that "racial identification correlates highly with political affiliation" in North Carolina, 532 U.S. at 258, 121 S. Ct. at 1466, 149 L. Ed. 2d at 453, and that the plaintiffs in that case "ha[d] not successfully shown that race, rather than politics, predominantly account[ed] for" the shape, location, and composition of the 1997 version of Congressional District 12, *id.* at 257, 121 S. Ct. 1466, 149 L. Ed. 2d at 453. Here the trial court found as fact that Congressional

District 12 (and District 4) were drawn based on the locations where President Obama received the highest voter totals during the 2008 presidential election. Even if these voter totals were "[t]he only information on the computer screen," we cannot ignore the fact that race played an extraordinary role in that election. *See* Bob Hall, *2008 Recap: Same-Day Registration & Other Successes*, Democracy North Carolina (Dec. 26, 2008, updated Mar. 19, 2009), http://www.democracy-nc.org/downloads/WrapUpYearofVoterPR2008.pdf ("[I]n 2008, a record 72% of registered blacks voted, which surpassed the rate of whites (69%) for the first time. . . . That record level of participation proved crucial for many candidates, beginning with Obama."). To justify this serpentine district, which follows the I-85 corridor between Mecklenburg and Guilford Counties, on partisan grounds allows political affiliation to serve as a proxy for race and effectively creates a "magic words" test for use in evaluating the lawfulness of this district. Because race and politics historically have been and currently remain intertwined in North Carolina, the record contains evidence tending to suggest that politics are no more than a pretext for this excruciatingly contorted district. Therefore, given the inadequacy of its findings of fact, the trial court erred by concluding that "the shape, location and composition of [this district] . . . included equally dominant legislative motivations . . . to protect incumbents[ ] and to . . . enact redistricting plans that were more competitive for Republican candidates." Upholding this district's tortured construction creates an incentive for legislators to stay "on script" and avoid mentioning race on the record, and in this instance, it is disingenuous to suggest that race is not the predominant factor. As such, this Court should vacate and remand as to Congressional District 12.

With respect to Senate District 32, plaintiffs contend that the trial court's findings actually undermine its conclusion that strict scrutiny does not apply because the non-VRA districts are not race-based. The trial court found the following relevant facts:

> 204. As was true under the 2000 Census, under the 2010 Census there is insufficient TBVAP in Forsyth County to draw a majority-TBVAP Senate district in Forsyth County. However, because of concerns regarding the State's potential liability under § 2 and § 5, Dr. Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 versions of Senate District 32.
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> . . . .

> 207. The first version of Senate District 32 that was released by the General Assembly had a TBVAP of 39.32%. Subsequently, the [AFRAM][8] plan was released. Its version of District 32 was located in a three-county and three-district group (Forsyth, Davie, Davidson). The [AFRAM] District 32 had a TBVAP of 41.95%. The [AFRAM] District 32 was a majority-minority coalition district with a non-Hispanic white population of 43.18%.
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> 208. The redistricting chairs were concerned that any failure to match the TBVAP % found in the [AFRAM] District 32 could potentially subject the state to liability under § 2 or § 5 of the VRA. Therefore, Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State's version of Senate District 32 so that it would at least equal the [AFRAM] version in terms of TBVAP.

As discussed above, the Supreme Court has held that when redistricting plans drawn in an attempt to preempt VRA § 2 litigation or obtain VRA § 5 preclearance are predominantly race-based, such plans attract strict scrutiny. *See Vera*, 517 U.S. at 959, 116 S. Ct. at 1952, 135 L. Ed. 2d at 257; *Shaw II*, 517 U.S. at 906, 116 S. Ct. at 1901, 135 L. Ed. 2d at 219; *Miller*, 515 U.S. at 920, 115 S. Ct. at 2490, 132 L. Ed. 2d at 782.

The trial court acknowledged that compliance with the VRA was a motivating factor behind the enacted plans, but concluded that "comply[ing] with the Whole County Provision, . . . equaliz[ing] population among the districts, . . . protect[ing] incumbents, and . . . satisfy[ing] the General Assembly's desire to enact redistricting plans that were more competitive for Republican candidates" were "equally dominant legislative motivations." But, in the section of its fact-finding Judgment addressing Senate District 32, the trial court made no findings regarding these other considerations. While the evidence might support such a conclusion, the trial court's actual findings do not. Accordingly, this Court should vacate the trial court's Judgment and remand this case to the trial court to address whether race was the predominant motivation behind the shape, location, and composition of Senate District 32.

With respect to House District 54 and Congressional District 4, the trial court also found that race was not the predominant motivating

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8. The trial court mistakenly refers to plaintiffs' alternative redistricting map as being proposed by the Southern Coalition for Social Justice; it was actually drawn by the Alliance for Fair Redistricting and Minority Voting Rights (AFRAM).

factor. Plaintiffs do not contest these determinations, and they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). As stated above, however, because the shapes and compositions of the four non-VRA districts are necessarily affected by the VRA districts, it would be impossible to vacate and remand piecemeal.

Because I conclude that the issue of whether race was the predominant motivating factor in drawing the non-VRA districts should be remanded to the trial court for more complete findings of fact taking into account the guidance provided by *ALBC*, I do not find it necessary to address the trial court's application of the rational basis test or the majority's approval of it.

III.

Plaintiffs contend that the trial court erred in concluding that the enacted House and Senate plans do not violate the provisions of the state constitution, which dictate that "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," *id.* § 5(3). In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), this Court construed the Whole County Provisions in light of federal law and "mandated that in creating legislative districts, counties shall not be divided except to the extent necessary to comply with federal law, including the 'one-person, one-vote' principle and the VRA." *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 251-52 (2003) (*Stephenson II*) (citing *Stephenson I*, 355 N.C. at 363-64, 562 S.E.2d at 384-85). To ensure complete compliance with federal law and to provide maximum enforcement of the Whole County Provisions, this Court "outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan":

> [1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established* . . . .
>
> [2.] In forming new legislative districts, any deviation from the ideal population for a legislative

district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . . , the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping*; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined*[.]

> [7.] . . . *[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.*
>
> [8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> [9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law.

Stephenson II, 357 N.C. at 305-07, 582 S.E.2d at 250-51 (alterations in original) (emphases added) (quoting *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-97).

The majority concludes that its analysis of the Enacted Plans under the Whole County Provisions remains "unaffected" by *ALBC*. Yet, a Whole County Provisions analysis conducted in accordance with the framework set forth in *Stephenson I*, requires application of the nine rules listed above, the first of which is premised on designing any legislative districts required by the VRA. *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97. One cannot sever compliance with the VRA from compliance with the Whole County Provisions. Because *ALBC* provides legal principles that must be applied in determining the constitutionality of VRA districts, *ALBC* affects an analysis under the Whole County Provisions, albeit indirectly.

In view of the necessity for a remand to the trial court to address the equal protection claim, the trial court must also address the Whole County Provisions issue on remand given that the General Assembly, in attempting to comply with *Stephenson I*'s Rule 1, drew the VRA districts before applying Rules 2 through 9. Because I conclude that the trial court's findings of fact fail to establish that the VRA districts are constitutional, the trial court must, after making a valid determination relating to the VRA districts, and to the extent necessary, revisit the Whole County Provisions issues as well. Simply put, to the extent that the VRA districts are unconstitutional, that fact would necessarily affect the result reached with respect to the General Assembly's application of the rubric set forth in *Stephenson I*. *See Pender County*, 361 N.C. at 508-09, 649 S.E.2d at 375 (concluding that a house district created with the intent to comply with VRA § 2 was not required by the VRA and

thus, "must be drawn in accordance with the WCP and the *Stephenson I* requirements"). As such, I would vacate and remand on this issue.

IV.

When addressing the parties' arguments in support of and in opposition to the Enacted Plans, we cannot lose sight of the purpose of the VRA. The House Report accompanying the original Voting Rights Act of 1965 noted:

> A salient obligation and responsibility of the Congress is to provide appropriate implementation of the guarantees of the 15th amendment to the Constitution. Adopted in 1870, that amendment states the fundamental principle that the right to vote shall not be denied or abridged by the States or the Federal Government on account of race or color.
>
> The historic struggle for the realization of this constitutional guarantee indicates clearly that our national achievements in this area have fallen far short of our aspirations. The history of the 15th amendment litigation in the Supreme Court reveals both the variety of means used to bar Negro voting and the durability of such discriminatory policies [such as grandfather clauses, white primaries, racial gerrymandering, improper challenges, and the discriminatory use of tests].
>
> The past decade has been marked by an upsurge of public indignation against the systematic exclusion of Negroes from the polls that characterizes certain regions of this Nation.

H.R. Rep. No. 89-439, at 8 (1965) (titled "Voting Rights Act of 1965"), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-40 (citations omitted). In *Gingles* the Supreme Court noted the "historical pattern of statewide official discrimination" in North Carolina.[9] 478 U.S. at 39, 106 S. Ct. at 2760, 92 L. Ed. 2d at 39. The VRA was intended to remove barriers to

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9. The Court in *Gingles* summarized the trial court's findings on the types of voting discrimination mechanisms that persisted in North Carolina. The trial court found that "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax, a literacy test, a prohibition against bullet (single-shot) voting and designated seat plans for multimember districts"; that "historic discrimination in education,

enfranchisement and ensure that new barriers did not arise in their place; however, "[s]ince the adoption of the Voting Rights Act [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength." *De Grandy*, 512 U.S. at 1018, 114 S. Ct. at 2660, 129 L. Ed. 2d at 795 (second and third alterations in original) (citation and internal quotation marks omitted). Although those new barriers may not look the same as the old barriers, it is this Court's duty to identify and invalidate policies or tactics that effectively impede the minority group's ability to elect its candidate of choice in compliance with the VRA and the Equal Protection Clause.

Here, even if the legislature considered traditional redistricting principles, such as compactness and the protection of incumbents or other political motivations, the fact remains that the General Assembly started with the premise that African-American voters in North Carolina should only be guaranteed the opportunity to elect candidates of their choice to 21% of the seats in each chamber. From there, the legislature worked backwards to avoid liability under § 2 and ensure preclearance under § 5. The implications of such a premise reach beyond the challenged VRA districts, affecting the non-VRA districts as well.

When the legislature purposely carves out majority-minority districts, increasing or decreasing the TBVAP by a few percentage points while maintaining a greater than 50% TBVAP, the district-drawing process necessarily requires the identification of voters by race and the movement of the district lines to incorporate or exclude those voters accordingly. This scheme compels the question: Is the ability of the minority voters who are suddenly no longer represented by their preferred candidate of choice in a VRA district unimportant? If the only way to ensure that the minority group has the ability to elect the candidate of its choice is to create majority-minority districts, the General Assembly has the power to determine which of the voters in the minority group will be represented by the candidate of their choice, and which voters will not.

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housing, employment, and health services had resulted in a lower socioeconomic status for North Carolina blacks as a group than for whites"; that North Carolina had a majority vote requirement for primaries that operated as an impediment to African-American voters' ability to elect their preferred candidates of choice; that white candidates appealed to racial prejudice; that African-Americans enjoyed very little electoral success; and that "voting in the challenged districts was racially polarized." *Gingles*, 478 U.S. at 38-41, 106 S. Ct. at 2760-61, 92 L. Ed. 2d at 39-41 (footnote call numbers omitted).

Writing separately in *De Grandy*, Justice Kennedy warned:

> Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid § 2 litigation. . . . Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against. As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.

Id. at 1029, 114 S. Ct. at 2666, 129 L. Ed. 2d at 802 (Kennedy, J., concurring) (internal citation omitted). In my view, the trial court's decision to uphold the Enacted Plans in the absence of adequate findings demonstrates that Justice Kennedy's concerns may be well-founded.

For all the complexity of VRA jurisprudence, the bottom line is that the manipulation of district lines based on race to a greater extent than necessary to comply with the VRA is unconstitutional. The record in this case contains evidence tending to show that the General Assembly used numerical targets formulated by racial considerations to avoid liability under § 2 and ensure preclearance under § 5 without fully considering whether the decisions made were necessary to enable the minority group to elect its preferred candidate of choice in compliance with the VRA.[10] Any such scheme would be unconstitutional. The trial court's findings are not adequate to support a conclusion that this unconstitutional scheme did not occur. Any impermissibly racially gerrymandered districts affect the entire state under the Whole County Provisions of the North Carolina Constitution. For any of these errors, this Court would do well to vacate and remand rather than prematurely affirm a defective districting plan.

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10. The *amici* constitutional law professors point out that "[t]he distinction between the affirmative purpose of complying with federal law and a state's negative interest in avoiding future liability is constitutionally significant. A legislature concerned about compliance with the Voting Rights Act is ultimately pursuing the same goal of protecting the minority voters whom 'Acts such as the Voting Rights Act sought to help,' *ALBC*, 135 S. Ct. at 1263, and has a strong motivation to craft its redistricting to that end. A legislature intent on avoiding future liability is likely to do no more than the minimum necessary to escape legal difficulties: its interests and those of minority voters are not the same and, indeed, potentially are in conflict."

Accordingly, I concur in that part of the majority's opinion regarding plaintiffs' remaining state claims related to the "Good of the Whole" Clause in Article I, Section 2 of the Constitution of North Carolina, and respectfully dissent from those parts of the opinion affirming the trial court's erroneous judgment.

Justices HUDSON and ERVIN join in this opinion.

STEPHANIE L. NEEDHAM, Individually and as Guardian ad Litem for John Doe, Jane Doe, and June Doe, minor children

v.

ROY ALAN PRICE

No. 81PA15

Filed 18 December 2015

Parent and Child—parent-child doctrine—unemancipated minors—not a bar to gross negligence, intentional infliction of emotional distress, or punitive damages—bars ordinary negligence

The Court of Appeals erred in a negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, gross negligence, and punitive damages case by reversing in part the trial court's order granting summary judgment in favor of defendant. The parent-child immunity doctrine neither bars unemancipated minors' claims based on gross negligence and intentional infliction of emotional distress nor defeats their claims for punitive damages. The parent-child immunity doctrine 'bars actions between unemancipated children and their parents based on ordinary negligence.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 160 (2015), affirming in part and reversing in part an order entered on 3 February 2014 by Judge J. Thomas Davis in Superior Court, Buncombe County. Heard in the Supreme Court on 5 October 2015.

Paul Louis Bidwell and Douglas A. Ruley for plaintiff-appellee.

Allegra Collins and Jack W. Stewart for defendant-appellant.

BEASLEY, Justice.

We consider whether the Court of Appeals erred by reversing in part the trial court's order granting summary judgment in favor of defendant. We reverse that decision by the Court of Appeals.

Plaintiff Stephanie L. Needham (Plaintiff Needham) and defendant had been involved in a long-term domestic relationship but they separated before 20 November 2009 when the events described below occurred. The couple had three children during the course of the relationship, all of whom were minors at the time of the incident that led to the present action.

On 26 September 2012, plaintiff filed a complaint alleging individual claims against defendant as well as claims asserted in her capacity as guardian ad litem on behalf of the three unemancipated minors. On the children's behalf, plaintiff brought claims seeking compensatory damages based on negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, and gross negligence, plus punitive damages. Plaintiff alleges in the complaint that around 1:25 a.m. on 20 November 2009, when she and the unemancipated minors still occupied defendant's home, defendant surreptitiously entered the home through the garage and attic. As defendant attempted to penetrate into the interior of the home via the attic stairs, he caused the attic ladder to unfold into the hallway below, striking plaintiff Needham on the back of her head, neck, and, shoulders. Plaintiff Needham sustained serious and permanent injuries. The unemancipated minors awoke because of the noise, observed plaintiff being struck by the ladder, and "recoiled in terror screaming . . . and watched in shock as [defendant] descended the ladder shouting obscenities at their fallen mother[.]" Plaintiff Needham alleged that the children suffered emotional distress and psychological injuries, including post-traumatic stress disorder.

Defendant filed an answer and counterclaims followed by a motion for summary judgment in his favor on all claims asserted in the action. In his summary judgment motion, defendant argued, *inter alia*, that no issue of material fact existed regarding the unemancipated minors' claims because plaintiff's claims on their behalf are barred under the parent-child immunity doctrine. After hearing the motion, the trial court entered an order on 3 February 2014 granting summary judgment in defendant's favor and dismissing all the children's claims.[1] Plaintiff appealed.

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1. The trial court also denied a separate motion by defendant for summary judgment in his favor on plaintiff's individual claims. That ruling was not challenged before the Court of Appeals and thus, that determination is not before this Court.

Using a de novo standard of review, the Court of Appeals agreed with plaintiff's argument that the parent-child immunity doctrine neither bars the unemancipated minors' claims based on gross negligence and intentional infliction of emotional distress, nor does it defeat their claim for punitive damages.[2] *Needham v. Price*, ___ N.C. App. ___, ___, 768 S.E.2d 160, 164 (2015). Relying on this Court's decision in *Holt*, the Court of Appeals explained that "[t]he parent-child immunity doctrine 'bar[s] actions between unemancipated children and their parents based on *ordinary* negligence.' " *Id.* at ___, 768 S.E.2d at 164 (second alteration in original) (quoting *Doe v. Holt*, 332 N.C. 90, 95, 418 S.E.2d 511, 514 (1992)). The Court of Appeals recognized the exception to the parent-child immunity doctrine found in *Holt* that any injuries sustained by unemancipated minors arising from a parent's willful and malicious acts may be actionable. *Id.* at ___, 768 S.E.2d at 164 (citing *Holt*, 332 N.C. at 96, 418 S.E.2d at 514)). The Court of Appeals also concluded that the terms "willful and wanton conduct" and "gross negligence" are used interchangeably in describing conduct falling between ordinary negligence and intentional conduct. *Id.* at ___, 768 S.E.2d at 164 (quoting *Yancy v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001)). The Court of Appeals ultimately concluded that because gross negligence and intentional infliction of emotional distress require conduct that goes beyond ordinary negligence, an unemancipated minor could pursue those claims against a parent. *Id.* at ___, 768 S.E.2d at 164 (citations omitted). In analyzing the forecast of evidence regarding the unemancipated minors' intentional infliction of emotional distress and gross negligence claims, the Court of Appeals held that the trial court erred by dismissing those claims as well as the related punitive damages claim. *Id.* at ___, 768 S.E.2d at 165-66 (citations omitted). This Court allowed defendant's petition for discretionary review.

In *Holt*, this Court examined whether unemancipated minors could pursue an action against their father in tort arising from repeated incidents of rape and sexual molestation over nine years. *Holt*, 332 N.C. at 91-92, 418 S.E.2d at 512. This Court recognized that the purpose of the parent-child immunity doctrine is "maintenance of family harmony" so that "suits by children against their parents for negligent injury" do not

2. Plaintiff conceded that the doctrine of parent-child immunity bars the unemancipated minors' claims for ordinary negligence. The Court of Appeals concluded that the trial court's decision to dismiss the unemancipated minors' claims of negligence, premises liability, and negligent infliction of emotional distress was not at issue and affirmed the trial court's entry of summary judgment and dismissal on those claims. Thus, the Court of Appeals limited its consideration to the children's claims for gross negligence, intentional infliction of emotional distress, and punitive damages.

"destroy parental authority and undermine the security of the home." *Id.* at 95, 418 S.E.2d at 514 (quoting *Small v. Morrison*, 185 N.C. 577, 584, 118 S.E. 12, 15 (1923)). Therefore, this Court concluded that except where statutorily abrogated, *id.* at 93, 418 S.E.2d at 512-13, the parent-child immunity doctrine "bar[s] actions between unemancipated children and their parents based on *ordinary* negligence," *id.* at 95, 418 S.E.2d at 514. This Court also concluded that "the parent-child immunity doctrine in North Carolina has never applied to, and may not be applied to, actions by unemancipated minors to recover for injuries resulting from their parent's willful and malicious acts." *Id.* at 96, 418 S.E.2d at 514.

In *Holt* this Court took great care to emphasize the importance of allowing unemancipated minors to seek damages for injuries suffered as a result of a parent's willful and malicious conduct through repeated use of that phrase. *Id.* at 94-97, 418 S.E.2d at 513-15. An act is willful "when it is done purposely and deliberately in violation of law" or "when it is done knowingly" and for a particular purpose. *Id.* at 96, 418 S.E.2d at 514 (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929)). An act is malicious when committed deliberately. . . "without just cause, excuse[,] or justification, and is "reasonably calculated to injure another." *Id.* at 96, 418 S.E.2d at 514 (quoting *Betts v. Jones*, 208 N.C. 410, 411, 181 S.E. 334, 335 (1935)). Therefore, the term "willful and malicious acts" refers to intentional acts. *See Holt*, *Id.* at 96, 418 S.E.2d at 514.

The Court of Appeals concluded that the terms "willful and wanton conduct" and "gross negligence" apply to conduct that falls "between ordinary negligence and intentional conduct." *Needham*, ___ N.C. App. at ___, 768 S.E.2d at 164 (quoting *Yancey v. Lea*, 354 N.C. at 52, 550 S.E.2d at 157). However, based upon this Court's holding in *Holt*, the standard for determining whether an unemancipated child's claim can survive summary judgment in an action for damages against a parent is whether the parent's actions are "willful and malicious." Anything short of willful and malicious conduct does not support a valid claim against a parent. We therefore hold that there must be willful and malicious conduct for an unemancipated child's claims to survive summary judgment in an action for damages against a parent.

Notably, the unemancipated minors here were bystanders to plaintiff Needham's injuries while the children in *Holt* were direct victims of repeated sexual abuse by their father over the course of many years. There was no evidence forecast to show that defendant's conduct was directed towards the unemancipated minors. There was also no evidence

forecast to show that defendant's conduct rose to the level of malicious conduct "reasonably calculated to injure another." *See Holt*, 332 N.C. at 96, 418 S.E.2d at 514. We hold that defendant's conduct did not rise to the level of willful and malicious conduct against the unemancipated minors.

We therefore hold that the trial court's entry of summary judgment in favor of defendant on the children's claims for intentional infliction of emotional distress and gross negligence, as well as their related punitive damages claim, was correct, and that the Court of Appeals erred in reversing that portion of the trial court's order. Accordingly, we reverse the decision of the Court of Appeals on the issue before this Court and remand this case to that court for further remand to the trial court for further proceedings not inconsistent with this opinion. The remaining issues addressed by the Court of Appeals were not before this Court and that court's decision as to these issues remains undisturbed.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA
v.
MICHAEL SCOTT HAMILTON

No. 124PA15

Filed 18 December 2015

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 772 S.E.2d 13 (2015), finding no error in part, but vacating defendant's convictions after appeal from judgments entered on 27 March 2014 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County, remanding for resentencing in part, and ordering that defendant receive a new trial in part. Heard in the Supreme Court on 7 December 2015.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender,[1] by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

1. Defendant's new brief was filed on 29 October 2015. Effective 1 November 2015, Glenn Gerding succeeded Staples S. Hughes as Appellate Defender.

STATE v. HUCKELBA

[368 N.C. 569 (2015)]

STATE OF NORTH CAROLINA
v.
ANNA LAURA HUCKELBA

No. 156A15

Filed 18 December 2015

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. ___, 771 S.E.2d 809 (2015), reversing judgments entered on 3 October 2013 by Judge R. Stuart Albright in Superior Court, Guilford County, and remanding for a new trial. Heard in the Supreme Court on 17 November 2015.

Roy Cooper, *Attorney General*, *by Catherine F. Jordan*, *Assistant Attorney General*, *for the State-appellant.*

Edward Eldred for defendant-appellee.

PER CURIAM.

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

REVERSED.

STATE v. LEAK

[368 N.C. 570 (2015)]

STATE OF NORTH CAROLINA
v.
KEITH A. LEAK

No. 206A15

Filed 18 December 2015

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. ___, 773 S.E.2d 340 (2015), reversing an order denying defendant's motion to suppress signed on 26 November 2013 *nunc pro tunc* 6 August 2013 by Judge Tanya T. Wallace, and vacating defendant's guilty plea and a judgment entered on 14 November 2013 by Judge Mark E. Klass, all in Superior Court, Anson County. Heard in the Supreme Court on 17 November 2015.

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

Narendra K. Ghosh for defendant-appellee.

PER CURIAM.

We vacate the decision of the Court of Appeals and remand this case to that court for further remand to the trial court for reconsideration of defendant's motion to suppress in light of *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015).

VACATED AND REMANDED.

STATE v. McCRARY

[368 N.C. 571 (2015)]

STATE OF NORTH CAROLINA
v.
RONALD MICHAEL McCRARY

No. 413A14

Filed 18 December 2015

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. ___, 764 S.E.2d 477 (2014), affirming in part and remanding in part for additional findings of fact an order denying motions to suppress and to dismiss entered on 18 March 2013, which resulted in judgments entered on 21 March 2013, all by Judge W. Osmond Smith in Superior Court, Chatham County. On 10 June 2015, the Supreme Court allowed defendant's petition for writ of certiorari and the State's petition for discretionary review. Heard in the Supreme Court on 16 November 2015.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State-appellant/appellee.

John L. Wait for defendant-appellant/appellee.

PER CURIAM.

This case comes before this Court from the Court of Appeals, which affirmed the trial court's 18 March 2013 order denying defendant's motion to dismiss, but remanded the case "to the trial court to make additional findings of fact addressing the availability of a magistrate and the additional time and uncertainties in obtaining a warrant, as well as the other attendant circumstances that bear upon the conclusion of law that exigent circumstances existed that justified the warrantless blood draw. *State v. McCrary*, ___ N.C. App. ___, ___, 764 S.E.2d 477, 483 (2014) (internal quotation marks omitted). In considering this case, the trial court did not have the benefit of the opinion of the United States Supreme Court in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013). Moreover, in remanding to the trial court for further findings of fact, the Court of Appeals did not vacate or reverse the trial court's previous order.

We affirm the Court of Appeals majority opinion to the extent it affirms the trial court's denial of defendant's motion to dismiss. In addition, we remand to the Court of Appeals with instructions to that court to vacate the portion of the trial court's 18 March 2013 order denying

defendant's motion to suppress and further remand to the trial court for (1) additional findings and conclusions—and, if necessary—a new hearing on whether the totality of the events underlying defendant's motion to suppress gave rise to exigent circumstances, and (2) thereafter to reconsider, if necessary, the judgments and commitments entered by the trial court on 21 March 2013. Defendant's petition for a writ of certiorari and the State's petition for discretionary review were improvidently allowed.

AFFIRMED IN PART AND REMANDED; PETITIONS FOR WRIT OF CERTIORARI AND FOR DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
JOSHUA WINKLER

No. 440PA14

Filed 18 December 2015

Drugs—conspiracy to traffic in opium—motion to dismiss—circumstantial evidence

There was sufficient evidence to support defendant's conviction for conspiracy to traffic in more than four but less that fourteen grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). In the light most favorable to the State, the record showed that defendant mailed sixty Oxycodone pills in an unmarked pill bottle to a person whom he knew to have a history of using and selling controlled substances. The State may rely on circumstantial evidence to survive a motion to dismiss.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 150 (2014), vacating a judgment entered on 7 November 2013 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 5 October 2015.

Roy Cooper, *Attorney General*, *by Barry H. Bloch*, *Assistant Attorney General*, *for the State-appellant.*

Craig M. Cooley for defendant-appellee.

ERVIN, Justice.

The sole issue presented for our consideration in this case is whether the record contains sufficient evidence to support defendant's conviction for conspiracy to traffic in more than four, but less that fourteen, grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). After examining the evidence utilizing the applicable standard of review, we conclude that the State presented sufficient evidence to support the jury's determination that defendant agreed with another individual to traffic in opium by transportation. In light of that determination, we reverse the Court of Appeals' decision to vacate the trial court's judgment and remand this case to the Court of Appeals for the purpose of allowing it to address defendant's remaining challenge to the trial court's judgment. *State v. Winkler*, ___ N.C. App. ___, 767 S.E.2d 150, 2014 WL 6433161, at *4-5 (2014) (unpublished).

On 2 April 2013, the Buncombe County grand jury returned a bill of indictment charging defendant with conspiracy to traffic in at least four, but less than fourteen, grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). More specifically, the grand jury alleged that, on 16 January 2013, defendant "conspire[d] with Jamie Thomas Harris to commit the felony [of] Trafficking in Opium or Heroin, by transporting in excess of 4 grams but less than 14 grams of a mixture containing Oxycodone, an opium derivative, . . . which is included in Schedule II of the North Carolina Controlled Substances Act."[1] The charge against defendant came on for trial before the trial court and a jury at the 4 November 2013 criminal session of the Superior Court, Buncombe County. At trial, the State relied on circumstantial, as opposed to direct, evidence for the purpose of establishing that defendant had conspired with Mr. Harris to traffic in Oxycodone. After the State presented its case in chief, defendant unsuccessfully moved to dismiss the conspiracy charge, arguing that the evidence was insufficient to establish that (1) defendant and Mr. Harris had formed an agreement to traffic in Oxycodone by transportation and (2) the Oxycodone pills had been "transported." Upon announcing his decision to rest without presenting evidence, defendant unsuccessfully renewed his dismissal motion, which was predicated on the same grounds that had been asserted in support of the dismissal

1. The North Carolina Controlled Substances Act is codified in Article 5 of Chapter 90 of the North Carolina General Statutes. *See* N.C.G.S. § 90-86 (2013) (stating that Article 5 of Chapter 90 "shall be known and may be cited as the 'North Carolina Controlled Substances Act' "). "Oxycodone" is explicitly listed as a "Schedule II controlled substance[ ]" in N.C.G.S. § 90-90(1)(a)(14). *Id.* § 90-90(1)(a)(14) (2013).

motion that he had made at the conclusion of the State's evidence. On 6 November 2013, the jury returned a verdict convicting defendant as charged. After accepting the jury's verdict, the trial court entered a judgment on 7 November 2013 sentencing defendant to an active term of 70 to 93 months imprisonment and ordering defendant to pay $54,320.50 in costs, fines, and fees. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

On appeal to the Court of Appeals, defendant argued that the trial court had erred by denying his dismissal motion on the grounds that the evidence developed at trial did not suffice to establish that (1) defendant and Mr. Harris had entered into an agreement to traffic in Oxycodone and (2) the Oxycodone had been "transported." A unanimous panel of the Court of Appeals concluded that "the trial court erred by denying [defendant's] motions to dismiss because the State presented insufficient evidence that [defendant] conspired or formed an agreement with Mr. Harris to traffic in Oxycodone." *Winkler*, 2014 WL 6433161, at *2. As a result, the Court of Appeals vacated the trial court's judgment without addressing defendant's challenge to the sufficiency of the evidence to establish that the Oxycodone had been "transport[ed]." *Id.* at *4. On 9 April 2015, we allowed the State's request for discretionary review of the Court of Appeals' decision.

> "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) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 154 L. Ed. 2d 403 (2002). In ascertaining whether the record contains substantial evidence tending to show the existence of an element of a criminal offense:

> 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). According to well-established North Carolina law:

> Circumstantial evidence may be utilized to overcome a motion to dismiss " 'even when the evidence does not rule out every hypothesis of innocence.' " [*State v.*] *Thomas*, 350 N.C. [315,] [343], 514 S.E.2d [486,] 503 (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))[, *cert. denied*, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999)]. If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, "to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). If, however, the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

State v. Golphin, 352 N.C. 364, 458, 533 S.E.2d 168, 229-30 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305, and *cert. denied*, *id.* at 931, 121 S. Ct. at 1380, 149 L. Ed. 2d at 305 (2001).

N.C.G.S. § 90-95(h)(4)(a) provides that any person "who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate[,] . . . or any mixture containing such substance, shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin' " and shall be punished as a Class F felon "if the quantity of such controlled substance or mixture involved . . . [i]s four grams or more, but less than 14 grams." N.C.G.S. § 90-95(h)(4)(a) (2013). "The penalties provided in subsection (h) of this section . . . also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section." *Id.* § 90-95(i) (2013).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted).

> Direct proof of [a conspiracy] charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.

State v. Whiteside, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933) (citations omitted). We will now review the sufficiency of the evidence adduced at trial to support defendant's conviction in light of the applicable standard of review.

In January 2013, probation and parole officer Melissa Whitson received information that Jamie Harris, a probationer subject to Officer Whitson's supervision, was selling Oxycodone out of his residence. As a condition of his probation, Mr. Harris was required, among other things, to submit to warrantless searches of his person, premises, and vehicle for anything that was reasonably related to his supervision.

On 16 January 2013, Officer Whitson contacted Mr. Harris and requested that he come to her office. A drug test administered to Mr. Harris at the time that he came to Officer Whitson's office for the requested visit was positive for Oxycodone. In view of the fact that she had received information to the effect that Mr. Harris was not living at the location that he had provided to the probation office, Officer Whitson asked Mr. Harris where he was living. In response, Mr. Harris said that "he had been staying . . . some" at 83 Dix Creek Chapel Road and that he was planning to move to that residence on a permanent basis in the near future. Although he was required to keep Officer Whitson informed in the event that he changed his address, Mr. Harris had not told any representative of the probation office that he had already moved to the Dix Creek Chapel Road address. In light of the information that she had

developed, Officer Whitson and two other officers transported Mr. Harris to the Dix Creek Chapel Road residence for the purpose of searching it.

Upon arriving at the residence, which was a two bedroom mobile home, the officers encountered Mr. Harris' girlfriend, Crystal Green, and Mr. Harris' minor son. While searching the mobile home, the officers found various items of drug paraphernalia associated with intravenous drug use, including needles, a spoon containing a partially melted pill, and tourniquets, plus a firearm.

As Officer Whitson entered the living room to converse with one of the other officers and to question Mr. Harris about the firearm, a United States mail carrier knocked at the door for the purpose of delivering a package addressed to "Jamie Harris, 83 Dix Creek Chapel Road, Asheville, North Carolina 28806." The package, which had been sent using priority mail, required a signature confirmation that had been requested by "J. Winkler, 1219 Everglades Avenue, Clearwater, Florida 33764."

In spite of the fact that he "seemed nervous" when the package arrived, Mr. Harris consented to the officers' request to open it. Upon opening the package, the officers found a prescription pill bottle from which all identifying labels and other information had been removed. Inside the bottle, into which tissue that prevented the contents from rattling or making any other noise had been inserted, the officers found sixty pills. After making this discovery, Officer Whitson contacted the poison control center for the purpose of ascertaining the identity of the pills that had been discovered in the bottle and was told that they contained Oxycodone. According to a subsequent analysis performed by Amanda Battin, a forensic scientist with the North Carolina State Crime Laboratory, each of these pills contained thirty milligrams of Oxycodone, a Schedule II opium derivative; twenty of the pills had been made by one manufacturer and the remaining forty pills had been made by another, and the sixty pills had a total combined weight of 6.01 grams.

In light of the report that she had received to the effect that Mr. Harris might have been selling drugs, the quantity of Oxycodone pills contained in the unmarked prescription bottle, and the fact that Mr. Harris "confirmed" the information that she had received concerning his involvement in drug-related activities, Officer Whitson contacted the Buncombe County Anti-Crime Taskforce for the purpose of having further investigative activities performed. Approximately fifteen to twenty minutes later, Officer Tammy Bryson and Agent Amy Seed, who worked with the drug diversion unit of the Buncombe County Anti-Crime Taskforce, arrived at the Dix Creek Chapel Road residence. At

that time, Officer Whitson handed Officer Bryson the package containing the pill bottle.

As of the date of defendant's trial, Officer Bryson had been a law enforcement officer for eighteen years and had conducted "hundreds of drug diversion" investigations.[2] According to Officer Bryson, "Oxycodone and most of the opiates" were the primary prescription medications involved in drug diversion activities. A single thirty milligram Oxycodone pill had a street value of approximately $30.00. As a result, the pills contained in the package that had been shipped to Mr. Harris had a street value of approximately $1,800.00.

Based upon her training and experience, Officer Bryson concluded that the condition of the bottle in which the sixty pills were contained reflected the existence of drug diversion activities. According to Officer Bryson, officers frequently encounter pill bottles from which the labels and other identifying information have been removed during drug diversion investigations. Also, given that individuals are not permitted to ship medications by mail, pill bottles utilized in drug diversion activities are frequently stuffed with tissue to muffle any sounds that the pills might make during the transmission process.

In addition, Officer Bryson suspected that Mr. Harris was involved in drug diversion activities based on the location from which the package in question had been sent. According to Officer Bryson, Florida was a primary "hub" or source state from which unlawfully diverted drugs entered Buncombe County. Officer Bryson had investigated individuals who had transported several hundred to more than a thousand pills dispensed from Florida pharmacies as a result of the fact that Florida did not have "a prescription monitoring system" that law enforcement officers could utilize for the purpose of tracking and investigating prescriptions for controlled substances.

After arresting Mr. Harris, Officer Bryson and Agent Seed began attempting to determine the identity of "J. Winkler," who had sent the package containing the pills to Mr. Harris. As part of that process, the officers listened to recordings of the phone calls that Mr. Harris made from jail. In a phone conversation that occurred on 17 January 2013, Mr. Harris mentioned an individual named "Josh" and stated that Josh was "in town."

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2. According to Officer Bryson, "drug diversion" occurs when a legal drug, such as a prescription medication, is redirected and used illegally or in a manner differing from the purpose for which the drug in question was originally prescribed.

The next day, Officer Bryson and Agent Seed learned that there was an individual named Joshua Winkler, who had a Farmville, North Carolina address and possessed both North Carolina and Florida driver's licenses. Upon obtaining that information, Agent Seed returned to the Dix Creek Chapel Road residence for the purpose of conducting surveillance activities there. At the Dix Creek Chapel Road residence, Agent Seed observed the presence of a vehicle that had not been there on 16 January 2013; however, Agent Seed was unable to ascertain the number of the license plate attached to the vehicle at that time. On 22 January 2013, Officer Bryson observed that the vehicle in question bore a North Carolina license plate that was registered to Joshua Winkler of 4281 West Pine Street in Farmville.

On 28 January 2013, an officer employed by the Asheville Police Department observed defendant leaving the Dix Creek Chapel Road residence and stopped his vehicle. After Officer Bryson and Agent Seed arrived at the scene of the traffic stop, they informed defendant that they were law enforcement officers and asked to speak with him. In response to that request, defendant joined Officer Bryson in the front seat of her vehicle. At that point, Officer Bryson informed defendant that she and Agent Seed wanted to discuss the package that he had sent to Mr. Harris and advised defendant of his rights against compulsory self-incrimination. After defendant executed a rights waiver form and indicated that he was willing to speak with Officer Bryson and Agent Seed, Officer Bryson questioned defendant while Agent Seed took notes.

In the course of his conversation with Officer Bryson and Agent Seed, defendant admitted that he had mailed the Oxycodone pills to Mr. Harris, claimed to be the owner of the pills contained in the package that had been addressed to Mr. Harris, and asserted that he had a prescription for thirty milligram Oxycodone pills. Although defendant lived in Farmville, defendant told the officers a doctor practicing in Miami had written his Oxycodone prescription. Defendant also told the officers that his North Carolina physician had refused to prescribe Oxycodone for him as a result of the fact that he was on probation for "doctor shopping."[3] Defendant claimed to have come from Florida to Buncombe County for the purpose of visiting "several grandchildren" and stated

3. Officer Bryson described "doctor shopping" as an offense in which an individual obtains or seeks to obtain a prescription from a health care practitioner after having already obtained the same prescription from another practitioner without disclosing the existence of the initial prescription to the practitioner from whom the subsequent prescription had been sought or obtained.

that he had visited a couple of his other grandchildren before arriving at Mr. Harris' residence for the purpose of visiting Mr. Harris' son, who was also defendant's grandson.

In the course of his conversation with Officer Bryson and Agent Seed, defendant acknowledged that he knew that "Mr. Harris did pills and sold pills." When asked why he had chosen to mail his Oxycodone pills to Mr. Harris' residence, defendant initially stated that he had acted in this manner because he did not want to travel to North Carolina with the pills in his possession and believed that he would arrive at Mr. Harris' residence before the package containing the pills was delivered. Defendant could not provide any response to Officer Bryson's request for an explanation of the reason that defendant did not want to travel with medication that had been prescribed for him and that he claimed to need. In addition, defendant could not provide any explanation for his decision to place the pills in an unmarked bottle into which tissue had been stuffed and to send the pills to Mr. Harris in light of his knowledge that Mr. Harris used drugs and engaged in unlawful drug transactions.

Defendant told Officer Bryson and Agent Seed that the last occasion on which he had filled his prescription was on 14 January 2013, when he obtained one hundred twenty, thirty milligram Oxycodone pills. At that point, defendant kept half of the pills and sent the other half to Mr. Harris. Although defendant claimed that he took three Oxycodone pills each day, none of the sixty pills that defendant said that he had kept in his possession remained by the time that defendant came to North Carolina. Defendant claimed that his probation officer knew that he took Oxycodone and asserted that he had never produced a positive result when tested for the presence of that medication at the request of his probation officer.

Officer Bryson found defendant's description of the manner in which he obtained, used, and mailed the Oxycodone pills to be "unusual" given that, in order for defendant's account to be true, he would have had to have consumed sixty pills in a couple of days. In addition, Officer Bryson expressed an inability to understand how defendant could have failed to test positive for the presence of Oxycodone. After defendant stated that his claim to this effect should be deemed to be credible because Oxycodone left an individual's system within a day, Officer Bryson reminded defendant that he had admitted consuming Oxycodone three times each day. After this exchange, defendant refrained from engaging in any further discussion of the extent to which he had ever tested positive for the presence of Oxycodone.

In seeking to persuade us to overturn the Court of Appeals' decision, the State argues that the Court of Appeals failed to correctly apply the established standard for evaluating a challenge to the denial of a motion to dismiss for insufficiency of the evidence and that, when the evidence contained in the present record is evaluated and all reasonable inferences permitted by that evidence have been drawn, the State presented more than enough evidence to permit a jury to conclude that defendant and Mr. Harris agreed to traffic in Oxycodone by transportation as part of a drug diversion scheme. Defendant, on the other hand, argues, in reliance upon *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985), that the record evidence shows, at most, the existence of a relationship between defendant and Mr. Harris arising from Mr. Harris' status as the father of defendant's grandson and that evidence of such a relationship, without more, does not sufficiently establish the existence of an unlawful conspiracy. In addition, defendant notes that the record contains no evidence tending to show that defendant and Mr. Harris had communicated in any way, such as by telephone, text message, or e-mail, concerning their alleged agreement to transport Oxycodone despite the fact that they lived in different states. We find the position espoused by the State to be more persuasive than the position espoused by defendant.

When viewed in the light most favorable to the State, the record tends to show that defendant sent sixty Oxycodone pills in an unmarked pill bottle that was packed to prevent its contents from making any noise to an individual that defendant knew to have a history of using and dealing in controlled substances. Defendant acted in this manner despite the fact that he claimed to have a valid Oxycodone prescription, that he could have lawfully travelled from Florida to North Carolina with these Oxycodone pills in his possession, and that he could have sent the package containing the Oxycodone pills to the residences occupied by any of the multiple grandchildren with whom he planned to visit. In addition, Mr. Harris manifested obvious signs of nervousness at the time that he received the package that contained the bottle of pills.[4] Moreover, the fact that defendant knew that Mr. Harris had begun to spend time at the Dix Creek Chapel Road address and elected to send the Oxycodone pills to him at that address even though Mr. Harris' probation officer was ignorant of the fact that Mr. Harris had been staying there tends to support an inference that defendant and Mr. Harris had been in communication

4. Defendant's argument that many people become nervous during encounters with law enforcement officers goes to the weight, rather than the sufficiency, of the State's evidence.

with each other. Finally, defendant was unable to offer any logical explanation for the inconsistencies and logical flaws inherent in the account of his conduct that he provided to Officer Bryson, including his failure to arrive at the Dix Creek Chapel Road residence before the package containing the pill bottle was delivered and his inability to explain what happened to the sixty pills that he claimed to have retained in his possession after mailing the package containing the pill bottle to Mr. Harris. Although defendant denied having been engaged in drug diversion activities with Mr. Harris and offered an innocent explanation for his conduct, this Court has clearly stated that "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Thomas*, 350 N.C. at 343, 514 S.E.2d at 503 (quoting *State v. Stone*, 323 N.C. at 452, 373 S.E.2d at 433). As a result, for the reasons set forth above, we believe that the record, when taken in the light most favorable to the State and when all reasonable inferences permitted by that evidence are drawn in favor of the State, shows much more than a "suspicion or conjecture" of defendant's guilt and provides ample support for the jury's determination that defendant conspired with Mr. Harris to traffic in at least four, but less than fourteen, grams of Oxycodone by transportation. *Golphin*, 352 N.C. at 458, 533 S.E.2d at 229.

The arguments that defendant has advanced in support of the result reached in the Court of Appeals' decision rest, in our opinion, upon a misapprehension of the applicable law. Although defendant correctly notes that he and Mr. Harris were located in different states at the time that they allegedly formed their agreement to traffic in cocaine and that the record is devoid of any direct evidence tending to show that the two men had communicated by telephone, text message, or e-mail concerning their alleged plan to engage in drug diversion activities, the absence of such evidence does not conclusively resolve the issue that is currently before this Court. Simply put, while the presence or absence of such evidence is certainly relevant to the issue of defendant's guilt or innocence, the State is not required to attempt to prove defendant's guilt in any particular manner. In addition, defendant's emphasis upon the absence of direct evidence that he and Mr. Harris had entered into an agreement to traffic in Oxycodone by transportation is inconsistent with the principle that the agreement necessary to support a conspiracy conviction can be established by either direct or circumstantial evidence, or both. Similarly, defendant's reference to this Court's decisions requiring that the circumstantial evidence utilized to establish the existence of an unlawful conspiracy point "unerringly" to the defendant's guilt overlooks the fact that the same decision in which that language initially

appeared indicates that circumstantial evidence can establish the existence of a conspiracy despite the defendant's explicit denial that such an agreement ever existed, *Whiteside*, 204 N.C. at 712-13, 169 S.E. at 712, and the fact that this Court has stated that the circumstantial evidence utilized to properly establish a defendant's guilt need not eliminate "every hypothesis of innocence," *Thomas*, 350 N.C. at 343, 514 S.E.2d at 503. Finally, although defendant correctly cites the Court of Appeals' decision in *Massey* for the proposition that the mere existence of a relationship between two individuals is not, standing alone, sufficient to establish that a defendant entered into an unlawful agreement with another person, the evidence contained in the present record permits a reasonable inference that there was much more than a mere relationship between defendant and Mr. Harris. As a result, given our conclusion that the record evidence, when considered in the light most favorable to the State, tends to show that defendant agreed with Mr. Harris to traffic in at least four, but not more than fourteen, grams of Oxycodone, by transportation, the Court of Appeals' decision is reversed and this case is remanded to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

REVERSED AND REMANDED.

THOMAS C. WETHERINGTON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY (F/K/A N.C. DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA HIGHWAY PATROL), RESPONDENT

No. 22PA14

Filed 18 December 2015

Police Officers—dismissal of highway trooper—failure to exercise discretion—misapprehension of law

The commanding officer of the North Carolina State Highway Patrol acted under a misapprehension of law when he dismissed a State Trooper (petitioner) from employment for an alleged violation of the Patrol's truthfulness policy. The commanding officer erroneously believed that he was required to dismiss petitioner and thus failed to exercise his discretion based on the circumstances of the case. The Supreme Court remanded the matter to the employing

agency for determination of whether petitioner's conduct constituted just cause for dismissal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 752 S.E.2d 511 (2013), affirming a decision and order entered on 14 December 2012 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. On 18 December 2014, the Supreme Court allowed petitioner's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 19 May 2015.

McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee/appellant.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, and Thomas J. Ziko, Special Counsel, for respondent-appellant/appellee.

George J. Franks IV and Richard C. Hendrix for National Association of Police Organizations, amicus curiae.

Crabbe, Brown & James, LLP, by Larry H. James, pro hac vice, and Christina L. Corl, pro hac vice, for National Fraternal Order of Police; and Richard Hattendorf for North Carolina State Lodge of Fraternal Order of Police, amici curiae.

Edelstein and Payne, by M. Travis Payne, for Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.

Bailey & Dixon, LLP, by J. Heydt Philbeck and Sabra J. Faires, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for State Employees Association of North Carolina, amicus curiae.

JACKSON, Justice.

On 4 August 2009, Thomas Wetherington (petitioner) was dismissed from the North Carolina State Highway Patrol (the Patrol) for alleged violations of the Patrol's truthfulness policy. The State Personnel Commission (SPC) determined that petitioner's dismissal was supported

by just cause. Petitioner filed for judicial review in Superior Court, Wake County, and the superior court reversed, concluding that petitioner's "misconduct . . . did not amount to just cause for dismissal" and that "the decision to dismiss [petitioner] was arbitrary and capricious." On appeal, the North Carolina Court of Appeals affirmed the superior court's order. *Wetherington v. N.C. Dep't of Crime Control & Pub. Safety*, ___ N.C. App. ___, 752 S.E.2d 511 (2013). We allowed the petition for discretionary review filed by respondent, the North Carolina Department of Crime Control and Public Safety,[1] and the conditional petition for discretionary review filed by petitioner. Because it appears that the official who dismissed petitioner proceeded under a misapprehension of the law, namely that he had no discretion over the range of discipline he could administer, we now modify and affirm the opinion of the Court of Appeals and remand.

Petitioner was employed as a Trooper with the Patrol. On 21 May 2009, a complaint was filed against petitioner with the Patrol's Internal Affairs Section alleging that petitioner had provided contradictory statements about an incident in which he lost his campaign hat and in doing so had violated the Patrol's truthfulness policy. This policy states: "Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information." After an investigation, the Patrol dismissed petitioner on 4 August 2009.

On 23 October 2009, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH), and a hearing was conducted on 17 and 18 March 2010. On 3 September 2010, the administrative law judge (ALJ) filed a recommended decision making findings of fact and concluding that the Patrol's decision to dismiss petitioner was supported by the evidence. The ALJ made extensive findings of fact that included:

> 5. On March 29, 2009, Petitioner, while on duty, observed a pickup truck pulling a boat and made a traffic stop of that truck on US 70 at approximately 10:00 pm. During that traffic stop, Petitioner discovered two loaded handguns in the truck and smelled the odor of alcohol coming from the interior of the truck. The two male occupants of the truck were cooperative and not belligerent.

1. Subsequently, this Court allowed respondent's motion to substitute the North Carolina Department of Public Safety as respondent.

Petitioner took possession of the handguns. At the conclusion of that traffic stop, Petitioner proceeded to a stopped car that had pulled off to the side of the road a short distance in front of the truck and boat trailer.

6. Petitioner testified that he first noticed his hat missing during his approach to the car parked in front of the truck. Petitioner heard a crunch noise in the roadway and saw a burgundy eighteen-wheeler drive by.

7. Petitioner testified that after the conclusion [of] his investigation of the stopped car, he looked for his hat. Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened.

. . . .

9. After searching for, but not locating his hat, Petitioner contacted Sergeant Oglesby, his immediate supervisor, and told him that his hat blew off of his head and that he could not find it.

. . . .

11. Trooper Rink met Petitioner on the side of the road of US 70. Trooper Rink asked Petitioner when he last saw his hat. Petitioner said he did not know. . . . Petitioner said that he was going down the road . . . and was putting something in his seat when he realized he did not have his hat. Petitioner then indicated that he turned around and went back to the scene of the traffic stops and that is when he found the acorns from his hat. Petitioner was very upset and Trooper Rink told Petitioner that everybody loses stuff and that if Petitioner did not know what happened to his hat, then he should just tell his Sergeants that he didn't know what happened to it. Petitioner replied that it was a little late for that because he already had told his Sergeant that a truck came by and blew it off of his head.

. . . .

13. The testimony of Trooper Rink provides substantial evidence that Petitioner did not know what happened to his hat, was untruthful to Sergeant Oglesby when he

said it blew off of his head, and that Petitioner's untruthfulness was willful.

. . . .

15. The next day, March 30, 2009, Sergeant Oglesby and several other members of the Patrol looked for Petitioner's hat.

16. Sergeant Oglesby had a detailed conversation with Petitioner on the side of the road regarding how the hat was lost. During the conversation, Petitioner remained consistent with his first statement to Sergeant Oglesby from the night of March 29, 2009 as he explained to Sergeant Oglesby that a gust of wind blew his hat off of his head. Petitioner continued stating that the wind was blowing from the southeast to the northwest. Petitioner said he turned back towards the direction of the roadway and saw a burgundy eighteen[-]wheeler coming down the road so he could not run out in the roadway and retrieve his hat. Petitioner then heard a crunch and did not see his hat anymore.

. . . .

18. Petitioner was not truthful to Sergeant Oglesby on March 30, 2009, when he explained how he lost his hat.

. . . .

20. Petitioner testified that, approximately three to four days after the loss of the hat, he suddenly realized that the hat did not blow off of his head, but that he had placed the hat on the light bar of his Patrol vehicle and it blew off of the light bar. Petitioner never informed any supervisors of this sudden realization.

21. Approximately three weeks after the hat was lost, Petitioner received a telephone call from Melinda Stephens, during which Petitioner was informed that her nephew, the driver of the truck and boat trailer on March 29, 2009, had Petitioner's hat.

22. Petitioner informed Sergeant Oglesby that his hat had been found.

23. Petitioner's hat subsequently was returned to Sergeant Oglesby. When returned, the hat was in good condition and did not appear to have been run over.

24. Due to the inconsistencies in Petitioner's statements and the condition of the hat, First Sergeant Rock and Sergeant Oglesby called Petitioner to come in for a meeting. During the meeting, First Sergeant Rock asked Petitioner to clarify that the hat blew off of his head and that the hat was struck by a car. Petitioner said yes. First Sergeant Rock then pulled Petitioner's hat out of the cabinet and told Petitioner that his story was not feasible because the hat did not appear to have been run over. At that point, Petitioner broke down in tears and said he wasn't sure what happened to his hat. He didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off. Petitioner stated that he told Sergeant Oglesby that the hat blew off his head because he received some bad counsel from someone regarding what he should say about how the hat was lost.

25. During his meeting with First Sergeant Rock and Sgt. Oglesby, Petitioner was untruthful when he told First Sergeant Rock that the hat blew off of his head because by Petitioner's own testimony, three days after losing his hat he realized that he placed it on his light bar. However, three weeks after the incident, in the meeting with First Sergeant Rock and Sergeant Oglesby he continued to claim that the hat blew off of his head. It wasn't until First Sergeant Rock took the hat out and questioned Petitioner more that Petitioner admitted that the hat did not blow off of his head, but blew off of the light bar. Therefore, even if Petitioner was confused on March 29, 2009, as he claims, he still was being untruthful to his Sergeants by continuing to tell them that the hat blew off of his head . . . .

. . . .

33. Petitioner's untruthful statements to First Sergeant Rock and Sergeant Oglesby were willful and were made to protect himself against possible further reprimand because of leaving the patrol vehicle without his cover.

(Citations omitted.) The findings also noted that Colonel Randy Glover ultimately was responsible for determining what type of discipline to impose upon petitioner for his conduct. The ALJ observed that Colonel Glover "considers the policy on truthfulness so paramount to the organization that, in his opinion, a member who is untruthful must be terminated"; however, the ALJ found that Colonel Glover "was aware that he had discretion" regarding what type of discipline to impose and "exercised that discretion in deciding to dismiss [p]etitioner." The ALJ concluded that "Respondent had just cause to discipline Petitioner in the form of dismissal." The SPC adopted the ALJ's findings of fact and conclusions of law, found that "Respondent met its burden of proving that it had just cause to dismiss Petitioner," and affirmed.

On 25 February 2011, petitioner filed for judicial review in Superior Court, Wake County, and on 14 December 2012, the superior court entered an order reversing the final decision of the SPC. Although the superior court determined that the evidence supported the agency's findings that petitioner engaged in untruthful conduct and that his actions constituted unacceptable personal conduct, the court ultimately concluded that the conduct did not provide just cause for dismissal. In addition, the superior court ruled that the decision to dismiss petitioner "was arbitrary and capricious" and that Colonel Glover failed to "consider alternative, lesser sanctions against [petitioner] over this incident involving the temporary loss of a $50.00 hat during a legitimate traffic stop and [petitioner's] variable recollections of the circumstances under which the hat disappeared."

Respondent appealed to the Court of Appeals, and petitioner filed a cross appeal. On 17 December 2013, the Court of Appeals filed a unanimous, published opinion affirming the superior court's order. *Wetherington*, ___ N.C. App. at ___, ___, 752 S.E.2d at 511, 517. We allowed both respondent's petition for discretionary review and petitioner's conditional petition for discretionary review.

Respondent argues that the Court of Appeals erred by affirming the superior court's order reversing the SPC's decision. We disagree. Because Colonel Glover did not understand that he had discretion to consider the full range of potential discipline, his decision was "[a]ffected by [an] error of law." *See* N.C.G.S. § 150B-51(b)(4) (2009).[2]

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2. The General Assembly amended section 150B-51 in 2011. Act of June 18, 2011, ch. 398, sec. 27, 2011 N.C. Sess. Laws 1678, 1689. The amendments apply only to contested cases commenced on or after 1 January 2012. *Id.*, sec. 63, at 1701. The petition for a contested case hearing in the case *sub judice* was filed 23 October 2009.

"On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citing, *inter alia*, *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997), *questioned in Shackleford-Moten v. Lenoir Cty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002), *disc. rev. denied*, 357 N.C. 252, 582 S.E.2d 609 (2003), and *State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981)). The reviewing court may, *inter alia*,

> reverse or modify the agency's decision . . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b). This Court has explained that if "the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) . . . a court engages in *de novo* review." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 895 (citing, *inter alia*, *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 665, 509 S.E.2d 165, 171 (1998)). "Under the *de novo* standard of review, the trial court 'consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's.' " *Id.* at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (alterations in original)).

Chapter 126 of our General Statutes provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35(a) (2009). A career State employee is defined as

> a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:

> (1) Is in a permanent position appointment; and
>
> (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the State Personnel Act for the immediate 24 preceding months.

Id. § 126-1.1 (2009).

As authorized by N.C.G.S. § 126-35(a), the SPC has adopted rules that define just cause for discipline of a career state employee. *See* 25 NCAC 01J .0604 (June 2014). These rules establish two grounds for discipline: unsatisfactory job performance and unacceptable personal conduct. *Id.* Unacceptable personal conduct is defined, *inter alia*, as

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> (b) job-related conduct which constitutes a violation of state or federal law;
>
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
>
> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a state employee that is detrimental to state service[.]

25 NCAC 01J .0614(8) (June 2014).

"Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900. Just cause "is a 'flexible concept, embodying notions of equity and fairness,' that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900-01 (citations omitted) (quoting *Crider v. Spectralite Consortium, Inc.*, 130 F.3d 1238, 1242 (7th Cir. 1997)). It follows that, pursuant to *Carroll*'s "flexible" definition of "just cause," Colonel Glover has discretion, as a matter of law, in dismissing an employee for violating the Patrol's truthfulness policy.

Here, the ALJ found that petitioner behaved as alleged and that his behavior violated a written work rule. The error of law occurred when Colonel Glover was unaware of his responsibility to exercise discretion. Colonel Glover's testimony at the OAH hearing establishes that he decided to dismiss petitioner not based upon consideration of the facts and circumstances of petitioner's conduct, but instead because of his erroneous view that any violation of the Patrol's truthfulness policy must result in dismissal. Colonel Glover testified that because petitioner's conduct "was obviously a violation of the truthfulness policy," dismissal was required, and he repeatedly asserted that he "had no choice" to impose any lesser punishment. After petitioner's counsel asked Colonel Glover whether, "when there is a substantiated or adjudicated finding of untruthfulness . . . [a trooper] would necessarily need to be terminated," Colonel Glover reiterated that if "that's the violation, again . . . I have no choice because that's the way I view it." Petitioner's counsel then asked, "[D]oes that mean if you find a substantiated or adjudicated violation of the truthfulness policy . . . that you don't feel like that gives you any discretion as Colonel to do anything less than termination?" Colonel Glover agreed with that statement.

As written, the truthfulness policy applies to "all written and oral communications," and it applies to a wide range of untruthful, inaccurate, "improper," or "misleading" statements. Nothing in the text of the policy limits its application to statements related to the trooper's duties, the Patrol's official business, or any other significant subject matter. Notwithstanding the potentially expansive scope of this policy, Colonel Glover confirmed that he could not impose a punishment other than dismissal for any violation, apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Colonel Glover's mistaken view that he had no discretion over the appropriate measure of discipline was a misapprehension of the law, which subjects his decision to reversal or modification pursuant to N.C.G.S. § 150B-51(b)(4) because it is "[a]ffected by other error of law." The approach employed by Colonel Glover in applying a fixed punishment of dismissal for any violation is antithetical to the flexible and equitable standard described in *Carroll* and is at odds with both the ALJ's and the SPC's finding of fact that Colonel Glover exercised discretion in reaching his decision to dismiss petitioner.

Application of an inflexible standard deprives management of discretion. While dismissal may be a reasonable course of action for dishonest conduct, the better practice, in keeping with the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case.

As such, by upholding respondent's use of a per se rule of mandatory dismissal for all violations of a particular policy, the SPC failed to examine the facts and circumstances of petitioner's individual case as required by this state's jurisprudence. For these reasons, we conclude that the superior court correctly reversed the SPC's decision.

Nevertheless, the superior court determined that petitioner's conduct did not constitute just cause for dismissal, and the Court of Appeals affirmed that determination. Because we conclude that Colonel Glover's use of a rule requiring dismissal for all violations of the Patrol's truthfulness policy was an error of law, *see* N.C.G.S. § 150B-51(b)(4), we find it prudent to remand this matter for a decision by the employing agency as to whether petitioner should be dismissed based upon the facts and circumstances and without the application of a per se rule. As a result, we do not decide whether petitioner's conduct constitutes just cause for dismissal.

Accordingly, the decision of the Court of Appeals is modified and affirmed, and the case is remanded to the Court of Appeals with instructions to that court to remand to the Superior Court, Wake County for subsequent remand to the SPC and further remand to the employing agency for additional proceedings not inconsistent with this opinion. We further conclude that petitioner's conditional petition for discretionary review was improvidently allowed.

MODIFIED, AFFIRMED, AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
QUINTEL AUGUSTINE, TILMON GOLPHIN, AND CHRISTINA WALTERS	)	

No. 139PA13

ORDER

The trial court granted respondents' motions for appropriate relief under the Racial Justice Act, N.C.G.S. §§ 15A-2010 to -2012 (2009) and N.C.G.S. §§ 15A-2010 to -2012 (2011 & Supp. 2012). After careful review, we conclude that the error recognized in this Court's Order in *State v. Robinson*, ___ N.C. ___, ___ S.E.2d ___ (2015) (411A94-5), infected the trial court's decision, including its use of issue preclusion, in these cases. Accordingly, the trial court's order is vacated. Furthermore, the trial court erred when it joined these three cases for an evidentiary hearing. These cases are therefore remanded to the senior resident superior court judge of Cumberland County for reconsideration of respondents' motions for appropriate relief. *Cf.* Gen. R. Pract. Super. & Dist. Cts. 25(4), 2016 Ann. R. N.C. 22.

We express no opinion on the merits of respondents' motions for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

By order of the Court in Conference, this 15th day of December, 2015.

s/Jackson, J.
For the Court

Justice BEASLEY and Justice ERVIN did not participate in the consideration or decision of these cases.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 18th day of December, 2015

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	
MARCUS REYMOND ROBINSON	)	

No. 411A94-5

ORDER

The trial court granted respondent's motion for appropriate relief under the Racial Justice Act, N.C.G.S. §§ 15A-2010 to -2012 (2009). We allowed a petition for writ of certiorari to review the trial court's order.

Central to respondent's proof in this case is a statistical study that professors at the Michigan State University College of Law conducted between 2009 and 2011. Respondent gave petitioner all of the data used for the study in May 2011 and a report summarizing the study's findings in July 2011. Respondent then provided the final version of the study to petitioner in December 2011, approximately one month before the hearing on respondent's motion began. At the start of the hearing, petitioner moved for a third continuance because it needed more time to collect additional data from prosecutors throughout the state and to address respondent's study. The trial court denied the motion.

Section 15A-952 of the Criminal Procedure Act requires a trial court ruling on a motion to continue in a criminal proceeding to consider whether a case is "so unusual and so complex" that the movant needs more time to adequately prepare. N.C.G.S. § 15A-952(g)(2) (2013). Respondent's study concerned the exercise of peremptory challenges in capital cases by prosecutors in Cumberland County, the former Second Judicial Division, and the State of North Carolina between 1990 and 2010. The breadth of respondent's study placed petitioner in the position of defending the peremptory challenges that the State of North Carolina had exercised in capital prosecutions over a twenty-year period. Petitioner had very limited time, however, between the delivery of respondent's study and the hearing date. Continuing this matter to give petitioner more time would have done no harm to respondent, whose remedy under the Act was a life sentence without the possibility of parole. See N.C.G.S. § 15A-2012(a)(3). Under these exceptional circumstances, fundamental fairness required that petitioner have an adequate opportunity to prepare for this unusual and complex proceeding. Therefore, the trial court abused its discretion by denying petitioner's third motion for a continuance.

The trial court's failure to give petitioner adequate time to prepare resulted in prejudice. *See* N.C.G.S. § 15A-952(g)(1)-(2). Without adequate time to gather evidence and address respondent's study, petitioner did not have a full and fair opportunity to defend this proceeding. *Cf. State v. Wong*, No. 424P09, 2009 N.C. LEXIS 1263 (N.C. Oct. 9, 2009); *State v. Stuart*, 359 N.C. 279, 609 S.E.2d 224 (2004); *State v. Nicholson*, 533 S.E.2d 463 (N.C. 1999). Accordingly, the trial court's order is vacated and the matter is remanded to the senior resident superior court judge of Cumberland County for reconsideration of respondent's motion for appropriate relief. *Cf.* Gen. R. Pract. Super. & Dist. Cts. 25(4), 2016 Ann. R. N.C. 22.

We express no opinion on the merits of respondent's motion for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearing on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *State v. Augustine*, ___ N.C. ___, ___ S.E.2d ___ (2015) (139PA13), in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

By order of the Court in Conference, this 15th day of December, 2015.

s/Jackson, J.
For the Court

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

WITNESS my hand and the seal of the Supreme Court of North Carolina, this 18th day of December, 2015.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

15 DECEMBER 2015

050P00-3	State v. Albert Lee Stevenson, Jr.	1. Def's *Pro Se* Motion for Temporary Stay 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-610) 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **12/11/2015** 2. Denied **12/11/2015** 3. Allowed **12/11/2015**
056PA14-2	Kirby, et al. v. N.C. Department of Transportation	1. Motion to Admit Mark Miller *Pro Hac Vice* 2. Pacific Legal Foundation and Center for Law and Freedom's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed
084P15-3	State v. Curtis Louis Sangster	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. 2. 3. Denied **11/25/2015**
119PA15	In the Matter of N.T.	Guardian *ad Litem*'s Motion to Substitute Counsel	Allowed **12/02/2015**
123A13	Vincent Burley, Employee v. U.S. Foods, Inc., Employer, and Indemnity Insurance Company of North America, Carrier (with Gallagher Bassett Services, Inc., Third-Party Administrator)	Plt's Petition for Rehearing Under N.C. R. App. 31	Denied **11/12/2015**
172P15-4	State v. Mohammed Nadder Jilani	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Dismissed **11/25/2015** 2. Denied **11/25/2015**
207PA14-2	State v. Curtis Mario Benton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA13-1204-2) 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

15 DECEMBER 2015

216P15	Amy Pharr Elam, Elizabeth F. Bailey, and Reid T. Deramus v. William Douglas Management, Inc. and Charlotte House Association of Unit Owners, Inc.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA14-1377) 2. Plts' Motion for Temporary Stay 3. Plts' Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **07/22/2015** Dissolved **12/15/2015** 3. Denied **Ervin, J., recused**
219P15	State v. William Lowery, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-385)	Denied
222P15	Thomas F. Adcox v. Clarkson Brothers Construction Company and UTICA National Insurance Group	1. Defs' Motion for Temporary Stay (COA14-313-2) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/02/2015** Dissolved **12/15/2015** 2. Denied 3. Denied 4. Dismissed as moot **Beasley, J., recused**
238P15	State v. Grady Lee Nicholson	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Denied 3. Allowed 4. Dismissed as moot

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

15 DECEMBER 2015

247P15	The Estate of Robert Eugene Tipton, Jr., by and through his Ancillary Administrator Deborah Dunklin Tipton v. High Point University, Delta Sigma Phi Fraternity, Inc., Jeffrey A. Karpovich, Michael Qubein, and Marshall Jefferson	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1286) 2. Motion to Admit Douglas G. Fierberg *Pro Hac Vice* 3. Motion to Admit Douglas C. Melcher *Pro Hac Vice*	1. Denied 2. Allowed 3. Allowed **Martin, C.J., recused**
252PA14-2	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/10/2015** 2. 3.
266P15	State v. Thomas Rashad Armstrong	Def's PDR Under N.C.G.S. § 7A-31 (COA14-765)	Denied **Ervin, J., recused**
271P14-2	State v. Rodney Moucell Jones	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed **11/25/2015** 2. Denied **11/25/2015** 3. Allowed **11/25/2015**
274P15-2	Robert K. Stewart v. Honorable James M. Webb	1. Plt's *Pro Se* Motion for Complaint 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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

15 DECEMBER 2015

284P15	Francisco K. Avoki and Ekoko K. Avoki v. Larry Eugene Ferebee, Jr., Does I-XX (Unknown), and Intervenor Government Employees Insurance	1. Plts' *Pro Se* Motion for Notice of Appeal (COA15-484) 2. Plts' *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 3. Plts' *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **Ervin, J., recused**
286P15	State v. Crystal Gail Mangum	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-909) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw PDR	1. Denied 2. — 3. Allowed
292P15	State v. Lucious Bernard Sullivan, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-76)	Denied **Ervin, J., recused**
295P15	State v. Claude Edward Dammons	1. Def's *Pro Se* Motion for PDR (COAP15-499) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **11/19/2015** 2. Allowed **11/19/2015**
303P15	Melchor Zapata Dominguez, Employee v. Francisco Dominguez Masonry, Inc., Employer and Builders Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1307)	Denied
304P15	Salvatore Marsico and David Hand v. New Hanover County Board of Education	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA14-1370)	Denied
305P97-7	State v. Egbert Francis, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-255)	Dismissed

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

15 DECEMBER 2015

306P15	Karen Jensen v. Blake Jessamy, in his individual and official capacities; Rodney Monroe, in his individual and official capacities; The City of Charlotte; Richard Stahnke, in his individual and official capacities; Sgt. Elliot, in his individual and official capacities; Sheriff Daniel Chipp Bailey, in his individual and official capacities; Sheriff A. Conner, in his individual and official capacities; Sheriff G. Coble, in his individual and official capacities; Sheriff Employees at the Mecklenburg County Jail; John Doe, in his individual and official capacities; Deputy Horn, in his individual and official capacities; Deputy Pillow, in his individual and official capacities; Deputy Durant, in his individual and official capacities; and Deputy Williams, in his individual and official capacities	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA15-35) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' (Mecklenburg County Sheriff Defendants) Motion to Dismiss Appeal 4. Defs' (City Defendants) Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed 4. Allowed **Ervin, J., recused**
322P15-3	State v. Raymond Alan Griffin	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Petition for *Writ of Mandamus* 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed 3. Dismissed
328P15	In the Matter of The Estate of Charles W. Pickelsimer, Jr.	Caveators' PDR Under N.C.G.S. § 7A-31 (COA14-1192)	Denied

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

15 DECEMBER 2015

332PA14-2	State v. Gregory Aldon Perkins	1. Def's Notice of Appeal Based on A Constitutional Question (COA15-15) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw as Private Assigned Counsel 4. Def's Motion to Appoint the Appellate Defender 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed 5. Allowed
331P15	State v. Harley Ray Alligood, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Beaufort County (COAP15-103) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
338P15	State v. Christopher Adam Turbyfill	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1003)	Denied
341A15	Julie Lancaster and Brannon Lancaster v. Harold K. Jordan and Co., Inc., Withers & Ravenel, Inc., Arthur R. Cogswell, and Lighthouse Engineering, PA	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA14-1413) 2. Def's (Harold K. Jordan and Co., Inc.) Motion to Dismiss Appeal	1. --- 2. Allowed
342P15	State v. Teddy Rudolph King	Def's PDR Under N.C.G.S. § 7A-31 (COA15-54)	Denied
344P15	State v. Dymond Jevon-Demetrius Moore	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-52)	Denied
345P15-2	State v. Jonathan Lavon Friend El	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
348P15	State v. Michael Antony Paige	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1324)	Denied
349P12-2	Harold Bright Harris, Jr. v. Department of Public Safety, Division of Adult Prisons; Lawrence Parsons	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **11/30/2015** **Ervin, J., recused**

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

15 DECEMBER 2015

349P15	Timothy W. Holliday, Employee v. Tropical Nut & Fruit Co., Employer; Farmington Casualty Co., Carrier	Defs' PDR Under N.C.G.S. § 7A-31 (COA14-1030)	Denied
350P15	State v. Jimmy Scott Sisk	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	Denied **Ervin, J., recused**
352P15	State v. Aswad Malik Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA15-173)	Denied
354P15	State v. Christopher Mosby	Def's *Pro Se* Motion for Notice of Appeal for Discretionary Review (COAP15-597)	Dismissed
357P15	State v. James David Nanney	Def's *Pro Se* Motion for Notice of Appeal (COA15-476)	Dismissed *ex mero motu*
358P15	State v. Shawn Louis Goodman	Def's *Pro Se* Motion for PDR (COAP14-917)	Dismissed
361P15	Ardeal Roseboro v. John Roseboro, The Roseboro Law Firm, Womble Carlyle Sandridge & Rice, City of Winston-Salem, Winston-Salem Police Department, Barry D. Roundtree, and M.L. Bowens	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COAP15-704)	Denied
363A15	Steven Craig Herndon v. Alison Kingrey Herndon	Plt's Motion for Additions to Record on Appeal	Allowed **11/30/2015**
367P15	State v. Christopher John Horton	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA12-366) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Ervin, J., recused**

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

15 DECEMBER 2015

368P15	Johnnie Wilkes, Employee v. City of Greenville, Employer, Self-Insured (PMA Management Group, Third-Party Administrator)	1. Def's Motion for Temporary Stay (COA14-1193) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 1**1/12/2015** 2. 3.
374P15	State v. Matthew Ray Hooks	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-212) 2. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
375A15	Dabeeruddin Khaja v. Fatima Husna	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-701) 2. Plt's Motion to Dismiss Def's Notice of Appeal 3. Plt's Motion to Dismiss Appeal 4. Def's *Pro Se* Motion for Temporary Stay 5. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. --- 2. Allowed 3. Allowed 4. Denied **11/25/2015** 5. Dismissed as moot
378P09-2	State v. Kawamie Shonta Cole	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 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 Amend Petition for *Writ of Certiorari* with Addendum	1. Denied 2. Allowed 3. Dismissed as moot 4. Allowed **Jackson, J., recused**
379P15	State v. Jesus Rafael Rodriguez	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-794) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
380P15	State v. Deonza Lamar Carmichael	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
381P15	State v. Jeremie Labrandon Stevenson	Def's *Pro Se* Motion for PDR (COA10-1313)	Denied **Ervin, J., recused**

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

15 DECEMBER 2015

385P15	State v. Archimede N. Nkiam	1. State's Motion for Temporary Stay (COA14-1164) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/23/2015** 2. 3. 4.
387P15	State v. Judy Hardison	1. State's Motion for Temporary Stay (COA15-150) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/23/2105** 2. 3.
391P15	City of Asheville, a municipal corporation v. State of North Carolina and the Metropolitan Sewerage District of Buncombe County	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/25/2015** 2. 3. 4.
416P15	State v. Nijel Ramsey Lee	1. Def's *Pro Se* Motion for Notice of Appeal (COAP14-351) 2. Def's *Pro Se* Petition in the Alternative for *Writ of Habeas Corpus*	1. 2. Denied **12/15/2015**
468P13-3	State v. Donald Jay Young	1. Def's *Pro Se* Motion for PDR (COAP15-745) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
497P12-3	State v. Jay Mikal Brooks-Bey	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **Ervin, J., recused**
525P13-3	State v. Dennis O'Keith Blackwell	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion for Collateral Review Consideration Petition Second Review of Judgment Supplementary Petition Not Challenging Conviction Only the Sentencing Phase 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. Denied 3. Allowed 4. Dismissed as moot

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

15 DECEMBER 2015

606A05-3	State v. Eric Glenn Lane (DEATH)	1. Def's Motion for Extension of Time to Prepare Transcript 2. Def's Motion in the Alternative to Declare the One Hundred Twenty-Five Day Deadline for Capitally Tried Cases Applies	1. Allowed by Special Order **11/18/2015** 2. Denied **Jackson, J., recused**
629P01-4	State v. John Edward Butler	Def's *Pro Se* Petition for Writ of Certiorari to Review Order of COA (COAP14-558)	Denied
667PA03-5	Kenneth D. Bobbitt v. Danny Safrit, Administrator, Alexander Correctional Institution and Roy A. Cooper, III, Attorney General, State of North Carolina	State's Motion to Withdraw the Appeal	Allowed **11/24/2015**

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

18 DECEMBER 2015

124PA15	State v. Michael Scott Hamilton	1. Def's Petition for *Writ of Habeas Corpus* 2. Def's Motion in the Alternative for Appropriate Relief	1. Dismissed without prejudice 2. Dismissed without prejudice
139PA13	State v. Quintel Augustine, Tilmon Golphin, and Christina Walters	1. Defs' Petition for *Writ of Mandamus* 2. Defs' Motion to Withdraw Petition for *Writ of Mandamus* to the Clerk of Superior Court of Cumberland County 3. Defs' Motion to Strike 4. Defs' Motion to Supplement the Record 5. Defs' Motion to Supplement Record	1. Withdrawn **01/02/2014** 2. Allowed **01/02/2014** 3. Denied 4. Allowed **01/23/2014** 5. Allowed **12/18/2014** **Ervin, J., recused** **Beasley, J., recused**
201PA12-3	Margaret Dickson, et al. v. Robert Rucho, et al.	1. Plts' (NAACP) Notice of Filing of Affidavit of John W. O'Hale 2. Affidavit of John W. O'Hale 3. Motion to Supplement Record on Appeal by Taking Judicial Notice of Certain Materials	1. --- 2. --- 3. Allowed

TYKI SAKWAN IRVING
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

No. 557PA13

Filed 29 January 2016

Tort Claims Act—jurisdiction—school activity bus accident—not covered by waiver of governmental immunity

The Industrial Commission did not have jurisdiction over plaintiff's action brought under the Torts Claims Act to recover for alleged negligence by an employee of a local board of education in the operation of an activity bus transporting students and school staff to an extracurricular event. The waiver of governmental immunity provided in N.C.G.S. § 143-300.1 of the Tort Claims Act did not apply to this set of facts. Public school buses, school transportation service vehicles, and school activity buses are distinct categories of vehicles, and school activity buses were not incorporated into the waiver of immunity contemplated by the Tort Claims Act.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 750 S.E.2d 1 (2013), reversing an order filed on 8 August 2012 by the North Carolina Industrial Commission and remanding for further proceedings. Heard in the Supreme Court on 16 February 2015.

Osborne Law Firm, P.C., by Curtis C. Osborne, for plaintiff-appellee.

Roy Cooper, Attorney General, by Olga E. Vysotskaya de Brito and Amar Majmundar, Special Deputy Attorneys General, for defendant-appellant.

Law Office of Kevin J. Williams, PLLC, by Kevin J. Williams; and Perry Perry & Perry, P.A., by Maria Singleton, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this case, we consider whether plaintiff Tyki Sakwan Irving may bring an action pursuant to the Tort Claims Act before the North Carolina Industrial Commission (the Commission) to recover for alleged negligence by an employee of a local board of education in the operation of an activity bus transporting students and school staff to an extracurricular event. Because the waiver of governmental immunity provided in the relevant section of the Tort Claims Act does not apply to the set of facts before us, we conclude that the Commission does not have jurisdiction over plaintiff's action.

In October 2007, plaintiff's car was struck by a school activity bus transporting student athletes and staff to a football game in Mecklenburg County. The bus was driven by Randall Long, an employee of defendant Charlotte-Mecklenburg Board of Education. Plaintiff contends that as a result of Long's negligence, she received serious personal injuries, for which she now seeks compensation.

Plaintiff initiated this action on 29 September 2010 by filing a claim against defendant with the Commission pursuant to the Tort Claims Act—specifically, section 143-300.1. This statute establishes a limited waiver of local governmental immunity by authorizing lawsuits against county and city boards of education for the negligent operation of "school buses" and "school transportation service vehicles" when certain criteria are met, and the statute confers jurisdiction upon the Commission to hear these claims. N.C.G.S. § 143-300.1 (2013).

On 8 August 2012, the Commission granted defendant's motion for summary judgment on the grounds that the Commission lacked subject matter jurisdiction over plaintiff's claim because the claim did not fall within the parameters of section 143-300.1.

Plaintiff appealed, and the Court of Appeals unanimously reversed the Commission and remanded the matter for further proceedings. *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, ___ N.C. App. ___, ___, 750 S.E.2d 1, 9 (2013). Defendant filed a petition for discretionary review, which this Court allowed on 19 August 2014.

In its appeal defendant argues that section 143-300.1 does not confer jurisdiction over plaintiff's action to the Commission because this section applies only to accidents involving "public school bus[es] or school transportation service vehicle[s]," occurrences that do not include accidents involving school activity buses. In response, plaintiff contends that school activity buses fall within the ambit of a "public school bus or school transportation service vehicle." We conclude that public school buses, school transportation service vehicles, and school activity buses

are distinct categories of vehicles, and that school activity buses were not incorporated into the waiver of immunity contemplated by the Tort Claims Act.

When considering a case on discretionary review from the Court of Appeals, we review the decision for errors of law. N.C. R. App. P. 16(a). Questions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo. *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013); *accord Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335-37, 678 S.E.2d 351, 353-54 (2009).

"The State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a plain, unmistakable mandate of the [General Assembly]." *Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972). In addition, "State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted). Here "[defendant] is a county agency. As such, the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig*, 363 N.C. at 335 n.3, 678 S.E.2d at 353 n.3 (2009). Although this claim implicates sovereign immunity because the State is financially responsible for the payment of judgments against local boards of education for claims brought pursuant to the Tort Claims Act, N.C.G.S. §§ 143-299.4, -300.1(c) (2013), the specific question of the Commission's subject matter jurisdiction over this claim is one of governmental immunity because the named party is the local board of education.

Section 143-300.1 states in pertinent part:

> (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged . . . negligent act or omission of the driver . . . of a *public school bus or school transportation service vehicle* when:
>
> (1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit. . . .
>
> and which driver was at the time of the alleged negligent act or omission *operating a public school bus or school*

> *transportation service vehicle in accordance with G.S. 115C-242* in the course of his employment by or training for that administrative unit or board . . . .

Id. § 143-300.1(a) (emphases added). In 1998 the General Assembly added the language "in accordance with G.S. 115C-242" to the statute. *See* Current Operations Appropriations and Capital Improvement Appropriations Act of 1998, ch. 212, sec. 9.17(b), 1997 N.C. Sess. Laws, 937, 975-76 (Reg. Sess. 1998). Section 115C-242, titled "Use and operation of school buses," is part of the statutory scheme regulating school transportation, and it limits the permissible use of school buses to seven purposes. N.C.G.S. § 115C-242 (2013). As a result, the waiver of immunity and jurisdictional dictates of section 143-300.1 apply only when the bus at issue is being operated "in accordance with" one of the purposes authorized in section 115C-242.

Therefore, in order for the Commission to possess jurisdiction over plaintiff's claim, the government vehicle involved must, *inter alia*, constitute "a public school bus or school transportation service vehicle." Because the vehicle at issue here is a school activity bus, to resolve this matter, we first must address whether a school activity bus is considered a "school bus" or a "school transportation service vehicle" pursuant to section 143-300.1.

Since 1955 the General Assembly has authorized local boards of education to own and operate school buses, as well as provide other transportation for students, "in accordance with rules and regulations adopted by the State Board of Education [(State Board)]" and subject to other specific statutory limits. *Id.* §§ 115C-239 to -262 (2013). Activity buses and transportation service vehicles are among the other significant classes of regulated school transportation vehicles operated by local boards. In accordance with its statutory authority, the State Board has adopted rules and policies directing the operation of all three of these categories of vehicles within the school transportation system.

The General Assembly has defined a "school bus" as

> a vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, that is painted primarily yellow below the roofline, and that bears the plainly

> visible words "School Bus" on the front and rear. The term includes a public, private, or parochial vehicle that meets this description.

Id. § 20-4.01(27)(d4) (2013). The ownership and operation of school buses in particular are subject to a considerable amount of regulation both by statute and the State Board. *See*, *e.g.*, *id.* § 115C-240(c) (appearance and equipment); *id.* §§ 115C-240(e)-(f), -249 (funding for purchase and maintenance); *id.* §§ 115C-241, -244, -246 (allocation and routes); *id.* §§ 115C-242, -243, -254 (permissible uses); Sch. Support Div., Transp. Servs., N.C. Dep't of Pub. Instruction, *NC Bus Fleet: North Carolina School Transportation Fleet Manual* 5 (June 2015) [hereinafter Manual] (N.C. State Bd. of Educ. Policy EEO-H-005) (requirements related to purchase, maintenance, and operation of public school transportation vehicles), http://www.ncbussafety.org/Manuals/NCBusFleet%20Manual04June2015.pdf.

As noted previously, section 115C-242 directs that "[p]ublic school buses may be used for the following purposes only," and nearly all of those authorized uses relate directly to a school's provision of instruction to students. *See* N.C.G.S. § 115C-242(1) (limiting use to "transportation of pupils enrolled in and employees in the operation of the school to which [the] bus is assigned" and "transportation to and from such school for the regularly organized school day"); *id.* § 115C-242(3) (authorizing operation of school buses one day before the opening of the regular school term to transport pupils to and from school for registration and for the distribution of textbooks); *id.* § 115C-242(5) (permitting use and operation for transportation of pupils and instructional personnel as local boards of education "deem[ ] necessary to serve the instructional programs of the schools," including "transportation of children with disabilities and children enrolled in . . . special vocational or occupational programs" within the state). Those sanctioned uses in section 115C-242 that do not relate directly to instruction of students allow for the use of school buses for the community at large and do not involve schools or students at all. *See id.* § 115C-242(6) (use for "emergency management purposes in any state of disaster"); *id.* § 115C-242(7) (use by senior citizen groups).

Other legal constraints are imposed upon the operation of school buses. By statute, the maximum speed for a school bus is forty-five miles per hour. *Id.* § 20-218(b) (2013). In addition, the State Board has adopted uniform, statewide specifications for the appearance, color, and

lettering of school buses, and has made certain safety equipment mandatory for school buses only.[1]

In contrast, the General Assembly has defined a "school activity bus" as

> a vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.

Id. § 20-4.01(27)(d3) (2013). Further, section 115C-247 of the North Carolina General Statutes, which specifically addresses the purchase and use of activity buses as part of the school transportation statutory scheme, provides:

> The several local boards of education in the State are hereby authorized and empowered to take title to school buses purchased with local or community funds for the purpose of transporting pupils to and from athletic events and for other local school activity purposes, and commonly referred to as activity buses.
>
> Each local board of education that operates activity buses shall adopt a policy relative to the proper use of the vehicles. The policy shall permit the use of these buses for travel to athletic events during the regular season and playoffs and for travel to other school-sponsored activities.
>
> The provisions of G.S. 115C-42 shall be fully applicable to the ownership and operation of such activity buses.

N.C.G.S. § 115C-247. Section 115C-42, titled "Liability insurance and immunity," allows local boards of education to waive their immunity from tort claims by purchasing liability insurance. *Id.* § 115C-42 (2013). By statute, the maximum speed for a school activity bus is fifty-five

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1. The State Board's policy states that "[e]ach school bus (not activity bus) shall be equipped with" lights in specific configurations, stop signals, and other safety features unique to school buses. *See* Sch. Support Div., Transp. Servs., N.C. Dep't of Pub. Instruction, *North Carolina School Bus and Activity Bus Specifications Type C - Conventional Bus* 23 (Nov. 2011), http://www.ncbussafety.org/documents/buses/TypeCSpecs2011.pdf.

miles per hour—ten miles per hour higher than for a school bus. *Id.* § 20-218(b). The State Board also allows more flexibility in the lettering shown on the exterior of activity buses and permits "[a]ctivity bus colors [to] vary."[2]

Although the term "school transportation service vehicle" has not been defined by statute, the State Board has defined these vehicles as "the service vehicles required for maintenance of [school buses for basic to-and-from-school transportation] and delivery of fuel to those buses."[3] The State Board's policy describes these service vehicles as a category of "local vehicles" which "are typically not directly involved in the to/from school transportation for grades K-12" and prohibits State funds from being spent on servicing, maintenance, and fuel for such vehicles. *Manual* at 9. In addition, the policy places activity buses in this same category. *Id.* (listing activity buses among the examples shown as types of local vehicles).

When we review a statute that operates to waive governmental immunity, the statute must not only be strictly construed, *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627, but also be given its plain meaning and enforced as written, so long as its language is clear and unambiguous, *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999). We note that the term "activity bus" has never appeared in section 143-300.1, but is treated as a separate category of vehicle in other statutes and regulations.[4] Therefore, we must conclude that the General Assembly and the State Board have defined and managed school buses, activity buses, and school transportation service vehicles as distinct categories of vehicles. This conclusion is further supported by the fact that school buses and activity buses, both of which share the clear purpose of transporting passengers, are patently distinguishable from school transportation service vehicles, which are to be used for the maintenance and repair of school buses. Consequently, we conclude that an activity bus does not fall within the category of a "school transportation service vehicle."

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2. *Id.* at 32, 34.

3. *Manual* at 8.

4. For example, section 115C-255 refers individually to "school bus drivers, school transportation service vehicle drivers and school activity bus drivers," indicating that the General Assembly recognized a distinction among them all. N.C.G.S. § 115C-255. Numerous other provisions refer to activity buses separately. *See, e.g.*, *Manual* at 5, 6, 9, 13, 18, 31; *see also* N.C.G.S. § 20-4.01(27)(d3); *id.* §§ 115C-247, -248.

Even though school buses and school activity buses are immediately and plainly distinguishable by statutory definition, their differing treatment by the legislature in other relevant respects further indicates that a school activity bus is not a mere subset of a school bus. As compared with school buses, which are subject to significant regulation such that the State has remained a functional part-owner of them, the ownership and operation of activity buses are the exclusive province of local school boards. *See* N.C.G.S. § 115C-247. Every use of a school bus that the General Assembly has authorized that involves schools and the transport of students is for a purpose that is fundamentally curricular in nature.

The role of an activity bus within the school transportation system is governed by a separate statute in Chapter 115C, which indicates that activity buses are to be used for students' extracurricular transport needs, specifically, "for the purpose of transporting pupils to and from athletic events and for other local school activity purposes." *Id.* Perhaps most importantly, the General Assembly explicitly provided in this statute the method by which local school boards waive immunity for tort claims arising from the negligent operation of activity buses. Section 115C-247 states that section 115C-42—which authorizes local boards of education to waive their immunity from tort claims by purchasing liability insurance—"shall be fully applicable to the ownership and operation of such activity school buses." *Id.* The General Assembly enacted sections 115C-247 and 143-300.1 the same year—which supports our conclusion that activity buses were contemplated to be used for school transportation services—yet the method of waiving immunity for the operation of activity buses is markedly different than that employed for a waiver for the operation of a school bus. *Compare* N.C.G.S. § 115C-247 (waiving immunity for operation of activity buses by purchasing liability insurance) *with id.* § 143-300.1 *id.* § 143-300.1 (bringing negligent acts by drivers of "school buses and school transportation service vehicles" under the limited waiver of sovereign immunity provided in the State Tort Claims Act). Therefore, we conclude that activity buses constitute an independent category of school transportation vehicles. Although certain regulations apply equally to both school buses and activity buses, when the legislature has sought to couple the two, it has done so expressly. *See*, *e.g.*, *id.* § 115C-249.1(a)(2) (defining a "school bus" for purposes of that section as a "school bus" or a "school activity bus"). The legislature has taken no such action with respect to section 143-300.1 or its subject matter. Activity buses plainly are excluded from section 143-300.1, therefore they are not a category of vehicle covered by this statute.

Because section 143-300.1 confers jurisdiction upon the Commission only when "a public school bus or school transportation service vehicle" is at issue, and we have concluded that the school activity bus in this case does not meet this requirement, the Commission does not have jurisdiction in this case. Accordingly, we hold that the Commission properly granted defendant's motion for summary judgment.

REVERSED.

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

JUSTIN LLOYD
v.
DANIEL BAILEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO CASUALTY INSURANCE COMPANY

No. 181PA15

Filed 29 January 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 772 S.E.2d 874 (2015), reversing and remanding an order entered on 21 May 2014 by Judge Calvin Murphy in Superior Court, Mecklenburg County. Heard in the Supreme Court on 7 December 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

PER CURIAM.

For the reasons stated in *Young v. Bailey*, ___ N.C. ___, ___ S.E.2d ___ (2016) (355PA14-2), the decision of the Court of Appeals is affirmed.

AFFIRMED.

IVAN McLAUGHLIN AND TIMOTHY STANLEY
v.
DANIEL BAILEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO CASUALTY INSURANCE COMPANY

No. 163A15

Filed 29 January 2016

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. ___, 771 S.E.2d 570 (2015), affirming an order granting summary judgment entered on 6 January 2014 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. On 20 August 2015, the Supreme Court allowed plaintiffs' petition for discretionary review of additional issues. Heard in the Supreme Court on 7 December 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellants.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

Tin Fulton Walker & Owen, PLLC, by William G. Simpson, Jr.; and Pinto Coates Kyre & Bowers, PLLC, by Jon Ward, for North Carolina Advocates for Justice, amicus curiae.

Edmond W. Caldwell, Jr., General Counsel, North Carolina Sheriffs' Association, amicus curiae.

Bailey & Dixon, LLP, by Jeffrey P. Gray; and McGuinness Law Firm, by J. Michael McGuinness, for North Carolina State Lodge of the Fraternal Order of Police, amicus curiae.

PER CURIAM.

For the reasons stated in *Young v. Bailey*, ___ N.C. ___, ___ S.E.2d ___ (2016) (355PA14-2), plaintiffs' suit under N.C.G.S. § 153A-99 fails. In addition, the suit brought by plaintiff Stanley pursuant to the North Carolina Constitution and the United States Constitution fails for the reasons set out in *Young v. Bailey*.

Unlike plaintiff Stanley, however, plaintiff McLaughlin was not a sworn law enforcement officer, and thus *Young v. Bailey* does

not dispose of McLaughlin's constitutional claims. We need not address whether a non-deputy employee of a sheriff, like McLaughlin, may be legally fired on the basis of political speech. Instead, the record indicates that plaintiff McLaughlin violated the department's policies by failing to properly conduct his pod tours and by falsifying paperwork submitted to his supervisors. The record also shows that plaintiff conceded to such allegations and that his termination was upheld by a department review board.

Based on this record, and applying de novo review, *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007), we conclude that the trial court properly granted defendants' motion for summary judgment. Even if defendant Bailey knew that plaintiff McLaughlin did not contribute to his reelection campaign, defendant Bailey had sufficient job-related reasons to terminate this plaintiff. Accordingly, plaintiff McLaughlin's constitutional claims also fail. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.").

AFFIRMED.

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

STATE OF NORTH CAROLINA
v.
RYAN MATTHEW WILLIAMS

No. 333PA14

Filed 29 January 2016

Indictment and Information—registered sex offender change of address—"three business days" statutory language

The indictment charging defendant, a registered sex offender, with failure to provide timely written notice of his change of address in violation of N.C.G.S. § 14-208.11 was valid and conferred jurisdiction upon the trial court. Omission of the word "business" from the phrase "third business day" as set forth in § 14-208.9(a) did not deprive defendant of notice of the charge against him. The indictment included the critical language of § 14-208.11, alleging that defendant failed to report "as a person required by Article 27A of Chapter 14."

Justice BEASLEY dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 763 S.E.2d 926 (2014), finding no error after appeal of a judgment entered on 7 June 2013 by Judge Eric L. Levinson in Superior Court, Burke County. Heard in the Supreme Court on 17 March 2015.

Roy Cooper, *Attorney General*, *by William P. Hart*, *Jr.*, *Assistant Attorney General*, *for the State.*

Ryan McKaig for defendant-appellant.

EDMUNDS, Justice.

As a registered sex offender, defendant Ryan Matthew Williams was required to report to the appropriate sheriff when he changed his address. He was convicted of failing to make such a report. Before this Court, defendant argues that the indictment failed to allege properly the time period within which he was required to file the report. We conclude that the indictment adequately apprised defendant of the conduct that was the basis of the charge against him. Accordingly, we affirm the

ruling of the Court of Appeals that the trial court correctly denied defendant's motion to dismiss.

Ryan Matthew Williams was convicted of indecent liberties with a minor on 15 March 2001 and, as a result, is a registered sex offender subject to the requirements of N.C.G.S. §§ 14-208.9 and 14-208.11. Defendant maintained his registration with the Burke County Sheriff's Office and reported several changes of address. Evidence presented at defendant's trial indicated that from 17 February 2010 to 5 April 2011, defendant's registered address was 107-D Ross Street in Morganton, where he lived with Sunshine Blevins. In April 2011, defendant and Blevins moved to 2022 Bristol Creek Avenue in Morganton and registered that address with the Burke County Sheriff's Office. In June 2011, defendant left the Bristol Creek Avenue home for 107-D Ross Street, Morganton, a move he registered on 29 June 2011.

On 8 September 2011, Deputy Sheriff Chuck Fisher went to defendant's last registered address at 107-D Ross Street. When no one answered his knock, Deputy Fisher contacted the property owner, Tim Norman, who reported that defendant had been living at a different address, 109-D Ross Street. Other evidence indicated that defendant had never resided at 107-D Ross Street. Norman advised Deputy Fisher that defendant stopped paying rent for the 109-D Ross Street residence and had vacated the premises in late July 2011 after Norman demanded that he either pay up or leave. At least six weeks passed after defendant's departure before Deputy Fisher came searching for him. Defendant was arrested on 13 September 2011.

On 5 October 2011, defendant was indicted by a Burke County Grand Jury for violating N.C.G.S. § 14-208.11 by failing to provide timely written notice of his change of address. The indictment included a preprinted block containing information in the following format:

DATE OF OFFENSE	ON OR ABOUT
09/08/2011	- after 4/2011

The body of the indictment beneath this block did not include a date but instead alleged that "on or about the date of offense shown," defendant committed the charged crime.

Defendant filed a motion to dismiss the indictment on the grounds that "it does not allege a specific enough date of offense to allow the Defendant to formulate a defense and is violative of his due process rights." After considering arguments presented by counsel for both

sides, the trial court denied defendant's motion to dismiss. On 7 June 2013, a jury found defendant guilty and the trial court imposed a sentence in the presumptive range of twenty-three to twenty-eight months of imprisonment.

Defendant appealed to the Court of Appeals, challenging the sufficiency of the indictment. *State v. Williams*, ___ N.C. App. ___, 763 S.E.2d 926, 2014 WL 3824252 (2014) (unpublished). He argued that the indictment was fatally defective because it identified the date of offense as a five month span, and that, because the indictment was defective, the trial court lacked jurisdiction to hear his case. *Id.* at *3. The Court of Appeals concluded that section 14-208.9(a)'s requirement that defendant register a new address within three business days of the change "does not make the specific day or year an essential element of the crime." *Id.* at *4. The court held that the indictment sufficiently alleged that defendant failed to notify the sheriff's office of a change of address within the prescribed statutory time period. *Id.* The court further held that defendant failed to demonstrate that he was misled by the times set out in the indictment and that no basis existed for concluding the indictment was fatally defective. *Id.* Consequently, the trial court properly denied the motion to dismiss. *Id.* On 9 October 2014, this Court allowed defendant's Petition for Discretionary Review.

Although defendant argued to the trial court and the Court of Appeals that the time span alleged in the indictment rendered it defective, he takes a different tack before us. Defendant contends his constitutional right to notice was violated because the indictment alleged that he failed to register his change of address with the sheriff's office within three days, rather than within three *business* days. Defendant made the latter argument in his Petition for Discretionary Review while candidly acknowledging that he had not raised it below. We will consider the petition because conflicting analyses of this issue may be found in opinions of the Court of Appeals.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). The alleged failure of a criminal pleading to charge the essential elements of a stated offense is an error of law that this Court reviews de novo. *See State v. Sturdivant*, 304 N.C. 293, 308-11, 283 S.E.2d 719, 729-31 (1981).

The North Carolina Constitution guarantees that, "[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation." N.C. Const. art. I, § 23. Ordinarily, a person accused of a felony is charged by means of an indictment, which must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2013). In interpreting this statute, we have held that "it is not the function of an indictment to bind the hands of the State with technical rules of pleading," *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citing *State v. Gregory*, 223 N.C. 415, 27 S.E.2d 140 (1943)), and that we are no longer bound by the "ancient strict pleading requirements of the common law," *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). Instead, contemporary criminal pleading requirements have been "designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Id.* Consistent with this retreat from archaic pleading standards, the General Assembly has provided that

> [e]very criminal proceeding by . . . indictment . . . is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2013). We now consider whether defendant's indictment passes muster.

The indictment alleged that defendant violated N.C.G.S. § 14-208.11, which states, in pertinent part, that: "A person required by this Article to register who willfully does any of the following is guilty of a Class F felony: . . . (2) Fails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2013). Defendant's indictment cited "G.S. 14-208.11" and alleged that "defendant named above unlawfully, willfully, and feloniously did as a person required by Article 27A of Chapter 14 of the North Carolina General

Statutes to register with the Sheriff's office in the county wherein he resides . . . failed [sic] to provide written notice of his change of address no later than the 3rd day after his change in address . . . . This act was in violation of the law referenced above."

Details of the registration requirements are set out in N.C.G.S. § 14-208.9, which states that "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a) (2014). Defendant acknowledges that he was required to register, but contends that the indictment is fatally defective because it omitted the word "business" as found in section 14-208.9(a).

Defendant cites *State v. Abshire* for the proposition that "three business days" is an essential element of the offense. 363 N.C. 322, 677 S.E.2d 444 (2009). In *Abshire*, we addressed an earlier version of the statute at bar and stated that the third element of the offense was that "the defendant '[f]ails to notify the last registering sheriff of [the] change of address,' [N.C.G.S. § 14-208.11(a)(2)], 'not later than the tenth day after the change,' N.C.G.S. § 14-208.9(a).' " *Id.* at 328, 677 S.E.2d at 449 (first and second alterations in original). However, our reference in *Abshire* to the ten-day deadline was not critical to the holding in that case. Moreover, we are reluctant to assume from *Abshire* that if the statute had said "ten business days," we would have found that the word "business" was essential to the pleading, especially when no such issue was before us. Instead, *Abshire* discussed the meaning of the term "address" in that earlier version of the statute, along with the unremarkable requirement that essential elements be included in the indictment. *Id.* at 328-32, 677 S.E.2d at 449-51. *Abshire* did not set out specific language to be used in an indictment alleging an offense under section 14-208.11, and the holding in that case is consistent with the flexible pleading standards expressed in sections 15-153 and 15A-924(a).

Defendant also argues that the Court of Appeals holding in *State v. Osborne*, ___ N.C. App. ___, 763 S.E.2d 16, 2014 WL 2993855 (2014) (unpublished), entitles him to a new trial. The defendant in *Osborne* was, as here, a convicted sex offender required to register with the sheriff of his county of residence. The indictment in *Osborne* alleged only that the defendant was required to register within three days of his move to a new address. The Court of Appeals vacated the defendant's conviction for a violation of N.C.G.S. § 14-208.11(a)(2) on the grounds that "three days," as alleged in the indictment, is different from "not later than the third business day," as found in section 14-208.9(a). 2014 WL 2993855 at

*3. In contrast, in the case at bar, the Court of Appeals concluded that time was not of the essence for this reporting offense and "[i]t does not matter when the crime occurred so long as the evidence shows that the defendant did not give the proper notification." The court then held "that an indictment under N.C. Gen. Stat. § 14-208.11 is sufficient if it alleges . . . the pertinent time element." *Williams*, 2014 WL 3824252, at *4. In other words, the absence of the term "business" before "days" in the indictment was found fatal in *Osborne* but not in *Williams*.

We have found no other case in which a panel of the Court of Appeals has adopted *Osborne*'s rationale. In *State v. Leaks*, ___ N.C. App. ___, 771 S.E.2d 795 (2015), the defendant sex offender was charged with failure to report a change of address under N.C.G.S. § 14-208.11(a)(2). He claimed the indictment was invalid because it failed to allege that he was required to provide "written notice" as set out in N.C.G.S. § 14-208.9. *Id.* at ___, 771 S.E.2d at 797-98. In a published opinion, the Court of Appeals distinguished *Osborne* and held that written notice was an evidentiary matter to be proved at trial but need not be alleged in an indictment brought under section 14-208.11. *Id.* at ___, 771 S.E.2d at 798-99. We denied discretionary review. *State v. Leaks*, ___ N.C. ___, 775 S.E.2d 870 (2015). In *State v. Furr*, ___ N.C. App. ___, 775 S.E.2d 693, 2015 WL 3791729 (2015) (unpublished), the defendant sex offender was indicted under N.C.G.S. § 14-208.11(a)(2) for failing to report a new address. The defendant claimed the indictment was invalid because it did not allege that he was required to provide "written notice" within "three business days," as set out in N.C.G.S. § 14-208.9. 2015 WL 3791729 at *2. The Court of Appeals declined to follow *Osborne* and found no error. *Id.* at *4. We denied discretionary review. *State v. Furr*, ___ N.C. ___, 775 S.E.2d 854 (2015). In *State v. McLamb*, ___ N.C. App. ___, 777 S.E.2d 150 (2015), the defendant sex offender was charged under N.C.G.S. § 14-208.11(a)(2) with failing to register. He claimed the indictment was invalid for failing to allege that he was required to provide "written notice" within "three business days." *Id.* at ___, 777 S.E.2d at 151. In a published opinion, the Court of Appeals declined to follow *Osborne* and found no error. *Id.* at ___, 777 S.E.2d at 152-53.

Moreover, the Court of Appeals declined to subject indictments to the type of hypertechnical scrutiny employed in *Osborne* before that opinion was issued. In *State v. Pierce*, ___ N.C. App. ___, 766 S.E.2d 854 (2014), the defendant sex offender was charged with failing to provide notification of an address change. He argued that the indictment was fatally defective because it omitted the purportedly essential element that he report to the sheriff of the new county to which he had moved.

Id. at ___, 766 S.E.2d at 857. The Court of Appeals determined that the indictment, "read in totality," gave the defendant adequate notice. *Id.* at ___, 766 S.E.2d at 858. We denied discretionary review. *State v. Pierce*, 368 N.C. 262, 772 S.E.2d 734 (2015). In *State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004), the defendant claimed that the indictment charging him with failure to report was defective because it did not identify the specific dates of the moves or the defendant's new address. The Court of Appeals found that the indictment provided defendant "ample notice of the charge," even though it did not identify the specific dates on which the defendant moved or his new address. *Id.* at 336, 598 S.E.2d at 263. We denied discretionary review. *State v. Harrison*, 359 N.C. 72, 604 S.E.2d 922 (2004).

Consistent with these Court of Appeals opinions, this Court has acknowledged the general rule that an indictment using "either literally or substantially" the language found in the statute defining the offense is facially valid and that "the quashing of indictments is not favored." *State v. James*, 321 N.C. 676, 681, 365 S.E.2d 579, 582 (1988) (citations omitted). Here, defendant's indictment included the critical language found in N.C.G.S. § 14-208.11, alleging that he failed to meet his obligation to report "as a person required by Article 27A of Chapter 14." This indictment language was consistent with that found in the charging statute and provided defendant sufficient notice to prepare a defense. Additional detail about the reporting requirement such as that found in section 14-208.9 was neither needed nor required in the indictment.

Because defendant's indictment substantially tracks the language of section 14-208.11(a)(2), the statute under which he was charged, thereby providing defendant adequate notice, we conclude that the Court of Appeals' analysis in *Williams* is consistent with the applicable statutes and holdings cited above. Accordingly, we hold that defendant's indictment is valid and conferred jurisdiction upon the trial court.

AFFIRMED.

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

Justice BEASLEY dissenting.

The majority, in concluding that the indictment here was not facially invalid, violates a defendant's right to be placed on reasonable notice of the charges pending against him. The majority incorrectly concludes

that the term "business day" is not an essential element of an indictment under N.C.G.S. § 14-208.11. Our case law supports a defendant's right to be placed on reasonable notice of the charges against him and the indictment here failed to provide reasonable notice. Because subject matter jurisdiction does not vest with the trial court under a fatally defective indictment, I respectfully dissent.

Defendant, a registered sex offender, is required to register as such pursuant to N.C.G.S. § 14-208.11. This statute states that one who willfully "[f]ails to report in person to the sheriff's office" as required by sections 14-208.7, 14-208.9, and 14-208.9A is guilty of a Class F felony. N.C.G.S. § 14-208.11(a)(7) (2013). Section 14-208.9 sets out the specific reporting requirements and states, in relevant part, "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address *not later than the third business day* after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a) (2014) (emphasis added).

I note here that defendant failed to object to the sufficiency of the indictment in the trial court or before the Court of Appeals. Defendant now raises the argument that the indictment was facially invalid, and therefore the trial court lacked subject matter jurisdiction. Defendant may timely raise this jurisdictional argument for the first time on appeal to this Court because an argument that the trial court lacked subject matter jurisdiction may be raised at any time after a verdict. *See State v. Sturdivant*, 304 N.C. 293, 307-08, 283 S.E.2d 719, 729-30 (1981); *see also State v. Harwood*, ___ N.C. App. ___, ___, 777 S.E.2d 116, 118 (2015) ("The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*."). While it appears defendant raised an argument under the North Carolina Constitution, his analysis is consistently grounded in the interpretation of section 14-208.9. Further, given the conflicting analyses in recent Court of Appeals opinions, this Court properly addresses defendant's petition for discretionary review.

In determining essential elements to be included in an indictment, it is important to recognize that there is a long-standing trend which disfavors hypertechnical, common law pleadings and favors more practical, liberal pleadings. The General Assembly adopted the Criminal Procedure Act of 1975, which modernized archaic pleading requirements for criminal indictments. *See State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985) ("It is unnecessary for us to decide here whether that rule drawn from the ancient strict pleading requirements of the common law has survived the more liberal criminal pleading requirements of our

new Criminal Procedure Act and other recent legislation designed to remove from our law unnecessary technicalities which tend to obstruct justice."); *see also State v. Worsley*, 336 N.C. 268, 279, 443 S.E.2d 68, 73 (1994) (observing that N.C.G.S. § 15A-924 "supplanted prior law" requiring more strictly pleaded indictments (citations omitted)); *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977) (explaining the requirements of N.C.G.S. § 15A-924 (citations omitted)).

The Criminal Procedure Act sets forth the minimum standard for a sufficient indictment in North Carolina by requiring

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2013). Indictments serve "(1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) (citations omitted).

"An indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citations omitted). "It is well settled that 'a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.' " *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143-44 (1994) (quoting *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729). "The existence of subject matter jurisdiction is a matter of law and 'cannot be conferred upon a court by consent.' " *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)).[1] An appellate court must vacate any judgment or conviction based upon a facially invalid indictment because the indictment fails to confer jurisdiction to the trial court. *See State v. Petersilie*, 334 N.C. 169, 175-76, 432 S.E.2d 832, 835-36 (1993)

1. Although the case cited is a civil case, if a party to a civil action cannot waive subject matter jurisdiction, because subject matter jurisdiction must vest with the trial court, a criminal defendant must also be prohibited from such waiver.

(citations omitted); *see also State v. Jarvis*, 50 N.C. App. 679, 680-81, 274 S.E.2d 852, 852 (1981) (where the trial court dismissed the indictment *sua sponte* for lack of subject matter jurisdiction).

Critically, in the statute at issue, the General Assembly amended the time by which an offender must report his address change to the local sheriff's department. Initially, in 1996 the legislature required that an offender submit his change of address to the sheriff no later than the tenth day after the change. Act of July 29, 1995, ch. 545, sec. 1, 1995 N.C. Sess. Laws 2046, 2048 (effective 1 January 1996). In 2008 the legislature reduced the time period by which an offender must report his address change from *the tenth day* to the *third business day* after the change. Act of July 18, 2008, ch. 117, sec. 9, 2007 N.C. Sess. Laws (Reg. Sess. 2008) 426, 430-31 (emphases added).

The majority errs by discounting the significance of the "third business day" reporting requirement established by the General Assembly. In 2006 Congress enacted the Sex Offender Registration and Notification Act (SORNA) to provide a comprehensive system for nationwide sex offender registration.[2] *See United States v. Price*, 777 F.3d 700, 703 (4th Cir.), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 941 (2015).

> Congress through SORNA has not commandeered . . . nor compelled the state[s] to comply with its requirements. Congress has simply placed conditions on the receipt of federal funds. A state is free to keep its existing sex-offender registry system in place (and risk losing funding) or adhere to SORNA's requirements (and maintain funding).

United States v. White, 782 F.3d 1118, 1128 (10th Cir. 2015) (quoting *United States v. Felts*, 674 F.3d 599, 608 (6th Cir. 2012)). In North Carolina, by amending section 14-208.9 to require notification of an address change within three business days, the legislature intended to comply with the SORNA requirement to adopt the statutory language in 42 U.S.C. § 16913(c), which provides that "[i]f a sex offender

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2. SORNA, also known as the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), is mostly codified at 42 U.S.C. §§ 16901-16962. *See* Adam Walsh Act, Pub. L. No. 109-248, Title I, 120 Stat. 587 (2006). North Carolina is one of numerous states that have not substantially implemented SORNA, but the State complies with many of its provisions as a requirement to receive federal funding for crime labs, prisons and jails, and other law enforcement programs. Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), Office of Justice Programs, U.S. Dep't of Justice, *SORNA*, http://www.smart.gov/sorna.htm (last visited Jan. 25, 2016); *see*, *e.g.*, *White*, 782 F.3d at 1128.

changes his residence, employment, or student status, he must update his registration within three business days." *Price*, 777 F.3d at 703-04 (emphasis added).[3]

The legislature also intended to shorten the "grace period" during which an offender must report an address change and to specify the method by which the address change period is calculated. The legislature's deliberate change from "day" to "business day" alleviates confusion for offenders and law enforcement. For example, if a defendant's address changes on Thursday, without this business day requirement, it would be unclear whether that defendant is required to report his change of address to the sheriff by the following Sunday or by the following Tuesday. This statute provides clarity and reasonable notice to a defendant. Because the legislature deliberately carved out this distinction, this nomenclature is not hypertechnical surplusage.

The majority cites three recent opinions from the Court of Appeals as support that the term "business days" is not an element of the offense and, therefore, not compulsory language in an indictment under section 14-208.9. In *State v. Leaks*, upon the sheriff's office's realization that defendant was no longer occupying the address he previously registered, the sheriff's office sent defendant "an address verification letter" that was later returned as "undeliverable." ___ N.C. App. ___, ___, 771 S.E.2d 795, 797 (2015). In *Leaks* the defendant argued that his indictment was insufficient because it did not state that "he was required to provide 'written notice' " of his address change. ___ N.C. App. at ___, 771 S.E.2d at 797-98. The defendant relied on *State v. Osborne*, an unpublished Court of Appeals decision, which held that "written notice" and "three business days" are essential elements of the offense. *Id.* at ___, 771 S.E.2d at 798 (citing *State v. Osborne*, ___ N.C. App. ___, 763 S.E.2d 16, 2014 WL 2993855 (2014) (unpublished). The issue of whether "three

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3. Though not defined in this context by the legislature, we assume that a business day occurs Monday through Friday during "bankers' hours."

Further, N.C.G.S. § 90-95 is another example in which the legislature intended to distinguish business days and calendar days. Time is an essential element in this statute in that the Legislature has codified time limits by which a defendant has a right to object to the State's admitting certain toxicology evidence at trial. *See* N.C.G.S. § 90-95(g) (2014) (requiring the State to provide notice to a defendant at least 15 business days before a judicial proceeding of its intent to introduce a toxicology report into evidence and allowing the defendant up to five business days to object to introduction of the report into evidence). Although section 90-95 is based on the Confrontation Clause, this statute highlights the importance of distinguishing between business days and calendar days in the criminal context.

business days" is an element of N.C.G.S. § 14-208.9(a) was not raised in *Leaks*. The Court of Appeals held in *Leaks* that the statutory requirement that notice be provided "in writing" is an evidentiary matter and not an element of the offense. *Id.* at ___, 771 S.E.2d at 799. Moreover, the Court of Appeals relied on *State v. Abshire*, 363 N.C. 322, 677 S.E.2d 444 (2009), to reject the defendant's argument that the indictment failed to confer subject matter jurisdiction to the trial court. *Id.* at ___, 771 S.E.2d at 799.

Similarly, in *State v. McLamb*, following the sheriff's office's discovery that defendant had vacated his last registered address without notifying that office, the defendant was convicted for failing to register. ___ N.C. App. ___, ___, 777 S.E.2d 150, 151 (2015). On appeal the defendant argued that the indictment was deficient because it failed to contain language alleging the required "written notice" and "three business days." *Id.* at ___, 777 S.E.2d at 151. The Court of Appeals rejected the analysis in *Osborne*, noting that the court had since issued *Leaks* and *State v. James*, ___ N.C. App. ___, 774 S.E.2d 871 (2015), which held respectively that the exclusion of "written notice" in *Leaks* and of "three business days" in *James* was not a fatal defect. *McLamb*, ___ N.C. App. at ___, 777 S.E.2d at 152. The court noted, however, that the better practice is for the indictment to include the words "written notice" and "three business days." *Id.* at ___, 777 S.E.2d at 153.[4]

The majority also cites *State v. Furr*, an unpublished opinion, to support its conclusion that "three business days is not required for an indictment under N.C.G.S. § 14-208.11." In *Furr* the sheriff's office received information that the defendant did not reside at his registered address, which was confirmed by the woman with whom the defendant was living. ___ N.C. App. ___, 775 S.E.2d 693, 2015 WL 3791729 at *1-2 (2015). On appeal the defendant argued that the indictment did not confer subject matter jurisdiction because of its omission of "written notice" and "three business days." 2015 WL 3791729 at *2. In *Furr* the Court of Appeals again declined to follow *Osborne*, concluding that *Osborne* is not controlling because the opinion is unpublished. *Id.* at *4. The Court of Appeals instead relied on its published opinions in *State v. Pierce*, ___ N.C. App. ___, 766 S.E.2d 854 (2014), and *State v. Harrison*, 165 N.C. App. 332, 598 S.E.2d 261 (2004), both of which held that the indictments

4. *James* noted that defendant was not prejudiced by the omission of the words "three business days" from the indictment. Further, the court opined that the "indictment nevertheless gave [the d]efendant sufficient notice of the charge against him." ___ N.C. App. at ___, 774 S.E.2d at 875.

were sufficient despite their failure to allege "additional elements." *Furr*, 2015 WL 3791729 at *4.

It is noteworthy that *State v. Leaks*, *State v. McLamb*, and *State v. Furr* were all decided by the Court of Appeals *after* the present case was decided by that court. The conflicts in the Court of Appeals' opinions, as reflected in *Leaks*, *McLamb*, *Furr*, and *Osborne*, suggest that the court has not settled this issue, as the split in its own precedent demonstrates and, therefore, is not persuasive.

Here defendant also argues that the "timing of the offense is a specific element" and that the indictment was invalid because it alleged "a window of five months during which [defendant] could have committed a crime involving a three day threshold." The majority cites *State v. Harrison* for the proposition that the time of the commission of the offense is not essential. In *Harrison*, decided by the Court of Appeals before *Osborne*, the Court of Appeals rejected the defendant's argument that the indictment failed to confer jurisdiction to the trial court because the indictment did not identify the specific dates of the moves or the new address. 165 N.C. App. at 336, 598 S.E.2d at 263. The Court of Appeals ultimately held that the indictment gave the defendant adequate notice of the charges pending against him. *Id.* at 336, 598 S.E.2d at 263.

It cannot be that, as the majority writes, "it does not matter when the crime occurred" because it is imperative that if a failure to report an address change is alleged, a defendant must have notice of the time by which he must have reported an address change. It proves impossible for a defendant to be properly noticed, as the statute requires, of the time by which he must report an address change to the sheriff if the indictment does not inform that defendant of the time during which the State alleges he violated the statute. Neither the statute nor SORNA makes that time requirement a fluid one. It does appear that when, as here, the time period is alleged, the proof thereof is an evidentiary matter.

The majority correctly assesses that defendant's reliance on *State v. Abshire* is misguided for the proposition that "three business days" is an essential element of the offense. The majority also correctly characterizes the holding in *Abshire* as defining "address" consistent with SORNA's intent. *Abshire* did not address whether "three business days," or ten days per the statute at the time *Abshire* was decided, is an essential element.

Therefore, because I would hold that the term "business day" is an essential element for an indictment charging a defendant under N.C.G.S. § 14-208.11, and thus the indictment at issue here is facially invalid,

I respectfully dissent. I would remand this case to the Court of Appeals for remand to the trial court with instructions to vacate the judgment based upon this fatally defective indictment.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA, UPON THE RELATION OF PATRICK L. McCRORY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; JAMES B. HUNT, JR.; AND JAMES G. MARTIN

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE COAL ASH MANAGEMENT COMMISSION, HARRELL JAMISON AUTEN III, TIM L. BENNETT, D. ALLEN HAYES, SCOTT FLANAGAN, RAJARAM JANARDHANAM, AND LISA D. RIEGEL

No. 113A15

Filed 29 January 2016

1. Constitutional Law—review of state constitutional issues—de novo—presumed constitutionality

The North Carolina Supreme Court reviews constitutional questions de novo. In exercising de novo review, it is presumed that laws enacted by the General Assembly are constitutional, and a law will not be declared invalid unless it is determined that the law is unconstitutional beyond reasonable doubt. To determine whether the violation is plain and clear, the Supreme Court looks to the text of the state Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and the Court's precedents.

2. Constitutional Law—state constitution—appointments clause—authority of governor and legislature

Considering whether the appointments clause in Article III, Section 5(8) of the North Carolina Constitution prohibits the General Assembly from appointing statutory officers, the North Carolina Supreme Court concluded that this clause gives the Governor the exclusive authority to appoint constitutional officers whose appointments are not otherwise provided for by the constitution. The appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions.

3. Constitutional Law—state constitution—separation of powers—legislative appointments to administrative commissions

Challenged statutory provisions involving legislative appointments to administrative commissions violated the separation of powers clause in the North Carolina Constitution by preventing the Governor from performing his constitutional duty. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself.

Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-27(a1) from a decision and judgment entered on 16 March 2015 by a three-judge panel of the Superior Court, Wake County, appointed under N.C.G.S. § 1-267.1(b1). Heard in the Supreme Court on 30 June 2015.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, David C. Wright, III, and Andrew A. Kasper, for plaintiff-appellee Governors; and Office of General Counsel to the Governor, by Robert C. Stephens, Jr., General Counsel, and Jonathan R. Harris, Associate General Counsel, for Governor McCrory, plaintiff-appellee.

K&L Gates LLP, by John H. Culver III and Brian C. Fork, for legislator defendant-appellants; and Roy Cooper, Attorney General, by Alexander McC. Peters, Senior Deputy Attorney General, and Melissa L. Trippe and Ann W. Matthews, Special Deputy Attorneys General, for Coal Ash Management Commission defendant-appellants.

Arch T. Allen III, pro se, amicus curiae.

Troutman Sanders LLP, by Christopher G. Browning, Jr. and C. Elizabeth Hall, for Carolinas AGC (Associated General Contractors), Employers Coalition of North Carolina, National Federation of Independent Business Small Business Legal Center, North Carolina Chamber, North Carolina Forestry Association, North Carolina Home Builders Association, North Carolina Manufacturers Alliance, and North Carolina Retail Merchants Association, amici curiae.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for North Carolina Council of State members Cherie Berry, Commissioner of Labor; Wayne Goodwin, Commissioner of Insurance; Steve Troxler, Commissioner of Agriculture; and Beth A. Wood, State Auditor, amici curiae.

Campbell Shatley, PLLC, by Robert F. Orr, for North Carolina Institute for Constitutional Law, amicus curiae.

MARTIN, Chief Justice.

Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty. The Constitution of North Carolina therefore vests each of these powers in a different branch of government and declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

Each branch of government has a distinctive purpose. The General Assembly, which comprises the legislative branch, enacts laws that "protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also* N.C. Const. art. II, §§ 1, 20. The executive branch, which the Governor leads, faithfully executes, or gives effect to, these laws. *See* N.C. Const. art. III, §§ 1, 5(4). The judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution. *See id.* art. IV, § 1; *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787).

The constitution also incorporates a system of checks and balances that gives each branch some control over the others. For example, the Lieutenant Governor is the President of the Senate and casts tie-breaking votes when the Senate is equally divided. N.C. Const. art. III, § 6.

At the same time, the General Assembly can assign duties to the Lieutenant Governor. *Id.* Still, the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions. *See Hart v. State*, 368 N.C. 122, 126-27, 774 S.E.2d 281, 285 (2015).

In this case, plaintiffs challenge legislation that authorizes the General Assembly to appoint a majority of the voting members of three administrative commissions. Plaintiffs contend that, by giving itself the power to appoint commission members, the General Assembly has usurped Governor McCrory's constitutional appointment power and interfered with his ability to take care that the laws are faithfully executed. Plaintiffs' contentions raise two important questions about the function and structure of state government: (1) Does the appointments clause in Article III, Section 5(8) of the state constitution prohibit the General Assembly from appointing statutory officers to administrative commissions? (2) If not, do the specific appointment provisions challenged in this case violate the separation of powers clause in Article I, Section 6?

We hold that, while the appointments clause itself places no restrictions on the General Assembly's ability to appoint statutory officers, the challenged provisions violate the separation of powers clause. In short, the legislative branch has exerted too much control over commissions that have final executive authority. By doing so, it has prevented the Governor from performing his express constitutional duty to take care that the laws are faithfully executed.

I

The Energy Modernization Act and the Coal Ash Management Act of 2014 create three administrative commissions that are housed in the executive branch of government: the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission. *See generally* N.C.G.S. §§ 143B-290 to -293.6 (2014) (effective July 31, 2015); *id.* §§ 130A-309.200 to -309.231 (2014). The Acts also specify how commission members will be appointed and how they may be removed. *See generally id.*

The Oil and Gas Commission is housed in the Department of Environment and Natural Resources (DENR)[1] and has the power to

1. The Department of Environment and Natural Resources is now called the Department of Environmental Quality. Current Operations and Capital Improvements Appropriations Act of 2015, ch. 241, sec. 14.30(c), 2015-5 N.C. Adv. Legis. Serv. 38, 322

promulgate rules, make determinations, and issue orders consistent with the Oil and Gas Conservation Act. N.C.G.S. § 143B-293.1. The commission has nine members: three appointed by the Governor and six appointed by the General Assembly. Id. § 143B-293.2(a1). Each member serves a three-year term. *Id.* § 143B-293.2(b). A majority of the members constitutes a quorum for the transaction of business. *Id.* § 143B-293.2(e). The commission elects one of its members to serve as chair. *Id.* § 143B-293.4. The chair appoints members of the commission to a Committee on Civil Penalty Remissions, which has the power to remit civil environmental penalties that DENR imposes. *Id.* § 143B-293.6(b), (c). The Governor may remove any member of the commission for misfeasance, malfeasance, or nonfeasance. *Id.* § 143B-293.2(c)(1).

Like the Oil and Gas Commission, the Mining Commission is housed in DENR. *Id.* § 143B-290. The Mining Commission has the power to promulgate mining rules and affirm, modify, or overrule permit decisions that DENR makes. *Id.* § 143B-290(1)(c)-(e). This commission has eight members: two appointed by the Governor; four appointed by the General Assembly; the chair of the North Carolina State University Minerals Research Laboratory Advisory Committee; and the State Geologist, who is ex officio and nonvoting. *Id.* § 143B-291(a1). Each member serves a six-year term. *Id.* § 143B-291(b). As with the Oil and Gas Commission, a majority of the Mining Commission's members constitutes a quorum for the transaction of business, and the Governor may remove any member for misfeasance, malfeasance, or nonfeasance. *Id.* § 143B-291(d), (f).

The Coal Ash Management Commission is administratively located in the Division of Emergency Management of the Department of Public Safety but is expressly required to exercise its powers and duties "independently," without "the supervision, direction, or control of the Division or Department." *Id.* § 130A-309.202(n). This commission has the power to review and approve coal ash surface impoundment classifications and closure plans that DENR proposes. *Id.* § 130A-309.202(f); *see also id.* §§ 130A-290(a)(4a), -309.213, -309.214. The commission has nine members: three appointed by the Governor and six appointed by the General Assembly. *Id.* § 130A-309.202(b). Each member serves a six-year term. *Id.* § 130A-309.202(o). Five members constitute a quorum for the transaction of business. *Id.* § 130A-309.202(h). The Governor appoints the chair of the Coal Ash Management Commission from among the

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(LexisNexis). Because the Energy Modernization Act and the Coal Ash Management Act predate this name change and refer to the department as the Department of Environment and Natural Resources, we will continue to use this superseded name.

nine members, and that member serves as chair at the pleasure of the Governor. *Id.* § 130A-309.202(c). As with the other two commissions, the Governor may remove any member of the Coal Ash Management Commission for misfeasance, malfeasance, or nonfeasance. *Id.* § 130A-309.202(e).

On 13 November 2014, plaintiffs filed a complaint in Superior Court, Wake County, that challenged the constitutionality of certain provisions in the Acts. Plaintiffs argued that the provisions authorizing the General Assembly to appoint members to the commissions—specifically, N.C.G.S. §§ 130A-309.202(b), 143B-291(a1), and 143B-293.2(a1)—violate the appointments clause in Article III, Section 5(8) and the separation of powers clause in Article I, Section 6. Plaintiffs also argued that the provision requiring the Coal Ash Management Commission to exercise its powers and duties independently of the Division of Emergency Management and the Department of Public Safety, *see* N.C.G.S. § 130A-309.202(n), violates Article I, Section 6 and Article III, Sections 1 and 5(4). Plaintiffs sought a declaration that the challenged provisions are unconstitutional.[2] In addition, because the General Assembly had already made appointments to the Coal Ash Management Commission, plaintiffs requested that those appointees be removed.

On 16 March 2015, a three-judge panel of the superior court determined that the challenged appointment provisions did not violate the appointments clause but did violate the separation of powers clause. The panel also determined that the Coal Ash Management Commission's independent status violated the separation of powers clause. Finally, the panel dismissed without prejudice plaintiffs' action to remove Coal Ash Management Commission appointees. Defendants appealed directly to this Court pursuant to N.C.G.S. § 7A-27(a1) (2014).

II

[1] This Court construes and applies the provisions of the Constitution of North Carolina with finality. *Hart*, 368 N.C. at 130, 774 S.E.2d at 287; *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479

2. Plaintiffs also sought a declaration that a provision of the Coal Ash Management Act requiring the Governor to issue an executive order, *see* N.C.G.S. § 130A-309.202(j) (2014) (repealed 2015), was unconstitutional. The three-judge panel granted declaratory relief to plaintiffs on this issue, and the General Assembly subsequently repealed the provision. Act of Apr. 16, 2015, ch. 9, sec. 1.1, 2015-1 N.C. Adv. Legis. Serv. 63, 65 (LexisNexis). Defendants did not appeal this issue and, in any event, it is moot.

(1989). We review constitutional questions de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt. *Hart*, 368 N.C. at 131, 774 S.E.2d at 287-88; *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991). In other words, the constitutional violation must be plain and clear. *Preston*, 325 N.C. at 449, 385 S.E.2d at 478. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents. *See id.* at 449, 385 S.E.2d at 479 ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere."); *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."); *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932) ("Likewise, we may have recourse to former decisions, among which are several dealing with the subject under consideration."). With these principles in mind, we now examine the two questions raised by defendants' appeal.

A

[2] We first address whether the appointments clause in Article III, Section 5(8) prohibits the General Assembly from appointing statutory officers. This clause states: "The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for." N.C. Const. art. III, § 5(8). Plaintiffs contend that the clause gives the Governor broad power to appoint both constitutional and statutory officers. In defendants' view, the appointments clause implicitly gives the appointment power to the General Assembly. They cite the maxim that all power not expressly limited by the people in the constitution remains with the people and "is exercised through the General Assembly, which functions as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam). Based on our review of the text of the appointments clause, its historical development, and our precedents interpreting it, we conclude that this clause gives the Governor the exclusive authority to appoint *constitutional* officers whose appointments are not otherwise provided for *by the constitution*.

The appointments clause does not prohibit the General Assembly from appointing *statutory* officers to administrative commissions.[3]

The Constitution of 1776 did not have an analogue to the appointments clause. That constitution had specific provisions that expressly authorized the General Assembly to appoint certain officers. These officers included the Governor, N.C. Const. of 1776, § 15; all seven members of the Council of State, *id.* § 16; and the judges of the Supreme Courts of Law and Equity, *id.* § 13. As a result, the General Assembly was the general appointing authority under our state's first constitution. *People ex rel. Nichols v. McKee*, 68 N.C. 429, 431-32 (1873).

In 1835, the people ratified a constitutional amendment that gave them the power to directly elect the Governor. N.C. Const. of 1776, Amends. of 1835, art. II, § 1. When they ratified the Constitution of 1868, they then shifted appointment power from the General Assembly to the Governor. *McKee*, 68 N.C. at 433. The Constitution of 1868 removed all of the provisions that had authorized the General Assembly to appoint executive and judicial officers.[4] Instead, it introduced the appointments clause, which stated:

> The Governor shall nominate, and, by and with the advice and consent of a majority of the Senators elect, appoint, all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

N.C. Const. of 1868, art. III, § 10.

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3. Our interpretation of the appointments clause in the state constitution differs from the United States Supreme Court's interpretation of the federal constitution's appointments clause. Under the latter clause, "[p]rincipal officers are selected by the President with the advice and consent of the Senate," and Congress may allow "[i]nferior officers . . . to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam); *see* U.S. Const. art. II, § 2, cl. 2. The text and drafting history of the federal clause indicate that the framers of the United States Constitution deliberately denied Congress "any authority itself to appoint those who were 'Officers of the United States.' " *Buckley*, 424 U.S. at 129. Congress therefore may not vest the appointment of any officers of the United States with itself or its own officers. *Id.* at 127. North Carolina's appointments clause, however, differs in both text and history.

4. The Constitution of 1868 did give the General Assembly the power to appoint members of the Board of Public Charities. *See* N.C. Const. of 1868, art. XI, § 7.

Shortly after the Constitution of 1868 was ratified, this Court stated that the phrase "whose appointments are not otherwise provided for" referred to those appointments not otherwise provided for by the constitution itself. *People ex rel. Welker v. Bledsoe*, 68 N.C. 457, 462-64 (1873); *State ex rel. Clark v. Stanley*, 66 N.C. 59, 63 (1872). By 1875, it was "settled that the words 'otherwise provided for' mean[t] otherwise provided for by the Constitution." *People ex rel. Cloud v. Wilson*, 72 N.C. 155, 158 (1875) (citing *Clark* and *Welker*); *accord Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 83 (1875). This Court also observed that the Constitution of 1868 had "superadded" the phrase "and no such officer shall be appointed or elected by the General Assembly" to ensure that the General Assembly could not appoint constitutional or statutory officers, except where the constitution expressly provided for it. *Clark*, 66 N.C. at 63; *see also Welker*, 68 N.C. at 463-64; *McKee*, 68 N.C. at 432-34. Under the original version of the appointments clause, then, the Governor had the exclusive power to appoint all constitutional and statutory officers unless the constitution itself provided otherwise. *See also State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226, 83 S.E. 354, 354-55 (1914); *State Prison v. Day*, 124 N.C. 362, 366 67, 32 S.E. 748, 749 (1899).

This expansive shift in the appointment power was "not . . . satisfactory to the dominant sentiment in the State," *Salisbury*, 167 N.C. at 226, 83 S.E. at 355, and was short-lived. In 1876, the people ratified a set of thirty constitutional amendments. John L. Sanders, *Our Constitutions: A Historical Perspective*, *in* Elaine F. Marshall, N.C. Dep't of Sec'y of State, *North Carolina Manual 2011-2012* 73, 76, https://www.secretary.state.nc.us/Publications/manual.aspx. These amendments restored much of the power that the General Assembly had lost in the Constitution of 1868. *Id.* at 77. One amendment modified the appointments clause, which now stated:

> The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint all officers, whose offices are established by this Constitution, and whose appointments are not otherwise provided for.

N.C. Const. of 1868, art. III, § 10 (1876). We have indicated that the people purposefully deleted the phrases "or which shall be created by law" and "and no such officer shall be appointed or elected by the General Assembly" to restore the General Assembly's ability to appoint statutory officers. *See State ex rel. Cherry v. Burns*, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899). In other words, the amended clause no longer gave the Governor the constitutional power to appoint statutory officers. *Id.*; *see also Salisbury*, 167 N.C. at 226, 83 S.E. at 355 ("It will thus be

noted that the inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides."). But the amendment did not change the language of the phrase "whose appointments are not otherwise provided for," even though it was ratified in the wake of this Court's authoritative and then-recent pronouncements about that phrase's meaning. *See Welker*, 68 N.C. at 462-64; *Clark*, 66 N.C. at 63. That phrase continued to mean "provided [for] by the constitution." *Cherry*, 124 N.C. at 764, 33 S.E. at 137.

In sum, this amendment to the appointments clause authorized the Governor to appoint only constitutional officers whose appointments were not otherwise provided for by the constitution. Because the scope of the appointments clause after 1876 no longer encompassed statutory officers, the clause did not prohibit the General Assembly from appointing them. *Salisbury*, 167 N.C. at 226, 83 S.E. at 355; *Cherry*, 124 N.C. at 765, 33 S.E. at 137; *Cunningham v. Sprinkle*, 124 N.C. 638, 641, 33 S.E. 138, 138-39 (1899); *Day*, 124 N.C. at 366-67, 32 S.E. at 749; *State ex rel. Ewart v. Jones*, 116 N.C. 570, 571-74, 21 S.E. 787, 787-88 (1895).

The appointments clause did not change again until the people adopted the current version of the clause in the Constitution of 1971. The current appointments clause states:

> Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

N.C. Const. art. III, § 5(8). When the people enacted the current version of the clause, they deleted the phrase "whose offices are established by this Constitution." But, as in 1876, they did not disturb the phrase "whose appointments are not otherwise provided for." *Compare* N.C. Const. of 1868, art. III, § 10 (1876), *with* N.C. Const. art. III, § 5(8).

We conclude that the latter phrase still means "whose appointments are not otherwise provided for *by the Constitution*." *Welker*, 68 N.C. at 463 (emphasis added). To conclude otherwise would imply that the drafters of the Constitution of 1971 intended to change the meaning of this phrase while using the same words. That inference would not be justified, especially since this Court had already given the phrase a settled construction before 1971.

We also conclude that the omission of the phrase "whose offices are established by this Constitution" in the current version of the

appointments clause does not affect the clause's meaning. At first glance, this omission seems to restore the Governor's exclusive power to appoint statutory officers, whose offices are *not* established by the constitution. But the text of the current clause, as a whole, is unclear. Just as the phrase "whose appointments are not otherwise provided for" refers only to those appointments not otherwise provided for in the constitution itself, the phrase "all officers" might refer only to *constitutional* officers. The report of the North Carolina State Constitution Study Commission that drafted and proposed the Constitution of 1971 resolves this ambiguity. *Cf. Sneed*, 299 N.C. at 615-16, 264 S.E.2d at 112 (relying on this report to discern the meaning of another provision in the current constitution). That report shows that the current appointments clause does not enlarge the Governor's appointment power.

According to the report, the Study Commission did not intend for the proposed constitution's revisions "to bring about any fundamental change in the power of state and local government or the distribution of that power." *Report of the North Carolina State Constitution Study Commission* 4 (1968). The report explains that the proposed constitution contained "editorial pruning, rearranging, rephrasing, and modest amendments," but that the Study Commission had reserved its "more substantial changes" for a separate set of amendments that it was proposing along with the proposed constitution. *Id.* at 29. And the report notes that "[a]bbreviation of the constitution for brevity's sake . . . has been an incident of [the Study Commission's] work, since the great majority of the changes embraced in the proposed constitution take the form of deletions of or contractions in language." *Id.*

The report then addresses the proposed changes to Article III specifically. It states that, although the Study Commission "reorganized and abbreviated" Article III "by the omission of repetitive, legislative-type, and executed provisions," the proposed constitution "contains few substantive changes of note" to that Article. *Id.* at 31. The report goes on to discuss these few substantive changes but does not mention the appointments clause or anything about the appointment power. *See id.*

The report also states that the Study Commission was "recommending several changes that affect the executive branch of state government and especially the Governor," but that "these [changes] are of sufficient moment that they take the form of separate amendments." *Id.* And the Study Commission did propose a separate amendment that would have made significant substantive changes to the appointments clause. *See id.* at 47. The amendment would have given the Governor the power to

"appoint and . . . remove the heads of all administrative departments and agencies of the State," and would have stated that "[a]ll other officers in the administrative service of the State shall be appointed and may be removed as provided by law." *Id.* (quoting the Study Commission's proposed Amendment No. 5). Unlike the "general editorial revision" that the adopted language embodied, this amendment entailed "a substantive constitutional change of such importance that . . . the voters should have a chance to act upon it independently." *Id.* at 4. The House Committee on Constitutional Amendments gave the amendment an unfavorable report, however, and the General Assembly did not submit it to the people for ratification. *See* N.C. House Journal, Reg. Sess. 1969, at 518, 520 (recording the introduction of the proposed amendment in H.B. 880); *id.* at 755, 757 (recording the unfavorable committee report on H.B. 880; no further action noted).

Given how careful the Study Commission was to identify any substantive changes in the proposed constitution—and given that the Study Commission proposed major substantive changes by separate amendments—it would be unreasonable to say that deleting the phrase "whose offices are established by this Constitution" dramatically changed the appointments clause's meaning. The Governor's power to appoint officers under the clause thus continues to extend only to constitutional officers.

As a result, the appointments clause means the same thing now that it did in 1876. It authorizes the Governor to appoint all constitutional officers whose appointments are not otherwise provided for by the constitution. It follows that the appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions.

We now turn to plaintiffs' separation of powers challenge.

B

[3] Plaintiffs argue that the challenged provisions violate the separation of powers clause in Article I, Section 6 by preventing the Governor from performing his constitutional duty under Article III, Section 5(4). To address an Article I, Section 6 challenge, we necessarily examine the text of the constitution, our constitutional history, and this Court's separation of powers precedents.

The separation of powers clause declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I,

§ 6. This principle is fundamental to our form of government and has appeared in each of our state's constitutions. *See id.*; N.C. Const. of 1868, art. I, § 8; N.C. Const. of 1776, Declaration of Rights § IV; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 595-601, 596 n.2, 286 S.E.2d 79, 81-84, 82 n.2 (1982).

Although the text of the separation of powers clause has changed very little since 1776, the powers that the current constitution allocates to the legislative and executive branches have changed significantly. In particular, the General Assembly lost the power to appoint the Governor in 1835, *see* N.C. Const. of 1776, Amends. of 1835, art. II, § 1; lost the power to appoint the Council of State in 1868, *see* N.C. Const. of 1868, art. III, §§ 1, 14; and has never regained the full scope of appointment power that it had in 1776. And unlike the Constitution of 1776, our subsequent state constitutions have given the Governor the duty to take care that the laws are faithfully executed. *See* N.C. Const. art. III, § 5(4); N.C. Const. of 1868, art. III, § 7. Because the "powers" that must be kept "forever separate and distinct from each other," N.C. Const. art. I, § 6, are different in the current constitution than they were in the original constitution, the separation of powers clause applies differently as well.

The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch. *See Houston v. Bogle*, 32 N.C. 496, 503-04 (1849). Other violations are more nuanced, such as when the actions of one branch prevent another branch from performing its constitutional duties. *See Bacon v. Lee*, 353 N.C. 696, 715, 549 S.E.2d 840, 853, *cert. denied*, 533 U.S. 975 (2001). When we assess a separation of powers challenge that implicates the Governor's constitutional authority, we must determine whether the actions of a coordinate branch "unreasonably disrupt a core power of the executive." *Id.* at 717, 549 S.E.2d at 854; *see also In re Alamance Cty. Ct. Facils.*, 329 N.C. 84, 100-01, 405 S.E.2d 125, 133 (1991) (stating that one branch "must minimize the encroachment" on another branch "in appearance and in fact"). As part of the inquiry in this case, we must also consider whether the General Assembly has "retain[ed] some control" over the executive branch's functions. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88.

In the current constitution, Article III, Section 5(4) gives the Governor the duty to "take care that the laws be faithfully executed." The challenged legislation implicates this constitutional duty because, as the three-judge panel correctly observed, all three commissions "are primarily administrative or executive in character," and because they have final authority over executive branch decisions. *See* N.C.G.S.

§ 130A-309.202(f) (authorizing the Coal Ash Management Commission to overrule DENR classifications and closure plans for coal ash surface impoundments); *id.* § 143B-290 (authorizing the Mining Commission to overrule certain permit decisions that DENR makes); *id.* § 143B-293.6(b) (authorizing a committee within the Oil and Gas Commission to remit civil environmental penalties that DENR imposes). In light of the final executive authority that these three commissions possess, the Governor must have enough control over them to perform his constitutional duty.[5]

The degree of control that the Governor has over the three commissions depends on his ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office. The legislation that plaintiffs challenge here limits each of these methods of control. It gives the General Assembly the power to appoint a majority of each commission's voting members and gives the Governor only two or three appointees per commission. *See id.* § 130A-309.202(b); *id.* §§ 143B 291(a1), -293.2(a1). It also gives each commission final executive authority over certain DENR decisions, sapping the power of a principal administrative department over which the Governor has greater control. *See id.* § 130A-309.202(f); *id.* §§ 143B-290(1)(c), -293.6; *see also id.* §§ 143B-9, -6(6). It insulates the Coal Ash Management Commission from executive branch control even more by requiring the commission to exercise its powers and duties "independently," without the "supervision, direction, or control" of the Division of Emergency Management or the Department of Public Safety. *Id.* § 130A-309.202(n). And the challenged legislation sharply constrains the Governor's power to remove members of any of the three commissions, allowing him to do so only for cause. *Id.* § 130A-309.202(e); *id.* §§ 143B 291(d), -293.2(c)(1).

We cannot adopt a categorical rule that would resolve every separation of powers challenge to the legislative appointment of executive officers. Because each statutory scheme will vary the degree of control that legislative appointment provisions confer on the General Assembly, we must resolve each challenge by carefully examining its specific factual

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5. Our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State. *See* N.C. Const. art. III, § 7 (providing for the election of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Labor, Commissioner of Agriculture, and Commissioner of Insurance). The facts of this case concern DENR, which unquestionably falls under the Governor's purview. *See* N.C.G.S. § 143B-6(6) (2013) (identifying DENR as a principal department); *id.* § 143B-9 (2013) ("The head of each principal State department, except those departments headed by popularly elected officers, shall be appointed by the Governor and serve at his pleasure.").

and legal context. While the General Assembly's ability to appoint an officer obviously does not give it the power to control what that officer does, we must examine the degree of control that the challenged legislation allows the General Assembly to exert over the execution of the laws.

Using that approach here, we hold that the challenged appointment provisions violate the separation of powers clause. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself. *See Bacon*, 353 N.C. at 717-18, 549 S.E.2d at 854; *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88; *see also* N.C. Const. art. III, § 5(4).[6]

Under the rule that defendants advance, the General Assembly could appoint every statutory officer to every administrative body, even those with final executive authority, and could prohibit the Governor from having any power to remove those officers. This rule would nullify the separation of powers clause, at least as it pertained to the General Assembly's ability to control the executive branch.

Our appointment cases do not embrace defendants' proposed rule. Many do not even involve separation of powers challenges. *See*, *e.g.*, *Salisbury*, 167 N.C. at 227, 83 S.E. at 355 (interpreting two statutes to

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6. Because we hold that the challenged appointment provisions violate the separation of powers clause, we can no longer address plaintiffs' separate claim that the Coal Ash Management Commission's statutory mandate to act "independently" of the Division of Emergency Management and the Department of Public Safety violates that clause as well. The facts that existed when plaintiffs brought their claim—namely, that the Coal Ash Management Commission has final executive authority, that the Governor has limited removal power, *and* that the General Assembly appoints a majority of its voting members—no longer exist now that the challenged appointment provisions have been invalidated. As a result, plaintiffs' claim under the current statutory scheme is moot. We therefore vacate the portion of the three-judge panel's decision that held N.C.G.S. § 130A-309.202(n) unconstitutional.

determine that the Governor's recess appointment without Senate confirmation was valid only until the Senate reconvened and confirmed a new appointee); *Cherry*, 124 N.C. at 764-65, 33 S.E. at 137 (concluding that the "keeper of the capitol" was outside the scope of the appointments clause because it was not a constitutional office); *Ewart*, 116 N.C. at 573-74, 21 S.E. at 788 (determining that the General Assembly's creation of a new office did not create a "vacancy" in that office).

Those appointment cases that do involve separation of powers challenges do not establish the proposed rule either. *State ex rel. Martin v. Melott* does not supply a majority rationale that supports its judgment, so it does not establish any separation of powers rule at all. *Compare* 320 N.C. 518, 523-24, 359 S.E.2d 783, 786-87 (1987) (plurality opinion), *with id.* at 525-28, 359 S.E.2d at 788-89 (Meyer, J., concurring). In *Trustees of the University of North Carolina v. McIver*, where there was a clear majority, this Court held that the General Assembly could elect trustees of the University of North Carolina. 72 N.C. at 87. There, a constitutional amendment separate from the appointments clause gave the General Assembly the "unlimited power" to determine who would elect the trustees. *Id.* at 83-85. The Court concluded that this absolute discretion necessarily gave the General Assembly the power to elect them itself. *See id.* at 81-87. But that holding has no effect on this case because the constitutional provision in question—which pertained only to the University of North Carolina and its trustees—does not apply here. In *Cunningham v. Sprinkle*, a constitutional amendment that directed the General Assembly to establish the Department of Agriculture likewise gave the General Assembly "the largest latitude of regulation" in establishing that department. 124 N.C. at 641-42, 33 S.E. at 139. The provision in *Cunningham* also does not apply here.

Notably, *Cunningham* and *McIver* both conclude that appointing statutory officers is not an exclusively executive prerogative. *See Cunningham*, 124 N.C. at 643, 33 S.E. at 139; *McIver*, 72 N.C. at 85. We agree, and do not deny that the General Assembly may generally appoint statutory officers to administrative commissions.[7] We merely deny that it may appoint them in every instance and under all circumstances.

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7. As a corollary, the General Assembly may have broader latitude than it does here when it appoints members to commissions whose functions are different from those of the commissions in the present case, such as the Rules Review Commission. *See* N.C.G.S. § 143B-30.1; *id.* §§ 150B-2(1d), -21.1 to -21.14 (2013).

III

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," N.C. Const. art. I, § 35, and "the principle of separation of powers is a cornerstone of our state and federal governments," *Wallace*, 304 N.C. at 601, 286 S.E.2d at 84. The appointments clause does not prohibit the General Assembly from appointing statutory officers, and the General Assembly can appoint them in many instances. But the challenged appointment provisions, in their statutory context, prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause.

We therefore modify and affirm the decision of the three-judge superior court panel in part and vacate it in part.

MODIFIED AND AFFIRMED IN PART; VACATED IN PART.

Justice NEWBY concurring in part and dissenting in part.

This case presents the issue of whether the General Assembly has the constitutional power to fill a majority of positions on executive commissions it creates. Unlike the Federal Constitution, the state constitution is not an express grant of power but a limitation on power. All power not expressly granted to the federal government or limited by the constitution resides in the people and is exercised through the General Assembly. Since our original Constitution of 1776, except for a short time by explicit limitation, the General Assembly has had the constitutional authority to provide for the filling of statutory executive positions it creates. As an exercise of the General Assembly's lawmaking power, this appointment authority, both constitutionally prescribed and jurisprudentially recognized, does not implicate separation of powers because under our jurisprudence the authority to appoint the official has never been deemed the power to control the appointee. Our state's constitutional text and history and this Court's precedent demonstrate that when the legislature statutorily enables itself to select the official, it is simply filling the position and not controlling the appointee.[1] Because

1. "The true test is, where does the [state] Constitution lodge the power of electing the various public agents of the government . . . ." *Cunningham v. Sprinkle*, 124 N.C. 638, 642, 33 S.E. 138, 139 (1899) (quoting *Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 85 (1875)). This precise question was asked and answered by this Court over 131 years ago. In rejecting the argument that the General Assembly violated separation of powers by exercising appointment authority over executive statutory offices, this Court stated that

the statutes at issue here are constitutional, I must respectfully dissent in part.

The idea of one branch of government, the judiciary, preventing another branch of government, the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *See Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 8 (1833) ("[T]he exercise of [judicial review] is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation."), *overruled in part on other grounds by Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 89 (1805)[2] (Hall, J., dissenting) ("A question of more importance than that arising in this case [the constitutionality of a legislative act] cannot come before a court. . . . [W]ell convinced, indeed, ought one person to be of another's error of judgment . . . when he reflects that each has given the same pledges to support the Constitution."). Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves, *see Baker v. Martin*, 330 N.C. 331, 336-37, 410 S.E.2d 887, 890 (1991).

All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895) ("[T]he sovereign power resides with the people and is exercised by their representatives in the General Assembly."). Unlike the Federal Constitution, "a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102,

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"a mode of filling the offices created by law" is the prerogative of the General Assembly, acknowledging that filling the position is not exercising the power of the position. *Id.* at 642-43, 33 S.E. at 139. (Of note, many of the older opinions referenced in this opinion use the term "selection" when referring to a single appointing authority, such as the Governor, and "election" when referring to multiple decisionmakers, such as the General Assembly.)

2. The Court of Conference was the predecessor of this Court, which was statutorily established in 1818. Walter Clark, *History of the Supreme Court of North Carolina*, *in* 177 N.C. 616, 619-20 (1919); *see also Benzien's Ex'rs v. Lenoir*, 11 N.C. (4 Hawks) 403, 406 (1826) (noting "[t]he act of 1818, New Rev., ch. 962, constituting the present Supreme Court" and discussing the Court of Conference).

112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959)); *see also Jones*, 116 N.C. at 570-71, 21 S.E. at 787 ("The only limitation upon this power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time."). The presumptive constitutional power of the General Assembly to act is consistent with the principle that a restriction on the General Assembly is in fact a restriction on the people. *Baker*, 330 N.C. at 336, 410 S.E.2d at 890 ("[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws." (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989))). Thus, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be express and demonstrated beyond a reasonable doubt. *E.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

This rigorous standard for constitutional challenges ensures uniformity and predictability in the application of our constitution. *State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable." (citing, *inter alia*, *State ex rel. Att'y-Gen. v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915))); *see also Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851-52 ("A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*." (citations omitted)), *cert. denied*, 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001). Adhering to this fixed standard ensures that we remain true to the rule of law, the consistent interpretation and application of the law. *State v. Bell*, 184 N.C. 701, 720, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting) ("[T]here must be some uniformity in judicial decisions . . . or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea . . . .").

Under a proper application of these foundational principles, the constitutional challenge here cannot surmount the high bar imposed by the presumption of constitutionality given to legislative acts. A clear understanding of the constitutionally prescribed powers and their division among the branches of government is a basis for stability and cooperation within government. Because that stability instills public confidence in governmental actions, this Court should follow its time-honored approach in assessing the powers conferred upon each branch of government and applying separation of powers principles.

Since 1776 our constitutions have expressly vested the vast legislative power, the power to make laws, in two distinct chambers of the General Assembly, the Senate and the House of Representatives. N.C. Const. art. II, § 1; N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I; *see also Legislative Power*, Black's Law Dictionary (10th ed. 2014) ("The power to make laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws."). This express power to make laws is broad and has not changed; it is limited only as expressly forbidden by the constitution and by federal law. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891-92; *Jones*, 116 N.C. at 570-71, 21 S.E. at 787; *see*, *e.g.*, *Bayard*, 1 N.C. (Mart.) at 7 (declaring an act of the General Assembly unconstitutional because it violated the constitutional right to a trial by jury); *see also Dickson v. Rucho*, 365 N.C. 481, 504, 781 S.E.2d 404, 422 (2015) (recognizing restriction of state legislative power by federal law).

In addition to federal limitations on state legislative power, the state constitution provides express restrictions safeguarding against an abuse of legislative power. *See*, *e.g.*, N.C. Const. art. II, § 23 (prescribing the procedure for the passing of revenue bills); *id.* art. II, § 24 (limiting certain local, private, or special acts); *id.* art. III, § 5(11) (limiting "reconvened sessions" to considering certain bills); *id.* art. IV, § 1 (limiting authority to establish certain courts or to deprive courts of jurisdiction "that rightfully pertains to [the courts] as a co-ordinate department of the government"); *id.* art. V, §§ 1, 2(1)-(7) (limiting taxing authority); *id.* art. V, § 3(1)-(2), 4 (limiting authority regarding debt); *id.* art. VI, § 9 (preventing the appointment of an official already serving in one branch to serve simultaneously in another branch).[3]

Moreover, the General Assembly is checked and balanced by its structure and its accountability to the people. *See* N.C. Const. art. I,

3. Every one of our state constitutions has placed express limitations or prohibitions on legislative power. *See*, *e.g.*, N.C. Const. of 1868, art. I; *id.*, art II, §§ 13, 14 (prohibiting the passing of certain private laws and providing a procedure by which to pass permissible private laws); *id.*, art. II, § 16 (prescribing the procedure for passing laws regarding state debt or credit); N.C. Const. of 1776, Declaration of Rights, § III (prohibiting "exclusive or separate emoluments or privileges," except for "in consideration of public services"); *id.*, Declaration of Rights, § XII (prohibiting seizure of person and "freehold liberties or privileges" and deprivation of "life, liberty, or property, but by the law of the land"); *id.*, Declaration of Rights, § XIV (prohibiting the suspension of trial by jury); *id.*, Declaration of Rights, § XXII (prohibiting "hereditary emoluments, privileges or honors").

§ 2. Legislative power is divided between two chambers,[4] with its combined one hundred seventy members. *Id.* art. II, §§ 2, 4 (providing for 50 senators and 120 representatives). The members of each chamber serve different constituencies with various needs and priorities. *Id.* art. II, §§ 3, 5. The General Assembly's power is diffused by its sheer magnitude, its diversity within each chamber, and, consequently, the need to find compromise. *See* 1 James Bryce, *The American Commonwealth* 480 (3d ed. 1901) ("The Americans restrain their legislatures by dividing them . . . ."). History has shown that the legislative branch is not a continuously cohesive force; disagreements between the two chambers are not infrequent.[5] The diversity within the branch, however, ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise. Likewise, members of the legislative branch face the most frequent elections, serving only two-year terms,[6] N.C. Const. art. II, §§ 2, 4, and are thereby most directly accountable to the people. Lawmakers represent the particular interests of their different constituents, who are limited in number. *Id.* art. II, §§ 3, 5. In addition to these structural safeguards, the final check on the legislative power of the General Assembly is judicial review, the implied constitutional authority of the court to decide if a law violates the constitution. *See Bayard*, 1 N.C. (Mart.) at 6-7; *see generally Hoke*, 15 N.C. (4 Dev.) at 28 (observing that the constitution "guards against abuse" of legislative power through "frequent elections," protection of individual rights, division of powers, and judicial review).

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4. Our constitution has even referred to the division of legislative power between the bicameral houses as "distinct branches" of government. N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I.

5. Notably, the statutes in question here do not provide for appointments by the "General Assembly" but instead distribute legislative appointments between the Senate and the House of Representatives. *See* Act of June 4, 2014, ch. 4, § 4(a), 2014 N.C. Sess. Laws 57, 61 (providing that the Oil and Gas Commission consists of nine members: three selected by the House, three by the Senate, and three by the Governor); *id.* § 5(a), 2014 N.C. Sess. Laws at 64-65 (providing that the Mining Commission consists of eight members: two selected by the House, two by the Senate, two by the Governor, along with the State Geologist and the chair of the North Carolina State University Minerals Research Laboratory Advisory Committee); Act of Sept. 20, 2014, ch. 122, § 3(a), 2014 N.C. Sess. Laws 828, 832 (providing that the Coal Ash Management Commission consists of nine members: three selected by the House, three by the Senate, and three by the Governor).

6. The terms for legislators were lengthened from one to two years by amendment in 1835. N.C. Const. of 1776, art. I, § 1 (1835).

This broad constitutional power to make laws includes the indisputable authority of the General Assembly to create executive statutory offices. Along with the power to create the office, the legislature has the power to assign the selection authority either to itself or another. *See*, *e.g.*, *State ex rel. Martin v. Melott*, 320 N.C. 518, 520, 524, 528, 359 S.E.2d 783, 785, 787, 789 (1987) (plurality) (stating, with one dissenting judge agreeing, that the General Assembly had the constitutional power to appoint the position itself); *State ex rel. Cherry v. Burns*, 124 N.C. 761, 765, 33 S.E. 136, 137 (1899) (concluding that the constitution "leads us to the opinion that the Legislature may fill this [statutory] office" (citations omitted)); *Cunningham v. Sprinkle*, 124 N.C. 638, 641, 33 S.E. 138, 139 (1899) ("[B]eing of legislative creation," appointments of members of the Board of Agriculture "are equally within the power of legislative appointment."); *State Prison v. Day*, 124 N.C. 362, 367, 32 S.E. 748, 749 (1899) (concluding that the constitution intended "to confer upon the General Assembly the power to fill offices created by statute"), *abrogated on other grounds by State ex rel. Salisbury v. Croom*, 167 N.C. 223, 228, 83 S.E. 354, 356 (1914); *Jones*, 116 N.C. at 574, 21 S.E. at 788 ("Here, the Legislature had the constitutional power to create the office and fill it . . . .").

The only express constitutional limitation on statutory appointments forbids any member of one branch from serving simultaneously in another branch of government; however, that prohibition does not speak to who has the authority to appoint. N.C. Const. art. VI, § 9; N.C. Const. of 1868, art. XIV, § 7 (1873); N.C. Const. of 1776, art. IV, § 4 (1835); N.C. Const. of 1776, §§ XXVI-XXX; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 608-09, 286 S.E.2d 79, 88-89 (1982) (concluding that, if an appointing authority appoints an official from one branch to an official role in another branch, that official unconstitutionally exercises the power of two branches). There is no constitutional limitation on the General Assembly's designating itself as the appointing authority of positions it creates by statute.

The people have retained for themselves alone the only constitutional method of changing the powers of each of the branches: the constitutional amendment. As discussed below, for only an eight-year period, the people limited the General Assembly's power to designate the appointing authority for statutory offices. Thereafter, the people expressly removed any such limitation. Most recently, the people modified the legislative power by passing a constitutional amendment granting the Governor the power to veto certain legislation. *See* Act of March 8, 1995, ch. 5, §§ 3, 4, 1995 N.C. Sess. Laws 6, 8 (establishing referendum

to amend the constitution to provide gubernatorial veto to take effect 1 January 1997). A gubernatorial veto requires a three-fifths vote in each chamber to override. N.C. Const. art II, § 22. Thus, legislative power remains broad, limited only by express constitutional provision.

Unlike the unified executive present in the federal model, the state constitution has never had a unified executive; rather, executive power is dispersed among several specified constitutional executive officers, with the Governor being chief among them. N.C. Const. art. III, §§ 1, 7; N.C. Const. of 1868, art. III, § 1; N.C. Const. of 1776, §§ XIV, XIX. The 1776 constitution, like every constitution thereafter, placed the general executive power in the Governor. N.C. Const. art. III, § 1; N.C. Const. of 1868, art. III, § 1, 4; N.C. Const. of 1776, § XIX. This constitution vested the Governor with the power to "exercise all the other executive powers of government, limited and restrained as by this Constitution [as] mentioned, and according to the laws of the State." N.C. Const. of 1776, § XIX; *see also Executive Power*, Black's Law Dictionary (10th ed. 2014) ("The power to see that the laws are duly executed and enforced. . . . [G]overnors' executive powers are provided for in state constitutions."). This original constitution, like each constitution thereafter, also provided specific gubernatorial duties. *E.g.*, N.C. Const. art. III, § 5 (outlining the "Duties of Governor"); N.C. Const. of 1868, art. III, § 6 ("to grant reprieves commutations and pardons"); *id.*, art. III, § 9 ("to convene the General Assembly in extra session"); N.C. Const. of 1776, § XIX (including the "power to draw for and apply such sums of money as shall be voted by the general assembly" and to exercise clemency, "the power of granting pardons and reprieves").

The 1776 constitution, like those that followed, divided the executive responsibilities between the Governor and others, including a Council of State, even though the Governor was expressly given the general executive authority and responsibility. N.C. Const. of 1776, § XIX. This model of diffused executive power, with the Governor exercising the general executive power, was unchanged in the 1868 state constitution. *Compare id.* § XIX ("[Governor] may exercise all . . . executive powers of government . . . ."), *with* N.C. Const. of 1868, art. III, § 1 ("[Governor] shall be vested [with] the Supreme executive power . . . ."). Stylistically improved, the 1868 constitution implemented separate articles for each branch, including the first constitutional establishment of the judicial branch. *See* N.C. Const. of 1868, arts. II-IV. The use of separate articles provided for more detailed descriptions of the workings of each branch. John V. Orth & Paul Martin Newby, *The North Carolina State*

Constitution 19-20 (2d ed. 2013) [hereinafter *State Constitution*].[7] As in the past, to enable the Governor to fulfill his supervisory role, the 1868 constitution authorized the Governor to gather information from the other executive branch officers and report to the General Assembly. N.C. Const. of 1868, art. III, § 7. In summarizing this supervisory role, this provision states: "[The Governor] shall take care that the laws be faithfully executed." *Id.* This phrase did not expand the Governor's powers but stated more explicitly this general supervisory aspect of the Governor's executive responsibilities in a multimember executive branch.

In other words, the constitution charged the Governor with supervising the executive branch and its functions while, at the same time, granting certain executive powers to other executive officers. *E.g.*, *id.*, art. III, § 1 (listing Governor as one of eight elected offices in the executive branch); *id.*, art. III, § 7 ("The officers of the Executive Department . . . shall . . . severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly . . . ."); *id.*, art. III, § 9 (authorizing the Governor to "convene the General Assembly in extra session" "by and with the advice of the Council of State"); *id.*, art. III, § 13 ("The respective duties of the [constitutional executive officers] shall be prescribed by law."); *id.*, art. III, § 14 ("The Secretary of State, Auditor, Treasurer, Superintendent of Public Works, and Superintendent of Public Instruction, shall constitute *ex officio*, the Council of State, who shall advise the Governor in the execution of his office . . . ."). The constitution allowed the General Assembly to assign executive duties and functions by statute. *Id.*, art. III, § 13. Thus, while the Governor had general supervisory responsibility, *id.*, art. III, §§ 1, 7, each constitutional executive officer was primarily responsible for executing the laws assigned to that official by the General Assembly, *id.*, art. III, § 13.

The executive branch is fundamentally unchanged under the current constitution. The Governor continues to share the exercise of executive

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7. Professor John V. Orth is a legal historian and state constitutional scholar acknowledged and cited by both this Court and the United States Supreme Court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 108, 120, 116 S. Ct. 1114, 1149, 1155, 134 L. Ed. 2d 252, 299, 306 (1996) (Souter, Ginsburg & Breyer, JJ., dissenting); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 499, 510 n.16, 520 n.20, 107 S. Ct. 2941, 2959, 2965 n.16, 2970 n.20, 97 L. Ed. 2d 389, 413, 420 n.16, 426 n.20 (1987) (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting); *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 648, 599 S.E.2d 365, 397 (2004) (quoting and citing John V. Orth, *The North Carolina State Constitution: A Reference Guide* (1993)); *Stephenson v. Bartlett*, 355 N.C. 354, 367, 562 S.E.2d 377, 387 (2002) (referring to Orth as "a highly respected state constitutional scholar").

powers with the other constitutional executive officers who are separately elected members of the Council of State, N.C. Const. art. III, §§ 7(1)-(2), 8, while maintaining his supervisory role, *id.* art. III, §§ 1, 5(4), notwithstanding possible conflict among these officials, *see* N.C.G.S. § 147-17 (2013) (allowing the Governor to employ independent counsel). The constitution continues to require the General Assembly to assign by statute executive duties and functions to the constitutional executive officers and the administrative departments. N.C. Const. art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time . . . ."); *id.* art. III, § 7(2) ("[R]espective duties [of the Council of State] shall be prescribed by law."); *id.* art. III, § 11 ("[A]ll administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law . . . .").

In addition to prescribing duties to the executive officers, our current constitution expressly recognizes the General Assembly's power to organize and reorganize the executive branch. *Id.* art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time . . . ."); *see id.* art. III, § 11 ("Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."). Thus, the executive power remains diffused and unchanged. *Compare* N.C. Const. of 1868, art. III, *with* N.C. Const. art. III. When the people have desired to expand executive authority, they have done so through express constitutional change. Such change occurred in the 1868 constitution, though it proved to be short-lived.

The Constitution of 1868, through a controversial provision, expressly limited the General Assembly's constitutional authority to assign the selection of statutory officers, expressly granting the appointment authority to the Governor, subject to consent of the Senate:

> The Governor shall nominate, and by and with the advice and consent of a majority of the Senators elect, appoint, all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.

N.C. Const. of 1868, art. III, § 10. Notably, a specific constitutional provision was required to limit the General Assembly's lawmaking power and to prevent it from designating an appointing authority other than the Governor.

Eight years later, the people specifically repealed this limitation on the General Assembly's legislative power by constitutional amendment in 1876. The amendment "restore[d] in considerable measure the former power of the General Assembly." Thad Eure, Sec'y of State, *North Carolina Government 1585-1974* at 798 (John L. Cheney, Jr. ed., 1975). Thereafter, the explicit constitutional power to designate the appointing authority, including the authority to designate itself, again resided in the General Assembly. *See* N.C. Const. of 1868, art. III, § 10 (1876); *Day*, 124 N.C. at 367, 32 S.E. at 749 ("[I]t is clear that the [Constitutional] Convention of 1875 intended to alter the Constitution . . . to confer upon the General Assembly the power to fill offices created by statute." (citation omitted)); *Jones*, 116 N.C. at 572-73, 21 S.E. at 788 ("[T]he [Constitutional] Convention refused to incorporate the words 'and no such officer shall be appointed or elected by the General Assembly.' " (citing Convention Journal of 1875, at 175-76)); *see*, *e.g.*, *Burns*, 124 N.C. at 765, 33 S.E. at 137 ("[T]he Legislature may fill [the] office [of keeper of the capitol]."); *Cunningham*, 124 N.C. at 641, 33 S.E. at 139 ("[M]embers of the Board of Agriculture . . . being of legislative creation, . . . are equally within the power of legislative appointment.").[8]

Since this fundamental return to the historical status quo, the constitutional authority to provide the method of filling statutory offices resides squarely with the General Assembly; the relevant provisions of our constitution regarding legislative power have remained unchanged. N.C. Const. art. II, § 1; *see id.* art. III, §§ 5(8), (10), 11. In 1968 the North Carolina State Constitution Study Commission acknowledged this broad legislative power. The Study Commission was tasked with drafting and proposing amendments to our current constitution. *See* N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* i-ii (1968) [hereinafter *Report*]. The

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8. *See State Constitution* 25 ("[T]he General Assembly now reclaimed the power to provide for legislative appointments to executive offices created by statute."). In 1911 two of the foremost legal scholars in North Carolina, Henry G. Conner, a former Supreme Court Justice, then serving as a federal district court judge, and Joseph B. Cheshire, Jr., an attorney in Raleigh, North Carolina, published an annotation of the state constitution. Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of the State of North Carolina Annotated* i (1911). They stated that "the amendment to this section by the Convention of 1875 altered the Constitution as construed [previously] . . . and conferred upon the General Assembly the power to fill offices created by statute." *Id.* at 140. This Court has quoted and cited this valuable work on our state constitution throughout the past century. *See*, *e.g.*, *Coley v. State*, 360 N.C. 493, 497, 631 S.E.2d 121, 125 (2006); *State v. Furmage*, 250 N.C. 616, 618, 109 S.E.2d 563, 564-65 (1959); *Penny v. Salmon*, 217 N.C. 276, 279, 7 S.E.2d 559, 561 (1940); *Moose v. Bd. of Comm'rs*, 172 N.C. 419, 441-42, 90 S.E. 441, 452 (1916) (Brown, J., concurring).

Study Commission reviewed our constitution and transmitted a special report to the Governor and General Assembly, which would serve "as the primary source of guidance for the 1969 legislative session" and adoption of our current constitution. *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 286 S.E.2d 89, 94 (1982). As we noted,

> a comparison . . . reveals that our Legislature relied almost exclusively on the Report. Hence, a close study of the Report allows us "to place [ourselves] as nearly as possible in the position of the men who framed the instrument" and allows us to "look to the history [and] general spirit of the times" . . . .

Id. at 635, 286 S.E.2d at 94 (brackets in original) (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("The court should place itself as nearly as possible in the position of the men who framed the instrument.")).

In its report the Study Commission explained:

> The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily.

Report at 131-32; *see also* N.C. Const. art. III, §§ 5(10), 11. Moreover, the Study Commission recommended limiting legislative appointment authority by constitutional amendment. Its proposed amendment would have vested sole authority in the Governor to "appoint and [ ] remove the heads of all administrative departments and agencies." *Report* at 113. This proposed constitutional amendment, modestly limiting some legislative appointment authority, was not adopted, thus perserving for the General Assembly its historically broad appointment authority. *See* N.C. Const. art. III, § 7.

Thus, aside from a short-lived express limitation, the constitutional authority to designate the appointing authority for statutory positions has resided and continues to reside squarely in the General Assembly under its general legislative power to make laws. Therefore, not only does the General Assembly have the undisputed constitutional power to create positions in the other branches, it may also designate to itself the authority to fill the positions.

Since 1776 our state constitutions have contained a separation of powers provision stating "[t]hat the legislative, executive, and supreme judicial powers of government, ought[9] to be forever separate and distinct from each other." N.C. Const. of 1776, Declaration of Rights, § IV; *see* N.C. Const. art. I, § 6; N.C. Const. of 1868, art. I, § 8. Notably, the plain language of the provision states that "powers" are to be "separate and distinct." A violation of separation of powers occurs when one branch of government exercises the power reserved for another branch of government.[10]

The first case in which this Court[11] addressed separation of powers, decided less than fifty years after the adoption of the original constitution, arose in a land title dispute. In *Robinson v. Barfield* the General

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9. Even though the word "ought" in both the 1776 and 1868 constitutions was changed to "shall" in the 1971 constitution, the Study Commission noted there was no substantive change to the separation of powers clause. *Report* at 73-75; *see also Smith v. Campbell*, 10 N.C (3 Hawks) 590, 591, 598 (1825) (providing that "ought" is synonymous with "shall," noting that "the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively").

10. This Court has consistently recognized this application of the separation of powers principle. *See, e.g.*, *State v. Whitehead*, 365 N.C. 444, 448-49, 448 n.1, 722 S.E.2d 492, 496 & n.2 (2012) (providing that the judiciary cannot exercise executive power under N.C. Const. art. III, § 5(6) to invalidate sentence for nonlegal error); *Bacon*, 353 N.C. at 717-18, 722, 549 S.E.2d at 854-55, 857 (recognizing that the judiciary cannot impose additional constraints on the executive's "exclusive prerogative" to grant clemency under N.C. Const. art. III, § 5(6)); *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 138-40, 142-43, 337 S.E.2d 477, 483-44, 486 (1985) (holding the legislature cannot exercise judicial power extended to the Industrial Commission under the Worker's Compensation Act by retroactively altering a judgment rendered by that agency); *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (holding the General Assembly cannot exercise constitutional power granted to the judiciary under N.C. Const. art. IV, § 13(2) in making rules of appellate practice and procedure); *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 513-14, 115 S.E. 336, 345 (1922) (holding the judiciary cannot invalidate a statute found not in conflict with the exercise of the legislature's constitutional taxation power under N.C. Const. of 1868, art. V, § 3); *Houston v. Bogle*, 32 N.C. (10 Ired.) 496, 503-04 (1849) (holding the legislature cannot exercise judicial power to retroactively determine "what the law is and what it was"); *Hoke*, 15 N.C. (4 Dev.) at 13-15 (holding the General Assembly violates separation of powers by exercising judicial power when it passes a law which attempts to settle a dispute between competing claimant to a public office); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391, 418-19 (1818) (holding that the legislature cannot exercise judicial power by deciding whether a deed "was executed according to . . . [the] law"); *see also Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 ("A violation of the separation of powers required by the North Carolina Constitution occurs when one branch of state government exercises powers that are reserved for another branch of state government."), *disc. rev. denied*, 357 N.C. 250, 582 S.E.2d 269 (2003).

11. *See* footnote 2.

Assembly passed a private act attempting to cure a flaw in a deed. 6 N.C. (2 Mur.) 391, 418-19 (1818). The Court said that the General Assembly violated separation of powers by exercising power reserved for the judiciary. *Id.* at 419. The Court noted that in passing the act, the legislature was attempting to determine "the *effects* in *law* of the several deeds. By the Constitution they are restricted from this exercise of power; they are to *make* the law, and the *judicial* power is to expound and determine what cases are within its operation." *Id.*

Similarly, in a more recent case, *Bacon v. Lee*, a convicted criminal asked this Court to intrude into the Governor's clemency review—an explicit constitutional power vested in the Governor since 1776. 353 N.C. at 704, 549 S.E.2d at 846-47. The criminal defendant sought substantive review from this Court because the then-serving Governor had represented the State during Bacon's appeal. *Id.* at 701-02, 711, 549 S.E.2d at 844-45, 851. This Court concluded that clemency was an explicit constitutional power of the Governor to be exercised solely at the Governor's discretion. *Id.* at 704, 549 S.E.2d at 846-47. As such, clemency was a nonjusticiable, political question. *Id.* at 716-17, 549 S.E.2d at 854. In explaining nonjusticiability, the Court noted that any substantive review by the Court would interfere with the Governor's express constitutional authority. *Id.* at 716-17, 549 S.E.2d at 854. When one branch interferes with another branch's performance of its constitutional duties, it attempts to exercise a power reserved for the other branch. *Id.* at 721-22, 549 S.E.2d at 857. Therefore, if the Court conducted a substantive review of the clemency proceeding, the judicial branch would be exercising a power constitutionally reserved for the Governor, thus violating separation of powers. *Id.* at 721-22, 549 S.E.2d at 857.

As discussed, the General Assembly has the constitutional power to assign itself the authority to fill statutory positions; this designation does not violate separation of powers. From our founding, the authority to appoint has simply been a mode of filling the position and has not in any way implicated control over the official or an exercise of any official duties. *Cunningham*, 124 N.C. at 642-43, 33 S.E. at 139 (holding that legislative appointment is "only a mode of filling the offices" and that "[t]his view . . . was strictly in accordance with the constitutional history of this State"); *Jones*, 116 N.C. at 580, 21 S.E. at 790 (Avery, J., concurring) ("[B]efore any such express power was given or limited to the Chief Executive, when by the Constitution as amended in 1835 no express grant of authority to appoint or elect was conferred upon either of the coördinate departments, the residuary power of the people to provide for filling offices, already existing, and to create others, was exercised

by their representatives in the General Assembly."); *Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 85 (1875) ("Now the election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law, whether they belong to one department or the other. The election of a judge is not a judicial power, nor the election of a Governor an executive power; for if so, all elections by the people would be an infringement upon the executive department.").

If the appointing of the official is simply a mode of filling the position and does not implicate control, then the appointment does not in any manner amount to exercising the duties of the office. Thus, whether appointing an official or a majority of a group of officials, the appointing authority is not exercising any responsibilities of the position. This principle has existed since our independence from Great Britain and has been reiterated throughout our history.

In 1776 the Drafters of the Declaration of Rights in our state constitution provided for separation of powers, N.C. Const. of 1776, Declaration of Rights, § IV; the next day, those same Drafters specified legislative appointment of the entire executive and judicial branches, N.C. Const. of 1776, §§ XIII-XVI, XXII-XXIV. In appointing the Governor, the then-seven-member Council of State, an Attorney General, Secretary of State, and Treasurer, *id.*, the General Assembly did not exercise the power of those offices. The authority to appoint all the officials of the other branches did not violate separation of powers because a separation of powers violation only occurs when one branch of government *exercises the power* belonging to another branch. Once appointed, the Governor and other executive branch officials each took an oath to perform the duties of the office and served a designated term. N.C. Const. of 1776, §§ XII, XV, XVI. Similarly, the legislature did not exercise the judicial power by creating a judicial system and appointing and removing judges. *Id.* § XIII. The judges took an oath to perform their duties and did so, despite the possibility of removal. *Id.* §§ XII, XIII.

Our original judges aptly demonstrated that a selected officer exercises independent judgment after appointment, even in the face of the legislature's removal authority. In *Bayard v. Singleton* the three judges had been appointed by the General Assembly and were subject to removal by that body. *See id.* § XIII. Nonetheless, the judges held an act of the General Assembly unconstitutional. 1 N.C. (Mart.) at 7. The Court observed

> that the obligation of their oaths and the duty of their office required them, in that situation, to give their opinion

> on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

Id. at 6-7. As demonstrated by the behavior of the judges and their decision in *Bayard v. Singleton*, appointment was simply a means of filling the position, not controlling the official and thereby exercising the power of the office.[12]

Our current constitution and a variety of statutes continue to recognize that the authority to appoint an official does not result in control of the appointee; having and exercising such authority does not implicate separation of powers. The constitution and statutes place with one or more officials in one branch the authority to appoint officials in another branch.[13] Moreover, various statutory schemes allow for the branches to

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12. The commissioners appointed under the statutes at issue here likewise must take oaths before taking on the responsibilities of their positions. *See* N.C.G.S. § 11-1 (2013) ("[O]aths . . . are necessary . . . to the important end of good government . . . [and] ought to be taken and administered with the utmost solemnity."); *id.* § 11-7 (2013) ("[E]very person elected or appointed to hold any office . . . shall . . . take and subscribe to the following oath: 'I . . . do solemnly and sincerely swear that I will . . . be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State . . . .' "); *see also id.* § 143B-13(a) (2013) ("[E]ach member [is appointed] on the basis of interest in public affairs, good judgment, knowledge, and ability in the field for which appointed, and with a view to providing diversity of interest and points of view in the membership.").

13. *See* N.C.G.S. §§ 7A-752, -753 (Chief Justice makes appointments to the Office of Administrative Hearings, housed in the executive branch); *Melott*, 320 N.C. at 526, 359 S.E.2d at 788 (Meyer, J., concurring in result) (recognizing that the Office of Administrative Hearings exercises judicial functions, yet is housed in the executive branch); *see, e.g.*, N.C. Const. art IV, § 19 (Governor fills judicial vacancies); N.C.G.S. § 163-9(a) (2013) (same); *see also* N.C. Const. art. III, §§ 3(4), (5) (General Assembly determines Governor's mental capacity and has power to impeach); *id.* art. III, § 7(6) (General Assembly determines incapacity of executive officers); N.C.G.S. § 106-2 (2013) (Governor appoints Agriculture Board, housed under elected Council of State member); *id.* §§ 162-5, -5.1 (2013) (vacancy in the office of sheriff, exercising the executive function of enforcing the laws, filled by board of county commissioners, a legislative body).

share appointments[14] and even authorize the political parties to recommend certain appointees.[15] This historically recognized principle, that appointment is simply a means of filling the position, is true regardless of the function ultimately exercised by the official.[16] Thus, for example, when the Governor appoints a judge, the Governor is not controlling the judge or exercising a judicial power; separation of powers is not implicated. N.C. Const. art. IV, § 19.

The principle of separation of powers is certainly not implicated by the General Assembly's appointment of a majority of the members of various executive commissions, particularly in light of the General Assembly's significant express constitutional authority to assign executive duties to the constitutional executive officers and organize executive departments. The executive branch executes the laws as enacted by the General Assembly. The constitution expressly acknowledges the General Assembly's power to assign duties and functions to the executive branch under its broad lawmaking power. N.C. Const. art. III, §§ 5(10), 7(1)-(2), 8, 11. The executive branch officials and their departments carry out these statutory duties and functions. *Id.* art. III, §§ 5(10), 7(1)-(2). The General Assembly retains the prerogative to change these duties, the organization of the executive branch, and the

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14. *See*, *e.g.*, N.C.G.S. § 7A-375 (2013) (Judicial Standards Commission) (providing for thirteen members severally appointed by the Chief Justice, State Bar Council, Governor, and General Assembly to serve six-year terms, and for cause and disqualification removal); *id.* § 115D-2.1 (2013) (State Board of Community Colleges) (providing for twenty-one members appointed by the Governor and General Assembly, various limited terms, and removal by vote and recommendation from the Ethics Commission); *id.* § 138A-7 (2013) (State Ethics Commission) (providing for eight members, four each appointed by the General Assembly and Governor to serve staggered terms, and removal for cause).

15. *See*, *e.g.*, N.C.G.S. § 162-5.1 (2013) (In forty six counties, the board "shall elect the person recommended by" the prior sheriff's political party to fill a vacancy in the office of sheriff.); *id.* § 163-19 (2013) (State Board of Elections) (providing for five members, requiring the Governor to appoint members from a list of nominees submitted by the two largest political parties, and limiting members to two consecutive four-year terms).

16. *See*, *e.g.*, N.C.G.S. § 62-10(f) (2013) (Utilities Commission) (independent commission performing judicial functions but residing in executive branch; members appointed by Governor subject to legislative confirmation); *id.* § 97-77(a1) (2013) (Industrial Commission) (independent commission performing judicial functions but residing in executive branch; members appointed by Governor but must be confirmed by the General Assembly).

branch's supervisory structure. *Id.* art. III, §§ 5(10), 7(1)-(2), 11. Though the General Assembly may have assigned a particular function to a constitutional executive officer at present, the constitution provides that the legislature can assign that function elsewhere. *Id.*

To overturn a law of the people acting through the General Assembly, the Court must find an express constitutional violation beyond a reasonable doubt. As demonstrated by the text and history of our constitution and by our jurisprudence, the General Assembly in exercising its express constitutional lawmaking power has the authority to appoint a majority of the members of executive commissions that it has created by statute. The authority to appoint is simply a mode of filling positions and does not result in control over the appointed officials. Absent an explicit constitutional amendment such as that proposed in 1968, the General Assembly's constitutional power, including its appointment authority, remains unchanged. While I agree with the majority that the statutes in question do not violate the appointments clause, *id.* art. III, § 5(8), I do not believe that the challenged provisions violate separation of powers. Accordingly, I concur in part and dissent in part.

TERRI YOUNG
v.
DANIEL BAILEY,[1] IN HIS OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO CASUALTY INSURANCE COMPANY

No. 355PA14-2

Filed 29 January 2016

1. Public Officers and Employees—wrongful termination—firing of sheriff's deputy—not a county employee—no public policy violation

The trial court did not err in a wrongful termination case, arising from the firing of a deputy by defendant sheriff for reasons allegedly attributable to her failure to support the sheriff's reelection, by granting summary judgment in favor of defendant sheriff. North Carolina is an employment-at-will state. Further, a deputy sheriff or employee of a sheriff's office is not a county employee. As a

1. Pursuant to N.C. R. App. P. 38(c), we note that Irwin Carmichael took office as Sheriff of Mecklenburg County on 1 December 2014, replacing defendant Daniel Bailey. Even though defendant Bailey was sued in his official capacity and thus is no longer a party, for purposes of clarity we will continue to refer to him as "defendant Bailey" or "defendant sheriff" in this opinion.

result, plaintiff was not covered by the public policy violation under N.C.G.S. § 153A-99 and her suit brought under that statute failed.

2. Constitutional Law—freedom of speech—wrongful termination based on political considerations—sheriff's deputy

The trial court did not err in a wrongful termination case by concluding plaintiff deputy sheriff's First Amendment free speech rights were not violated when she was fired allegedly based on her failure to support the sheriff's reelection. By standing in the elected sheriff's shoes, a deputy sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out. Mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties, and thus the dismissal of plaintiff based on political considerations was permissible.

3. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Although plaintiff deputy sheriff presented additional constitutional arguments on appeal in a wrongful termination case, they were not preserved based on plaintiff's failure to raise them at trial.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 771 S.E.2d 628 (2015), affirming an order granting summary judgment entered on 25 April 2014 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 7 December 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellees.

EDMUNDS, Justice.

Following the reelection of defendant Daniel Bailey to the office of Sheriff of Mecklenburg County, plaintiff's employment as a deputy sheriff was terminated. In response, plaintiff brought this action, alleging wrongful termination in violation of the North Carolina public policy enunciated in N.C.G.S. § 153A-99, and of Article I, Sections 14 and 36 of the North Carolina Constitution. We hold that plaintiff was not a county employee as defined in N.C.G.S. § 153A-99. As a result, she is not entitled to the protections provided in that statute and was not terminated in

violation of public policy. In addition, defendant sheriff's actions did not violate plaintiff's freedom of speech rights. Accordingly, we affirm the decision of the Court of Appeals.

Plaintiff Terri Young was hired as a deputy in the Mecklenburg County Sheriff's Office in 1990 and in 2010 had reached the rank of Captain. Plaintiff's duties included oversight of a detention facility, staff operations, and inmate and staff security, along with other responsibilities the sheriff assigned to her. During her tenure as a deputy, plaintiff received three disciplinary suspensions. In addition, she was reprimanded for violations of rules of conduct in June and July 2010.

On 23 June 2009, while preparing for his 2010 run for reelection, defendant Bailey sent letters to each of his deputies, seeking contributions in support of his upcoming campaign. Plaintiff did not make a contribution. Over a year later, in November 2010, defendant Bailey was reelected Sheriff of Mecklenburg County. On 6 December 2010, defendant Bailey chose not to reappoint plaintiff to her position as a deputy sheriff, pursuant to his authority under N.C.G.S. § 153A-103(1).

On 23 May 2013, plaintiff filed suit in Superior Court, Mecklenburg County against Bailey, in his official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company, the surety bond holder for defendant Bailey. In her complaint, plaintiff alleged that she was wrongfully terminated in violation of the public policy embodied in N.C.G.S. § 153A-99, specifically contending that she was fired because she had not contributed to defendant Bailey's reelection campaign. In addition, plaintiff alleged that her termination violated her rights guaranteed to her by Article I, Sections 14 and 36 of the North Carolina Constitution. On 26 June 2013, defendant Bailey filed an answer denying all of plaintiff's material allegations, asserting an affirmative defense of sovereign immunity, and arguing that plaintiff's constitutional claims are barred because defendant Bailey would have declined to reappoint plaintiff "even in the absence of the Plaintiff's First Amendment conduct." On 21 August 2013, defendant Ohio Casualty Insurance Company filed its answer, raising similar defenses.

On 3 March 2014, defendants made a joint motion for summary judgment asserting that no genuine issues of material fact existed concerning plaintiff's claims of wrongful discharge in violation of section 153A-99 or her claims under the North Carolina Constitution. After conducting a hearing, the trial court on 25 April 2014 entered a written order allowing defendants' motion. On 22 May 2014, plaintiff filed a notice of appeal from the order.

On 21 April 2015, the Court of Appeals issued an opinion affirming the trial court's ruling. *Young v. Bailey*, ___ N.C. App. ___, 771 S.E.2d 628 (2015). The court in *Young* cited *McLaughlin v. Bailey*, ___ N.C. App. ___, 771 S.E.2d 570 (2015), in which a different plaintiff had raised the same issues after being terminated by defendant Bailey. *Young*, ___ N.C. App. at ___, 771 S.E.2d at 630 (citing *McLaughlin*, ___ N.C. App. at ___, 771 S.E.2d at 572). In *McLaughlin*, the court stated that

> employees of a county sheriff, including deputies . . . , are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute.

McLaughlin, ___ N.C. App. at ___, 771 S.E.2d at 572. As a result, the court in *McLaughlin* held that the plaintiff could not establish a claim for wrongful termination in violation of section 153A-99. *Id.* at ___, 771 S.E.2d at 579. The panel here concluded that it was bound by this holding. *Young*, ___ N.C. App. at ___, 771 S.E.2d at 630-31. The panel in *Young* further concluded that plaintiff's state constitutional arguments lacked merit, *id.* at ___, 771 S.E.2d at 632, again relying on *McLaughlin*'s holding that deputy sheriffs can "lawfully be fired based on political considerations" without violating the state constitution's free speech guarantees, *McLaughlin*, ___ N.C. App. at ___, 771 S.E.2d at 581. We allowed discretionary review.

[1] We review a trial court's grant of summary judgment de novo, *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007), to determine whether any genuine issues of material fact exist and "whether the moving party is entitled to judgment as a matter of law," *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

North Carolina is an employment-at-will state. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 569, 515 S.E.2d 438, 439-40 (1999) (citations omitted). Parties to a contract of employment may end their relationship at any time for any reason when that agreement does not establish a defined term of employment. *See Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997) (citations omitted). Although exceptions are few, *see id.*, this Court has recognized one when the employer's acts violate the public policy of North Carolina, *see Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (citations omitted). Section 153A-99 embodies the public policy of protecting county employees from specific forms of political coercion. N.C.G.S. § 153A-99 (2013). The statute, entitled "County employee

political activity," provides in part that "[n]o employee may be required as a duty or condition of employment, promotion, or tenure of office to contribute funds for political or partisan purposes." *Id.* § 153A-99(d). Subdivision (b)(1) defines " 'County employee' or 'employee' " as "any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds." *Id.* § 153A-99(b)(1).

Thus, to state a cause of action based on a violation of this statute, plaintiff must first show that, although she was hired by the sheriff and worked as the sheriff's deputy, she was a "county employee." The parties agree that plaintiff was not a direct employee of the county. Instead, they wrangle over whether plaintiff falls under the second part of the definition. Plaintiff contends that the statute's protections apply to her because the sheriff's office is financed through the county, is integral to and a part of the county, and thus is a program or department of the county. Defendants acknowledge that the sheriff's office receives funding and other support from the county in the form of salaries, insurance, and so forth, but argue that funding is not the determining factor and that the mere fact of funding does not establish that a sheriff's office is a department or program of a county. Contending instead that a sheriff's office is independent of county government, defendants argue the statute does not apply to plaintiff. Accordingly, we first address the nature of plaintiff's employer.

The office of the sheriff, one of great antiquity, is established in North Carolina by our constitution. N.C. Const. art. VII, § 2; *Borders v. Cline*, 212 N.C. 472, 476, 193 S.E. 826, 828 (1937) ("The office of sheriff is constitutional."). The General Assembly explicitly has recognized the unique nature of the sheriff's position. N.C.G.S. § 17E-1 (2013). The sheriff is elected by the people, N.C. Const. art. VII, § 2, and alone is responsible for carrying out his or her official duties, N.C.G.S. § 162-24 (2013) ("The sheriff may not delegate to another person the final responsibility for discharging his official duties . . . ."). In addition, the sheriff has singular authority over his or her deputies and employees and is responsible for their actions. Under North Carolina law, each sheriff "has the exclusive right to hire, discharge, and supervise the employees in his office." *Id.* § 153A-103(1) (2013). While certain county officials have the power to hire and fire county employees, *see id.* §§ 153A-12 (setting out powers of county boards of commissioners), -82(1) (2013) (listing powers of county manager), a county government lacks hiring, supervisory, and firing authority over deputy sheriffs.

In light of the distinct demarcation between county government and the office of the sheriff, we conclude that a sheriff's office is not a

program or department of a county and agree with the consistent holdings of the Court of Appeals that a deputy sheriff or employee of a sheriff's office is not a county employee. *See, e.g.*, *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 449, 368 S.E.2d 892, 894 ("It is clear to this Court that plaintiff was an employee of the sheriff and not Watauga County . . . ."), *appeal dismissed and disc. rev. denied*, 323 N.C. 366, 373 S.E.2d 547 (1988); *see also Sims–Campbell v. Welch*, ___ N.C. App. ___, 769 S.E.2d 643, 648 (2015) (holding that an assistant register of deeds, like a deputy sheriff, does not enjoy the protections of section 153A-99 because the county "lacks *any* authority to supervise or control the details of the work performed by employees in that office"). Because a sheriff's office is not a program or department of a county, the fact that the sheriff's office receives funds therefrom is of no moment. As a result, plaintiff is not covered by N.C.G.S. § 153A-99 and her suit brought under that statute fails.

[2] Plaintiff also claims her termination was in violation of the free speech rights guaranteed by North Carolina Constitution, Article I, Section 14.[2] Here we assume without deciding that plaintiff was terminated for reasons attributable to her failure to support defendant sheriff's reelection. In analyzing alleged violations of the state constitution's guarantee of free speech, "this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court." *State v. Packingham*, ___ N.C. ___, ___, 777 S.E.2d 738, 743 (2015) (citing *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993)).

The United States Supreme Court has held that "[a] State may not condition public employment on an employee's exercise of his or her First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717, 116 S. Ct. 2353, 2356, 135 L. Ed. 2d 874, 880 (1996) (citations omitted). However, this general rule is subject to exceptions when the employee's loyalty to the employer is paramount. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), in which deputy sheriffs were fired or threatened with firing on the basis of their party registration, the Supreme Court recognized that "the prohibition on encroachment of First Amendment protections is not an absolute." *Id.* at 360, 96 S. Ct at 2683, 49 L. Ed. 2d at 558. To ensure the execution of policies on which the winning candidate campaigned, the Court

2. We note that plaintiff's complaint additionally cites North Carolina Article I, Section 36 but makes no argument relating to this Section. Accordingly, the claim is waived and we do not address it further. *See* N.C. R. App. P. 28(a).

held that employees in policymaking positions legally can be dismissed on grounds relating to political loyalty "to the end that representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate." *Id.* at 367, 96 S. Ct. at 2687, 49 L. Ed. 2d at 562. The Supreme Court later refined its holdings regarding political patronage dismissals when it added that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518, 100 S. Ct. 1287, 1295, 63 L. Ed. 2d 574, 584 (1980). The North Carolina Court of Appeals adopted *Elrod*'s reasoning in *Carter v. Marion*, 183 N.C. App. 449, 453-55, 645 S.E.2d 129, 131-32 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 175, 658 S.E.2d 271 (2008).

Accordingly, the question before us is whether defendant sheriff has satisfied the tests set out in *Elrod* and *Branti*. The state constitution mandates popular election of sheriffs, officials who establish procedures, guidelines, priorities, and policies for his or her office. N.C. Const. art. VII, § 2; *see also* N.C.G.S. § 162-1 (2013). The election of a particular candidate signifies public support for that candidate's platform, policies, and ideology. The General Assembly has concluded that the politics of the elected sheriff are sufficiently important that in many counties, including the populous counties of Buncombe, Forsyth, Guilford, Mecklenburg, and Wake, if a vacancy in the office occurs and the departed sheriff had been nominated by a political party, the county board of commissioners filling the vacancy is *required* to consult with the political party of the previous sheriff and must elect the person recommended by that party's executive committee. N.C.G.S. § 162-5.1 (2013).

Deputies are a reflection of their sheriff. They serve as the alter egos of the sheriff and, if liability results from the acts of a deputy, the sheriff is held responsible. *Styers v. Forsyth Cty.*, 212 N.C. 558, 565, 194 S.E. 305, 309 (1937) ("If there be a nonfeasance of neglect of duty by the under-sheriff, the sheriff alone is responsible to the party injured . . . .") (quoting *Lyle v. Wilson*, 26 N.C. (4 Ired.) 226, 228 (1844)); *see also* N.C.G.S. § 162-24 (stating that, although a sheriff may not delegate the final responsibility for discharging his or her responsibilities, "he may appoint a deputy or employ others to assist him in performing his official duties"). After considering these statutory and decisional factors, we conclude that, by standing in the elected sheriff's shoes, a deputy

sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out.

The Fourth Circuit undertook a similar analysis in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090, 118 S. Ct. 881, 139 L. Ed. 2d 869 (1998). After conducting an exhaustive examination of the role of deputy sheriffs in North Carolina and other jurisdictions, and after acknowledging the unique status of deputies in this state as recognized in such statutes as N.C.G.S. §§ 17E-1, 153A-103(2), and 162-24, that court concluded that "in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally." *Id.* at 1164. As a result, "North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod–Branti* exception to prohibited political terminations." *Id.* While *Jenkins* is not binding on us, we find the Fourth Circuit's analysis persuasive. When, as here, mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties, the dismissal of plaintiff here based on political considerations falls squarely within the rule established in *Elrod* and *Branti*. Accordingly, we hold that plaintiff's rights under the Constitution of North Carolina were not violated.

[3] Plaintiff also presented to this Court an argument based upon an alleged violation of her rights under the Constitution of the United States. This issue was neither raised below nor in plaintiff's petition for discretionary review. As a result, we do not address this contention. *See State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001) (citing *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)), *cert. denied*, 536 U.S. 930, 122 S. Ct. 2605, 153 L. Ed. 2d 791 (2002).

Because plaintiff has failed to raise any meritorious claims, the trial court correctly concluded defendants were entitled to judgment as a matter of law. Accordingly, we conclude the Court of Appeals correctly held the trial court's grant of summary judgment in favor of defendants was proper.

AFFIRMED.

MARGARET DICKSON, *et al.*	)	
	)	
v.	)	
	)	
ROBERT RUCHO, *et al.*	)	
	)	
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*	)	From Wake County
	)	
v.	)	
	)	
THE STATE OF NORTH CAROLINA, *et al.*	)	

No. 201PA12-3

ORDER

Plaintiff-Appellants' Rule 31 Petition for Rehearing is denied as to the second and third issues. As to the remaining first issue, plaintiff-appellants' petition is dismissed on procedural grounds. Plaintiff-appellants waived review of this argument by failing to raise it in their brief on remand. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

This Court's 18 December 2015 opinion is modified as follows: the sentence stating "Alabama's Constitution does not contain a Whole County Provision" is deleted, and the words in the next sentence, "that state," are replaced with the word, "Alabama." *Dickson v. Rucho*, No. 201PA12-3, 2015 N.C. LEXIS 1281, at *34 (Dec. 18, 2015).

By order of the Court in Conference, this 11th day of February, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)	

No. 294PA14

ORDER

On 21 August 2015, this Court ordered this case certified to the trial court for additional findings of fact as to "[w]hether a physician-patient relationship existed at the time Mr. King signed the arbitration agreement." On 6 November 2015, the trial court entered the additional findings of fact.

Now, the Court, on its own motion, orders that the parties submit supplemental briefs on the effect of the trial court's additional findings of fact on the proceedings in this case. Appellants' supplemental brief shall be filed no later than thirty days after the date of this order, and appellees' supplemental brief shall be filed no later than thirty days following appellants' filing.

By order of the Court in Conference, this 19th day of February, 2016.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. PERRY

[368 N.C. 675 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
DOMINIQUE JEVON PERRY	)	

No. 81A14

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016, revised Jan. 27, 2016), on the proceedings in this case. Defendant's supplemental brief shall be filed no later than thirty days after the date of this order, and the State's supplemental brief shall be filed no later than thirty days following defendant's filing.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of January, 2016.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. SEAM

[368 N.C. 676 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Davidson County
	)	
SETHY TONY SEAM	)	

No. 82A14

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016, revised Jan. 27, 2016), on the proceedings in this case. The State's supplemental brief shall be filed no later than thirty days after the date of this order, and defendant's supplemental brief shall be filed no later than thirty days following the State's filing.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of January, 2016.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. YOUNG

[368 N.C. 677 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe County
	)	
DAVID MARTIN BEASLEY YOUNG	)	

No. 80A14

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs on the effect of *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758 (U.S. Jan. 25, 2016, revised Jan. 27, 2016), on the proceedings in this case. The State's supplemental brief shall be filed no later than thirty days after the date of this order, and defendant's supplemental brief shall be filed no later than thirty days following the State's filing.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of January, 2016.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA, UPON THE RELATION OF PATRICK L. McCRORY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; JAMES B. HUNT, JR.; AND JAMES G. MARTIN	)	
v.	)	From Wake County
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE COAL ASH MANAGEMENT COMMISSION, HARRELL JAMISON AUTEN III, TIM L. BENNETT, D. ALLEN HAYES, SCOTT FLANAGAN, RAJARAM JANARDHANAM, AND LISA D. RIEGEL	)	

No. 113A15

ORDER

Plaintiffs' petition for writ of certiorari is allowed for the limited purpose of reversing the superior court's dismissal of plaintiffs' quo warranto claim, and remanding to the superior court for consideration of that claim on the merits.

By order of the Court in Conference, this 28th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of January, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

28 JANUARY 2016

001P16	State v. Ronald Farrow	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-583) 2. Def's Petition for *Writ of Certiorari* To Review Order of Superior Court of New Hanover County	1. Denied 2. Denied
002P16	Khalid Edward Cochran v. State of N.C.	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/05/2016**
003P16	State v. Scott Matthew Spiron	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-281) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed
013P16	Landover Homeowners Association, Inc. v. Thomas B. Sanders, Anna B. Sanders; Sanders Equipment Company, Inc.; and Sanders Development	1. Defs' Motion for Temporary Stay (COA14-1337) 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **01/15/2016** 2.
016P16	Maurice Antonio Burris v. Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles	1. Plt's Motion for Temporary Stay (COA15-312) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR	1. Allowed **01/20/2016** 2. 3.
024P16	State v. Oakland McCulloch	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/21/2016** 2.
026P14-2	William Thomas Fox and Scott Everett Sanders v. Mitchell Johnson, Timothy R. Bellamy, Gary W. Hastings, and Martha T. Kelly, in their individual capacities	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA15-206) 2. N.C. Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot **Edmunds, J., recused** **Ervin, J., recused**

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

28 JANUARY 2016

026P16	Shaka Greene v. Trustee Services of Carolina, LLC and US Bank, N.A. --- In the Matter of the Foreclosure of Real Property Under Deed of Trust from Jeffrey S. Kenley and Laura L. Kenley, in the Original Amount of $296,700, and Dated September 29, 2005 and Recorded on September 30, 2005, in Book 3935 at Page 427, of Union County Registry	1. Plt's Motion for Temporary Stay (COA15-90 & COA15-97) 2. Plt's Petition for *Writ of Supersedeas*	1. Allowed **01/22/2016** 2.
027P16	State v. Keyshawn Jones	1. State's Motion for Temporary Stay (COA15-804) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/26/2016** 2. 3.
035PA12-2	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 (COA14-1351) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/06/2016** 2. 3.
040P15-5	State v. Napoleon Junior Rankin	Def's *Pro Se* Motion for PDR (COA07-1232)	Dismissed **Ervin, J., recused**
080A14	State v. David Martin Beasley Young		Special Order
081A14	State v. Dominque Javon Perry		Special Order
082A14	State v. Sethy Tony Seam		Special Order

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

28 JANUARY 2016

101P15-2	State v. Christopher Anthony Clegg	1. Def's *Pro Se* Motion for Beal [sic] of Particulars and Probable Cause Indictment 2. Def's *Pro Se* Motion for Clerk Discharge of Debtors	1. Dismissed 2. Dismissed
112A15	Dana Marie Ribelin (fka Creel) v. Phillip Ray Creel	Plt's Motion for Leave to File Reply Brief	Denied **01/27/2016**
113A15	Patrick L. McCrory, et al. v. Philip E. Berger, et al.	Plt's PWC to Review Order of Superior Court of Wake County	Special Order
132P11-8	State v. Gregory Lynn Gordon	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-180) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Ex-Parte Petition for *Writ of Certiorari*	1. Denied 2. Allowed 3. Dismissed
139PA13	State v. Quintel Augustin, Tilmon Golphin, and Christina Walters (DEATH)	1. Defs' Motion for Temporary Stay of the Mandate 2. Defs' Motion for Clarification 3. Defs' Motion for Leave to File Reply to Response to Clarification	1. Denied **01/07/2016** 2. Denied **01/07/2016** 3. Allowed **01/07/2016** **Beasley, J., recused** **Ervin, J., recused**
150P15-2	State v. Quincy Lamar Hill	Def's *Pro Se* Motion for Re-Hearing	Dismissed **Beasley, J., recused**
162P95-6	State v. Isaac Jackson Stroud	Def's *Pro Se* Motion for a Redetermination of Its Order	Dismissed
182P10-2	State v. Charles R. Goodson	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
208P15	The North Carolina State Bar v. Jerry R. Tillett, Attorney	Def's PDR Prior to a Determination of COA	Denied

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

28 JANUARY 2016

225P15-2	State v. Connie Prentice Reaves	Def's *Pro Se* Motion for Appeal	Dismissed
228A15	N.C. Association of Educators, Inc., et al. v. The State of North Carolina	N.C. Retired Governmental Employees' Association's Motion for Leave to File *Amicus* Brief	Allowed **12/21/2015**
232A93-4	State v. Warren Robert Gregory (DEATH)	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Pitt County	Denied
248P15	Paul Frampton v. University of North Carolina at Chapel Hill	1. Respondent-Defendant's PDR Under N.C.G.S. § 7A-31 (COA14-1117) 2. Petitioner-Plaintiff's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
250P15	The North Carolina State Bar v. Robert L. Scott, Attorney	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1008) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Def's *Pro Se* Motion to Amend Notice of Appeal and PDR 5. Def's *Pro Se* Motion to Amend the Face Page of the Printed Record in this Appeal	1. --- 2. Denied 3. Allowed 4. Allowed 5. Allowed
278P15	State v. David Matthew Lowe	1. Def's Motion for Temporary Stay (COA14-1360) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/11/2015** 2. Allowed 3. Allowed 4. Allowed
297P15	State v. Terrance Javarr Ross	1. State's Motion for Temporary Stay (COA15-87) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed 0**8/21/2015** 2. Allowed 3. Allowed
305P15	State v. Roger Lewis Smyre	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1178) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for *Writ of Certiorari* to Review Decision of COA 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed

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

28 JANUARY 2016

309P15	State v. Reginald Underwood Fullard	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-93) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. 2. Denied **01/13/2016**
320P15	Leroy Courtland Broadnax v. Jason Edward Ramey, Attorney for the State	Petitioner's *Pro Se* Motion for Relief from Conviction and Sentence (COAP15-584)	Dismissed
337P15	State v. Aron Harper	1. Def's Motion for Temporary Stay (COA14-1182) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Petition for *Writ of Certiorari* to Review Decision of COA 4. Def's Motion to Amend Petition for *Writ of Certiorari* and Petition for *Writ of Supersedeas* and Motion for Temporary Stay	1. Denied **10/08/2015** 2. Denied 3. Denied 4. Allowed
351P15	State v. Paul Gregory Perry	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1328) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
353P15	Carolyn Joyner Driggers, Individually and as Co-Trust and Co-Beneficiary of the Barney G. Joyner Family Trust, and Phyllis M. Joyner, by and through Carolyn Driggers as Attorney-in-Fact v. David Lee Joyner and Ronald Dorrestein	1. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of COA (COA15-434) 2. Plt's (Carolyn Joyner Driggers) Petition for *Writ of Certiorari* to Review Order of Superior Court of Wake County 3. Defs' Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	1. Denied 2. Denied 3. Allowed **10/27/2015**
360P15	State v. Jorge Juarez	1. State's Motion for Temporary Stay (COA15-152) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/27/2015** 2. Allowed 3. Allowed

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

28 JANUARY 2016

364P15	Gaillard Bellows and her husband, Jon Bellows v. Asheville City Board of Education dba Asheville High School and SKA Consulting Engineers, Inc., Formerly Sutton-Kennerly & Associates, Inc., and Zebulon W. Wells, Jr., Individually	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-131)	Denied
366P15	In the Matter of: T.F.L., S.D.L., and B.A.N.L.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-144-2)	Denied
368P12-3	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D., Ralph Whatley, M.D., Sanjay Patel, M.D., and Cynthia Brown, M.D.	Plt's *Pro Se* Motion for Petition for Reconsideration	Denied
372P15	William Shannon, M.D. v. Bob Testen, Joseph P. Jordan, and North Carolina Physicians Health Program, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-64)	Denied
373A15	State v. Nisandro Conzelez Sanchez	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1381) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
376A15	Paramount RX, Inc. v. Robert E. Duggan and Agelity, Inc.	Plt's Motion to Stay the Appeal	Allowed **12/21/2015**
377P15	State v. Victor Jay Crisco, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-272) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw Def's *Pro Se* PDR	1. Denied 2. --- 3. Allowed
378P15	State v. Eric Cornell Wilson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-234)	Denied

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382P10-4	State v. John Lewis Wray, Jr.	1. Def's *Pro Se* Motion to Remand 2. Def's *Pro Se* Motion to Vacate/ Dismiss Conviction Based on Altered/ Falsified Documents	1. Dismissed 2. Dismissed **Beasley, J., recused**
382P15	State v. Richard Jackson Hall	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-767)	Denied
383P15	State v. Lesiba Simon Matsoake	Def's PDR Under N.C.G.S. § 7A-31 (COA15-304)	Denied
384P15	State v. Sherry Endoleen Austin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-44)	Denied
385P15	State v. Archimede N. Nkiam	1. State's Motion for Temporary Stay (COA14-1164) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal 6. Def's Motion to Dismiss PDR	1. Allowed **11/23/2015** 2. Allowed 3. --- 4. Allowed 5. Allowed 6. Dismissed as moot **Ervin, J., recused**
387P05-3	State v. Earl James Watson	Def's *Pro Se* Motion for PDR (COAP15-753)	Dismissed **Ervin, J., recused**
387P15	State v. Judy Hardison	1. State's Motion for Temporary Stay (COA15-150) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/23/2105** Dissolved **01/28/2016** 2. Denied 3. Denied
388P15	State v. Ralph Lewis Gettys	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-51) 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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389A15	State v. Tae Kwon Hammonds	1. Def's Notice of Appeal Based Upon a Dissent (COA15-53) 2. Def's PDR As to Additional Issues	1. — 2. Allowed
391P15	City of Asheville, a municipal corporation v. State of North Carolina and the Metropolitan Sewerage District of Buncombe County	1. Plt's Motion for Temporary Stay (COA14-1255) 2. Plt's Motion for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31 5. International Municipal Lawyers Association's Motion for Leave to File *Amicus* Brief 6. Brunswick Regional Water & Sewer H2GO's Conditional Motion for Leave to File *Amicus* Brief 7. City of Wilson's Conditional Motion for Leave to File *Amicus* Brief 8. State's Motion to Dismiss Appeal 9. North Carolina League of Municipalities Conditional Motion for Leave to File *Amicus* Brief	1. Allowed **11/25/2015** 2. Allowed 3. Retained 4. Allowed 5. Allowed 6. Allowed 7. Allowed 8. Denied 9. Allowed
392PA13-3	State v. Robert T. Walston, Sr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/18/2015** 2.
392P15	State v. Joshua Donyell Walker	Def's PDR Under N.C.G.S. § 7A-31 (COA15-340)	Denied
395P15	State v. Timothy Jerome Lawing	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA14-1288) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
396P15	State v. Eric Douglas Hicks	Def's PDR Under N.C.G.S. § 7A-31 (COA15-491)	Denied
397P15	State v. Marlette Toomer and Vernon Toomer	Def's (Vernon Toomer) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1246)	Denied

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398P15	State v. Samuel Lee Gaskins	Def's *Pro Se* Motion for PDR (COAP15-798)	Dismissed
399P15	State v. Devon Armond Gayles	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Buncombe County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
401P15	John M. McCormick, Employee v. EXEL/ DPWN Holdings, Inc., Employer, Self-Insured (Sedgwick CMS, Servicing Agent)	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA15-690)	Denied
402P11-6	State v. Sylvester Eugene Harding	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-148) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
402P15	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414) 2. State's Motion to Strike Def's Reply to State's Response 3. Def's Motion to Hold PDR in Abeyance 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas*	1. 2. 3. 4. Allowed **12/17/2015** 5.
403P15	State v. James Earl Parker	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
404P13-2	Robert A. Izydore v. City of Durham (Durham Board of Adjustment)	Petitioner's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA14-1378)	Denied

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404P15	Prince Jerry Jones v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
405P15	State v. Jesus Adan Cruz Rios	Def's *Pro Se* Motion for PDR (COA07-1232)	Denied **Jackson, J., recused**
406P15	State v. David Sellers	Def's *Pro Se* Motion for PDR (COA15-10)	Denied
408P15	State v. Marty Allan Lewis	Def's PDR Under N.C.G.S. § 7A-31 (COA15-408)	Denied
410P15	Joleando Lyndell Jones v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
411A94-5	State v. Marcus Reymond Robinson (DEATH)	1. Def's Motion for Temporary Stay of the Mandate 2. Def's Motion for Clarification 3. Def's Motion for Leave to File Reply to Response to Motion for Clarification	1. Denied **01/07/2016** 2. Denied **01/07/2016** 3. Allowed **01/07/2016** **Ervin, J., recused**
411P15	State v. John W. Hearne	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Vance County	Dismissed
413P15	Christopher W. Abells v. Tiffany J. Martin (formerly Abells)	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-88) 2. Def's Conditional Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
416P15	State v. Nijel Ramsey Lee	1. Def's *Pro Se* Motion for Notice of Appeal (COAP14-357) 2. Def's *Pro Se* Petition in the Alternative for *Writ of Habeas Corpus*	1. Dismissed 2. Denied **12/15/2015**
417P15	State v. Dustin Jamal Warren	Def's PDR Under N.C.G.S. § 7A-31 (COA15-499)	Denied

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418P15	Marcus Larent Henderson v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
419P15	State v. Emile George Fryou	1. Def's PDR Under N.C.G.S. § 7A-31 (COA14-1168) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
420P15	State v. Marlon E. Mendoza-Mejia	1. State's Motion for Temporary Stay (COA14-1261) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/21/2015** 2.
421P15	Law Offices of Peter H. Priest, PLLC v. Gabriel Coch and Information Pattern, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-254) 2. Plt's Petition for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Dismissed as moot
422P15	State v. Christopher Blake Squire	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/05/2016**
423P15	State v. Clyde Gary Whisenant	1. Def's Motion for Temporary Stay (COA15-607) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **12/30/2015** 2. **Ervin, J., recused**
425P15	State v. Dwayne D. Knolton	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/22/2015**
427P15	State v. James Cornelius McNeill	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-94)	Denied
428P15	Trevon DeAndre Rice v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
429P15	Nathaniel Ray McLean v. Harnett County District Court Jacqualyn L. Lee	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied

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430P15	State v. Omar Jackson	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/05/2016**
434P15	Curtis Kantawiti White, Jr. v. North Carolina, Carl F. Fox, Chief Judge	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/29/2015**
435A96-5	State v. Walic Christopher Thomas (DEATH)	1. Def's Motion to Stay PWC 2. Def's PWC to Review the Decision of the Superior Court of Guilford County 3. Def's *Pro Se* Motion to Withdraw All Appeals 4. State's Motion for Leave to Substitute Counsel of Record 5. Def's *Pro Se* Motion for Ineffective Assistance of Post Conviction Counsel 6. Kathyrn Vandenberg and Marvin Sparrow's Motion to Withdraw 7. Def's Motion to Authorize IDS to Appoint Substitute Counsel	1. 2. 3. Dismissed **12/15/2010** 4. Allowed **06/12/2013** 5. Dismissed **12/18/2014** 6. Allowed **11/05/2015** 7. Allowed **11/05/2015**
435P15	State v. Sulyaman Alisla Wasalaam	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/29/2015**
436P15	State v. Tony Eugene Howell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Alexander County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
437P15	Herman V. Tate v. North Carolina Department of Public Safety	1. Plt's *Pro Se* Motion to Safeguard Constitutional Rights (COA14-1274) 2. Plt's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
439P15	State v. James Emmanuel Nettles	Def's *Pro Se* Motion for PDR (COA11-638)	Denied **Ervin, J., recused**

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441P92-7	State v. Johnnie L. Harrington	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Lee County	Dismissed **Ervin, J., recused**
441P15	Arnold Powell v. Bourlon & Davis	1. Petitioner's *Pro Se* Motion for Request for an Order to Compel (COAP15-866) 2. Petitioner's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed
455P14-4	State v. Reginald Fullard	1. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 2. Def's *Pro Se* Motion for Appeal Seeking Recusal 3. Def's *Pro Se* Motion to Compel Constitutional Disclosure of Exculpatory Evidence 4. Def's *Pro Se* Motion to Withdraw Unconstitutionally Construed Instrument that Violates Due Process 5. Def's *Pro Se* Motion for *Writ of Mandamus* 6. Def's *Pro Se* Motion for Case Calendaring 7. Def's *Pro Se* Motion for Evidence Hearing 8. Def's *Pro Se* Motion for Appointment of Competent Criminal Attorney 9. Def's *Pro Se* Motion for Jury Trial	1. Allowed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed
459P00-5	State v. William M. Huggins	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed

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471P13-2	John Walter Lawson and Margaret (Meg) Elizabeth Lawson Darling v. Heidi Cavanagh Lawson; Jacqueline Cavanagh Hughes; Mark Caprise; Deputy Sheriff PJ Mullen, in his official capacity and individually; Deputy Sheriff Michael Brannon, in his official capacity and individually; Corporal Claybourn Harper, in his official capacity and individually; Sheriff William Schatzman, in his official capacity as Sheriff of Forsyth County, NC; Hartford Insurance, as surety; Lieutenant Max Creason, in his official capacity and individually; and Chief Kenneth Gamble	1. Plts' *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA14-1224) 2. Plts' *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (Lt. Max Creason) Motion to Dismiss Appeal 4. Defs' (Schatzman, Mullen, Brannon, and Harper) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed **Ervin, J., recused**
536P00-7	Terrance L. James v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/21/2016** **Ervin, J., recused**
629P01-5	State v. John Edward Butler	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-558) 2. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP15-886)	1. Denied 2. Denied

BEVERAGE SYSTEMS OF THE CAROLINAS, LLC
v.
ASSOCIATED BEVERAGE REPAIR, LLC, LUDINE DOTOLI, AND CHERYL DOTOLI

No. 316A14

Filed 18 March 2016

1. Contracts—non-compete agreement—overbroad restrictions—court may not amend—blue pencil doctrine not available

The trial court correctly declined to enforce a covenant not to compete even though the parties expressly agreed in their contract that a court could rewrite overbroad temporal and territorial limitations that would otherwise render the covenant unenforceable. A court may not unilaterally amend the terms of a non-compete contract, and parties cannot contract to give a court power that it does not have. Further, the blue pencil doctrine could not save the non-compete agreement because the only restrictions in the agreement—restrictions to all of North Carolina and South Carolina—were unreasonable, and nothing would remain if the court struck out the unreasonable portions.

2. Torts, Other—tortious interference with contract—no express or implied-in-fact contract

Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with contract. Plaintiff failed to establish a contract—express or implied-in-fact—with its customers. There was no evidence of any legal obligation of a third-party customer to the companies sold to plaintiff, and defendants were not restrained by the overbroad non-compete covenant.

3. Torts, Other—tortious interference with prospective economic advantage—mere expectation of continuing business relationship—no evidence of contract—no evidence of malice

Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with prospective economic advantage. Plaintiff's mere expectation of a continuing business relationship with the customers of defendants' former business was insufficient to establish this claim. Plaintiff could not

show that a contract would have resulted but for defendants' malicious intervention.

4. Unfair Trade Practices—contract claims failed—no basis for claim

Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, plaintiff's unfair and deceptive trade practices claim failed because the Supreme Court held that plaintiff's contract claims failed. The Supreme Court also rejected plaintiff's request for injunctive relief because the non-compete covenant was unenforceable.

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. ___, 762 S.E.2d 316 (2014), reversing an order granting summary judgment for defendants entered on 3 October 2013 by Judge A. Robinson Hassell in Superior Court, Iredell County, and remanding for additional proceedings and for trial. Heard in the Supreme Court on 31 August 2015.

Jones, Childers, McLurkin & Donaldson, PLLC, by Kevin C. Donaldson and Dennis W. Dorsey, for plaintiff-appellee.

Eisele Ashburn Greene & Chapman, PA, by Douglas G. Eisele, for defendant-appellants.

Higgins Benjamin PLLC, by Jonathan Wall; and Winslow Wetsch, PLLC, by Laura J. Wetsch, for North Carolina Advocates for Justice, amicus curiae.

EDMUNDS, Justice.

The trial court in this case declined to enforce a covenant not to compete, even though the parties expressly agreed in their contract that a court could rewrite overbroad temporal and territorial limitations that would otherwise render the covenant unenforceable. We agree that the trial court correctly refused to amend the covenant. In addition, we conclude that the trial court properly entered summary judgment in defendants' favor on plaintiff's claims for tortious interference with contract, tortious interference with prospective economic advantage, and unfair and deceptive practices. Accordingly, we reverse the decision of the Court of Appeals reversing the trial court.

Elegant Beverage Products, LLC ("Elegant") and Imperial Unlimited Services, Inc. ("Imperial") were two businesses that supplied, installed, and serviced beverage products and beverage dispensing equipment in parts of North Carolina and South Carolina. Elegant sold premium coffee and tea, and Imperial serviced soft drink dispensers. At the time these companies were sold to plaintiff, Thomas Dotoli owned Imperial, while Thomas's wife Kathleen and their son Loudine Dotoli[1] owned Elegant. Both Imperial and Elegant operated out of Statesville, North Carolina.

Mark Gandino entered into negotiations with Thomas and Kathleen Dotoli to purchase the business and the assets of both companies. Gandino organized plaintiff Beverage Systems of the Carolinas, LLC ("Beverage Systems" or "plaintiff") under North Carolina law in May 2009, and on or about 20 July 2009, Gandino purchased Elegant and Imperial to operate as Beverage Systems. Specifically, Beverage Systems entered into an Asset Purchase Agreement with Thomas, Kathleen, and Loudine Dotoli, and with Elegant and Imperial to purchase the assets, customer lists, equipment, existing inventory, and associated real property of Elegant and Imperial for $650,000.

The closing, sale, and purchase were completed on 30 September 2009. That same day, the parties executed a "Non-Competition, Non-Solicitation and Confidentiality Agreement" ("the Agreement") in which Loudine and his parents agreed not to compete with plaintiff's business in either North or South Carolina before 1 October 2014. Paragraph six of the Agreement contained a provision permitting the trial court to revise its temporal and geographic limits should a court find them to be unreasonably broad. The Dotoli family members, Elegant, and Imperial received $10,000 of the purchase price as consideration for the Agreement.

Defendant Cheryl Dotoli, Loudine's wife, was not a party to either the purchase contract or the Agreement. In 2011, Cheryl formed defendant Associated Beverage Repair, LLC ("Associated Beverage"). Associated Beverage began to install and service beverage dispensing equipment in parts of North and South Carolina, thus operating in a manner similar to Imperial. Gandino learned of Associated Beverage's existence in March 2011 when Thomas Dotoli communicated to representatives of Bunn-O-Matic, one of Imperial's former customers, that Imperial had been sold to Beverage Systems, which had vacated the building that

1. Throughout their pleadings and briefs, the parties refer to the son as both "Ludine" and "Loudine." We will follow the spelling used by Loudine in his affidavit.

Imperial previously had occupied. Thereafter, Bunn-O-Matic elected to conduct business with defendant Associated Beverage rather than plaintiff Beverage Systems.

After plaintiff's requests that defendants cease and desist went unanswered, Beverage Systems filed a complaint on 14 June 2012 in Superior Court, Iredell County, against Loudine, Cheryl, and Associated Beverage, seeking injunctive relief and damages. Plaintiff alleged against Loudine breach of the Agreement not to compete. Plaintiff also alleged claims against all defendants for tortious interference with contract, tortious interference with plaintiff's prospective economic advantage, and unfair and deceptive practices. Defendants filed their answer on 4 October 2012. Although defendants asserted multiple defenses, they admitted that Associated Beverage "with the help of L[o]udine Dotoli, intends to compete with Plaintiff," but "denied that such competition violates any Non-Competition Agreement." Defendants contended, *inter alia*, that neither Cheryl Dotoli, the sole member in Associated Beverage, nor Associated Beverage signed the Agreement not to compete, and therefore they were not bound by its terms. Defendants also asserted that the Agreement was unenforceable by virtue of being overly broad in geographic scope. On 11 September 2013, defendants moved for summary judgment on all issues. After conducting a hearing, the trial court entered an order on 3 October 2013 granting defendants' motion for summary judgment in all respects. Plaintiff appealed.

In a divided opinion, the Court of Appeals reversed the trial court's order. *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, ___ N.C. App. ___, ___, 762 S.E.2d 316, 326 (2014). Addressing first the Agreement not to compete, the majority found that the Agreement's five-year temporal restriction was reasonable, *id.* at ___, 762 S.E.2d at 320-21, but that its geographic scope was unreasonable because it included areas beyond those "necessary to maintain plaintiff's customer relationships," *id.* at ___, 762 S.E.2d at 321. The Court of Appeals then observed that paragraph six of the Agreement expressly authorized the trial court to revise the unreasonable territorial restriction. *Id.* at ___, 762 S.E.2d at 321. Addressing the effect of paragraph six, the Court of Appeals, citing *Welcome Wagon Int'l, Inc. v. Pender*, 255 N.C. 244, 248, 120 S.E.2d 739, 742 (1961), acknowledged that North Carolina has adopted the "strict blue pencil doctrine" under which a court cannot rewrite a faulty covenant not to compete but may enforce divisible and reasonable portions of the covenant while striking the unenforceable portions. *Beverage Sys.*, ___ N.C. App. at ___, 762 S.E.2d at 321. Here, though, the majority found that the limitations of the

blue pencil doctrine did not apply because the Agreement gave the trial court carte blanche to rewrite all the geographical terms of the covenant. *Id.* at___, 762, S.E.2d at 321. Nevertheless, relying on paragraph six of the Agreement and reasoning that the parties to the contract and the Agreement had relatively equal bargaining power, the Court of Appeals concluded that the trial court erred by declining to revise the Agreement pursuant to that paragraph "to make it reasonable based on the evidence before it." *Id.* at ___, 762 S.E.2d at 322. The Court of Appeals remanded the case to the trial court to revise the territorial scope of the Agreement. *Id.* at ___, 762 S.E.2d at 326. In addition, the majority also concluded that plaintiff forecast sufficient evidence of all remaining claims to survive defendants' motion for summary judgment and remanded the case for trial. *Id.* at ___, 762 S.E.2d at 326.

The dissenting judge agreed with the majority that the geographic scope of the Agreement was overbroad. *Id.* at ___, 762 S.E.2d at 326 (Elmore, J., dissenting). However, the dissenter argued that the blue pencil doctrine applied because the language of paragraph six limited the trial court's power to revise the Agreement to those measures "permitted by law." *Id.* at ___, 762 S.E.2d at 327. This limitation meant that the trial court lacked the authority to rewrite the restrictions set out in the Agreement that were not reasonable. *Id.* at ___, 762 S.E.2d at 327. Since the Agreement contained no reasonable territorial restrictions, the dissenter would affirm the order of the trial court granting summary judgment in defendants' favor as to breach of the covenant not to compete, despite the provisions in paragraph six of the Agreement. *Id.* at ___, 762 S.E.2d at 327.

The dissenting judge also argued that plaintiff presented insufficient evidence of implied contracts with third-party customers, *id.* at ___, 762 S.E.2d at 328, or that, but for defendants' actions, contracts with third-party customers would have been formed, *id.* at ___, 762 S.E.2d at 328-29. Concluding that there were no genuine issues of material fact as to plaintiff's remaining claims for relief, the dissenter would have affirmed the trial court's order granting summary judgment in favor of defendants on all of plaintiff's remaining claims. *Id.* at ___, 762 S.E.2d at 329. Defendants appeal as a matter of right.

We review an opinion of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). When an appeal is based on a dissent, our review is limited to "consideration of those issues that are . . . specifically set out in the dissenting opinion." N.C. R. App. P. 16(b). Here, we review the trial court's grant of defendants' motion for summary judgment. To prevail

on a motion for summary judgment, the moving party must show that, viewed in the light most favorable to the nonmovant, *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted), no genuine issue exists "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).

[1] Contending that the Court of Appeals erred when it remanded this matter to the trial court to revise the geographical terms of the Agreement, defendants first argue that the Agreement is too broad in territorial scope to be enforceable and that neither paragraph six of the Agreement nor the blue pencil doctrine empowers the trial court to amend that aspect of the Agreement. We begin by considering the territorial limits set out in the Agreement.

This Court will enforce a covenant not to compete made in connection with the sale of a business "(1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public." *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 662-63, 158 S.E.2d 840, 843 (1968) (citations omitted). Ordinarily, a covenant's geographic scope will be found reasonable if it encompasses the area served by the business that the covenant protects, *Thompson v. Turner*, 245 N.C. 478, 481-82, 96 S.E.2d 263, 266 (1957), or, more specifically, if the protected business had clientele in the area covered by the covenant, *Noe v. McDevitt*, 228 N.C. 242, 245, 45 S.E.2d 121, 123 (1947) (citations omitted) (finding the territorial limitation of North and South Carolina unreasonable when the business's services were confined to eastern North Carolina); *Manpower of Guilford Cty., Inc. v. Hedgecock*, 42 N.C. App. 515, 523, 257 S.E.2d 109, 115 (1979) ("A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining his customers.").

Here, the Agreement prohibits defendants from engaging in a competing business venture "in the states of North Carolina or South Carolina." The record indicates that, at the time the Agreement was executed, Imperial's North Carolina market did not extend east of Stanly County, while Elegant's North Carolina market did not extend east of Wake County. Neither company had a market west of Morganton, North Carolina, or in the Sandhills. In South Carolina at that time, neither Imperial nor Elegant operated east of the City of Rock Hill or south of the City of Spartanburg. A glance at a map reveals that neither Imperial nor Elegant had a presence in sizeable portions of either state. A primary purpose of the type of covenant not to compete found in the Agreement is to provide some protection to the seller for a defined time or space,

or both, *see, e.g.*, *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 408, 302 S.E.2d 754, 763 (1983) (addressing covenants not to compete in employment contexts), but when the Agreement was executed, Imperial and Elegant had no customers to protect in large swaths of the area covered by the Agreement. As a result, we agree with the Court of Appeals that this geographical restriction is unreasonably broad.

We next consider whether the Agreement may be rewritten, blue-penciled, or revised. As to the first alternative, when an agreement not to compete is found to be unreasonable, we have held that the court is powerless unilaterally to amend the terms of the contract. *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it."). If the parties have agreed upon territorial limits of competition, these limits will be enforced "as written or not at all," for courts will not carve out reasonable subdivisions of an otherwise overbroad territory. *Welcome Wagon*, 255 N.C at 251, 120 S.E.2d at 744 (Bobbitt, J., dissenting) (citing *Noe*, 228 N.C. at 245, 45 S.E.2d at 123).

Plaintiff argues that the blue pencil doctrine should save the Agreement. As discussed above, blue-penciling is the process by which "a court of equity will take notice of the divisions the parties themselves have made [in a covenant not to compete], and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable." *Welcome Wagon*, 255 N.C. at 248, 120 S.E.2d at 742 (majority opinion). That doctrine is unavailable here. The Agreement's territorial limits cannot be blue-penciled unless the Agreement can be interpreted so that it sets out both reasonable and unreasonable restricted territories. *Id.* at 248, 120 S.E.2d at 742. We found above that the restrictions to all of North Carolina and South Carolina, the only territorial restrictions in the Agreement, are unreasonable. Striking the unreasonable portions leaves no territory left within which to enforce the covenant not to compete. As a result, blue-penciling cannot save the Agreement.

Finally, plaintiff argues that the parties gave the trial court the power under paragraph six of the Agreement to revise its territorial limits to make them reasonable. However, parties cannot contract to give a court power that it does not have. *Id.* at 248, 120 S.E.2d at 742 ("The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions."); *see also Penn v. Standard Life Ins. Co.*, 160 N.C. 399, 402, 76 S.E. 262, 263 (1912) ("Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore,

determine what they meant by what they have said—what their contract is, and not what it should have been."). Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure. Accordingly, the parties' Agreement is unenforceable at law and cannot be saved.

[2] We now consider plaintiff's remaining claims. Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment on its claims of tortious interference with contract and tortious interference with prospective economic advantage. The elements of a claim for tortious interference with contract are:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 84 S.E.2d 176 (1954)). Interference with a contract is "justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors." *Embree Constr. Grp., Inc. v. Rafcor, Inc.*, 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992) (citing *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 221-22, 367 S.E.2d 647, 650 (1988)).

Thus, plaintiff must first establish the existence of a valid contract between plaintiff and its customers. Evidence in the record indicates that the industry custom is for owners of beverage-dispensing equipment to engage companies providing repairs to the equipment on an as-needed basis only, not via contract, and plaintiff concedes that the Court of Appeals correctly found that no express contracts existed. Nevertheless, plaintiff argues that defendants interfered with implied-in-fact contracts. To establish the existence of these implied contracts, plaintiff alleged in its complaint that when it purchased Elegant and Imperial, the "contracts and customers" of those companies "transferred to" plaintiff. In addition, plaintiff points out that Gandino stated in an affidavit that plaintiff purchased "the business, goodwill and

equipment of Imperial and Elegant, specifically including, any and all customers and customer lists," giving plaintiff "the exclusive right to continue the on-going business relationships that Imperial and Elegant had fostered with their customers." However, even considered in the light most favorable to plaintiff, this evidence fails sufficiently to establish the evidence of implied-in-fact contracts. In fact, the evidence does not establish any legal obligation of a third-party customer to Elegant or Imperial that would have been transferred to Beverage Systems through the Agreement. At most, this evidence indicates only a general business relationship. Moreover, because defendants were not restrained by the covenant not to compete, they were free to engage in routine business competition with Beverage Systems. Accordingly, we conclude that the trial court properly allowed summary judgment as to this issue.

[3] Plaintiff argues that the trial court also erred when it allowed defendants' motion for summary judgment on its claim for tortious interference with prospective economic advantage. This tort arises when a party interferes with a business relationship "by maliciously inducing a person not to enter into a contract with a third person, which he would have entered into but for the interference, . . . if damage proximately ensues, when this interference is done not in the legitimate exercise of the interfering person's rights." *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 559, 140 S.E.2d 3, 11 (1965) (citations omitted). However, a plaintiff's mere expectation of a continuing business relationship is insufficient to establish such a claim. *Dalton*, 353 N.C. at 655, 548 S.E.2d at 710. Instead, a plaintiff must produce evidence that a contract would have resulted but for a defendant's malicious intervention. *Id.* at 655, 548 S.E.2d at 710.

Plaintiff alleged that defendants "sought after the customers of Beverage System[s] which were previously transferred to Beverage Systems" and "purposely and intentionally interfered with the contracts and agreements of Beverage Systems with the intent to steal the customers away from Beverage Systems." Plaintiff contends that it "had an expectation to receive an economic advantage as a result of its business relationship with the Customers." However, plaintiff has not demonstrated that any contract would have ensued but for defendants' conduct, nor has plaintiff identified a particular business with which it lost an economic advantage. Instead, plaintiff appears to rely on the expectation that Elegant's and Imperial's former customers would continue to do business with plaintiff, an expectation insufficient to support a claim for either tortious interference with contract or tortious interference with prospective economic advantage. *Id.* at 655, 548 S.E.2d

at 710. Moreover, because the geographical limitations set out in the Agreement were unenforceable, its temporal limitations were applicable either everywhere, plainly an absurd result here, or nowhere. As a result, defendants were free to compete for customers with plaintiff. In the absence of evidence that defendants' conduct was maliciously motivated, any interference by defendants was a legitimate exercise of their right to compete. Therefore, summary judgment was also appropriate as to this claim.

[4] Finally, plaintiff argues that defendants' actions rise to the level of unfair and deceptive practices under N.C.G.S. § 75-1.1, and that their conduct should be enjoined based upon breach of the Agreement. Plaintiff's section 75-1.1 claim presupposes success of at least one of plaintiff's contract claims. Because we hold that each of those claims fails, plaintiff's unfair and deceptive practices claim also fails. Similarly, plaintiff's request for injunctive relief hinges on the validity of the Agreement. Because we have established that the Agreement is unenforceable, there is no basis on which to enjoin defendant Loudine's conduct.

The trial court correctly allowed defendants' motion for summary judgment as to all claims. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

IN RE FORECLOSURE OF BROWN

[368 N.C. 703 (2016)]

IN THE MATTER OF THE FORECLOSURE OF THE DEEDS OF TRUST EXECUTED BY GROVER C. BROWN AND WIFE, MARGARET C. BROWN, DATED APRIL 1, 1980, RECORDED IN BOOK 949 AT PAGE 109, AND BOOK 949 AT PAGE 111 OF THE BUNCOMBE COUNTY REGISTRY

No. 224PA15

Filed 18 March 2016

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 771 S.E.2d 829 (2015), affirming an order entered on 9 April 2014 by Judge J. Thomas Davis in Superior Court, Buncombe County. Heard in the Supreme Court on 16 February 2016.

Bull and Reinhardt, PLLC, by Adam W. Bull, for petitioner-appellee, Executor of the Estate of Merton L. Brown.

Wilder Wadford and Christopher Musial for respondent-appellants.

John R. Dillard for First Choice Title, LLC, d/b/a First Choice Title Company of North Carolina, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE M.P.M.

[368 N.C. 704 (2016)]

IN THE MATTER OF M.P.M.

No. 340A15

Filed 18 March 2016

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. ___, 776 S.E.2d 687 (2015), affirming an order entered on 12 December 2014 by Judge Michelle Fletcher in District Court, Guilford County. Heard in the Supreme Court on 15 February 2016.

Mercedes O. Chut for Guilford County Department of Health and Human Services, petitioner-appellee.

Opoku-Mensah Law Firm, PLLC, by Gertrude Opoku-Mensah, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

PER CURIAM.

AFFIRMED.

IN RE N.T.

[368 N.C. 705 (2016)]

IN THE MATTER OF N.T.

No. 119PA15

Filed 18 March 2016

Juveniles—petition—illegible signature

Respondent failed to show that a juvenile petition was not properly verified where a space on the petition for "Signature of Person Authorized to Administer Oaths" had an illegible signature and the space for the person's title was not filled in. By signing in a space with such a conspicuous designation, the person who did so necessarily represented that he or she possessed such authority, and there was nothing in the record indicating that this person lacked the authority he or she claimed to possess.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 658 (2015), vacating an order entered on 7 May 2014 by Judge Monica M. Bousman in District Court, Wake County. Heard in the Supreme Court on 15 February 2016.

Office of the Wake County Attorney, by Roger A. Askew and Claire H. Duff, for petitioner-appellant Wake County Human Services.

Poyner Spruill LLP, by John Michael Durnovich, for appellant Guardian ad Litem.

W. Michael Spivey for respondent-appellee father.

JACKSON, Justice.

In this case we consider whether a juvenile petition was properly verified when the signature of the person before whom it was verified is illegible and nothing in the record identifies that person's name or title. In light of the presumption of regularity which places the burden of proof on the party challenging jurisdiction, we conclude that respondent has failed to show that the petition was not properly verified. Accordingly, we reverse.

On 21 May 2012, Wake County Human Services (WCHS) obtained non-secure custody of N.T. On 22 May 2012, WCHS filed a juvenile petition alleging that N.T. was a neglected juvenile. The petition contains a

section for an authorized representative of the director of WCHS to sign and verify the following statement: "Being first duly sworn, I say that I have read this Petition and that the same is true of my own knowledge, except as to those matters alleged upon information and belief, and as to those, I believe it to be true." It is signed by Diamond Wimbish. The verification section also designates a space for "Signature of Person Authorized to Administer Oaths," which is signed with the letter "C" followed by an illegible signature. Although there is also a space for the person's title, the space has not been filled in with any title.

The trial court entered an adjudication order concluding that N.T. was a neglected juvenile and continuing custody of N.T. with WCHS. Subsequently, the trial court ceased reunification efforts and changed the permanent plan for N.T. to adoption. On 24 September 2013, WCHS filed a motion to terminate parental rights alleging grounds of neglect, failure to make reasonable progress to correct the conditions that led to N.T.'s removal from the home, and failure to pay a reasonable portion of the cost of care. On 7 May 2014, the trial court entered an order terminating the parental rights of respondent and N.T.'s mother. Respondent appealed.

In a published opinion filed on 17 March 2015, the North Carolina Court of Appeals vacated the order terminating parental rights. *In re N.T.*, ___ N.C. App. ___, ___, 769 S.E.2d 658, 661 (2015). The Court of Appeals stated that "[a] trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *Id.* at ___, 769 S.E.2d at 660 (quoting *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006)). After reviewing the record and noting the illegible signature on the juvenile petition, the Court of Appeals concluded that the trial court never obtained subject matter jurisdiction over this case because "[n]othing in the record . . . establishes that the person before whom the petition was verified was authorized to acknowledge the verification." *Id.* at ___, 769 S.E.2d at 661. In a footnote the Court of Appeals acknowledged that WCHS had requested to amend the record to include an affidavit from Wake County Magistrate Christopher H. Graves stating that the illegible signature was his and that he signed the petition in his official capacity as a magistrate. *Id.* at ___ n.2, 769 S.E.2d at 661 n.2. However, the court determined that the affidavit could not be considered because it had not been a part of the record before the trial court. *Id.* at ___ n.2, 769 S.E.2d at 661 n.2. We allowed WCHS's petition for discretionary review.

In its appeal WCHS argues that, although it is the better practice for a judicial officer who acknowledges a verification to identify his or

her name and office, the absence of this information does not render the verification invalid. In response, respondent contends that a juvenile petition must be verified before a person who has the authority to administer oaths. Respondent asserts that here the affidavit of verification "fails to show that the truth of the contents of the petition were sworn to or affirmed before an officer having authority to administer an oath." We disagree with the latter assertion and conclude that respondent had the burden of showing that the petition, which appears facially valid, was not verified before a person authorized to administer oaths.

"In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to [Rule 9 of the North Carolina Rules of Appellate Procedure]." N.C. R. App. P. 9(a). "Although the question of subject matter jurisdiction may be raised at any time . . . where the trial court has acted in a matter, 'every presumption not inconsistent with the record will be indulged in favor of jurisdiction. . . .' " *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) (internal citations omitted) (quoting *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E.2d 448, 452 (1951)). Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944) (citations omitted). As a result, "[t]he burden is on the party asserting want of jurisdiction to show such want." *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452.

A juvenile petition alleging dependency, abuse, or neglect "shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing." N.C.G.S. § 7B-403(a) (2015). "[V]erification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *In re T.R.P.*, 360 N.C. at 591, 636 S.E.2d at 791. In *In re T.R.P.*, the juvenile petition was notarized, but "was neither signed nor verified by the Director . . . or any authorized representative thereof." *Id.* at 589, 636 S.E.2d at 789. In concluding that the absence of proper verification deprived the trial court of subject matter jurisdiction, this Court emphasized "the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors." *Id.* at 592, 636 S.E.2d at 791. Specifically, we observed that a juvenile petition may be based upon an anonymous report and frequently results in "immediate interference" with a parent's fundamental rights to the custody,

care, and control of his or her children. *Id.* at 591-92, 636 S.E.2d at 791. Noting the "gravity" of these interests, we explained that the verification requirement is a reasonable means by which the General Assembly could ensure "that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations." *Id.* at 592, 636 S.E.2d at 791. We determined that "in the absence of the verification . . . the trial court's order was void ab initio." *Id.* at 588, 636 S.E.2d at 789.

A pleading is verified by means of an affidavit stating "that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." N.C.G.S. § 1A-1, Rule 11(b) (2015). "Any officer competent to take the acknowledgement of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes." *Id.* § 1-148 (2015). This Court has been clear that "[g]enerally there is a presumption that a public official in the performance of an official duty acts in accordance with the law and the authority conferred upon him. The burden is upon the contesting party to overcome this presumption." *State v. Watts*, 289 N.C. 445, 449, 222 S.E.2d 389, 391 (1976) (citations omitted).

Here the juvenile petition contains a verification that appears facially valid—it is signed by an authorized representative of the director of WCHS who "vouches" for the truth of the allegations in the petition, *see In re T.R.P.*, 360 N.C. at 592, 636 S.E.2d at 791, and another signature appears in a space clearly reserved for "Signature of Person Authorized to Administer Oaths." By signing in a space with such a conspicuous designation, the person who did so necessarily represented that he or she possessed such authority, and there is nothing in the record indicating that this person lacked the authority he or she claimed to possess. Respondent never submitted any evidence, or even any specific allegations, tending to overcome the presumption of regularity. Instead, respondent's argument is based upon speculation as to whether a person who represented that he or she had the authority to administer oaths actually had such authority. Considering only the materials contained in the record on appeal and the presumption of regularity that attaches to the trial court's decision to exercise jurisdiction, the Court of Appeals had no basis to conclude that the petition was not properly verified. Accordingly, we reverse that court's decision.

REVERSED.

PRUETT v. BINGHAM

[368 N.C. 709 (2016)]

SAMMY R. PRUETT, PLAINTIFF
v.
JOEL D. BINGHAM AND JEAN'S BUS SERVICE, INC., DEFENDANTS AND THIRD-PARTY PLAINTIFFS
v.
GREGORY ALAN WIGGINS, MATTHEW BRACKETT, AND MOUNTAIN HOME FIRE & RESCUE DEPARTMENT, INC., THIRD-PARTY DEFENDANTS

No. 34A15

Filed 18 March 2016

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. ___, 767 S.E.2d 357 (2014), affirming an order entered on 17 October 2013, as amended by an order entered on 23 January 2014, both by Judge Hugh B. Lewis in Superior Court, Rutherford County. Heard in the Supreme Court on 17 February 2016.

Davis & Hamrick, LLP, by Ann C. Rowe and H. Lee Davis, Jr., for defendants and third-party plaintiff-appellants.

Michael E. Casterline; and Brazil & Burke, P.A., by Meghann K. Burke and W.O. Brazil, III, for third-party defendant-appellees Matthew Brackett and Mountain Home Fire & Rescue Department, Inc.

PER CURIAM.

AFFIRMED.

STATE v. BARNETT

[368 N.C. 710 (2016)]

STATE OF NORTH CAROLINA
v.
KEITH ANTONIO BARNETT

No. 65PA15

Filed 18 March 2016

Sexual Offenders—registration—failure to notify of new address after release from incarceration

The Court of Appeals erred by vacating defendant's sex offender registration conviction arising from a 1997 felony conviction for taking indecent liberties with a child. Although defendant had last registered with the Gaston County Sheriff's Office, he failed to report in person or provide written notice of the fact that his address had changed from the facility or institution in which he had been incarcerated to his new residence following his release from custody no later than the third business day after the change as required by N.C.G.S. § 14-208.9(a).

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 327 (2015), vacating, in part, a judgment entered on 10 December 2013 by Judge F. Donald Bridges in Superior Court, Gaston County. Heard in the Supreme Court on 16 November 2015.

Roy Cooper, Attorney General, by J. Joy Strickland and William P. Hart, Jr., Assistant Attorneys General, for the State-appellant.

Guy J. Loranger for defendant-appellee.

ERVIN, Justice.

Defendant Keith Antonio Barnett was convicted of violating the sex offender registration laws and resisting, delaying, and obstructing a public officer. A unanimous panel of the Court of Appeals vacated defendant's sex offender registration conviction. We now reverse that decision of the Court of Appeals.

Defendant is required to register as a sex offender pursuant to the North Carolina Sex Offender and Public Protection Registration

Program because of a 1997 felony conviction for taking indecent liberties with a child. On 6 January 2010, defendant pleaded guilty to and was convicted of failing to register as a sex offender in October 2009. On 15 February 2010, defendant completed the initial registration process with the Gaston County Sheriff's Office, at which point defendant was required to report his physical address and to review "notice of duty to register" documentation. During the initial registration process, defendant reported that he resided at 554 South Boyd Street in Gastonia.

On 17 August 2011, a jury found defendant guilty of a second sex offender registration offense. Based upon that conviction, defendant was sentenced to an active term of twenty-eight to thirty-four months imprisonment. On 2 October 2012, the Court of Appeals filed an opinion vacating defendant's 17 August 2011 conviction based upon a determination that the indictment that had been returned against him in that case was fatally defective. *State v. Barnett*, 223 N.C. App. 65, 72, 733 S.E.2d 95, 100 (2012). On 14 November 2012, the North Carolina Division of Adult Correction released defendant from its custody in accordance with the Court of Appeals' decision.

In early February 2013, Deputy Luther Hester of the Gaston County Sheriff's Office received a telephone call concerning defendant. Upon receiving the information provided by the caller, Deputy Hester researched defendant's records and determined that, even though defendant was no longer incarcerated, he had not reported his current residence in the aftermath of his release from the custody of the Division of Adult Correction. According to Deputy Hester, the address of a registered sex offender is changed to the location of any facility or institution at which the offender in question is incarcerated, with the offender being required to update his address information upon release.

On 6 February 2013, Deputy Hester, accompanied by two other deputies, went to 332 North Mountain Street in Gastonia, which was the address at which defendant was suspected of residing. As the deputies arrived, they observed defendant, who had been standing in the front yard, run into the house. After presenting himself at the front door of the residence and speaking with a woman who identified herself as defendant's mother, Deputy Hester was allowed to enter the house in order to look for defendant.

When Deputy Hester located defendant on the back porch of the residence and informed defendant that he was being placed under arrest for failing to provide notice that he had changed his address, defendant stated that he was not going back to jail and stood "in a competitive

manner with his fists up in the air." After defendant refused to submit himself to arrest after repeated demands had been made that he lower his hands, Deputy Hester used a Taser to subdue defendant, handcuffed him, and placed him under arrest.

On 6 February 2013, warrants for arrest charging defendant with failing to notify the Gaston County Sheriff's Office of his address within three business days after having changed his address and with resisting, delaying, and obstructing a public officer were issued. On 18 February 2013, a Gaston County grand jury returned bills of indictment charging defendant with failing to notify the Gaston County Sheriff's Office of his address within three business days after having changed his address and resisting, delaying, and obstructing a public officer. The charges against defendant came on for trial before the trial court and a jury at the 9 December 2013 criminal session of the Superior Court, Gaston County. At the appropriate time, defendant unsuccessfully moved to dismiss the sex offender registration charge for insufficiency of the evidence. After hearing the evidence, the arguments of counsel, and the trial court's instructions, the jury found defendant guilty as charged. In light of the jury's verdict, the trial court consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of twenty-five to thirty-nine months imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court had erred by denying his motion to dismiss the sex offender registration charge for insufficiency of the evidence on the grounds that the record evidence did not tend to show defendant's guilt of the offense charged in the indictment and that there was a fatal variance between the charge alleged in the indictment and the evidence adduced at trial. *State v. Barnett*, ___ N.C. App. ___, ___, 768 S.E.2d 327, 329 (2015).[1] A unanimous panel of the Court of Appeals agreed with defendant's contention. After noting that the indictment returned against defendant alleged that he had violated N.C.G.S. § 14-208.11 by "fail[ing] to register as a sexual offender, in that the defendant did fail to notify the Gaston County Sheriff's Office, within three business days of his change of address," *id.* at ___, 768 S.E.2d at 330, the court determined that the State had proceeded against defendant at trial

1. In his brief before the Court of Appeals, defendant also argued that, in the event that his trial counsel had failed to advance a variance-based argument at trial, his failure to do so constituted ineffective assistance of counsel. However, given that the Court of Appeals vacated defendant's failure to register conviction for insufficiency of the evidence, the Court of Appeals never reached his ineffective assistance claim.

on the theory that he had failed to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution" as required by N.C.G.S. § 14-208.7(a), *id.* at ___, 768 S.E.2d at 331. In view of the fact that "defendant [had been] indicted on an allegation that he failed to register as a sex offender in that he failed to notify the Gaston County Sheriff's Office within three business days of his change of address in accordance with the requirements of N.C. Gen. Stat. § 14-208.9," the Court of Appeals held that "the trial court [had] erred in denying defendant's motion to dismiss." *Id.* at ___, 768 S.E.2d at 332.

The extent to which the evidence presented at trial suffices to support the denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed de novo by the appellate court. *See*, *e.g.*, *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). As this Court has previously stated:

> When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury. The evidence must be considered in the light most favorable to the state; all contradictions and discrepancies therein must be resolved in the state's favor; and the state must be given the benefit of every reasonable inference to be drawn in its favor from the evidence. There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime.

State v. Blake, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citations omitted). "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). "A motion to dismiss is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged." *Id.* at 445, 183 S.E.2d at 646. However, "[i]n order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense.' " *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (quoting *Waddell*, 279 N.C. at 445, 183 S.E.2d at 646).

N.C.G.S. § 14-208.11(a)(2) provides that a person required to register as a sex offender in accordance with Article 27A of Chapter 14 of the General Statutes is guilty of a Class F felony if he willfully "[f]ails to notify the last registering sheriff of a change of address as required by this Article." N.C.G.S. § 14-208.11(a)(2) (2015). According to N.C.G.S. § 14-208.9(a), "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." *Id.* § 14-208.9(a) (2015). "If [a] person [required to register] is a current resident of North Carolina, the person shall register . . . [w]ithin three business days of release from a penal institution or arrival in a county to live outside a penal institution." *Id.* § 14-208.7(a)(1) (2015).

In the opinion that we filed today in *State v. Crockett*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Mar. 18, 2016) (No. 29PA15), this Court clarified that N.C.G.S. § 14-208.7(a) applies solely to a sex offender's initial registration. N.C.G.S. § 14-208.9(a), on the other hand, applies to instances in which an individual previously required to register following his release from a penal institution or upon his conviction in the event that no active term of imprisonment was imposed as required by N.C.G.S. § 14-208.7(a) changes his address from the address on file with the sheriff of the county in which the sex offender last registered to a new address. In other words, contrary to the result reached in the Court of Appeals, we hold that there was no variance between the offense with which defendant was charged and the offense that defendant was convicted of committing. As a result, once defendant had initially registered as a sex offender on 15 February 2010 in accordance with N.C.G.S. § 14-208.7(a), any subsequent failure to notify the appropriate law enforcement agency that he had changed his address would constitute a violation of N.C.G.S. § 14-208.9(a) and subject him to prosecution under section N.C.G.S. § 14-208.11(a)(2) even if his change of address resulted from a release from incarceration.

At trial, Deputy Hester testified that, when a registered sex offender is incarcerated after the date upon which he initially registers, his address for sex offender registration purposes changes to the facility or institution in which he is housed. As long as the registrant remains incarcerated, his address is that of the facility or institution in which he is confined. *See State v. Abshire*, 363 N.C. 322, 331, 677 S.E.2d 444, 451 (2009) (concluding that "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary"), *superseded on other grounds by*

statute, An Act to Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 8(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070-71. Although the State did not elicit any evidence tending to show the location at which defendant had been incarcerated prior to his release from the custody of the Division of Adult Correction on 14 November 2012, his address necessarily changed when he was released from incarceration. As a result, in accordance with N.C.G.S. § 14-208.9(a), defendant was required to "report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." Although defendant had last registered with the Gaston County Sheriff's Office, he failed to report in person or provide written notice of the fact that his address had changed from the facility or institution in which he had been incarcerated to his new residence following his release from the custody of the Division of Adult Correction on 14 November 2012. In other words, given that the evidence adduced at trial tended to show that defendant was a "person required . . . to register" as a result of his 1997 conviction for taking indecent liberties with a child, N.C.G.S. § 14-208.11(a), that he had changed his address at the time that he was released from the custody of the Division of Adult Correction on 14 November 2012,[2] and that defendant "[f]ailed to notify the last registering sheriff of a change of address," *id.* § 14-208.11(a)(2), "not later than the third business day after the change," *id.* § 14-208.9(a), the State presented evidence tending to show the existence of each element of the offense with which defendant had been charged. *See Abshire*, 363 N.C. at 328, 677 S.E.2d at 449 (delineating the elements of the crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a)). Because the trial court properly denied defendant's dismissal motion,[3] the Court of Appeals erred by

2. As an aside, defendant asserts in his new brief that the record was devoid of any evidence tending to show that he remained a North Carolina resident. However, the fact that defendant had been a resident of Gaston County for some time, had reported having an address in Gaston County, and was apprehended in Gaston County, coupled with the absence of any evidence to the effect that he had moved out of state, sufficed to permit a jury determination that he had not established a place of abode out of state following his release from the custody of the Division of Adult Correction on 14 November 2012.

3. In his new brief, defendant also argues that, as previously stated by this Court in *State v. Williams*, "[t]he failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser included offenses." *Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986). We do not, however, believe that the principle upon which defendant relies has any application to this case given that, in light of the facts revealed by the present record, the trial court's instructions accurately stated the determinations that the jury would need to make in order to convict defendant of the offense that he had been charged with committing.

determining that the record did not contain sufficient evidence to permit a determination that defendant committed the offense of failure to register. As a result, for all of these reasons, the Court of Appeals' decision vacating defendant's conviction for failure to register is reversed.[4]

REVERSED.

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

4. As an alternative to his substantive challenge to the denial of his dismissal motion, defendant argued before the Court of Appeals that, in the event that defendant's trial counsel had not properly preserved his fatal variance claim, any such failure on the part of defendant's trial counsel deprived defendant of his right to the effective assistance of counsel. However, our decision to address and reject defendant's fatal variance claim on the merits renders his ineffective assistance of counsel claim moot.

STATE v. CROCKETT

[368 N.C. 717 (2016)]

STATE OF NORTH CAROLINA
v.
DARRETT CROCKETT

No. 29PA15

Filed 18 March 2016

1. Sexual Offenders—registration—after initial compliance and subsequent incarceration

On discretionary review of the Court of Appeals' decision affirming defendant's convictions for failure to register as a sex offender, the Supreme Court held that N.C.G.S. § 14-208.9, the "change of address" statute—not section 14-208.7, the "registration" statute—governs in situations in which a sex offender who has already complied with the initial registration requirements is later incarcerated and then released.

2. Sexual Offenders—failure to register—after initial compliance and subsequent incarceration

The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had previously filled out his registration paperwork, and, following his release, did not provide in-person or written notice that he had changed his address to the Urban Ministry Center.

3. Sexual Offenders—failure to register—after initial compliance and subsequent incarceration—out-of-state residence

The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had signed a registration form upon his release, and had failed to provide the required notification when he later moved to South Carolina.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 767 S.E.2d 78 (2014), finding no error after appeal from a judgment entered on 3 July 2013 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Supreme Court on 2 September 2015.

Roy Cooper, *Attorney General*, *by Lauren Tally Earnhardt*, *Assistant Attorney General*, *for the State.*

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

HUDSON, Justice.

Defendant Darrett Crockett was convicted on 8 October 1997 of an offense for which he was required to register as a sex offender and comply with the requirements of the North Carolina Sex Offender and Public Protection Registration Program. On 28 November 2011, defendant was indicted on one count of failure to register as a sex offender under N.C.G.S. § 14-208.11; this indictment referred to the period between 24 January 2011 and 6 November 2011. On 12 March 2012, defendant was indicted on a second count of failure to register as a sex offender; this second indictment referred to the period between 1 December 2011 and 23 February 2012. On appeal to this Court, defendant argues that the trial court erred by denying his motion to dismiss both charges because, he contends, the State failed to present sufficient evidence showing that he committed the offenses as alleged in the indictments. Because we conclude that the State offered sufficient evidence of each offense as alleged in the indictments, we affirm the decision of the Court of Appeals.

I. FACTUAL AND PROCEDURAL HISTORY

On 8 October 1997, defendant was convicted of an offense for which he was required to register as a sex offender under N.C.G.S. § 14-208.7(a). He signed the initial registration paperwork at the Mecklenburg County Sheriff's Department on 12 April 1999, and for the next several years, defendant reported changes of address to the Sheriff's Department in compliance with the statutory registration requirements.

On 27 June 2007, defendant provided a written notice to the Department changing his address to 945 North College Street, the address of the Urban Ministry Center, a nonprofit organization that provides services to the homeless. Urban Ministries is open during most business hours, from 8:30 a.m. until 4:00 p.m. on weekdays, and from 9:00 a.m. until 12:30 p.m. on weekends. It provides a range of services and amenities necessary for everyday life, such as food, shower facilities and restrooms, laundry and changing rooms, telephones, transportation, mail services, and counseling; however, no one lives at the facility, it has no beds, and no one is allowed to spend the night.

From 15 April 2009 until 20 January 2011, defendant was incarcerated in the Mecklenburg County Jail. Upon his release, defendant declined to sign the "Notice of Duty to Register" form or to provide

an address on the form. Similarly, after his release, defendant did not appear in person at the Mecklenburg County Sheriff's Department, nor did he provide written notice to the Sheriff regarding where he would live. Rather, the only record the Department received regarding defendant's location upon release was an e-mail sent by the jail stating that he would live at Urban Ministries.[1]

On 7 November 2011, defendant was arrested again on an unrelated charge and held at the Mecklenburg County Jail for approximately ten days. Upon his release on 17 November 2011, defendant signed a "Notice of Duty to Register" form, on which he again listed 945 North College Street as his address.

Several months later, defendant mailed a letter to the Honorable Yvonne Evans, Resident Superior Court Judge at the Superior Court in Mecklenburg County. This letter, which was signed by defendant, stated in part that "[m]y cousin Gerald Dixon . . . let me live in one of his houses . . . on Orr Dr. in Rock Hill. S.C. where my dog was taken from." The envelope in which the letter was sent indicated that defendant had mailed it on or about 15 February 2012 from the York County Detention Center in South Carolina. But defendant never gave the Mecklenburg County Sheriff's Department any written notice indicating that he was considering moving, or had moved, from Urban Ministries to South Carolina.

Defendant was indicted on 28 November 2011 for failure to register as a sex offender under N.C.G.S. § 14-208.11; this indictment referred to

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1. According to the trial transcript, the following exchange occurred between the prosecuting attorney and Laura Stutts, an employee with the Mecklenburg County Sheriff's Office who kept track of sex offender records:

> Q. Anything in your records indicate where he was living at that point, where he was residing once he left jail?
>
> A. The system has that we received an e-mail from [jail] release stating that he was going to live at 945 North College Street, but he didn't list it on the paper.
>
> . . . .
>
> Q. If you're aware, when's the next time the Mecklenburg County Sheriff's Office had any contact with Mr. Crockett?
>
> A. November 8 -- or November 7, 2011.
>
> Q. Do you know what kind of contact that was?
>
> A. When he was arrested.

the period between 24 January and 6 November 2011. On 12 March 2012, defendant was indicted on a second count of failure to register under § 14-208.11; this indictment referred to the period between 1 December 2011 and 23 February 2012. In July 2013, defendant was tried in the Superior Court in Mecklenburg County, and the jury found him guilty of both counts on 3 July 2013. Defendant appealed to the Court of Appeals, and, in a unanimous opinion, the Court of Appeals affirmed defendant's convictions. On 10 June 2015, we allowed defendant's petition for discretionary review.

II. ANALYSIS

The sole issue presented in this appeal is whether the trial court properly denied defendant's motion to dismiss, which argued that that the State had presented insufficient evidence showing that defendant had committed the offenses as alleged in the indictments. The standard a North Carolina trial court applies to a motion to dismiss is well settled:

> "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." 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. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 842-43 (2011) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002), and *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo. *E.g.*, *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013) (citations omitted). Because defendant challenges both of his convictions for failure to register as a sex offender under N.C.G.S. § 14-208.11, we will address each in turn.

A. Indictment and Conviction for the Period from 24 January 2011 through 6 November 2011

[1] Defendant was indicted for the first count of failure to register under N.C.G.S. § 14-208.11 on 28 November 2011. Subsection 14-208.11(a) lists several distinct offenses, each of which applies to a different fact pattern, and each of which refers explicitly or implicitly to other provisions within Article 27A of Chapter 14 of the North Carolina General Statutes, governing sex offender registration programs. *See* N.C.G.S. § 14-208.11 (a) (1) – (10). Of the provisions to which section 14-208.11 refers, section 14-208.9 requires an offender who changes address to provide written notice within three business days after the change of address:

> If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered.

Id. § 14-208.9(a) (2015). Similarly, section 14-208.7 requires an offender who is released from a penal institution to register within three business days after his release:

> A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . If the person is a current resident of North Carolina, the person shall register . . . [w]ithin three business days of release from a penal institution or arrival in a county to live outside a penal institution . . . . "

Id. § 14-208.7(a)(1) (2015). However, despite its seemingly plain text, section 14-208.7 appears in context to refer only to *initial* registration requirements. Not only does subsection (a) of that statute apply to offenders who first move to North Carolina from other states, *see id.* § 14-208.7(a) (2015) ("If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first."), and to those who are convicted but receive no active term of imprisonment, *see id.* § 14-208.7(a)(2) ("If the person is a current resident of North Carolina, the person shall register . . . [i]mmediately upon conviction for a reportable offense where an active term of imprisonment was not imposed."), it also refers specifically to "initial county registration," *id.* § 14-208.7(a)

("Registration shall be maintained for a period of at least 30 years following the date of *initial county registration* . . . ." (emphasis added)). In that same vein, subsection (b) specifies what information a sheriff must collect on registration forms, *see id.* § 14-208.7(b) (2015), and subsection (c) directs him to retain the originals, *see id.* § 14-208.7(c) (2015)—all of which suggests that section 14-208.7 applies only to a sex offender's initial registration. As a result of the limited application of section 14-208.7, neither section 14-208.7 nor section 14-208.9 clearly and specifically governs the situation in which a registered offender who has already been released from confinement for the offense for which he became required to register is later reincarcerated and rereleased.

In light of this ambiguity, different panels of the Court of Appeals have reached different conclusions regarding whether this situation is controlled by section 14-208.7 or by section 14-208.9. Here, for example, the Court of Appeals applied section 14-208.9, the "change of address" statute. *See State v. Crockett*, ___ N.C. App. ___, ___, ___ n.4, 767 S.E.2d 78, 83-84, 84 n.4 (2014) (rejecting defendant's argument that section 14-208.7 applies and applying section 14-208.9 instead). In at least one other case, however, the Court of Appeals concluded that section 14-208.7 applies. *See State v. Barnett*, ___ N.C. App. ___, ___, 768 S.E.2d 327, 331-32 (2015) ("We disagree with the State's interpretation of the statutes in Chapter 14, Article 27A, and hold the State errs in combining the requirements of N.C. Gen. Stat. § 14-208.9(a) governing changes in address with the requirements of N.C. Gen. Stat. § 14-208.7(a) governing registration upon release from a penal institution. It is clear from the language of N.C. Gen. Stat. § 14-208.7(a) that it governs registration upon release from penal institutions."), *rev'd*, ___ N.C. ___, ___ S.E.2d ___ (Mar. 18, 2016) (No. 65PA15).

We now hold that N.C.G.S. § 14-208.9, the "change of address" statute, and not section 14-208.7, the "registration" statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. While the statutory provisions themselves may be ambiguous, this decision accords with our decision in *State v. Abshire*, in which we offered a functional definition of the statutory term "address" in the absence of a definition provided by the legislature. *See* 363 N.C. 322, 329-32, 677 S.E.2d 444, 449-51 (2009), *superseded on other grounds by statut*e, An Act to Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, Sec. 8(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070. Specifically, we opined:

> We conclude that the legislature intended the definition of address under the registration program to carry an ordinary meaning of describing or indicating the location where someone lives. As such, the word indicates what this Court has considered to be a person's residence. . . . . Thus, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. Domicile is a legal term of art that "denotes one's permanent, established home," whereas a person's residence may be only a "temporary, although actual," "place of abode."
>
> . . . .
>
> . . . [M]ere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address. Adding any further nuance to the definition is unnecessary at this time.

Id. at 330-32, 677 S.E.2d at 450-51 (quoting *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972), *modified*, *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979)).[2] Our holding today regarding the applicability of N.C.G.S. § 14-208.9 accords with this definition and recognizes that the facility in which a registered sex offender is confined after conviction functionally serves as that offender's address. This interpretation is also consistent with N.C.G.S. § 14-208.5, which indicates that the primary purpose of Article 27A is

> to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of

2. We note that this portion of *Abshire* may be read to suggest that whether a particular location can qualify as an offender's "address" is a question of fact for the jury. But because "address" is a statutory term, the question of whether a particular place could qualify as an "address" is a question of law to be resolved by a judge, not a jury. The factual question of whether a registered offender changed his address, however, remains the province of the jury.

> sex offenses or certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize access to necessary and relevant information about those offenders to others . . . .

N.C.G.S. § 14-208.5 (2015).

[2] We now turn to the first charge against defendant. As noted, defendant was first indicted for failure to register on 28 November 2011; that indictment states:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about and between the 24th day of January, 2011 and the 6th day of November, 2011, in Mecklenburg County, Darrett Crockett did unlawfully, willfully and feloniously as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of said Article, fail to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than three (3) days after the change to the Sheriff's Office in the county with whom he had last registered.

Having resolved the central statutory issue, the key question becomes whether the State provided sufficient evidence tending to show that defendant willfully failed to register as a sex offender as alleged in the indictment.

We conclude that the State did so. The State's evidence tended to show that defendant was incarcerated in the Mecklenburg County Jail from 15 April 2009 until 20 January 2011; that he had previously filled out registration paperwork, which signals that he was aware of his duty to register (although he refused to sign the required form on this occasion); that following his release, he did not provide in-person or written notice that he would reside at Urban Ministries; and that the only written notice the Sheriff's Department received regarding defendant's post-release residence was via an e-mail sent by the jail. Taken in the light most favorable to the State, this evidence was sufficient for the jury to conclude that defendant had willfully failed to provide written notice that he had changed his address from the Mecklenburg County Jail to

the Urban Ministry Center. *See also Abshire*, 363 N.C. at 328, 677 S.E.2d at 449 (explaining that the State must prove three essential elements to establish guilt of failure to register: (1) that the defendant was a "person required . . . to register," (2) that the defendant " 'change[d]' his or her 'address,' " and (3) that the defendant willfully "fail[ed] to notify the last registering sheriff of [the] change of address within the requisite time period" (quoting N.C.G.S. § § 14-208.11(a), -208(11)(a)(2) and -208.9(a) (2005) respectively)). Accordingly, we affirm defendant's first conviction for failure to register as a sex offender.

B. Indictment and Conviction for the Period from 1 December 2011 through 23 February 2012

[3] Defendant was indicted on 12 March 2012 for the second count of failure to register; that indictment reads:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about and between the 1st day of December, 2011 and the 23rd day of February, 2012, in Mecklenburg County, Darrett Damon Crockett did unlawfully, willfully and feloniously as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of said Article, fail to register as a sexual offender in that said defendant, a Mecklenburg County, North Carolina resident, changed his address and failed to provide written notice of his new address no later than three (3) days after the change to the Sheriff's Office in the county with whom he had last registered.

Related to this indictment, the State's evidence tended to show that, upon his release from jail on 17 November 2011, defendant signed a "Notice of Duty to Register" form listing the address at which he would reside as "945 N. College St.," the address of Urban Ministries, and that he again provided that address on 17 January 2012. The State's evidence also tended to show, and defendant appears to concede, that he wrote a letter to Superior Court Judge Yvonne Evans, postmarked 15 February 2012, in which he stated that his cousin let him live in a house in Rock Hill, South Carolina. Finally, the State also provided evidence regarding defendant's history of updating the Sheriff's Department regarding his residence, but none of that evidence indicated that defendant had given written notice that he had moved, or planned to move, to South Carolina in 2012. Taken in the light most favorable to the State, this was sufficient

for the jury to find that defendant had willfully changed his address from Urban Ministries to Rock Hill, South Carolina without providing written notice to the Sheriff's Department.

Defendant argues, despite this evidence, that dismissal of this charge was required because the evidence presented at trial did not conform to the allegations in the indictment. Specifically, defendant contends that this indictment alleges that he violated N.C.G.S. § 14-208.9(a) by "fail[ing] to provide written notice" of his change of address within three days *after* the move; however, defendant argues, the evidence showed that he moved out of state, to South Carolina—and that situation, defendant contends, is governed by N.C.G.S. § 14-208.9(b), which requires a registered offender to notify the Sheriff's Department three business days *before* the move. *See* N.C.G.S. § 208.9(b) (2015) ("If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence *at least three business days before the date the person intends to leave this State* to establish residence in another state or jurisdiction." (emphasis added)). To hold otherwise and apply section 14-208.9(a) to defendant's out-of-state move, defendant suggests, would lead to the absurd result of requiring an offender who has already moved out of state—even to a distant state—to return to North Carolina to report in person and provide written notice of the address change.

Defendant's argument is unavailing. The plain text of section 14-208.9(a) states in full:

> If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address. Upon receipt of the notice, the sheriff shall immediately forward this information to the Department of Public Safety. When the Department of Public Safety receives notice from a sheriff that a person required to register is moving to another county in the State, the Department of Public Safety shall inform the sheriff of the new county of the person's new residence.

Id. § 14-208.9(a). Though the text of this section is, as defendant notes, focused on in-state changes of address, there is nothing in the plain text limiting its operation or effect to in-state address changes, or precluding its application to out-of-state address changes. And there is no need to depart from the plain text because giving effect to that plain text is not likely to lead to absurd results: When a registered offender plans to move out of state, appearing in person at the Sheriff's Department and providing written notification three days *before* he intends to leave, as required by subsection 14-208.9(b), would appear to satisfy the requirement in subsection 14-208.9(a) that he appear in person and provide written notice *not later than* three business days *after* the address change. *Compare id.* § 14-208.9(a) *with id.* § 14-208.9(b). Therefore, the scenario defendant envisions, in which a registered offender moves out of state and is required by law to return to North Carolina to notify the Sheriff's Department with which he last registered of that move, will likely occur only when the registered offender moves out of state without having at least a few days of advance notice. Because there is no reason to believe that such situations will be common, we see no need to depart from the plain text of the statute. Accordingly, we affirm defendant's second conviction for failure to register as a sex offender.

III. CONCLUSION

In conclusion, we hold that the State presented sufficient evidence which, when taken in the light most favorable to the State, would allow a jury to convict defendant of the offenses as alleged in the indictments. On this basis, we affirm the decision of the Court of Appeals.[3]

AFFIRMED.

3. Because we affirm the Court of Appeals on this basis, we do not address its alternate basis for affirming defendant's convictions, namely, its conclusion that the "Urban Ministry is not a valid address at which Defendant could register in compliance with the sex offender registration statute because Defendant could not *live* there." *Crockett*, 767 S.E.2d at 84 (emphasis in original).

STATE OF NORTH CAROLINA
v.
RICHARD DARNELL JAMES

No. 281A15

Filed 18 March 2016

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. ___, 774 S.E.2d 871 (2015), finding no error after appeal from a judgment entered on 26 August 2014 by Judge Claire V. Hill in Superior Court, Johnston County, and dismissing defendant's appeal in part. Heard in the Supreme Court on 7 December 2015.

Roy Cooper, Attorney General, by Mary Carla Babb, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

PER CURIAM.

For the reasons stated in *State v. Williams*, ___ N.C. ___, ___ S.E.2d ___ (2016) (No. 333PA14), the decision of the Court of Appeals is affirmed.

AFFIRMED.

STATE v. MILLER

[368 N.C. 729 (2016)]

STATE OF NORTH CAROLINA
v.
BRENT TYLER MILLER

No. 199PA15

Filed 18 March 2016

1. Appeal and Error—corrected Court of Appeals decision—reliance on original version—review by Supreme Court

The Supreme Court had authority under N.C. R. App. P. 16(a) to consider an issue raised by the decision of the Court of Appeals where neither party knew of the existence of a "corrected" version of the Court of Appeals' decision until two weeks before oral arguments in the Supreme Court. The differences between the two opinions that the Court of Appeals filed in this case went beyond changing the identity of the cases upon which the Court of Appeals relied in determining that the State's appeal should be dismissed to significantly changing the basis for the Court of Appeals' decision to dismiss the State's appeal.

2. Judgments—entry of order—absence of written order

The Court of Appeals erred by dismissing the State's appeal from the trial court's order in an intoxicated driving case on the theory that the order had never been properly entered. The Court of Appeals had noted that the record on appeal did not include a written copy of the order and held that it lacked jurisdiction in the absence of a written order. However, a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session. The order from which the State noted its appeal was, in fact, entered in accordance with *State v. Oates*, 366 N.C. 264 (2012).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 574 (2015), dismissing the State's appeal from an oral order entered on 2 June 2014 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Supreme Court on 15 February 2016.

Roy Cooper, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin and Aisha J. Dennis, for defendant-appellee.

ERVIN, Justice.

This case requires us to determine whether the Court of Appeals properly dismissed the State's appeal from a determination made by the trial court that the decision of the district court to allow defendant's pretrial suppression motion, which was predicated on the theory that a law enforcement officer had stopped defendant's vehicle in the absence of the required reasonable articulable suspicion, and to dismiss a driving while impaired charge and driving after consuming alcohol while less than twenty-one years of age charge on the grounds that the order from which the State purported to appeal had not been properly entered. For the reasons set forth below, we conclude that the trial court did, in fact, properly enter an order affirming the district court's decision.

At approximately 1:40 a.m. on 26 October 2012, Officer J.F. Jackson of the Charlotte-Mecklenburg Police Department stopped the vehicle that defendant was driving because defendant had taken evasive action while approaching a driving while impaired checkpoint and cited defendant for driving while impaired and driving after consuming alcohol while less than twenty-one years of age. On 3 June 2013, defendant made an oral motion to suppress evidence obtained as a result of the stop and to dismiss the charges that had been lodged against him on the grounds that the stop of defendant's vehicle was not supported by the required reasonable articulable suspicion. After orally indicating that the motion would be allowed on 7 June 2013, Judge Kimberly Best-Staton filed written findings and conclusions in support of a preliminary indication that defendant's motions should be allowed on 12 July 2013.

On 18 July 2013, the State filed a written notice of appeal from Judge Best-Staton's preliminary indication to the Superior Court, Mecklenburg County, that included a request for a de novo hearing pursuant to N.C.G.S. § 20-38.7. On 25 October 2013, defendant filed a motion seeking the dismissal of the State's appeal on the grounds that the State had only "made a generalized objection" to Judge Best-Staton's findings of fact; that the State's notice of appeal constituted "a blanket 'catch all' exception" that was "not made in good faith"; that "there [was] no way the State . . . [could] have an objection [to] every [f]inding[ ] of [f]act made by the District Court"; and that "the State's primary purpose" for noting an appeal was to argue that " 'the District Court's decision to grant . . . [d]efendant's [m]otion to [s]uppress was contrary to law.' "

The trial court heard defendant's dismissal motion at the 12 November 2013 session of the Superior Court, Mecklenburg County. On 15 November 2013, the trial court entered an order denying the State's request for a de novo hearing because "the State could not articulate in the written [n]otice of [a]ppeal [the] specific" findings of fact or conclusions of law to which the State was objecting; determining that Judge Best-Staton's preliminary indication "was not [an] abuse of discretion" and that her findings and conclusions "require[d] that [the superior court] affirm the decision of the District Court"; and "affirm[ing] the suppression of both [criminal] charges" and remanding this case "for entry of a suppression order by the District Court."

On 16 January 2014, Judge Best-Staton entered a "final order" allowing defendant's "pre-trial motion to suppress for lack of reasonable suspicion" and dismissing the charges that had been lodged against defendant. On the same date, the State noted an appeal from Judge Best-Staton's order to the Superior Court, Mecklenburg County, pursuant to N.C.G.S. § 20-38.7 and N.C.G.S. § 15A-1432, in which the State contended that Judge Best-Staton's final order "was contrary to the law" and that the State was "appeal[ing] the final ruling to Superior Court." The State's appeal from Judge Best-Staton's final order came on for hearing before the court at the 2 June 2014 criminal session of the Superior Court, Mecklenburg County. At that time, the State informed the court that, while the State was expecting that the court would uphold Judge Best-Staton's order, it had noted an appeal from that order on the grounds that, in accordance with N.C.G.S. § 15A-1432(e), the State could not seek review by the Court of Appeals unless the superior court affirmed Judge Best-Staton's final order. At the conclusion of the hearing, the court orally affirmed Judge Best-Staton's order, at which point the State orally noted an appeal to the Court of Appeals from the superior court's order upon making the required assertion that the appeal was not being taken for the purpose of delay and filed a written notice of appeal and certification, "in accord with the provisions of N.C.[G.S.] § 15A-1432(e), that the instant appeal [was] not [being] taken for the purpose of delay."

In challenging the superior court's order before the Court of Appeals, the State argued that the superior court had erred by denying the State's request for a de novo hearing as requested in its notice of appeal from Judge Best-Staton's preliminary indication. In response, defendant argued that the State was not entitled to de novo review of Judge Best-Staton's preliminary indication given its failure to comply with the requirements of N.C.G.S. § 15A-1432(b) as construed in *State v. Palmer*, 197 N.C. App. 201, 676 S.E.2d 559 (2009), *disc. rev. denied*,

363 N.C. 810, 692 S.E.2d 394 (2010), and that the State had waived its right to appellate review by requesting the trial court to affirm Judge Best-Staton's final order, assertions with which the State disagreed in its reply brief. In addition, defendant filed a motion seeking the dismissal of the State's appeal on the grounds that the State's written notice of appeal (1) failed to designate the trial court's order upholding Judge Best-Staton's preliminary indication as an order which the State sought to challenge on appeal, and (2) cited an incorrect statute as support for the contention that the State had a right to seek appellate review of the challenged decisions. In response, the State noted that the sufficiency of the State's notice is governed by Rule 4 of the North Carolina Rules of Appellate Procedure; that any error in the statutory reference contained in the State's written notice of appeal did not matter given the absence of any specification requirement in the rule provisions governing oral notices of appeal and given that the discussion on the record before the trial court made the identity of the orders that the State sought to challenge on appeal clear; that nothing in Rule 4(b) requires the State to correctly recite the statute which authorizes the State's appeal; and that defendant could not reasonably claim that he was confused or prejudiced by the State's written notice of appeal given that the State had clearly indicated the identity of the orders that it sought to challenge on appeal during the hearing held before the trial court immediately prior to the noting of its appeal. In addition, the State argued that its oral notice of appeal sufficed to support a challenge to the trial court's decision to refuse to review the State's appeal from Judge Best-Staton's preliminary indication on a de novo basis; that the State had "repeatedly" stated its intention to challenge the trial court's refusal to conduct a de novo review of its challenge to Judge Best-Staton's preliminary indication pursuant to the only available statutory provision, which required the State to wait and appeal from the trial court's 2 June 2014 "final order alone"; that the State's notice of appeal should be construed as a request for review of each of the orders that had been entered in this case given that the State had repeatedly objected to the denial of its request for de novo review of Judge Best-Staton's preliminary indication; and that, even if the State was required to make a reference to the order refusing to review the State's challenge to Judge Best-Staton's preliminary indication on a de novo basis in its written notice of appeal, the State had made its intention to challenge that decision on appeal clear to the trial court and to defendant. Finally, in the event that the Court of Appeals deemed the State's notices of appeal to be insufficient to support review of the trial court's refusal to review Judge Best-Staton's preliminary indication on a de novo basis, the State requested the Court of Appeals to issue a

writ of certiorari authorizing review of that decision on the grounds that any deficiencies in the notices of appeal "were inadvertent"; that defendant had always fully understood the nature of the issues that the State sought to present for the Court of Appeals' consideration; and that the State's legal arguments had substantive merit and were ripe for appellate review.

On 19 May 2015, the Court of Appeals filed a unanimous, unpublished opinion dismissing the State's appeal and determining that it would "not [be] appropriate" for the court "to treat the State's purported notice of appeal as a petition to issue the writ of certiorari." *State v. Miller*, No. COA14-1310, slip op. at 7 (N.C. App. May 19, 2015) (unpublished) [*Miller I*]. The Court of Appeals did not base this decision on any arguments advanced in defendant's dismissal motion. Instead, the Court of Appeals noted that the record on appeal did not "include a written copy of the [2 June 2014] order appealed from" and held that, "[i]n the absence of a written order," the court lacked "jurisdiction to hear the State's appeal," *Miller I*, slip op. at 6-7, given that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court," *id.* at 6-7 (quoting *State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388 (citations omitted), *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999), and citing *S. Furn. Hdwe., Inc. v. Branch Banking & Tr. Co.*, 136 N.C. App. 695, 702, 526 S.E.2d 197, 201 (2000) (stating that, "[w]hen an oral order is not reduced to writing, it is non-existent" (citing *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388))).

On 21 May 2015, the State filed a motion requesting the Court of Appeals to "withdraw and amend [its] opinion." In support of this request, the State asserted that "defendant neither raised nor argued th[e] basis for dismissal" adopted by the Court of Appeals, so that the State had been deprived of the "opportunity to defend against" that argument, and that the logic underlying the Court of Appeals' decision was inconsistent with numerous decisions from this Court, including *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012), *State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005), and *State v. Boon*e, 310 N.C. 284, 311 S.E.2d 552 (1984), *abrogated by Oates*, 366 N.C. at 267, 732 S.E.2d at 573-74. In response, defendant asserted that the Court of Appeals had made a correct decision in that the "plain language" of N.C.G.S. § 15A-1432(e) allows the State to seek appellate review only after an order "has been entered by the superior court"; that the Court of Appeals had repeatedly stated that an order had not been entered until it had been reduced to writing, signed by the trial court, and filed with the Clerk of Superior Court; that the opinion in *Oates* "confirmed, rather than undermined,"

the existence of this requirement; and that the Court of Appeals' decision does not conflict with *Oates* or any other decision of this Court. On 8 June 2015, the Court of Appeals entered an order denying the State's motion.

On 24 September 2015, this Court allowed the State's petition for discretionary review. In their new briefs before this Court, the parties debate the issue of whether the Court of Appeals had erred by dismissing the State's appeal on the grounds that the order from which the State had noted its appeal had not been entered by virtue of the fact that it had not been reduced to writing and filed with the Clerk. Approximately two weeks before the date upon which oral argument was scheduled to be held in this case, the Court learned that the version of the Court of Appeals' opinion on the basis of which the State had sought discretionary review, which was identical to the version contained in the LexisNexis and Westlaw on-line reporting services, differed from the version of the Court of Appeals' decision contained in the North Carolina appellate courts on-line database. On 4 February 2016, a representative of the authoring judge sent an e-mail to the attorneys for the parties, representatives from LexisNexis and Westlaw, and representatives of the offices of the Clerk of the Court of Appeals and this Court noting the fact that differing versions of the Court of Appeals' opinion in this case had been disseminated and stating that:

> After this Court's opinion was filed on 19 May 2015, the State filed a Motion to Withdraw and Amend the Opinion prior to the Issuance of the Mandate. This Court denied the Motion to Withdraw the Opinion but corrected the opinion to remove the references to State v. Gary and Southern Furn. Hdwe, Inc. v. Branch Banking & Trust on p.7. The correct opinion refers to State v. Oates and State v. Hadden on p. 7. The corrected opinion . . . was uploaded prior to the issuance of the mandate. At the time of the correction, we were advised that re-uploading . . . would [be] all we would need to do.

As we understand the record, neither party knew of the existence of the "corrected" version of the Court of Appeals' decision prior to receiving this communication. On the same date, defendant filed a motion seeking to have the record on appeal supplemented with a correct copy of the Court of Appeals' decision and suggesting that discretionary review had been improvidently allowed on the theory that the State's central argument had been that the Court of Appeals had erred by relying on *Gary* and *Southern Furniture* and that the references to these two decisions

had been removed from the Court of Appeals' opinion. In response, the State argued that "[t]he opinion's substance — its holding and result — is the exact same" and "remains erroneous for the very same reasons"; that the corrected opinion conflicts with numerous decisions of this Court, including *Oates*, and involves significant legal principles; and that any reliance upon *State v. Hadden* would be misplaced because *Hadden* was, in reality, a civil rather than a criminal case and because *Hadden* relied on *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388 for the premise that an order not reduced to writing "is a nullity," *Hadden*, 226 N.C. App. 330, 332-33, 741 S.E.2d 466, 468 (2013). In addition, the State pointed out that the Court had the correct version of the Court of Appeals' opinion at the time that it granted discretionary review in this case. On 5 February 2016, this Court entered an order dismissing defendant's motion to supplement the record as moot and taking no action on defendant's request that this Court dismiss the State's discretionary review petition as improvidently allowed.

[1] The differences between the two opinions that the Court of Appeals filed in this case go beyond changes in the identity of the cases upon which the Court of Appeals relied in determining that the State's appeal should be dismissed. Instead, the corrected opinion significantly changes the basis for the Court of Appeals' decision to dismiss the State's appeal. *Compare Miller I*, slip op. at 6-7, *with State v. Miller*, No. COA14-1310, slip op. at 7-8 (N.C. App. May 19, 2015, mandate issued June 8, 2015) (unpublished) [*Miller II*]. Instead of noting that the record on appeal "[did] not include a written copy of the order appealed from" and holding that "the absence of a written order" necessitates a conclusion that the State's appeal should be dismissed on the theory that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court," *Miller I*, slip op. at 6-7 (quoting *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388), and citing *S. Furn. Hdwe.*, 136 N.C. App. at 702, 526 S.E.2d at 201), the corrected opinion states that, because "the record on appeal . . . does not indicate the superior court's 2 June 2014 was entered," the State's appeal should be dismissed for lack of an "entered" order given this Court's statement in *Oates* that, "[f]or the purposes of entering notice of appeal in a criminal case under [Appellate] Rule 4(a)":

> [A] judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under [Rule 4(a)] <u>when the clerk of court records or files the judge's decision regarding the judgment or order</u>.

Oates, 366 N.C. at 266, 732 S.E.2d at 573 (quoted in *Miller II*, slip op. at 7 (underlining added by Court of Appeals)). In addition, after citing *Hadden*, the corrected opinion states:

> N.C.[G.S.] § 15A-1432, the statute that provides the State with a right to appeal from the superior court's order affirming the district court's final order, specifically requires the superior court to "enter an order affirming the judgment of the district court" if the superior court determines the order of the district court was correct.

Miller II, slip op. at 7 (quoting N.C.G.S. § 15A-1432(e) (2013)). As a result, rather than relying on the absence of a written order, the Court of Appeals held in *Miller II* that it lacked the authority to consider the State's appeal given the absence of any indication that the order from which the State sought to appeal had been entered in accordance with the process spelled out in *Oates*.

Although Rule 16 of the North Carolina Rules of Appellate Procedure limits discretionary review by this Court to the "issues stated in . . . the petition for discretionary review and the response thereto," N.C. R. App. P. 16(a), and although the exact issue specified in the State's discretionary review petition was whether the Court of Appeals had "err[ed] in determining that no order was entered because it was not reduced to writing," we do not believe that the fact that, unbeknownst to the State, the Court of Appeals changed the basis upon which it decided to dismiss the State's appeal necessitates dismissal of the State's petition as improvidently allowed. When read more broadly, the issue posed in the State's petition asked us to determine whether the Court of Appeals had erred by concluding that no order from which an appeal could properly be taken had ever been entered. As a result, we conclude that we have the authority under Rule 16 to consider the issue raised by the corrected Court of Appeals' decision and will proceed to do so.

[2] Our decision in *Oates* addressed the issue of whether the State had noted an appeal from a trial court order in a timely manner as required by Rule 4(a). As we stated in *Oates*,

> Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial or . . . the pretrial hearing. Otherwise, notice of appeal must be in writing and filed with the clerk of court. Such written notice may be filed at any time between the date of the rendition of the judgment or

> order and the fourteenth day after entry of the judgment or order.

366 N.C. at 268, 732 S.E.2d at 574 (citing N.C. R. App. P. 4(a)(1), (a)(2)). On the one hand, "*[r]endering* a judgment or an order 'means to "pronounce, state, declare, or announce" [the] judgment' or order, and 'is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy.' " *Id.* at 266, 732 S.E.2d at 573 (second alteration in original) (citations omitted). "*Entering* a judgment or an order," on the other hand, "is 'a ministerial act which consists in spreading it upon the record.' " *Id.* at 266, 732 S.E.2d at 573 (citations omitted). "For the purposes of entering notice of appeal in a criminal case under Rule 4(a), a judgment or an order . . . is entered . . . when the clerk of court records or files the judge's decision regarding the judgment or order." *Id.* at 266, 732 S.E.2d at 573. In reaching this conclusion, this Court noted, among other things, that the Court of Appeals' statement in *Oates* predicated on *Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388, that " '[e]ntry of an order [in the criminal context] occurs when it is reduced to writing' is incorrect." *Oates*, 366 N.C. at 267, 732 S.E.2d at 574 (alterations in original) (citation omitted). As a result, the basis for the Court of Appeals' initial decision in this case in *Miller I*, which was that an order from which an appeal could be taken had not been entered unless it had been reduced to writing and filed with the Clerk, rested upon a misapprehension of the applicable law.

The Court of Appeals' reliance upon *Hadden* for the proposition that "the superior court's order requiring [the] defendant to enroll in satellite-based monitoring was never 'entered' and was a nullity where it bore no indication it was filed with the clerk" as a basis for dismissing the State's appeal in its corrected opinion, *Miller II*, slip op. at 7 (citing *Hadden*, 226 N.C. App. at 332-33, 741 S.E.2d at 468), is misplaced as well. As an initial matter, it is well established that *Hadden*, which stemmed from a satellite-based monitoring proceeding, involved the application of the rules governing appeals in civil, rather than criminal, cases. *See, e.g.*, *State v. Clark*, 211 N.C. App. 60, 70-71, 714 S.E.2d 754, 761-62 (2011), *disc. rev. denied*, ___ N.C. ___, 722 S.E.2d 595 (2012). Secondly, as the State noted in response to defendant's motion to supplement the record and dismiss the State's petition as improvidently allowed, *Hadden* cited to and relied upon *Gary*, which this Court rejected in *Oates*, for the proposition that " '[e]ntry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court.' " *Hadden*, 226 N.C. App. at 332-33, 741 S.E.2d at 468. As a result, *Hadden* simply has no bearing on the proper resolution of this case.

Here the parties agree that N.C.G.S. § 15A-1432(e) is the statutory provision that authorizes the State's appeal from the trial court's 2 June 2014 order and that this statute requires an order to be entered in order for the Court of Appeals to acquire jurisdiction over the State's appeal. N.C.G.S. § 15A-1432(e) (2015) ("If the superior court finds that the order of the district court was correct, it must enter an order affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay."). The ultimate problem with the logic adopted by the Court of Appeals in *Miller II* is that it conflicts with this Court's statement in *Oates* that "a judgment or an order is entered under [Rule 4(a)] when the clerk of court records or files the judge's decision regarding the judgment or order." 366 N.C. at 266, 732 S.E.2d at 573. As we have already noted, *Oates* held, among other things, that a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its ruling in the minutes being kept for that session. The Court of Appeals appears to have simply overlooked the possibility that the trial court's 2 June 2014 order from which the State noted its appeal in this case had been entered in this fashion, perhaps because the record presented for its review did not reflect that such a procedure had been followed in this case. However, this Court has determined, during its consideration of this case, that, after the trial court announced its decision to affirm Judge Best-Staton's order, the courtroom clerk noted that "Court affirms appeal. State appeals court ruling" in the minutes relating to the relevant session of the Superior Court, Mecklenburg County.[1] As a result, contrary to the result reached by the Court of Appeals in *Miller II*, the order from which the State noted its appeal was, in fact, entered in accordance with our decision in *Oates*. Thus, the Court of Appeals erred by dismissing the State's appeal from the trial court's order on the theory that the order in question had never been properly entered. As a result, the Court of Appeals' decision in *Miller II* is vacated and this case is remanded to the Court of Appeals for consideration of the remaining issues in this case, including whether the State's appeal is subject to dismissal on any other basis not addressed in this opinion.

VACATED AND REMANDED.

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1. As authorized by Rule 15(f)(1) of the North Carolina Rules of Appellate Procedure, the Court has entered a separate order amending the record on appeal in this case to include the relevant minutes entry.

STATE v. SPIVEY

[368 N.C. 739 (2016)]

STATE OF NORTH CAROLINA
v.
JACOB MARK SPIVEY

No. 143PA15

Filed 18 March 2016

Indictment and Information—damage to real property—identity of property vital—owner's name not essential

An indictment charging injury to real property was valid on its face where the indictment alleged damage to "Katy's Great Eats" rather than the proper legal name of the corporate entity, "Katy's Great Eats, Inc." Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. In an indictment alleging injury to real property, identification of the property itself rather than the owner or ownership interest is vital. The owner or lawful possessor's name may be used to identify the specific parcel of real estate but it is not an essential element of the offense that must be alleged in the indictment. The indictment gave defendant reasonable notice of the charge against him.

Justice JACKSON dissenting.

Justice ERVIN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 841 (2015), finding no error in part and vacating in part judgments entered on 9 May 2014 by Judge Phyllis M. Gorham in Superior Court, New Hanover County, and remanding for resentencing on defendant's remaining convictions. Heard in the Supreme Court on 7 December 2015.

Roy Cooper, *Attorney General*, *by Brent D. Kiziah*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for defendant-appellee.*

NEWBY, Justice.

In this case we decide whether an indictment charging defendant with injury to real property "of Katy's Great Eats" is fatally flawed because it does not specifically identify "Katy's Great Eats" as a corporation or an entity capable of owning property. An indictment for injury to real property must describe the property in sufficient detail to identify the parcel of real property the defendant allegedly injured. The indictment needs to identify the real property itself, not the owner or ownership interest. By describing the injured real property as "the restaurant, the property of Katy's Great Eats," the indictment sufficiently identifies the crime being charged. Because it gives defendant reasonable notice of the charge against him and enables him to prepare his defense and protect against double jeopardy, the indictment is facially valid. We therefore reverse the decision of the Court of Appeals on that issue.

The State presented evidence at trial that showed that on 11 January 2013, defendant was at a restaurant called "Katy's Great Eats" to sing karaoke. When defendant went outside to the patio to smoke a cigarette, another patron, Christina Short, made a joke about President Obama and mocked defendant for voting for him. Defendant did not respond and went back inside the restaurant to eat his food. Approximately ten minutes later, as defendant was leaving the restaurant and walking to his car, Ms. Short made another derogatory comment toward him. Defendant again did not respond. Instead, angered by Ms. Short's comments, defendant got into his car, backed it across the parking lot, and drove it straight into the patio area of the restaurant where Ms. Short and other patrons stood. The car crashed into the front window and outside wall of the restaurant before stopping. Defendant attempted to flee in his car, but police stopped him a short distance away. Defendant admitted to police that he drove his car into the restaurant with the intent to hurt Ms. Short, but he denied trying to kill her.

A grand jury returned six bills of indictment for a variety of charges stemming from the incident, including attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, felony hit and run, injury to real property, reckless driving to endanger, and eleven counts of assault with a deadly weapon. The indictment in Case Number 13CRS050341 stated:

> I. The jurors for the State upon their oath present that . . . the defendant . . . unlawfully, willfully, and feloniously did fail to immediately stop the vehicle the defendant was driving at the scene of an accident and collision in which the defendant was involved. This accident and collision occurred at Katy's Great Eats

1054 S. College Rd, Wilmington, North Carolina and resulted in injury to a person, to wit: Christina Marie Short. The defendant knew and reasonably should have known that the vehicle that the defendant was operating was involved in the accident and collision and that the accident and the collision had resulted in injury to a person, to wit: Christina Marie Short.

II. The jurors for the State upon their oath present that . . . the defendant . . . unlawfully and willfully did wantonly damage, injure and destroy real property, front patio, façade, and porch of the restaurant, the property of Katy's Great Eats.

III. The jurors for the State upon their oath present that . . . the defendant . . . unlawfully and willfully did operate a motor vehicle on a public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger persons or property.

At the close of the State's evidence at trial, defendant moved to dismiss several charges, including Count II in the above indictment for injury to real property. Defendant argued that the indictment failed to allege "Katy's Great Eats" was a legal entity capable of owning property and that the proper legal name of the corporate entity is "Katy's Great Eats, Inc." The trial court denied defendant's motion. Defendant did not present any evidence.

During closing argument, defense counsel admitted that defendant was at "Katy's" on the night in question, that Ms. Short insulted defendant on two separate occasions, and that defendant subsequently drove his car into "Katy's bar." Defendant's primary defense was that his conduct was not deliberate or premeditated; rather, he drove his car into the restaurant with the general intent to hurt, not kill, Ms. Short. In fact, defense counsel not only admitted that defendant drove his car into "Katy's bar," but also asked the jury to find defendant guilty of assault with a deadly weapon inflicting serious injury, felony hit and run, and, significant here, injury to real property. Ultimately, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury, six counts of assault with a deadly weapon, and one count each of felony hit and run, reckless driving to endanger, and injury to real property.

The Court of Appeals vacated defendant's conviction for injury to real property and remanded the matter for resentencing. *State v. Spivey*, ___ N.C. App. ___, ___, 769 S.E.2d 841, 844 (2015). The Court of Appeals

concluded that Count II of the indictment charging injury to real property "is invalid on its face" because it "does not contain any allegation that the victim, 'Katy's Great Eats,' is a legal entity capable of owning property, and the name 'Katy's Great Eats' does not otherwise import a corporation or other entity capable of owning property." *Id.* at ___, 769 S.E.2d at 844. We allowed the State's petition for discretionary review.

It is well settled "that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). The Criminal Procedure Act of 1975 (1975 Act) requires that an indictment contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2015). The 1975 Act was intended "to simplify criminal proceedings." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). Under this statutory framework,

> it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

Sturdivant, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted). An indictment must allege "all the essential elements of the offense endeavored to be charged," *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985 (2003), but it is generally sufficient if couched in the language of the statutory offense, *State v. Williams*, ___ N.C. ___, ___, 781 S.E.2d 268, 272 (2016) ("[T]his Court has acknowledged the general rule that an indictment using 'either literally or substantially' the language found in the statute defining the offense is facially valid and that 'the quashing of indictments is not favored.' " (quoting *State v. James*, 321 N.C. 676, 681, 365 S.E.2d 579, 582 (1988))).

Here defendant was charged with injury to real property under section 14-127, which makes it a crime to "willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature." N.C.G.S. § 14-127 (2015). Count II of defendant's indictment

specifically alleges that he "unlawfully and willfully did wantonly damage, injure and destroy real property, front patio, façade, and porch of the restaurant, the property of Katy's Great Eats." The indictment mirrors the language of the controlling statute, and the description of the real property as "the property of Katy's Great Eats" clearly identifies the specific parcel of real property defendant allegedly injured. It is clear from the transcript that there was no confusion or controversy at trial regarding which establishment defendant damaged. Consequently, the indictment sufficiently advised defendant of the conduct that is the subject of the accusation.

Ideally, an indictment for injury to real property should include the street address or other clear designation, when possible, of the real property alleged to have been injured; however, under N.C.G.S. § 15A-925, had defendant been confused regarding which parcel of real property he was accused of injuring or "need[ed] more information to mount his preferred defense, he [could have] 'request[ed] a bill of particulars to obtain information to supplement the facts contained in the indictment.' " *State v. Jones*, 367 N.C. 299, 310-11, 758 S.E.2d 345, 353 (2014) (Martin, J., concurring in part and dissenting in part) (quoting *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984)).

Defendant argues, and the Court of Appeals agreed, that we should treat indictments charging injury to real property no differently than indictments charging crimes involving personal property, such as larceny, embezzlement, or injury to personal property. In so holding, the Court of Appeals relied on its own decision in *State v. Lilly*, 195 N.C. App. 697, 673 S.E.2d 718, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 214 (2009). In *Lilly* the Court of Appeals recognized that N.C.G.S. § 14-127 "does not appear to require that an indictment for injury to real property contain any allegation at all regarding the owner or possessor of the property," *id.* at 702, 673 S.E.2d at 722, but the court nonetheless concluded the indictment was required to contain an allegation regarding ownership or possession, *id.* at 702-03, 673 S.E.2d at 722. The statute under which defendant here was charged, N.C.G.S. § 14-127, does not require that the real property be "of another." Instead, it criminalizes damaging "any real property whatsoever," making the identity of the owner largely irrelevant as long as a defendant has adequate notice to prepare a defense. N.C.G.S. § 14-127.

Moreover, there is a fundamental difference between personal property and real property. Personal property is often fungible, such that two items can essentially be indistinguishable. Because personal property is easily moved, identifying information is particularly valuable. A

description of the owner of personal property is useful to differentiate between two similar pieces of personal property, thereby notifying the defendant of " 'the particular transaction on which the indictment is founded' and giv[ing] the [defendant] 'the benefit of the first acquittal or conviction if accused a second time of the same offense.' " *Jones*, 367 N.C. at 308-09, 758 S.E.2d at 352 (majority) (quoting *State v. Tisdale*, 145 N.C. 422, 425, 58 S.E. 998, 1000 (1907)); *see id.* at 311, 758 S.E.2d at 354 (Martin, J., concurring in part and dissenting in part) (noting it is "nearly impossible" to "[d]ifferentiat[e] between two jugs of malt liquor, two sacks of tobacco seed, or two baggies of cocaine").

Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. Thus, in an indictment alleging injury to real property, identification of the property itself, not the owner or ownership interest, is vital to differentiate between two parcels of property, thereby enabling a defendant to prepare his defense and protect against further prosecution for the same crime. While the owner or lawful possessor's name may, as here, be used to identify the specific parcel of real estate, it is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring. To the extent *Lilly* is inconsistent with this opinion, it is overruled.

We therefore conclude that by tracking the language of N.C.G.S. § 14-127 and clearly identifying the real property onto which defendant drove his car, the indictment "charges the offense of [injury to real property] in a plain, intelligible, and explicit manner" and fulfills the purpose of the 1975 Act. *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746; *accord* N.C.G.S. § 15-153 (2015). The indictment gives defendant reasonable notice of the charge against him, including the specific parcel of real property he is accused of injuring, so that he may prepare his defense and protect himself against double jeopardy. Accordingly, the indictment charging injury to real property is valid on its face. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to these matters remains undisturbed.

REVERSED.

Justice JACKSON dissenting.

In concluding that an indictment for injury to real property pursuant to N.C.G.S. § 14-127 need not identify the owner or lawful possessor of

the property, the majority ignores over one hundred and sixty years of precedent establishing that "[i]n indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal."[1] *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950) (quoting *State v. Mason*, 35 N.C. (13 Ired.) 341, 342 (1852)), *cert. denied*, 342 U.S. 831 (1951). I respectfully dissent.

Section 14-127 states, "If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a Class 1 misdemeanor." N.C.G.S. § 14-127 (2015). Interpreting this language, the majority concludes that the statute "does not require that the real property be 'of another' " and that "the owner or lawful possessor's name . . . is not an essential element of the offense that must be alleged in the indictment, so long as the indictment gives defendant reasonable notice of the specific parcel of real estate he is accused of injuring."

In 1852, faced with a statute that similarly lacked an explicit element stating that the allegedly injured property must be that of another, this Court rejected the majority's interpretation. In *State v. Mason* the defendant was accused of injury to a dwelling house in violation of a statute that stated:

> [I]f any person or persons . . . shall unlawfully and wilfully demolish, pull down, deface, or by other ways or means destroy, injure or damage any dwelling house, or any uninhabited house, out house, or other building, or shall unlawfully or wilfully burn, destroy, or remove any fence, wall, or other inclosure or any part thereof, surrounding or about any yard, garden, or cultivated grounds, he, she, or they shall be deemed guilty of a misdemeanor . . . .

Act of Jan. 14, 1847, ch. 70, 1846-47 N.C. Sess. Laws 137; *see also Mason*, 35 N.C. (13 Ired.) at 342 (referencing this statute). Like section 14-127, this statute did not specify that the dwelling house must belong to someone other than the defendant. Nevertheless, this Court stated that "[i]n indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *Mason*, 35 N.C. (13 Ired.) at 342. This Court explained that "although [the statute] protects houses and inclosures from destruction or injury, yet necessarily an exception

1. The statute at issue in *Hicks*, unlike the statutes at issue in other cases cited in this dissent, required that there be damage to the property "of another" as a precondition for a finding of liability. *See* 233 N.C. at 34, 62 S.E.2d at 499.

is to be implied when the destruction or damage is by the owner." *Id.* at 343. The Court determined that if the statute "had been intended to embrace the acts of willful waste by a tenant, there would have been express words to take in the case where the premises are in the possession of the offender." *Id.* As established in *Mason*, even if a statute prohibiting injury to some property does not state that the property must be that of another, such a requirement is implied, and an indictment for violation of that statute must identify the owner or lawful possessor.

Although *Mason* "was decided in 1852 when great particularity in criminal pleading was required," *State v. Taylor*, 172 N.C. 892, 893, 90 S.E. 294, 295 (1916), this Court has reaffirmed and applied its holding in multiple different contexts, *see, e.g.*, *State v. Watson*, 272 N.C. 526, 527, 158 S.E.2d 334, 335 (1968) (per curiam) (indictment for safecracking); *State v. Cooke*, 246 N.C. 518, 520, 98 S.E.2d 885, 887 (1957) (indictment for trespassing). In *Taylor*, after implicitly suggesting that the level of particularity required in indictments may have diminished since *Mason* was decided, this Court concluded that an indictment for unlawfully removing a fence "sufficiently charges that the property was in the possession of the [prosecuting witness] H. F. Otten" in part because the indictment stated that Otten "owned the property." 172 N.C. at 893, 90 S.E. at 295. Thus, even as we acknowledged that pleading requirements should be viewed more liberally than in the past, we still retained the requirement of identifying the owner or lawful possessor.

Our more recent decision in *Hicks* relied upon *Mason*. The defendant and a codefendant allegedly engaged in a conspiracy, part of which involved a plan to destroy an electrical transformer "by the use of dynamite or other high explosive." 233 N.C. at 31, 62 S.E.2d at 497. He was charged, *inter alia*, with both conspiracy to commit injury to real property and conspiracy to injure personal property, but the latter charge was dismissed. The jury found him "[g]uilty of conspiracy to damage real property." *Id.* at 33, 62 S.E.2d at 499. We noted that "[t]he indictment charge[d] the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company," while the evidence showed that the property actually belonged to the Duke Power Company. *Id.* at 34, 62 S.E.2d at 499. Relying upon *Mason* and subsequent cases cited in *Hicks*, we concluded that there was a fatal variance. *Id.* at 34, 62 S.E.2d at 499. *Hicks* confirms the vitality of our long-standing rule that indictments for injury to real property must identify the owner or lawful possessor of the property. In a later case we cited *Hicks* to establish that for the offense of "malicious injury to property," "it is necessary to allege in the warrant

or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge." *Cooke*, 246 N.C. at 520, 98 S.E.2d at 887. Similarly, the North Carolina Court of Appeals has relied upon *Hicks*, *Cooke*, and *Mason* in concluding that an indictment for injury to real property must name either the owner or lawful possessor of the property. *State v. Lilly*, 195 N.C. App. 697, 702-03, 673 S.E.2d 718, 722, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 214 (2009).

Contrary to the majority's suggestion, this principle was not affected by the enactment of the Criminal Procedure Act "to simplify criminal proceedings." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). The Criminal Procedure Act confirms that "every element of a criminal offense" must be alleged by the indictment. N.C.G.S. § 15A-924(a)(5) (2015). Although section 14-127 does not state that the injured property must be that of another, common sense dictates that this element is implied. *See Mason*, 35 N.C. (13 Ired.) at 343 (making a similar implication with respect to a similar statute). In addition, section 14-127 requires that the defendant have acted "willfully and wantonly." N.C.G.S. § 14-127. Willfulness refers to "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (per curiam) (citation omitted). "Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956) (citations omitted). In the context of injury to real property, the elements of willfulness and wantonness cannot be shown when a person injures his or her own property. This Court's established definition of wantonness explicitly provides the reference to "the rights . . . of others" that section 14-127 omitted. Furthermore, ownership of real property provides a complete justification for causing damage to it—including total demolition and replacement of buildings and fixtures. As a result, even though section 14-127 does not set out the element explicitly, the statute implicitly requires the State to show that the property belonged to another. *See State v. Chamberlain*, 232 N.C. App. 246, 253, 753 S.E.2d 725, 730 (2014) ("[I]t was for the jury to determine whether the shrubs [belonging to a neighbor] were planted on [the neighbor's] property or Defendant's and whether Defendant was legally justified in cutting them down."). As this Court's jurisprudence establishes, this element must be alleged in the indictment.

Applying this long-standing rule in the case *sub judice*, it is clear that the indictment is fatally defective. "When alleging ownership in an entity, an indictment must specify that the owner, 'if not a natural person,

is a corporation or otherwise a legal entity capable of owning property,' unless the entity's name itself 'imports an association or a corporation capable of owning property.' " *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960)). In *Campbell* we held that a larceny indictment identifying the property owner as "Manna Baptist Church" was sufficient because "alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property." *Id.* at 87, 772 S.E.2d at 444. At the same time, we distinguished *Thornton*, in which "an indictment alleging the defendant embezzled money belonging to 'The Chuck Wagon' was 'fatally defective' because it failed to allege 'that "The Chuck Wagon" is a corporation, and the words "The Chuck Wagon" do not import a corporation.' " *Id.* at 86, 772 S.E.2d at 443 (quoting *Thornton*, 251 N.C. at 662, 111 S.E.2d at 904). Here the indictment alleges that defendant damaged real property belonging to "Katy's Great Eats," a name which—like The Chuck Wagon—does not import a corporation or other legal entity capable of owning property.

Today the majority disposes of a well-established requirement without acknowledging over a century of precedent supporting the existence of that requirement. Even as the majority overturns the decision of the Court of Appeals in *Lilly*, it ignores that decision's reliance upon *Cooke*, *Hicks*, and *Mason*. Therefore, I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
GARY MAURICE WALTERS

No. 344PA14

Filed 18 March 2016

Kidnapping—disjunctive verdict—no error

The trial court's disjunctive jury instruction in a first-degree kidnapping prosecution did not violate defendant's constitutional right to be convicted only by the unanimous verdict of a jury in open court. The Court of Appeals concluded that the challenged instruction would have allowed one or more jurors to convict defendant based on a theory not supported by the evidence, but our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 765 S.E.2d 122 (2014), finding no error in part in judgments entered on 28 June 2013 by Judge William R. Pittman in Superior Court, Robeson County, but vacating defendant's conviction for first-degree kidnapping and ordering a new trial on that charge. Heard in the Supreme Court on 17 February 2016.

Roy Cooper, *Attorney General*, *by Mary Carla Babb*, *Assistant Attorney General*, *for the State-appellant.*

Paul F. Herzog for defendant-appellee.

HUDSON, Justice.

Defendant Gary Maurice Walters was convicted on 28 June 2013 of first-degree kidnapping, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, the Court of Appeals vacated defendant's conviction for first-degree

kidnapping on the basis that the trial court had given "a disjunctive instruction concerning the purpose for which [d]efendant acted that lacked adequate evidentiary support," which, the Court of Appeals concluded, effectively allowed defendant to be convicted based on a non-unanimous jury verdict. *State v. Walters*, ___ N.C. App. ___, 765 S.E.2d 122, 2014 WL 4292074, at *9 (2014) (unpublished). We allowed the State's petition for discretionary review on 5 November 2015. Because we now conclude that the trial court's disjunctive jury instruction did not violate defendant's constitutional right to be convicted only by the unanimous verdict of a jury in open court, *see* N.C. Const. art. I, § 24, we reverse in part the decision of the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of 17 August 2005, Paul Franklin began a two-day period of repeatedly buying and using cocaine, during which he was introduced to, and purchased cocaine from, defendant. After Franklin ran out of money while staying at the Redwood Inn in Lumberton, North Carolina, he allowed defendant to use his vehicle, a gray Ford Windstar van, in exchange for more cocaine. This arrangement continued through the next day, with defendant bringing Franklin cocaine every few hours in exchange for the continued use of the van.

Early in the morning of 19 August 2005, at approximately 3:30 a.m., Franklin's paycheck was deposited into his bank account, and defendant drove him in the van to an ATM to withdraw money. After Franklin made the withdrawal, defendant offered to bring Franklin "a third of cocaine" in exchange for the one hundred dollars Franklin had available to spend. However, when defendant arrived back at the Redwood Inn with the cocaine, Franklin believed it to be worth less than the full amount he had offered to pay; he offered defendant seventy-five dollars instead. In response, defendant reached down and broke off the leg of a table in the hotel room, then used the table leg to beat Franklin.

A short time later, at approximately 5:30 or 6:00 a.m., defendant arrived at the home of Christopher Bass and Shelly Scott. At defendant's request, Bass used Scott's Honda Civic to follow defendant while defendant drove Franklin's Windstar. They eventually parked near a river, and defendant told Bass that he had a man in the van. Defendant opened the door to show him Franklin in the back seat. According to Bass, Franklin's face "was mangled and beat up, and it sounded like he was breathing heavy." Defendant told Bass that the injuries were the product of a "tussle" stemming from "a drug deal gone wrong" at

the Redwood Inn. Bass answered in the negative when defendant asked him if he should kill Franklin. Defendant left the van at the scene and Bass used the Civic to drive defendant back to defendant's mother's house.

The injuries Franklin endured were severe. As a result of the beating, every bone in Franklin's face was broken; he suffered optic nerve damage, which caused him to have blind spots; and his eye socket was so badly damaged that doctors could not correctly realign his eyes, which resulted in double vision. He suffered such extensive facial scarring that he "went a year with no nose." When doctors attempted reconstructive surgery, an antibiotic-resistant staph infection prevented them from completing it successfully. As a result of the damage to his vision, Franklin could no longer continue his employment as a truck driver.

On 8 May 2006, defendant was indicted in Robeson County for first-degree kidnapping, attempted first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The charges against defendant were called for trial on 24 June 2013, and a jury was selected and impaneled the next day. The State presented evidence from 26 June through 28 June; defendant presented evidence on 28 June. Also on 28 June 2013, the trial court instructed the jury regarding the offenses with which defendant had been charged: attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree kidnapping. Regarding the elements of first-degree kidnapping, the trial court instructed as follows:

> The defendant has been charged with first degree kidnapping. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt: First, that the defendant unlawfully removed a person from one place to another; second, that the person did not consent; third, that the defendant removed that person for the purpose of facilitating his commission of or flight after committing the felony of assault with a deadly weapon with intent to kill inflicting serious injury; fourth, that this removal was a separate, complete act, independent of and apart from the assault; and fifth, that the person was not released by the defendant in a safe place or had been seriously injured.

Later that day, the jury returned verdicts convicting defendant of all three offenses. Defendant entered a written notice of appeal to the Court of Appeals on 5 July 2013.

At the Court of Appeals, defendant argued, *inter alia*, that he had been denied his right to a unanimous jury verdict regarding the first-degree kidnapping charge; defendant took particular issue with the instruction allowing the jury to convict him of first-degree kidnapping if it found beyond a reasonable doubt that he had committed the kidnapping "for the purpose of facilitating the commission of or flight following the commission of a felony." Applying its precedent in *State v. Johnson*, 183 N.C. App. 576, 646 S.E.2d 123 (2007), the Court of Appeals agreed, concluding that the challenged instruction would have allowed one or more jurors to convict defendant based on a theory not supported by the evidence, namely, that defendant had committed the kidnapping to facilitate the assault of Franklin rather than a subsequent escape. *See Walters*, 2014 WL 4292074, at *8-9. The Court of Appeals therefore ordered a new trial on the charged offense of first-degree kidnapping. *Id.* at *9. The State filed a petition for discretionary review, which we allowed on 5 November 2015.

II. ANALYSIS

Defendant contends to this Court, as he did to the Court of Appeals, that the trial court's "disjunctive" instruction to the jury regarding the charge of first-degree kidnapping allowed the jury to convict him through a non-unanimous verdict. Defendant argues in essence that the relevant instruction—that to convict, the jury must find that defendant "removed [Franklin] for the purpose of facilitating *the commission of* ***or*** *flight following* the commission of a felony" (emphases added)—allowed each individual juror to vote to convict on either basis. As a result, this argument continues, some jurors obeying this instruction may have found as fact that defendant kidnapped Franklin "to facilitate the commission of" the assault or attempted murder, but not the flight afterward, while others may have found that defendant kidnapped Franklin "to facilitate . . . flight following the commission of" the assault or attempted murder, but not the assault or attempted murder itself. In that event, there would be no unanimously agreed-upon basis for the conviction, in seeming violation of the unanimity requirement.

Because this argument has previously been considered and rejected by this Court, we now reverse in part the decision of the Court of Appeals. *See State v. Bell*, 359 N.C. 1, 29-30, 603 S.E.2d 93, 112-13 (2004), *cert. denied*, 544 U.S. 1052 (2005). Both the North Carolina Constitution and the North Carolina General Statutes protect the right of the accused to be convicted only by a unanimous jury in open court. *See* N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous

verdict of a jury in open court . . . ."); [1] N.C.G.S. § 15A-1237(b) (2015) (requiring that a jury verdict "be unanimous, and . . . be returned by the jury in open court"). But it does not follow from these constitutional and statutory guarantees that every disjunctive jury instruction violates one or both of those guarantees. Rather, as we explained in *Bell*, which the Court of Appeals did not mention even though that case also concerned a jury instruction for first-degree kidnapping, our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense. *See* 359 N.C. at 29-30, 603 S.E.2d at 112-13. As we explained in *Bell*:

> Two lines of cases have developed regarding the use of disjunctive jury instructions. *State v. Diaz* [317 N.C. 545, 346 S.E.2d 488 (1986), and its progeny] stand[ ] for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." In such cases, the focus is on the conduct of the defendant.
>
> In contrast, this Court has recognized a second line of cases [stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990),] standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

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1. This provision of the constitution was amended in 2014 and now states in full:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.
>
> N.C. Const. art. I, § 24.

Id. at 29-30, 603 S.E.2d at 112-13 (emphases in original) (internal citations omitted) (quoting *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991)).

This case falls within the second category of cases described in *Bell*. There, as here, the defendant was charged with first-degree kidnapping; there, as here, the trial court instructed the jury that it could convict the defendant only if it found beyond a reasonable doubt that the defendant had committed one or more specific acts, any of which could establish an essential element of the offense; and there, as here, the defendant argued that the trial court's "disjunctive" instruction violated his right under the North Carolina Constitution to be convicted only through a unanimous jury verdict. In that virtually identical context, this Court held that the trial court's disjunctive instruction did not deprive the defendant of this right. *See id.* at 29, 603 S.E.2d at 112 ("The trial court instructed the jury as to first-degree kidnapping, in accord with the pattern jury instructions . . . . Defendant contends that the trial court's disjunctive instructions were fatally ambiguous because the jury could have convicted defendant without a unanimous decision that defendant confined, restrained, or removed the victim for the purpose of committing a specific crime. We disagree."). We then went on to explain:

> It is not necessary for the State to prove, nor for the jury to find, that a defendant committed a particular act other than that of confining, restraining, or removing the victim. Beyond that, a defendant's intent or purpose is the focus, thus placing the case *sub judice* squarely within the *Hartness* line of cases. The trial court's instructions and the verdict form were proper.

Id. at 30, 603 S.E.2d at 113. Accordingly, consistent with our previous opinion in *Bell*, we now reverse in part the decision of the Court of Appeals.[2]

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2. We also note, despite the Court of Appeals' conclusion to the contrary, *see Walters*, 2014 WL 4292074, at *8-9, that the State's evidence, when viewed in the light most favorable to the State, was sufficient to support a finding by the jury that defendant had kidnapped Franklin in order to facilitate defendant's assault of Franklin with the intent to kill inflicting serious injury. As reviewed above, the State's evidence tended to show that, after beating Franklin with a table leg, defendant loaded Franklin into the Windstar, drove that Windstar to an isolated location near a river, and asked Christopher Bass whether he ought to kill Franklin. Because this testimony tends to show that defendant still may have intended to kill Franklin even after the beating was over and he had removed Franklin from the Redwood Inn, it appears that the State presented sufficient evidence to support

III. CONCLUSION

For the reasons set forth above, we reverse the Court of Appeals' holding that defendant is entitled to a new trial for the first-degree kidnapping charge. We do not address, and leave undisturbed, the Court of Appeals' conclusions regarding the convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.

REVERSED IN PART.

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

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a reasonable inference that defendant moved Franklin to "facilitate[ ] his commission of . . . the felony of assault with a deadly weapon with intent to kill inflicting serious injury." *Cf. State v. Kyle*, 333 N.C. 687, 695, 430 S.E.2d 412, 416 (1993) ("[T]he fact that all [the] essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." (citation omitted) (quoting *State v. Hall*, 305 N.C. 77, 82-83, 286 S.E.2d 552, 555-56 (1982), *overruled on other grounds by Diaz*, 317 N.C. at 555, 346 S.E.2d at 495)). Accordingly, it appears that the State's evidence was sufficient to support either portion of the trial court's disjunctive jury instruction.

STATE v. WARREN

[368 N.C. 756 (2016)]

STATE OF NORTH CAROLINA
v.
CHARLES DIONE WARREN

No. 312A15

Filed 18 March 2016

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. ___, 775 S.E.2d 362 (2015), affirming an order entered on 3 September 2014 and a judgment entered on 3 July 2014, both by Judge Richard T. Brown in Superior Court, Johnston County. Heard in the Supreme Court on 16 February 2016.

Roy Cooper, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.

Bryan E. Gates, Jr. and John J. Korzen for defendant-appellant.

PER CURIAM.

AFFIRMED.

MARGARET DICKSON, ET AL.	)	
	)	
v.	)	
	)	
ROBERT RUCHO, ET AL.	)	
	)	From Wake County
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL.	)	
	)	
v.	)	
	)	
THE STATE OF NORTH CAROLINA, ET AL.	)	

No. 201PA12-3

ORDER

Plaintiff-Appellants' Rule 31 Petition for Rehearing is denied as to the second and third issues. As to the remaining first issue, plaintiff-appellants' petition is dismissed on procedural grounds. Plaintiff-appellants waived review of this argument by failing to raise it in their brief on remand. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

This Court's 18 December 2015 opinion is modified as follows: the sentence stating "Alabama's Constitution does not contain a Whole County Provision" is deleted, and the words in the next sentence, "that state," are replaced with the word, "Alabama." *Dickson v. Rucho*, No. 201PA12-3, 2015 N.C. LEXIS 1281, at *34 (Dec. 18, 2015).

By order of the Court in Conference, this 11th day of February, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

SABRA FAIRES, BENNETT COTTON, AND DIANE P. LAHTI, PLAINTIFF-APPELLEES	)	
v.	)	
STATE BOARD OF ELECTIONS; A. GRANT WHITNEY, JR., CHAIR, AND RHONDA K. AMOROSO, JOSHUA D. MALCOLM, MAJA KRICKER, AND JAMES L. BAKER, MEMBERS OF THE STATE BOARD (IN THEIR OFFICIAL CAPACITIES ONLY); AND KIM WESTBROOK STRACH, EXECUTIVE DIRECTOR OF THE STATE BOARD (IN HER OFFICIAL CAPACITY ONLY), DEFENDANT-APPELLANTS	)	From Wake County

No. 84A16

ORDER

Parties' Joint Motion for Expedited Hearing is allowed as follows. The Record on Appeal and Defendant-Appellants' brief are due on or before 24 March 2016. Plaintiff-Appellees' brief is due on or before 31 March 2016. Defendant-Appellants' reply brief, if any, is due on or before 5 April 2016. Oral Argument will be heard at 9:30 a.m. on 13 April 2016.

By order of the Court in Conference, this the 10th day of March, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of March, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

KING v. BRYANT

[368 N.C. 759 (2016)]

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)	

No. 294PA14

ORDER

On 21 August 2015, this Court ordered this case certified to the trial court for additional findings of fact as to "[w]hether a physician-patient relationship existed at the time Mr. King signed the arbitration agreement." On 6 November 2015, the trial court entered the additional findings of fact.

Now, the Court, on its own motion, orders that the parties submit supplemental briefs on the effect of the trial court's additional findings of fact on the proceedings in this case. Appellants' supplemental brief shall be filed no later than thirty days after the date of this order, and appellees' supplemental brief shall be filed no later than thirty days following appellants' filing.

By order of the Court in Conference, this 19th day of February, 2016.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of February, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
BRENT TYLER MILLER	)	

No. 199PA15

ORDER

This case has come before this Court on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 574 (2015), dismissing the State's appeal from an oral order rendered on 2 June 2014 by Judge Linwood O. Foust in Superior Court, Mecklenburg County, based on the Court of Appeals' determination that the record did not contain any indication that the order from which the State sought to appeal had been entered in accordance with the process set out in *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012). While this case was pending before us, it came to the attention of this Court that the official minutes relating to the 2 June 2014 criminal session of the Superior Court, Mecklenburg County, reflected that, after Judge Foust orally announced his decision to affirm Judge Best-Staton's 16 January 2014 order, the courtroom clerk made a notation of Judge Foust's ruling in the minutes, establishing that Judge Foust's order had, in fact, been properly entered. The minute entry reflecting the entry of Judge Foust's order were not included in the record on appeal submitted for the consideration of the Appellate Division of the General Court of Justice.

Now, therefore, this Court, on its own motion, pursuant to N.C. R. P. 15(f), ORDERS that the record on appeal in this matter be AMENDED to include a certified copy of the minutes relating to the 2 June 2014 session of the Superior Court, Mecklenburg County, that reflect the courtroom clerk's notations regarding Judge Foust's ruling and the State's intent to appeal to the Court of Appeals therefrom, a copy attached to this order.

By order of the Court in Conference, this 17th day of March, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of March, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Iredell County
	)	
JAMES EDWARD JOYNER	)	

No. 414P15

ORDER

Upon consideration of the Petition for Discretionary Review filed by defendant on the 11th day of December 2015, the Petition is ALLOWED for the limited purpose of remanding to the Court of Appeals for reconsideration and review for plain error.

By order of this Court in Conference, this 17th day of March, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of March, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

17 MARCH 2016

004P14-2	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion for Order of Dismissal	Dismissed
004P16	State v. Jamonte Dion Baker	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
006P16	State v. Tunisia Dawson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-420)	Denied
007P16	Gilbert Breedlove and Thomas Holland v. Marion R. Warren, in his Official Capacity, as Director of the N.C. Administrative Office of the Courts, and the North Carolina Administrative Office of the Courts	Plts' PDR Prior to a Decision of the COA (COA15-1381)	Denied
008P16	State v. Teon Jamell Williams	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP15-863) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied 2. Allowed 3. Dismissed as moot 4. Denied **03/03/2016**
009P16	State v. Jordan Leon Mustard	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-147)	Denied
010P16	State v. Purcell Orlando Jones, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 2. Def's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Dismissed as moot
011P16	Robert Lee Hood v. N.C. Department of Public Safety	Plt's *Pro Se* Motion for Notice of Appeal (COAP15-934)	Dismissed

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

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012P16	State v. Don Christopher Hawes	1. Def's *Pro Se* Motion for Petition for *Writ of Error Coram Nobis* and Post Conviction Relief 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
014P16	State v. Robert Wayne Johnson	1. Def's *Pro Se* Motion for Re-Sentencing Hearing 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
015P16	State v. Jose Luis Dominguez	1. Def's *Pro Se* Motion for Notice of Appeal (COAP15-933) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed as moot **Jackson, J., recused**
017P16	State v. Fernando Hurtado	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-211) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion to Withdraw Notice of Appeal and PDR	1. --- 2. --- 3. Dismissed as moot 4. Allowed
018P16	State v. D'Marcus Delton Ballard	Def's PDR Under N.C.G.S. § 7A-31 (COA15-335)	Denied
020P16	Ricardo L. Bailey v. Ford Motor Company; Ford Motor Credit Company, LLC; and Kathleen Burns, Individually	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-9)	Denied
021P16	State v. Lee Edward Hutchens	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-275) 2. State's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot
022P16	State v. Jeremy Lynn Benfield	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA00-1236)	Denied **Hudson, J., recused**

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

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023P16	State v. Jeremy Lynn Benfield	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA01-780)	Denied **Hudson, J., recused**
024P16	State v. Oakland McCulloch	1. State's Motion for Temporary Stay (COA15-290) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/21/2016** Dissolved **03/17/2016** 2. Denied 3. Denied
028P16	State v. Brian Levi Byford	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
029P16	Timothy Clarke, Personal Representative of the Estate of Erica Bohn v. Ashraf Gad Bakhom Mikhail, M.D.; Jessica Lynn Hardin, P.A., and Coastal Carolina Neuropsychiatric Center, P.A.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA15-235) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Amend PDR	1. Denied 2. Dismissed as moot 3. Allowed
032A16	Michael Orban v. Pike Corporation, J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Court Square Capital Partners, Pioneer Parent, Inc., and Pioneer Merger Sub, Inc.	Plt's Motion to Dismiss Appeal	Denied **02/08/2016**
032A16	Michael Orban v. Pike Corporation, J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Court Square Capital Partners, Pioneer Parent, Inc., and Pioneer Merger Sub, Inc.	Def's Consent Motion to Hold Appeals in Abeyance Pending Settlement	Allowed **03/15/2016**

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

17 MARCH 2016

033A16	Collin Lieberg, on Behalf of Himself and All Others Similarly Situated v. Pioneer Parent, Inc., Pioneer Merger Sub, Inc., J. Eric Pike, Charles E. Bayless, James R. Helvey, III, General Peter Pace, Daniel J. Sullivan, and James L. Turner and Pike Corporation	Plt's Motion to Dismiss Appeal	Denied **02/08/2016**
034A16	Edwin Beickert, On Behalf of Himself and All Others Similarly Situated v. J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Pioneer Parent Inc., Pioneer Merger Sub Inc., and Court Square Capital Partners and Pike Corporation	Plt's Motion to Dismiss Appeal	Denied **02/08/2016**
035P16	State v. William Miller Baker	1. State's Motion for Temporary Stay (COA15-649) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/05/2016** 2.
036P16	State v. James Anthony Barnett, Jr.	1. State's Motion for Temporary Stay (COA15-200) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/05/2016** 2.
037P16	Annabelle Umberger v. Pike Corporation, J. Eric Pike, Charles E. Bayless, James R. Helvey III, Peter Pace, Daniel J. Sullivan, James L. Turner, Court Square Capital Partners, Pioneer Parent, Inc., and Pioneer Merger Sub, Inc.	1. Def's (Pike Corporation) PDR Prior to a Determination of COA 2. Def's (Pike Corporation) Motion to Consolidate Appeals	1. Allowed **02/08/2016** 2. Allowed **02/08/2016**

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

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038P16	Dr. Catherine B. Newkirk v. CVS-Caremark Corp., et al.	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-857)	Denied
039P16	State v. John David Watson	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **02/09/2016** 2.
040P16	State v. Kadeem Kirk	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-83) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
047P16	State v. Raymond Lee Crook, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-458)	Denied
048P16	Jamie Lee Stephenson v. State of North Carolina; Thomas Locke, Superior Court Judge; Susan Doyle, District Attorney; Michelle Ball, Clerk of Court	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
049P16	State v. Ahking Kaliek Williams	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-551)	Denied
050P16	State *ex rel.* Rebecca Aguirre v. Courts of Wilmington, North Carolina	Petitioner's *Pro Se* Motion for Petition Requesting Supervisory Control Over the Inferior Courts of North Carolina by the North Carolina Supreme Court	Dismissed
051P16	State v. Kelvin W. Sellers	Def's *Pro Se* Motion for PDR (COAP16-65)	Dismissed **Ervin, J., recused**
053P16	Darryl B. Adkins v. North Carolina Department of Public Safety	Plt's *Pro Se* Motion for Request for Review (COA16-20)	Dismissed
056PA14-2	Kirby, et al. v. N.C. Department of Transportation	Attorney Tanoury's Motion to Withdraw	Allowed **02/01/2016**

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

17 MARCH 2016

061P16	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay (COA15-585) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/25/2016** 2. 3.
062P16	State v. Walter Lemley, Jr.	1. Def's *Pro Se* Motion for PDR (COAP16-47) 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
069P06-3	State v. Terraine Sanchez Byers	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-897)	Dismissed **Ervin, J., recused**
069P13-2	Albert C. Burgess, Jr. v. eBay, Inc., et al.	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 **Ervin, J., recused**
070P16	State v. Nicolas Olivares Pineda	1. State's Motion for Temporary Stay (COA15-800) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/04/2016** 2. 3.
072P16	Christina D'Alessandro v. Adam D'Alessandro	1. Def's Motion for Temporary Stay (COA15-357) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed; Existing Bond Extended **03/07/2016** 2.
084P15-3	State v. Curtis Louis Sangster	1. Def's *Pro Se* Petition for *Writ of Mandamus* (9 November 2015) 2. Def's *Pro Se* Petition for *Writ of Mandamus* (16 November 2015) 3. Def's *Pro Se* Petition for *Writ of Mandamus* (23 November 2015) 4. Def's *Pro Se* Petition for *Writ of Mandamus* (3 December 2015) 5. Def's *Pro Se* Petition for Writ of Prohibition 6. Def's *Pro Se* Petition for *Writ of Mandamus* (28 January 2016)	1. Dismissed 2. Dismissed 3. Denied **11/25/2015** 4. Dismissed 5. Dismissed 6. Dismissed

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

17 MARCH 2016

084A16	Sabra Faires, Bennett Cotton, and Diane P. Lahti v. State Board of Elections; A. Grant Whitney, Jr., Chair, and Rhonda K. Amoroso, Joshua D. Malcolm, Maja Kricker, and James L. Baker, Members of the State Board (in their official capacities only); and Kim Westbrook Strach, Executive Director of the State Board (in her official capacity only)	Plts' and Defs' Joint Motion for Expedited Hearing	Allowed by Special Order **03/10/2016** **Edmunds, J., recused**
093A93-4	State v. Jaime Duarte Sierra El-Bey	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-800)	Dismissed
124PA15	State v. Michael Scott Hamilton	1. State's Motion for Temporary Stay (COA14-1005) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/06/2015** Dissolved **02/26/2016** 2. Allowed **08/20/2015** 3. Special Order **08/20/2015**

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

17 MARCH 2016

127P09-2	James E. Fulford Jr., Executor for the Estate of Mary Fulford v. Antonio Javon Jenkins; County of Duplin; Duplin County Department of Social Services; Millie I. Brown, Individually and in her Official Capacity as Director of Duplin County Department of Social Services; De Wana Kenan, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services; Sherita Wright, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services; Nanette Smith, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services; and Elva Quinn, Individually and in her Official Capacity as a Social Worker with the Duplin County Department of Social Services	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA15-296)	Denied
131P04-3	State v. Shan Edward Carter	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-463)	Dismissed **Ervin, J., recused**

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

17 MARCH 2016

132P11-9	Gregory Lynn Gordon v. Frank L. Perry, Secretary, Department of Public Safety; Susan R. White, Superintendent, Alexander Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **02/08/2016** **Ervin, J., recused**
158P06-6	State v. Derrick D. Boger	Def's *Pro Se* Motion for *Mandamus*	Denied
181A93-4	State v. Rayford Lewis Burke (DEATH)	1. Def's Motion to Hold PWC in Abeyance 2. Def's PWC to Review Order of Superior Court of Iredell County 3. State's Motion for Extension of Time to File Responses	1. Dismissed as moot 2. Allowed 3. Allowed **10/09/2014** **Ervin, J., recused**
199PA15	State v. Brent Tyler Miller	1. Def's Motion to Supplement the Record on Appeal 2. Def's Motion to Dismiss Appeal 3. Court's Motion for Supplemental Briefing	1. Dismissed as moot **02/05/2016** 2. Denied per opinion 3. Special Order **03/17/2016**
201PA12-3	Dickson, *et al.* v. Rucho, *et al.*	Plts' Petition for Rehearing	Special Order **02/11/2016**
220P11-2	State v. Christopher Dennie Ellerbe	Def's *Pro Se* Motion for PDR (COAP15-830)	Dismissed **Beasley, J., recused**
232A95-5	State v. Timothy Richardson (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Nash County 2. State's Motion to Amend Response to Petition for *Writ of Certiorari* 3. Def's Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*	1. Denied 2. Allowed 3. Allowed

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

17 MARCH 2016

254P08-3	State v. Michael Orlando Cook	1. Def's *Pro Se* Motion for PDR (COA15-963) 2. Def's *Pro Se* Motion to Appoint Counsel 3. Def's *Pro Se* Motion for Subpoena *Duces Tecum* 4. Def's *Pro Se* Motion to Amend 5. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed 5. Allowed
294PA14	Robert E. King and wife, Jo Ann O'Neal v. Michael S. Bryant, M.D., and Village Surgical Associates, P.A.	Court's Motion for Supplemental Briefing	Special Order **02/19/2016**
302A14	State v. Juan Carlos Rodriguez	Def's Motion to Amend Record on Appeal	Allowed **02/22/2016**
309P15	State v. Reginald Underwood Fullard	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-93) 2. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Denied 2. Denied **01/13/2016**
321P15	Hannah Marie Johnson Kearney v. Bruce R. Bolling, M.D.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-671) 2. Plt's Motion to Amend PDR	1. Denied 2. Allowed
336P15	State v. Melissa Amber Dalton	1. State's Motion for Temporary Stay (COA14-1329) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/06/2015** 2. Allowed 3. Allowed
369A15	State v. John Joseph Carvalho, II	1. Def's Notice of Appeal Based Upon a Dissent under N.C.G.S. § 7A-30 (COA14-1251) 2. Def's Notice of Appeal Based Upon a Constitutional Question Under N.C.G.S. § 7A-30 3. Def's PDR as to Additional Issues Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal	1. --- 2. --- 3. Allowed 4. Allowed
370P15	In the Matter of R.P.D.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-330)	Denied

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

17 MARCH 2016

371P15	State v. Wayne Allen Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA15-220)	Denied
376A15	Paramount, Rx, Inc. v. Robert E. Duggan and Agelity, Inc.	Plt and Defs' Joint Motion to Stay the Appeal	Allowed **02/24/2016**
382P93-2	State v. Truman Calvin Boone	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Guilford 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
382P10-5	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion for Notice of Appeal	Dismissed **Beasley, J., recused**
386P15	John James Scheffer, Individually and as Administrator of the Estate of Jeremy Talbot Scheffer, Deceased v. Nathaniel Eugene Dalton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-264) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. N.C. Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot
388A10	State v. Andrew Darrin Ramseur (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Iredell County 2. Def's Motion to Maintain Stay of Direct Appeal	1. Allowed 2. Allowed **06/10/2015**
393P15	State v. James Preston Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA15-222)	Denied
394P15	Alan Savage v. Julie Anne Zelent a/k/a Julie Anne Phillips a/k/a Julie A. McSwain	Def's PDR Under N.C.G.S. § 7A-31 (COA15-282)	Denied
407P15	State v. Larry Ricardo Tart	Def's *Pro Se* Motion for Notice of Appeal	Dismissed
412P15	Gregory Allen Taylor v. Harnett County District Court Jacqualyn L. Lee	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied

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

17 MARCH 2016

414P15	State v. James Edward Joyner	Def's PDR Under N.C.G.S. § 7A-31 (COA15-442)	Special Order
415P13-3	State v. Kelvin W. Sellars	Def's *Pro Se* Motion for PDR (COAP15-996)	Dismissed **Ervin, J., recused**
420P15	State v. Marlon E. Mendoza-Mejia	1. State's Motion for Temporary Stay (COA14-1261) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/21/2015** Dissolved **03/17/2016** 2. Denied 3. Denied
423P15	State v. Clyde Gary Whisenant	1. State's Motion for Temporary Stay (COA15-607) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss PDR 5. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Allowed **12/30/2015** Dissolved **03/17/2016** 2. Denied 3. Denied 4. Dismissed as moot 5. Dismissed as moot **Ervin, J., recused**
431P15	State v. William Charles Compton	Def's PDR Under N.C.G.S. § 7A-31 (COA15-567)	Denied
432P15	State v. April Jean Anderson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-269)	Allowed
433P15	Cheri Joyner Stallings v. Jeffrey Driver Stallings	Def's PDR Under N.C.G.S. § 7A-31 (COA15-327)	Denied
435P15-2	State v. Sulyaman Alisla Wasalaam	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Scotland County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion for Preparation of a Stenographic Transcript	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed as moot

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

17 MARCH 2016

437P15-2	Herman V. Tate v. North Carolina Department of Public Safety	Plt's *Pro Se* Motion to Reconsider Dismissal of Discretionary Review	Dismissed
440P15	Lewis Junior Jenkins v. Harnett County District Court, Jacqualyn L. Lee, Judge Faircloth	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied
446A13	State v. Mario Andrette McNeill	Def's Motion to Bypass the COA	Allowed **03/08/2016**
449P11-13	State v. Charles Everette Hinton	1. Petitioner's *Pro Se* Motion to Take Judicial Notice of Adjudicative Facts 2. Petitioner's *Pro Se* Motion for Necessary Joinder of Parties 3. Petitioner's *Pro Se* Motion for Joinder of Claims and Remedies 4. Petitioner's *Pro Se* Motion for Evidentiary Oral Hearing and Findings and Conclusions by the Court 5. Petitioner's *Pro Se* Motion for Inquiry into Restraint on Liberty; Petition for *Writ of Habeas Corpus*; Relief from Judgments 6. Petitioner's *Pro Se* Motion for Calendaring Cause	1. 2. 3. 4. 5. Denied **02/19/2016** 6.
470P14-2	N.C. Department of Public Safety v. Carrie J. Tucker	Petitioner's (Respondent Below) PDR Under N.C.G.S. § 7A-31 (COA14-1308)	Denied
471P14	John Price v. State of N.C. Office of the State Auditor	1. State's PDR Under N.C.G.S. § 7A-31 (COA14-375) 2. State's Motion for Consolidation 3. Petitioner's Motion to Dismiss PDR 4. Respondent's Motion for Leave to File Reply Brief to Response to Motion to Dismiss 5. Motion to Appear	1. Denied 2. Denied **04/09/2015** 3. Dismissed as moot 4. Dismissed as moot 5. Denied **08/20/2015** **Ervin, J., recused**

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

17 MARCH 2016

514P13-4	State v. Raymond Dakim Harris Joiner	Def's *Pro Se* Motion for Order for Dismissal	Dismissed
606A05-3	State v. Eric Glenn Lane	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed 2. Allowed

ATLANTIC COAST PROPERTIES, INC., A DELAWARE CORPORATION, PETITIONER
v.
ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLETT, PATRICIA W. MOORE–PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. 365A15

Filed 15 April 2016

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. ___, 777 S.E.2d 292 (2015), reversing and remanding an order entered on 29 May 2014 by Judge J. Carlton Cole in Superior Court, Currituck County. Heard in the Supreme Court on 21 March 2016.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis, for petitioner-appellee.

Vandeventer Black LLP, by Norman W. Shearin, for respondent-appellants.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., RICHARD J. NIXON, RHONDA HOLMES, BRIAN LINK, ANNETTE BEATTY, STEPHANIE WALLACE, AND JOHN DEVILLE

v.

THE STATE OF NORTH CAROLINA

No. 228A15

Filed 15 April 2016

1. Schools and Education—Career Status Law—did not in itself create vested rights

A statute governing the employment of teachers, the Career Status Law (now repealed), did not itself create any vested contractual rights. That statute contemplated the creation of individual contracts between school boards and teachers but did not itself establish any benefit provided to teachers by the State nor create any relationship between them.

2. Schools and Education—Career Status Law—implied inclusion in local contracts

Although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied.

3. Schools and Education—repeal of Career Status Law—impairment of vested rights

Teachers' vested rights were substantially impaired by the repeal of the Career Status Law. Retroactively revoking this status from those whose career status rights had already vested deprived career teachers of the promise of continuing employment as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed.

4. Schools and Education—teachers—impairment of contractual rights—no legitimate public purpose

Although a substantial impairment of teacher's contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose, there was not a legitimate public purpose for which it was necessary to impair substantially the vested contractual rights of career status teachers. Alleviating difficulties in dismissing ineffective teachers might be a

legitimate end justifying changes to the Career Status Law, but no evidence indicates that such a problem existed.

5. Schools and Education—impairment of teachers vested rights—method not reasonable and necessary

Even if a legitimate public purpose existed justifying an impairment of vested teachers' rights by repeal of the Career Status Law, the method adopted for alleviating that harm must be necessary and reasonable. Less sweeping alternatives were possible.

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. ___, 776 S.E.2d 1 (2015), affirming orders entered on 6 June 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. On 20 August 2015, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 15 February 2016.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh; and National Education Association, by Philip Hostak, pro hac vice, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General; Melissa L. Trippe, Special Deputy Attorney General; and Elizabeth A. Fisher, Assistant Solicitor General, for defendant-appellant.

Gray Layton Kersh Solomon Furr & Smith, PA, by Michael L. Carpenter, for North Carolina Retired Governmental Employees' Association, amicus curiae.

McGuinness Law Firm, by J. Michael McGuinness, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for State Employees Association of North Carolina, Inc., amicus curiae.

EDMUNDS, Justice.

The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. Until 2013, North Carolina public school teachers were employed under a system usually

described generically as the "Career Status Law," through which teachers could earn career status after successfully completing a probationary period and receiving a favorable vote from their school board. N.C.G.S. § 115C-325 (2012). That process changed with passage of the Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, 2013 N.C. Sess. Laws 995 ("the Act"). Details of the Act are described below, but most pertinent to the case at bar, the Act retroactively revoked the career status of teachers who had already earned that designation by repealing the Career Status Law ("Career Status Repeal"), *id.*, sec. 9.6(a), at 1091, and created a new system of employment for public school teachers, *id.*, secs. 9.6(b) to 9.7(y), at 1091-1116 (hereinafter sections 9.6 and 9.7).

Plaintiffs allege that sections 9.6 and 9.7 of the Act violate Article I, Section 10 of the United States Constitution (forbidding passage of any "Law impairing the Obligation of Contracts") and Article I, Section 19 of the North Carolina Constitution (the Law of the Land Clause), as it applied to teachers who have previously earned career status. We conclude that repeal of the Career Status Law unlawfully infringes upon the contract rights of those teachers who had already achieved career status. As a result, we hold that sections 9.6 and 9.7 are unconstitutional, though only to the extent that the Act retroactively applies to teachers who had attained career status as of 26 July 2013.

We begin our analysis with an overview of the evolution of state statutes that have controlled career status of public school teachers. For over four decades, North Carolina public schools have operated under what was commonly called the Career Status Law, a statutory framework setting out a system for the employment, retention, and dismissal of public school teachers. However, little in this framework has remained static over the years.

Beginning in 1971, the General Assembly created a procedure through which teachers who were employed for at least three consecutive years as probationers would become "career teachers" if the school board voted to reemploy the teacher for the upcoming school year. *See* Act of July 16, 1971, ch. 883, 1971 N.C. Sess. Laws 1396 (codified at N.C.G.S. § 115-142 (1971)). In addition, any teacher who had been employed in the same public school system for four consecutive years or been employed by the State as a teacher for five consecutive years would automatically became a career teacher. N.C.G.S. § 115-142(c). These career teachers were no longer subject to an annual appointment process, *id.* § 115-142(d), and could only be dismissed for one of twelve grounds specified in the statute, *id.* § 115-142(e)(1). If a teacher

was to be dismissed, the act provided for notice and, if requested by the teacher, a review of the recommendation of dismissal by a panel of the Professional Review Committee prior to termination. *Id.* § 115-142(h). A local school board could choose not to renew its contract with a probationary teacher for any reason that was not "arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* § 115-142(m)(2).

The system originally set up in 1971 has been subject to continual tinkering and revision by the General Assembly. In 1973, the General Assembly added a thirteenth statutory ground for dismissal of a teacher, *id.* § 115-142(e)(1)m (1975), and gave disappointed teachers the option of requesting either a review of a superintendent's dismissal recommendation by a panel of the Professional Review Committee or a hearing before the school board, *id.* § 115-142(h)(3) (1975). *See* Act of May 23, 1973, ch. 782, secs. 12, 20, 1973 N.C. Sess. Laws 1136, 1138, 1139 (codified at N.C.G.S. § 115-142 (1975)). In 1979, a fourteenth statutory ground for dismissal or demotion was added. *See* Act of June 8, 1979, ch. 864, sec. 2, 1979 N.C. Sess. Laws 1185, 1188 (codified at N.C.G.S. § 115-142(e)(1)n (1979)).

The next significant change came in the 1983 legislative session. The General Assembly amended the 1979 law to provide that, after a teacher had taught for three, four, or five consecutive years in a school system with more than 70,000 students, the local school board had authority to grant the teacher career status, reappoint the teacher to another probationary one-year contract, or decline to reappoint the teacher. *See* Act of May 26, 1983, ch. 394, 1983 N.C. Sess. Laws 301 (codified at N.C.G.S. § 115C-325(c)(1) (1985)). At the end of the probationary teacher's sixth year, the school board's choices were limited to appointment to career teacher status or nonrenewal of the appointment. N.C.G.S. § 115C-325(c)(1). However, the General Assembly did not extend this program, so after 1 July 1985 the process through which teachers received career status reverted to the 1981 system. *See* Ch. 394, sec. 6, 1983 N.C. Sess. Laws at 302. In 1992, a new statutory ground for dismissal was added, along with an amendment allowing a teacher who was being considered for dismissal to request a hearing either before the local school board or before a panel of the Professional Review Committee (instead of the previously provided investigation of the superintendent's recommendation by the Professional Review Committee). *See* Act of July 14, 1992, ch. 942, 1991 N.C. Sess. Laws (Reg. Sess. 1992) 730 (codified at N.C.G.S. § 115C-325(e)-(j) (1992)). Under either option, the hearing procedure was set out in subsection 115C-325(j). N.C.G.S. § 115C-325(e)(2), (h)(3), (i)(2) (1992).

In 1997, the General Assembly enacted a comprehensive set of statutes that included measures aimed at improving student academic achievement, enhancing teacher skills and knowledge, and implementing a system to review more rigorous teacher preparation, professional development, and certification standards. *See* The Excellent Schools Act, ch. 221, 1997 N.C. Sess. Laws 427. The new law enacted, amended, or repealed many provisions related to education and included significant changes to section 115C-325. For example, the act increased from three to four the number of years of consecutive service a teacher had to complete before becoming eligible for career status. *See* N.C.G.S. § 115C-325(c)(1) (1997). This act also expanded the definition of "demote" to include some circumstances under which a career teacher was suspended without pay and excluded circumstances where bonus payments were reduced or eliminated. *Id.* § 115C-325(a)(4) (1997). The Professional Review Committee system was eliminated and replaced with case managers who were certified mediators specially trained by the State Board of Education. *Id.* § 115C-325(h)-(h1) (1997). Career employees being recommended for dismissal or demotion had the option of choosing between a hearing in front of a case manager, governed by subsection 115C-325(j), or a hearing in front of the school board, conducted pursuant to subsection 115C-325(j2). *Id.* § 115C-325(h)(3) (1997). In 2009, the legislature amended the statute to add procedural protections for probationary teachers. *See* Act of July 13, 2009, ch. 326, 2009 N.C. Sess. Laws 528 (codified at N.C.G.S. § 115C-325(m)(3)-(4) (2009)).

In 2011, the legislature eliminated case managers and replaced them with hearing officers before whom career status teachers could request a hearing prior to dismissal or demotion. *See* Act of June 17, 2011, ch. 348, sec. 1, 2011 N.C. Sess. Laws 1464, 1464 (codified at N.C.G.S. § 115C-325(a)(4c), (h)(3), (h1) (2011)). The act also provided a definition for "inadequate performance," one of the original statutory grounds for dismissal or demotion of a career employee. N.C.G.S. § 115C-325(e)(3) (2011).

The employment system in place at the time of the passage of the Act was codified under N.C.G.S. § 115C-325 (2012) and established two classes of public school teachers. Probationary teachers were defined in N.C.G.S. § 115C-325(a)(5), while career teachers were defined in N.C.G.S. § 115C-325(a)(1c). Probationary teachers were employed through annual contracts with the local board of education. *Id.* § 115C-325(m)(2). These contracts were subject to nonrenewal for any reason that was not "arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* The school board would vote on whether to grant career status to a probationary teacher who had been employed by that school

system for four consecutive years. *Id.* § 115C-325(c)(1). Probationary teachers eligible for such a vote had the right to notice and a hearing before the board's vote if the superintendent did not intend to recommend the teacher for career status. *Id.* § 115C-325(m)(3)-(4). Upon a vote to grant career status, probationary teachers would enter into a career contract with their employing local board of education.

Career status teachers could only be dismissed, demoted, or relegated to part-time status based on one or more of fifteen specified statutory grounds. *Id.* § 115C-325(e)(1). Prior to making a recommendation for dismissal, demotion, or relegation to part-time status of a career status teacher, the superintendent was required to give written notice of the grounds on which he or she believed the action to be justified. *Id.* § 115C-325(e)(2). Upon receipt of such written notice, a career teacher had a right to request a hearing before a hearing officer to contest the superintendent's recommendation, at which the career teacher was entitled "to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist." *Id.* § 115C-325(j)(3). The decision of the hearing officer could be further appealed to the full school board. *Id.* § 115C-325(j1)(1). The board could approve dismissal or demotion of a career teacher after undertaking a whole record review to determine whether the hearing officer's findings of fact were supported by substantial evidence. *Id.* § 115C-325(j2)(7).

This summary demonstrates that the General Assembly's treatment of career teacher status has changed significantly over the last forty years. Now the Career Status Law, N.C.G.S. § 115C-325 (2012), is no more. The changes under review here occurred in 2013, when the General Assembly passed the Act. Ch. 360, 2013 N.C. Sess. Laws at 995. The Act revokes career status for all teachers as of 1 July 2018. *Id.*, sec. 9.6(i), at 1103. Under the new system, teacher contracts are not open-ended, as was previously the case for career teachers, but instead extend "for a term of one, two, or four school years." N.C.G.S. § 115C-325.3(a) (2015). A decision not to renew a teacher's contract can be based on any reason not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id.* § 115C-325.3(e) (2015). The superintendent must give the teacher written notice of a decision to recommend nonrenewal. *Id.* § 115C-325.3(d) (2015). Within ten days of receiving such notice, the teacher can petition the local school board for a hearing, but the school board has discretion whether to grant the request. *Id.* § 115C-325.3(e). Dismissal, demotion, or a change to part-time status during the term of the contract remains

based on the fifteen statutory grounds and procedure set forth previously in the Career Status Law. *Id.* § 115C-325.4(a) (2015). Any teacher who had not achieved career status "prior to the 2013-2014 school year" is no longer eligible to receive career status in the future and will instead be employed primarily by one-year contracts, "except for qualifying teachers offered a four-year contract as provided in subsection (g) of this section, until the 2018-2019 school year." Ch. 360, sec. 9.6(f), 2013 N.C. Sess. Laws at 1103.[1]

On 17 December 2013, the North Carolina Association of Educators, Inc. (NCAE), five tenured public school teachers, and one probationary public school teacher filed a complaint in Superior Court, Wake County, challenging the constitutionality of the repeal of the Career Status Law under both the North Carolina and United States Constitutions. In their first claim for relief, plaintiffs alleged that the repeal constituted a "taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution." Plaintiffs further contended the repeal was an "impairment of contracts in violation of Article I, Section 10 of the United States Constitution." Plaintiffs requested a declaration that sections 9.6 and 9.7 of the Act are unconstitutional under both constitutions as applied retroactively to revoke career status from teachers who had previously earned that designation, and also as applied prospectively to probationary teachers who were employed by the public schools before the repeal and had been on a track leading to eligibility for career status. Plaintiffs also sought "a permanent injunction against the implementation and enforcement" of both sections as to all tenured and probationary teachers who were employed by public schools as of 26 July 2013.

On 17 January 2014, the State filed its answer denying all of plaintiffs' allegations. The State also filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that plaintiffs failed to state a legal claim upon which relief may be granted. On 10 March 2014, plaintiffs filed a motion for summary judgment, along with supporting affidavits, and the State responded with affidavits opposing plaintiffs' motion. After a 12 May 2014 hearing, the trial court

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1. Subsections 9.6(g) and (h), which never went into effect, would have required superintendents to review the performance and evaluations of all teachers employed in their schools for at least three consecutive years and recommend one-quarter of those teachers to receive a four-year contract beginning in the 2014-15 school year. Ch. 360, sec. 9.6(f), 2013 N.C. Sess. Laws at 1103. The selected teachers would receive a five-hundred dollar annual pay raise for each year of the four-year contract in exchange for the relinquishing of career status. *Id.*, sec. 9.6(g)-(h), at 1103.

on 6 June 2014 entered an order granting in part plaintiffs' motion as to the retroactive revocation of career status from teachers who already held that status. As to the claims brought on behalf of teachers who had not yet earned career status, the trial court denied in part plaintiffs' motion for summary judgment and granted summary judgment in favor of the State. The trial court declared unconstitutional sections 9.6 and 9.7 of the Act as they apply to career status teachers as of 26 July 2013. The court further enjoined the State from implementing and enforcing those provisions as to teachers holding career status on 26 July 2013, and also denied the State's oral motion to stay the trial court's permanent injunction. Plaintiffs and defendant filed separate notices of appeal.

The Court of Appeals unanimously affirmed the trial court's decision to grant summary judgment in favor of the State as to plaintiffs' claims on behalf of probationary teachers. *NCAE*, ___ N.C. App. ___, ___, 776 S.E.2d 1, 23-24 (2015) (majority); *id.* at ___, 776 S.E.2d at 24 (Dillon, J., concurring in part and dissenting in part). That decision was not appealed to this Court and we do not address it further. However, the Court of Appeals was divided as to career status teachers. The majority rejected the State's argument that the trial court erred as a matter of law when it granted summary judgment in favor of plaintiffs on the issue of whether retroactive application of the Career Status Repeal violated the Contract Clause of the United States Constitution. *Id.* at ___, 776 S.E.2d at 9 (majority). The majority acknowledged that in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), this Court set out a three-part test for analyzing an alleged violation of the United States Constitution's Contract Clause. *NCAE*, ___ N.C. App. at ___, 776 S.E.2d at 9-10. Under that test, the reviewing court considers "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977)). Applying the *Bailey* test and analyzing cases from this Court and the United States Supreme Court, the majority found that, as to the existence of a contractual right, the Career Status Law was a "statutory promise" and that, upon satisfying its requirements and achieving career status, plaintiffs "earned a vested right to career status protections." *NCAE*, ___ N.C. App. at ___, 776 S.E.2d at 12. In considering next whether those statutory contractual rights were substantially impaired by the State's actions, the majority concluded that eliminating career contracts in favor of contracts for one, two, or four years substantially impaired the rights promised to plaintiffs. *Id.* at ___, 776 S.E.2d at 13. The majority also held that a school board's discretionary ability

to deny renewal of a contract for a term of years without a hearing was a substantial change from the previous law's requirement of a hearing prior to imposition of termination, demotion, or other discipline. *Id.* at ___, 776 S.E.2d at 13. Accordingly, the court had "no trouble concluding that the trial court was correct in its determination that the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights." *Id.* at ___, 776 S.E.2d at 13.

Finally, the Court of Appeals was unpersuaded by the State's argument that the General Assembly repealed the Career Status Law in order to improve the public school systems by providing a method under which schools more easily could rid themselves of ineffective teachers. *Id.* at ___, 776 S.E.2d at 14. The court found the contention that these measures would improve the school system to be baseless and unsupported by the affidavits submitted by both parties. *Id.* at ___, 776 S.E.2d at 14. Even assuming the State's purpose was an important one, the majority was unconvinced that repealing the Career Status Law "was a reasonable and necessary means to advance that purpose." *Id.* at ___, 776 S.E.2d at 15. The majority found that no evidence suggested that the approach embodied in the Act served the purpose of removing incompetent teachers, particularly when less drastic alternatives exist for the reform of public education. *Id.* at ___, 776 S.E.2d at 15-16. The majority concluded that the trial court correctly found the repeal of the Career Status Law violated the United States Constitution's Contract Clause as to teachers who had already earned career status at the time of repeal. *Id.* at ___, 776 S.E.2d at 16. Based on this Contract Clause violation, the Court of Appeals further held that plaintiffs' contract right was a property interest that was being unjustly taken away by the repeal without compensation to plaintiffs, in violation of the Law of the Land Clause of the North Carolina Constitution. *Id.* at ___, 776 S.E.2d at 16-18.

The dissenting judge argued that the repeal is unconstitutional to the extent that it allows career status teachers to be stripped of a protected property interest without a hearing. *Id.* at ___, 776 S.E.2d at 25 (Dillon, J., concurring in part and dissenting in part). Nevertheless, the dissenting judge would not hold that the Career Status Law created any contractual rights, *id.* at ___, 776 S.E.2d at 28, and except for the portion giving local boards the discretion whether to hold a hearing before depriving a career teacher of his or her property interest in continued employment, would find the repeal of that law constitutional on its face, *id.* at ___, 776 S.E.2d at 29. The State appealed to this Court on the basis of the dissenting opinion and we granted the State's petition for discretionary review as to additional related issues.

This Court presumes that statutes passed by the General Assembly are constitutional, *State v. Packingham*, 368 N.C. 380, 382-83, 777 S.E.2d 738, 742 (2015) (citing *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991)), and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt, *Morris v. Holshouser*, 220 N.C. 293, 295, 17 S.E.2d 115, 117 (1941). Even so, we review de novo any challenges to a statute's constitutionality. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted).

[1] Plaintiffs first allege that the Career Status Repeal violated Article I, Section 10 of the Constitution of the United States by impairing the contract rights of teachers who had earned career status before the repeal. The Contract Clause, "one of the few express limitations on state power" in the Constitution, *U.S. Tr. Co.*, 431 U.S. at 14, 97 S. Ct. at 1514, 52 L. Ed. 2d at 104, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10. As the Court of Appeals correctly recognized, this Court uses the three-factor test set out in *Bailey* to determine whether a Contract Clause violation exists. *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co.*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92).

Accordingly, we first consider whether any contractual obligation arose from the statute making up the now-repealed Career Status Law. The United States Supreme Court has recognized a presumption that a state statute "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 100, 82 L. Ed. 57, 62 (1937). This presumption is rooted in the long-standing principle that the primary function of a legislature is to make policy rather than contracts. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S. Ct. 443, 446, 82 L. Ed. 685, 690 (1938). A party asserting that a legislature created a statutory contractual right bears the burden of overcoming that presumption, *Dodge*, 302 U.S. at 79, 58 S. Ct. at 100, 82 L. Ed. at 62, by demonstrating that the legislature manifested a clear intention to be contractually bound, *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451, 84 L. Ed. 2d 432, 446 (1985). Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 451, 105 S.E.

187, 192 (1920). We are deeply reluctant to "limit drastically the essential powers of a legislative body" by finding a contract created by statute without compelling supporting evidence. *Nat'l R.R.*, 470 U.S. at 466, 105 S. Ct. at 1451, 84 L. Ed. 2d at 446; *see also Mial v. Ellington*, 134 N.C. 131, 153, 46 S.E. 961, 968 (1903) ("[M]any things done by the State may seem to hold out promises to individuals which, after all, cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions.").

This requirement for explicit indications of legislative intent is shown in two United States Supreme Court cases in which the use or omission of the word "contract" in the statute was deemed critical. In *Phelps v. Board of Education*, 300 U.S. 319, 57 S. Ct. 483, 81 L. Ed. 674 (1937), that Court considered a New Jersey employment system where, after completing three years of service, teachers were hired for an ongoing open-ended period during which they could not be dismissed or subjected to a reduction in salary without notice and a hearing. *Id.* at 320-21, 57 S. Ct. at 484, 81 L. Ed. at 676. The Supreme Court found that this system did not set up a contract but instead "established a legislative status for teachers," *id.* at 322, 57 S. Ct. at 484, 81 L. Ed. at 676, and was a "regulation of the conduct of the board" that created no binding obligation, *id.* at 323, 57 S. Ct. at 485, 81 L. Ed. at 677. However, the Court shortly thereafter distinguished *Phelps* in *Brand*, 303 U.S. 95, 58 S. Ct. 443, 82 L. Ed. 685, when it held that Indiana's "Teachers' Tenure Act" created a statutory contractual right between the teachers and a local school district. In *Brand*, the Court looked specifically to the language of Indiana's Act, noting that the word "contract" was peppered throughout nearly every section of the statute. *Id.* at 105, 58 S. Ct. at 448, 82 L. Ed. at 693 ("The title of the Act is couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body the word 'contract' appears ten times in § 1, eleven times in § 2, and four times in § 4 . . . .").

These cases indicate that courts must consider the language used by the legislature to determine whether a statute "provides for the execution of a written contract on behalf of the state." *Dodge*, 302 U.S. at 78, 58 S. Ct. at 100, 82 L. Ed. at 61. North Carolina's Career Status Law does not present the type of unmistakable legislative intent found by the United States Supreme Court in the statute at issue in *Brand*. Nowhere in the portion of section 115C-325 establishing the promotion of a teacher to career status does the word "contract" appear. *Compare* N.C.G.S. § 115C-325(c)(1) (2012), *with Brand*, 303 U.S. at 101 n.14,

58 S. Ct. at 446 n.14, 82 L. Ed. at 691 n.14 (discussing the Indiana statute's frequent use of that term). The word "contract," as used in the remainder of our Career Status Law refers only to individual contracts with the local school boards and relationships between teachers and the local school system, with no mention of the State.

Turning next to cases from this Court, we considered an alleged Contract Clause violation in the context of retirement benefits in *Bailey*, 348 N.C. 130, 500 S.E.2d 54, and in the context of disability retirement payments in *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997). In both cases, this Court held that vested contractual rights were created by the statutes at issue because, at the moment the plaintiffs fulfilled the conditions set out in the two benefits programs, the plaintiffs earned those benefits. Though the benefits would be received at a later time, the plaintiffs' right to receive them accrued immediately, became vested, and a contract was formed between the plaintiffs and the State. *Bailey*, 348 N.C. at 138, 500 S.E.2d at 58 ("After employment for the set number of years, an employee is deemed to have 'vested' in the retirement system."); *Faulkenbury*, 345 N.C. at 692, 483 S.E.2d at 428 (stating that the plaintiffs fulfilled their condition of working for five years and "[a]t that time, the plaintiffs' rights to benefits in case they were disabled became vested"). In other words, neither the retirement benefits in *Bailey* nor the disability payments in *Faulkenbury* were based upon future actions by the plaintiffs. Instead, those benefits had been presently earned and became vested as the plaintiffs performed, even though payment of those benefits was deferred until a later time.

In contrast, a teacher has no vested career status rights at the end of the probationary period. Instead, after successfully meeting all the requirements, a teacher could enter a career contract with the school board. Thus, we see that the Career Status Act is a regulation of conduct through which local school boards can exercise their discretion to enter into contracts with teachers for whom they approve career status. The Career Status Law contemplates the creation of individual contracts between school boards and teachers but does not itself establish any benefit provided to teachers by the State nor create any relationship between them. As a result, plaintiffs have not overcome the strong presumption against finding a vested right created by the Career Status Law.

In addition, the oft-amended course of the Career Status Law over the decades is evidence that the State did not intend to create a contract with teachers by the terms of the statute. Each new version of the statute did not immediately create a vested contract between the State

and public school teachers. The amendments instead altered details of career status while leaving the overall career status system intact, thereby allowing the possibility of future modifications and amendments as needs arose. Accordingly, we conclude the Career Status Law did not itself create any vested contractual rights.

[2] However, our analysis does not end here. "[L]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30, 54 S. Ct. 231, 237, 78 L. Ed. 413, 424 (1934) (quoting *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550, 18 L. Ed. 403, 408 (1866)). Before receiving career status, plaintiffs entered individual contracts with the local school boards. Implied as a part of each of these contracts was the Career Status Law. As the State concedes in its brief, the "applicable statutory terms must be read into the contracts" and the contracts "[i]ncorporat[ed] the statutory body of 'school law' applicable to Plaintiffs as teachers." The statutory system that was in the background of the contract between the teacher and the board set out the mechanism through which the teachers could obtain career status. A teacher's career status rights under the Career Status Law become vested only upon completing several consecutive years as a probationary teacher and then receiving approval from the school board. Thus, vesting stems not from the Career Status Law, but from the teacher's entry into an individual contract with the local school system. At the time the parties made the contract, the right to career status vested. At that point, the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it.

The record demonstrates the importance of those protections to the parties and the teachers' reliance upon those benefits in deciding to take employment as a public school teacher. For instance, in his affidavit, Bruce W. Boyles, Cleveland County Superintendent of Schools, stated that "[t]eachers rely upon their career status rights in making employment decisions"; "[w]hen interviewing and hiring teachers, teachers frequently ask about career status rights"; and such protections have value to prospective teachers which "makes up for not having better monetary compensation." The affidavits of plaintiffs Annette Beatty, John deVille, Rhonda Holmes, Richard J. Nixon, and Stephanie Wallace establish that they were promised career status protections in exchange for meeting the requirements of the law, relied on this promise in exchange for accepting their teacher positions and continuing their employment with their school districts, and consider the benefits and protections of

career status to offset the low wages of public school teachers. Thus, we conclude that, although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied.

[3] We next move to the second part of a Contract Clause analysis in which we consider whether the vested rights found above were substantially impaired by the Career Status Repeal. *U.S. Tr. Co.*, 431 U.S. at 17, 97 S. Ct. at 1515, 52 L. Ed. 2d at 106. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569, 580 (1983) (citing *U.S. Tr. Co.*, 431 U.S. at 26-27, 97 S. Ct. at 1519-20, 52 L. Ed. 2d at 112). However, a showing that the change in the law results in an outcome different from that "reasonably expected from the contract" may be sufficient to show a substantial deprivation. *Id.* at 411, 103 S. Ct. at 704, 74 L. Ed. 2d at 580. Plaintiffs contend that the repeal of the Career Status Law and its protections substantially impairs the contractual rights for which they bargained.

The benefits enjoyed by career teachers have been described above, most of which boil down to enhanced job security. The Career Status Law establishing those benefits was replaced by a new system that eliminates career status entirely, allowing local school boards and teachers to enter into contracts in durations of only one, two, or four years. N.C.G.S. § 115C-325.3(a) (2015). Nonrenewal of these shortened contracts can be based on any reason not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id.* § 115C-325.3(e) (2015). If the superintendent recommends that a teacher not be renewed, the teacher can petition for a hearing but the school board has unrestricted discretion whether to grant or deny that request. *Id.*

We hold that these changes are a substantial impairment of the bargained-for benefit promised to the teachers who have already achieved career status. Retroactively revoking this status from those whose career status rights had already vested deprives career teachers of the promise of continuing employment, as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed. Plaintiffs' affidavits indicate they relied both on the promise of continued employment as a form of added compensation to supplement their lower salaries and on the benefits of career status when deciding to continue teaching in the public school systems. Elimination of these

benefits substantially deprives current career status teachers of the value of their vested contractual rights.

[4] Under the third prong of the *Bailey* test, a substantial impairment of contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose. *U.S. Tr. Co.*, 431 U.S. at 25, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. The Contract Clause is not meant to bind the hands of the State absolutely. The Clause's "prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Grp.*, 459 U.S. at 410, 103 S. Ct. at 704, 74 L. Ed. 2d at 580 (quoting *Blaisdell*, 290 U.S. at 434, 54 S. Ct. at 239, 78 L. Ed. at 426). Courts weigh a state's interest in exercising its police power against the impairment of individual contractual rights when determining whether the impairment is sufficiently justified. This portion of the inquiry involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose. *See id.* at 412, 103 S. Ct. at 705, 74 L. Ed. 2d at 581.

Accordingly, we consider the interest the State argues is furthered by repealing the Career Status Law. The burden is upon the State when it seeks to justify an otherwise unconstitutional impairment of contract. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115. Relying on Article I, Section 15 of our constitution, which establishes the duty of the State to guard and maintain the people's right to the privilege of education, the State claims that improving public education is an essential constitutional responsibility. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 599 S.E.2d 365, 376 (2004) ("[T]he State and State Board of Education had constitutional obligations to provide the state's school children with an opportunity for a sound basic education, and that the state's school children had a fundamental right to such an opportunity." (citing *Leandro v. State*, 346 N.C. 336, 351, 488 S.E.2d 249, 257 (1997))). The State argues that "the goal of the Career Status Repeal was to address 'adequate' but marginal teachers with career status" as part of a series of reforms intended to improve the deficiencies in the State's public school system.

We fully agree that maintaining the quality of the public school system is an important purpose. Nevertheless, while alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, no evidence indicates that such a problem existed. Instead, the record is replete with affidavits from teachers and administrators who relate that the Career Status Law

did not impede their ability to dismiss teachers who failed to meet the academic standards necessary properly to educate students in public schools. Instead, these affiants indicate that the Career Status Law was an important incentive in recruiting and retaining high-quality teachers. Inadequate teachers could be and were dismissed under the Career Status Law on the statutory grounds laid out in N.C.G.S. § 115C-325(e)(1) (2012), including dismissal for "[i]nadequate performance," defined in the Career Status Law as "(i) the failure to perform at a proficient level on any standard of the evaluation instrument or (ii) otherwise performing in a manner that is below standard," *id.* § 115C-325(e)(3) (2012). Accordingly, we fail to see a legitimate public purpose for which it was necessary substantially to impair the vested contractual rights of career status teachers.

[5] Moreover, even if we conclude that a legitimate public purpose did exist justifying such an impairment, the method adopted for alleviating that harm must be necessary and reasonable. *U.S. Tr. Co.*, 431 U.S. at 25, 97 S. Ct. at 1519, 52 L. Ed. 2d at 112. While we acknowledge that the retroactive repeal was motivated by the General Assembly's valid concern for flexibility in dismissing low-performing teachers, we do not see how repealing career status from those for whom that right had already vested was necessary and reasonable. "[A] State is not free to impose a drastic impairment [of contract] when an evident and more moderate course would serve its purposes equally well." *Id.* at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115. In the record, plaintiffs suggest several alternatives to retroactive repeal of the Career Status Law that would allow school boards more flexibility in dismissing low-quality teachers. The legislature could add additional grounds for dismissal as it did in 1973, *see* Ch. 782, sec. 12, 1973 N.C. Sess. Laws at 1138, in 1979, *see* Ch. 864, sec. 2, 1979 N.C. Sess. Laws at 1188, and in 1992, *see* Ch. 942, sec. 1, 1991 N.C. Sess. Laws (Reg. Sess. 1992) at 730. Or the General Assembly could have refined the definition of "inadequate performance" as it did in 2011. *See* Ch. 348, sec. 1, 2011 N.C. Sess. Laws at 1464. Given the possibility of such less sweeping alternatives for improving teacher quality, "the State has failed to demonstrate" why the retroactive repeal was necessary and reasonable. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S. Ct. at 1522, 52 L. Ed. 2d at 115.

Because we hold the repeal is unconstitutional in its retroactive application based on the Contract Clause of the United States Constitution, we need not address plaintiffs' alternative claim based on Article I, Section 19 of the North Carolina Constitution. Accordingly, we conclude that the retroactive repeal of career status from those teachers who had earned that designation prior to the Career Status Repeal is

unconstitutional. The vested contractual rights of those teachers were substantially impaired without adequate justification, in violation of the Contract Clause of the United States Constitution.

MODIFIED AND AFFIRMED.

DANA MARIE RIBELIN (F/K/A CREEL)
v.
PHILLIP RAY CREEL

No. 112A15

Filed 15 April 2016

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 770 S.E.2d 389 (2015), affirming in part and remanding in part an order entered on 12 November 2013, and remanding an order entered on 24 January 2014, both by Judge Charlie Brown in District Court, Rowan County. On 20 August 2015, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 21 March 2016.

Arlaine Rockey for plaintiff-appellant.

Kip D. Nelson for defendant-appellee.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
RANDY CARTER DAVIS

No. 132PA15

Filed 15 April 2016

Evidence—expert opinion testimony—general characteristics of child sexual assault victims—possible reasons for delayed reporting of allegations—subject to disclosure in discovery in sexual offense prosecution

In defendant's prosecution for sexual offenses perpetrated against two minors, the State failed to satisfy its statutory obligations when it did not produce summaries of its expert witnesses' opinions and the basis for those opinions in response to defendant's discovery requests. Expert testimony about the general characteristics of child sexual assault victims and the possible reasons for delayed reporting of sexual assault allegations constitutes expert opinion testimony, subject to disclosure in discovery under N.C.G.S. § 15A-903(a)(2). The Supreme Court modified and affirmed the decision of the Court of Appeals upholding defendant's conviction because defendant failed to show that there was a reasonable possibility that the jury would have reached a different result absent the erroneously admitted expert opinion testimony.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 903 (2015), finding no error after appeal from judgments entered on 30 September 2013 by Judge Jeffrey P. Hunt in Superior Court, Cleveland County. Heard in the Supreme Court on 22 March 2016.

Roy Cooper, *Attorney General*, *by Robert M. Curran*, *Special Deputy Attorney General*, *for the State.*

Mark Montgomery for defendant-appellant.

HUDSON, Justice.

Here we are asked to determine whether expert testimony about general characteristics of child sexual assault victims and the possible reasons for delayed reporting of such allegations constitutes expert opinion testimony, subject to disclosure in discovery under N.C.G.S.

§ 15A-903(a)(2). We hold that it does, and thus, the State failed to satisfy its statutory obligations when it did not produce summaries of the experts' opinions and the basis for those opinions in response to defendant's discovery requests. However, because we conclude that defendant has failed to carry his burden of showing prejudice, we modify and affirm the decision of the Court of Appeals upholding his convictions.

In September 2013, defendant stood trial for various sexual offenses alleged to have been perpetrated on two minors, G.S. and L.W.[1] The State's evidence at trial tended to show the following: defendant was G.S.'s stepfather and he sexually abused her from the time she was around three-and-a-half years old until she was thirteen years old. At the time of trial, G.S. was thirty-six years old. As an adult, G.S. had nightmares and trouble sleeping, and she was hospitalized in 2006 for suicidal thoughts. She also had problems with alcohol dependency. G.S. never reported the alleged abuse to the authorities until October of 2011, when she was in her mid-thirties; she told her boyfriend when she was sixteen, and when she was in her early thirties, she told her pastor. She also reported the abuse to a psychiatrist, Vikram Shukla, M.D., when she was hospitalized in 2006 and to her therapist, Sandra Chrysler, in March 2013.

Dr. Shukla was tendered as an expert in child and adolescent psychiatry, and Ms. Chrysler as an expert in mental health counseling, both without objection. Both testified to their specific interactions with G.S., but then both also testified more generally regarding the characteristics of child sexual abuse victims and potential reasons for delayed reporting of allegations of abuse.[2] Once the questioning turned more generalized, defense counsel objected to each and every question, citing Evidence Rules 401 through 403, failure to provide discovery per N.C.G.S. § 15A-903(a)(2), and several provisions of the Constitutions of the United States and North Carolina.[3] Defendant had been provided a curriculum vitae for each expert and a medical records summary for G.S., but was not given a summary of any expert opinion testimony or

1. As is our custom and per Appellate Rule 4(e), we use the initials G.S. and L.W. to protect the identity of the victims even though the trial proceedings occurred when they were both adults. N.C. R. App. P. 4(e).

2. The specific testimony about treatment here referred only to G.S.; however, the more general testimony about child abuse victims and delayed reporting could have pertained to both alleged victims.

3. In its order allowing review of this matter, this Court dismissed defendant's Notice of Appeal based on constitutional questions.

the basis for any such opinion. Initially, at the close of voir dire, the trial court ruled that these witnesses would not be allowed to give opinions; however, in front of the jury, defendant's objections were ultimately overruled and the trial court allowed the experts to testify to matters that they had "observed."

The State also presented evidence that L.W. was defendant's stepdaughter (by a different mother; G.S. and L.W. are not biologically related). L.W., who is six months older than G.S., testified that defendant engaged in improper sexual conversations with her and attempted to sexually abuse her from the time she was thirteen or fourteen until she moved out of the house at age seventeen. L.W. never reported the abuse until 2011 when she was contacted by a detective.

Additionally, the State elicited testimony from two other alleged victims under Rule 404(b) of the North Carolina Rules of Evidence. Both girls testified that when they were in their early teens, defendant discussed inappropriate sexual matters with them. The State also called to the stand defendant's pastor, who testified that because of "an accumulated amount" of complaints about defendant and teenage girls, defendant was banned from the church premises.

A jury convicted defendant on all charges and defendant appealed. The Court of Appeals determined that defendant received a fair trial free of reversible error. *State v. Davis*, ___ N.C. App. ___, ___, 768 S.E.2d 903, 913 (2015). While defendant argued that the State had failed to provide discovery as required by N.C.G.S. § 15A-903(a)(2), the court determined on appeal that the expert testimony in question (that of Dr. Shukla and Ms. Chrysler) was not opinion testimony "of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903." *Id.* at ___, 768 S.E.2d at 908. As to Dr. Shukla, the court concluded that he "did not testify that there is a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903." *Id.* at ___, 768 S.E.2d at 908. Similarly, as to Ms. Chrysler, the court "conclude[d] that, because Ms. Chrysler's general testimony about sexual abuse victims was limited to her own observation and experience, it did not constitute an expert opinion that had to be disclosed in advance of trial." *Id.* at ___, 768 S.E.2d at 908.

In the Court of Appeals, defendant raised three issues on which that court declined to grant relief. *Id.* at ___, 768 S.E.2d at 905. He repeated all three in his petitions for discretionary review and for writ of certiorari before this Court:

> 1) whether the trial court erred in admitting the opinion testimony of witnesses Shukla and Chrysler; 2) whether the trial court erred in admitting the testimony of other witnesses who claimed that Mr. Davis made inappropriate comments to them; 3) whether the trial court erred in instructing the jury that the complaining witnesses were "victims."

We allowed review by special order to address only "whether the trial court erred in admitting the opinion testimony of witnesses Shukla and Chrysler."

The Court of Appeals reviewed the issue before us for abuse of discretion. *Id.* at ___, 768 S.E.2d at 907. In our consideration of the one issue on which we allowed review, we note that usually "[d]etermining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court." *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995) (citation omitted). Here, however, the question is one of statutory interpretation which we review de novo:

> Had the trial court found the violation, in its discretion it could have imposed any or all of the statutory sanctions, including the sanction requested by defendant at trial . . . . In that case, our task would have been to determine whether the trial court properly exercised its discretion in the choice of a sanction. *Because the court failed to find the violation, however, and consequently failed to exercise its discretion, the ruling is reviewable. Cf. State v. Brogden*, 334 N.C. 39, 46, 430 S.E.2d 905, 909 (1993) (" 'When the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable.' ")

State v. Patterson, 335 N.C. 437, 455, 439 S.E.2d 578, 588-89 (1994) (emphasis added).

Pursuant to N.C.G.S. § 15A-903(a)(2), "[u]pon motion of the defendant, the [trial] court must order:"

> The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by

> the expert. *The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion.*

N.C.G.S. § 15A-903(a)(2) (2015) (emphasis added). It is well settled that "the purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) (citations omitted), *cert. denied*, 498 U.S. 1092 (1991).

The central question here is whether the State's expert witnesses gave opinion testimony so as to trigger the discovery requirements under section 15A-903(a)(2). The State contends that Dr. Shukla and Ms. Chrysler only testified to facts; defendant asserts that the testimony of both included a number of expert opinions and that he was entitled to receive via discovery summaries of these opinions and their underlying rationales. *Black's Law Dictionary* defines "opinion" as "[a] person's thought, belief, or inference, esp. a witness's view about [ ] facts in dispute, as opposed to personal knowledge of the facts themselves," and "opinion evidence" as "[a] witness's belief, thought, inference, or conclusion concerning a fact or facts." *Opinion*, *opinion evidence*, *Black's Law Dictionary* (10th ed. 2014). According to Evidence Rule 702(a), an expert may give an opinion "[i]f . . . technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," and if the other requirements of Rule 702 apply. N.C.G.S. § 8C-1, Rule 702(a) (2015). In other words, when an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment "to assist" the jury based on his "specialized knowledge," he is rendering an expert opinion.[4] *See id.* We recognize that determining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context. In doing so here, we conclude that both Dr. Shukla and Ms. Chrysler gave expert opinions that should have been disclosed in discovery.

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4. We note that in the lay opinion context, we consider "shorthand statements of fact" or "instantaneous conclusions of the mind" as fact, not opinion. *See*, *e.g.*, *State v. Lloyd*, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) ("The 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, are, legally speaking, matters of fact, and are admissible in evidence."). Nothing in this opinion affects that precedent.

Specifically, both witnesses offered expert opinion testimony about the characteristics of child sexual abuse victims.[5] Dr. Shukla was asked, "[W]hat have you observed in the course of your practice as to some of the manifestations of childhood sexual abuse?" He responded, at length:

> In the course of my practice as a child, adolescent and adult psychiatrist I work with children who have been abused. Then immediately or later on, in months and years, they come back, at any age, and the manifestations of the abused children who are victimized with sexual abuse can go according to the developmental age of the child. If it's a small child who cannot speak and articulate what happened, this child may role play, role play the trauma, role play what was done to the child. They may role play and act like what happened, doing the actual victimization with a sexual motion that the child is not expected to know and it's a very common understanding of all of us.
>
> They may have terrible dreams but not be able to speak about the dreams. If it is a very young child, they may not have much to go with, what happened. The older the child, of understanding age, developmentally the child may be able to say, "Mommy, mommy, Uncle Tom did this to me," and mommy would say, "What happened?" But the patients says [sic], "Uncle Tommy put his wee-wee in me," the child's interpretation of what Uncle Tom did. And I'm not talking about any particular case; I'm not talking about a specific case.
>
> Older children may or may not be able to verbalize what happened, depending on the circumstances of the abuse. The child may be told this is what we're supposed to do, daddy loves you so daddy can do this, so that the child does not understand that it's wrong. The child may not be objecting to it; they may be okay with it and may not have understanding, and then at some point realizes that something is not really right.

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5. In the transcript, one can see a clear turning point at which the testimony of each of these experts pivoted from case-specific testimony to more general views based on experience. In Dr. Shukla's testimony, this occurred at page 315 of the transcript; in Ms. Chrysler's, at page 678.

> They have complaints about depression or problems that may be emerging, depending on how vulnerable the child is to the genetics of trauma. Some children withstand it and go through all right. They will say yeah, it happened, but I'm tough. It happened, I had bad dreams for a month and a day, and I got over it. Others, they are extremely traumatized. They have a mild dose of trauma, it happened one time, I told mom, and mom got rid of the boyfriend, no more problems.
>
> The child will say I remember, I asked a forty-year old woman, she says, "I have not told anybody but you, doctor. Nobody really asked me if I was touched by Uncle Tom. It happened, and my mom, (unintelligible).["] Sometimes the trauma is larger and the genetic vulnerability of the person — it's genetic; we have no control. We have all these other genes, we have no control. Battered women, bad genes, boom.
>
> We have trauma, depression, nightmares, insomnia, flashbacks. Other symptoms may include depression, suicide attempt. What happened, how was your childhood, did anybody touch you in the wrong places, any trauma, if I don't ask they might not tell me, so I have to be very careful with this initial meeting and the follow-up.

Ms. Chrysler testified:

> Q. Ms. Chrysler, can you tell me what are some of your observations with respect to the child abuse victims that you have treated, both adults and children, as to some of the characteristics that they can and tend to exhibit?
>
> . . . .
>
> A. A lot of the characteristics of someone who has been sexually abused or traumatized, in my experience and education, is that this person has an overall lack of trust, views the world as a very scary and dangerous place. It's often seen that there is a lot of anxiety, a lot of anxiousness, sometimes they can slip into a depressed mood, isolating themselves because of that lack of trust and fearfulness of the world. That is something that I've seen in my work with victims of sexual abuse.

Q. Does it tend to make a difference in what you see whether the person experiences that as an adult or a child?

. . . .

A. It's not different in my experience from what I've seen. My education and my experience tells me that both as a child, adolescent and adult the victims of sexual abuse that I have come in contact with exhibit a lot of the same characteristics, that feeling of guilt and shame about what has happened to them. Like I said a minute ago, just that lack of trust, viewing the world as a scary, dangerous place. You know, also just low mood, that is something that's across the board with victims of sexual abuse.

She further testified:

Q Are there any certain – are there any – is there any series or cluster of mental health illnesses or symptoms that you have seen in your practice associated with your patients who have been sexually victimized as children?

. . . .

A. Sexual abuse can be the trigger for all sorts of mental illnesses. Some of the illnesses are hereditary, you know, they're in your genes, you know, you're predisposed to having something like bipolar disorder. Something that happens to you that's traumatizing can bring that out. Typically adults with mental illness, severe mental illness, it generally comes out at college age, you know, in their young twenties. Sometimes victims of sexual abuse, this will begin to manifest in the form of high anxiety, sleeplessness, lack of appetite, depressed mood, isolative (sic) behaviors, and based on that, somebody who is predisposed to mental illness, like bipolar disorder, yeah, the trauma could manifest. The trauma could perpetuate something like that.

This testimony goes beyond the facts of the case and relies on inferences by the experts to reach the conclusion that certain characteristics are common among child sexual assault victims. Although not elicited

by the typical "Doctor, do you have an opinion?" question, it is plainly expert opinion testimony that the witnesses were prepared to give.

Similarly, both experts also offered expert opinion testimony explaining why a child victim might delay reporting abuse. Dr. Shukla testified as follows:

> Q. What is your observation about whether [child sex abuse] is commonly reported immediately, when children experience sexual abuse or trauma, as opposed to later in life?
>
> . . . .
>
> A. The immediate effects of sexual trauma may be developmentally related, so a child of understanding age, — depending on the psycho-socio circumstances, three-year-old, four-year-old, five-year-old, older child, will be able to say something terrible happened, or something happened that makes a person uneasy. If the mother is not paying attention or unwilling to pay attention, then it goes on, and a child may be led to believe that it's normal. Or if you say something, I will kill the whole family, or I will hurt you, or mom will be dead, or some psychological guilt trip.
>
> So the signs and symptoms of immediate trauma can be depression, can be terrible sleep, acute trauma symptoms, psycho-physiological disturbances, anxiety attacks, panicky feelings, panic attacks, the mind goes in these directions, which is exactly where it will go. There is no linear prediction where the mind will function after a serious trauma, and for a child, sexual trauma is a serious trauma.
>
> It could be like serious traumas, life and death experiences, accidents, World War I, soldiers, bombs, everyone's dead, loses his leg, carried to the hospital, starts having nightmares, flashbacks, depression, alcohol, what have you. It will happen with a combination of these signs and symptoms that occur immediately. And sometimes it does not happen; symptoms of numbness can occur. A child may have a serious problem functioning, but that is one of the common things I see is functional loss, where a child is at school,

home, with family or friends, the child is not functioning well academically or be able to verbalize what is wrong. Oh, nothing, I'm fine, may not say anything.

They say years later, may say, only when asked, maybe re-traumatized after twenty years, then the symptoms can begin. When the child who grew us [sic] is a doctor, and the doctor get molested or has to go through a life or death trauma, symptoms can be reactivated. With the mind, we cannot predict what will happen next in this matter.

He continued:

Q. What have you observed about some of the reasons that children don't report child sexual abuse immediately?

. . . .

A. Children who do not report the sexual abuse are under the impression it's what they're supposed to do. They do not have any avenues, don't have the skills to complain about things because of development and age. The developmental age of a child — the younger the age, the child is unaware of something between right and wrong. A child is unaware of what is allowed and wrong. Spanking, normal. When does spanking become abuse and when does touching, changing diapers by a caregiver, turn into some form of improper handling of the genitals, because when you change diapers you . . . clean the diaper, you clean the genitals.

And so a child does not have the mental apparatus, and then in certain families, a child is told to say no and run, but in some families it may be a factor of childhood training when you should say no to some improper physical contact. So physical contact, the child is oblivious of what to say or whether there should be something said, or whether something wrong happened. If it's something the child fails to report, it's a common event, because of the child's development. If it happens to a grownup, that's a different matter. If it happens to a trained child, it's a

different matter. If it happens to a child who shows symptoms, somebody walks into it, the child may still think it was okay, why is mom so upset?

I had a case, an eleven-year-old girl, with uncle having performed improper sexual advances. It turned out that she still felt psychologically guilty, responsible, terrible, for having sexual contact with this uncle, family friend, and presently they're dealing with that case.

Q. What are some of the other reasons you've observed why children don't report when things like that happen, if they're old enough to understand that it's wrong?

. . . .

A. The other reasons where children who are understanding to report, it depends on the perpetrator and the person, the child, the victim. And that may be bribing or giving gifts, what the child wants to do, giving permission to be out late. A child, a teenager, usually it's a girl, but really sometimes boys are also sexually abused, and this abuse is not verbalized by these individuals because of shock, disbelief, or they're just understanding that this is a way of expressing love. The threat of killing the mom, killing the whole family, say this and it will be really bad, you'll never see your mom again.

These are some of the reasons why teenaged girls, for example, or older child, seven to eleven years, arbitrarily will think I'm not supposed to talk to mom, mom will be upset, and sometimes they try to talk and mom says you are a liar. Sometimes they talk to a primary care giver, which you only have two, your mom and your dad, nobody else, stepfather, boyfriend, mom, stepfather, foster families. I work with these families, victims coming from these families. There's nobody to listen to [sic]. Who are you going to turn to if your family does not help? It's like if you go to the police and the police do not help. It's a problem. Who are you going to talk to? So the child

does not have ways; that's the reason they don't talk. If they talk and they're discredited, their credibility is undermined.

Ms. Chrysler testified:

Q. What about reporting that abuse? What is your observation and your experience with whether abuse victims tend to report right away, and is there any difference between children and adults in that?

. . . .

A. There's extensive documentation, research, also in my experience, that sexual abuse is not typically reported right away for a lot of different reasons, being afraid that no one will believe them, being fearful of the repercussions after they've told on the person that's perpetrated the crime on them. In fact, I read recently that it's one-third of all sexually abused children in cases, only one-third of incidents were reported, which means that two-thirds of these children out there never feel comfortable, never feel safe enough to share what's happened to them. And so for a lot of reasons, — should I keep going? It's for a lot of reasons that they don't tell. The primary reason is the one I just mentioned earlier about the classic signs of someone who's been abused are, feeling as though the world is a dangerous place, that no one is going to believe them, the guilt and the shame that's been instilled in them for the length of time that they've been sexually victimized. Children oftentimes go through a grooming period with their perpetrator, will groom them to keep a secret, and not sharing the secret, and the consequences of the secret. And any kind of resistance that the child gives them is met with coercion or met with threats about their own safety, about the safety of their own family members. A lot of them are taught to keep the secret at all costs. And for children, it's fairly simple: they believe what adults tell them, especially the younger than six-year-olds, kids that I've seen, they're going to believe what's told them. Nobody's going to believe you if you say that; that's something that they will believe.

Q. What about teenagers?

. . . .

A. Teenagers as well. I don't remember what the exact statistics are, but generally it's over a year. I think it was something like seventy-eight percent of people tell –

. . . .

Typically children are going to be telling right away. Teenagers was the question; teenagers as well are conditioned by a perpetrator not to feel comfortable talking about what's happened to them. They're a little bit more difficult to predict, I think. They will, I think for teenagers in my experience and education, eventually come forward. Like I said, one-third of sexually victimized children and adolescents come forward.

. . . .

Basically what I'm trying to say is it just depends, and typically they don't come forward at all.

. . . .

Q. What are some of the reasons, in your experience, that people do not come forward?

. . . .

A. Typically children and adolescents don't come forward for very many different reasons. One of the most common, though, is the guilt and the shame that they feel. That's the primary reason why a lot of them come to therapy, because they're taught to believe that this is their fault. A lot of them have been groomed, conditioned by the sexual perpetrator, that they are not allowed, can't come forward because of a lot of different reasons. But the main reason is fear.

Again, like the testimony regarding general characteristics of child sexual abuse victims, the experts here drew inferences and gave opinions explaining that these other unnamed patients of theirs had been abuse victims and delayed reporting the abuse for various reasons. These views presuppose (*i.e.*, opine) that the other children the expert witnesses

observed had actually been abused. These are not factual observations; they are expert opinions.

The State would have us limit the definition of discoverable "opinion" to that which reaches an ultimate issue: Was the victim sexually assaulted or does she exhibit the "profile" or characteristics of someone who has been sexually assaulted? This definition is far narrower than contemplated by our evidence rules and discovery statutes. As noted above, an expert can, and did here, offer opinions about typical characteristics of child sexual abuse victims.

Early in the trial, after voir dire of Dr. Shukla, the trial court ruled that proposed testimony "about the general characteristics of child sexual abuse and delayed reporting" "should have been given to defendant [in discovery]" and that the witnesses should not offer such opinions. In response to the trial court's ruling, the State framed the questions as "observations." As shown below, it took the State three attempts to phrase such a question in a manner that the trial court would allow:

> Q. Dr. Shukla, what are some of the reasons that children don't report sexual abuse immediately?
>
> [DEFENSE COUNSEL]: Objection. Same basis.
>
> THE COURT: Sustained.
>
> Q. In your experience, --
>
> [DEFENSE COUNSEL]: Objection. Same basis.
>
> THE COURT: Sustained.
>
> Q. What have you observed about some of the reasons that children don't report sexual abuse immediately?
>
> [DEFENSE COUNSEL]: Objection. Same basis.
>
> THE COURT: Overruled.

The trial court overruled defendant's final objection to that line of questioning and permitted that testimony to proceed. We conclude that, regardless of phrasing, the questions posed by the State and Dr. Shukla's answers to these questions elicited opinions based on his expertise.

Later during the testimony of Dr. Shukla, after a number of such questions, the trial court appears to have ultimately found that the curriculum vitae of each witness was sufficient to satisfy the discovery statute:

> Please let the record show, in the absence of the jury, relative to Dr. Shukla's testimony, the Court finds that he was accepted without objection as an expert in the field of child, adolescent and adult psychiatry, and was the treating psychiatrist of [G.S.] in 2006, that Dr. Shukla has treated perhaps a thousand child patients that either were or reported that they were victims of sex abuse, that at least approximately thirty days ago the State provided discovery, including Dr. Shukla's medical records, relating to the complainant in this case, and that pursuant to 15A-903, the State provided, in the Court's opinion, adequate notice to the Defendant of its intent to offer Dr. Shukla's testimony as an expert by providing his extensive resume or curriculum vitae, I think is the language of the statute.
>
> Therefore, the Court concludes that the Defendant was not surprised within the meaning of the case law in North Carolina, and that the expert testimony of Dr. Shukla is clearly helpful in instructing to the jury, outweighing any potential for prejudice in that regard to the Defendant.

The Court of Appeals concluded that Dr. Shukla did not testify to "a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed [in discovery]." *Davis*, ___ N.C. App. at ___, 768 S.E.2d at 908. The Court of Appeals reached similar conclusions regarding Ms. Chrysler's testimony, finally holding that "neither [witness] offered an expert opinion that there exists a 'profile' " with which G.S.'s characteristics were consistent. *Id.* at ___, 768 S.E.2d at 908.

In essentially agreeing with the State that these witnesses' opinions need not have been disclosed in discovery unless they included an opinion that G.S. exhibited characteristics consistent with a "profile" of a child abuse victim, the Court of Appeals erred. *Id.* at ___, 768 S.E.2d at 908. We do not agree that an "opinion" is so narrowly defined. Instead, we hold that the testimony at issue did include expert opinions that should have been disclosed previously. Accordingly, we hold that the State failed to comply with N.C.G.S. § 15A-903(a)(2) when responding to defendant's motion for discovery by failing to turn over all the information required by that statute.

Moreover, we conclude that the curricula vitae were not sufficient to prevent "unfair surprise." *See Payne*, 327 N.C. at 202, 394 S.E.2d at 162. The curricula vitae and medical records made it clear to defendant that each witness was going to testify as an expert about his or her own treatment of the victim G.S. (and presumably, the allegations of abuse she reported to them), but there was nothing to alert defendant that the witnesses would give opinions about child sexual abuse victims in general and no preview of what those opinions would be. Had such information been turned over in discovery, defendant would have been able to prepare a possible defense or counterpoint to the expert opinion testimony offered by the State.

Having found error in our de novo review, we now must determine if the error was prejudicial to defendant. Because this was a statutory error, we apply the standard found in N.C.G.S. § 15A-1443(a) (2015):

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

After careful consideration of all the evidence here, we hold that defendant did not meet his burden of showing a reasonable possibility that, absent the expert opinion testimony, the jury would have reached a different result. First, the expert opinion testimony was elicited specifically in relation to G.S.'s reporting, symptoms, and care; L.W. was not the focus of the expert testimony. Second, as to G.S., although the main issue in this case was her credibility, and the expert opinion testimony could factor into a credibility determination, the record reveals overwhelming evidence corroborating her testimony.[6] During her testimony, G.S. reported being sexually abused by defendant when she was between the ages of three-and-a-half and thirteen. She testified that she was forced to

6. To the extent that the expert opinion testimony related to the charges involving L.W. as well, defendant failed to meet his burden of showing prejudice under N.C.G.S. § 15A-1443(a) in these convictions as well. In light of the corroborating evidence, we do not see a reasonable possibility that the jury would have reached a different result regarding the alleged abuse of L.W.

perform oral sex on defendant, and that she had memories of him being in the bath with her as a young girl and touching her inappropriately and forcing her to touch his penis, and of him performing oral sex on her. She also testified that defendant vaginally raped her when she was twelve years old. She testified that she first told her then-boyfriend (now husband) about these events when she was sixteen. She further testified that she told Dr. Shukla about what happened when she was admitted to the hospital for suicidal thoughts in 2006 and that she reported the abuse to Ms. Chrysler when she started seeing her for counseling in 2013.

All of this testimony was corroborated in several ways. First, G.S.'s testimony matched the statement she gave to the police when she first reported the abuse in October 2011. Second, she consistently reported abuse by defendant to Dr. Shukla, her pastor, her husband, and Ms. Chrysler. Third, and importantly, the testimony of L.W., the testimony of the other two Rule 404(b) witnesses, and the testimony of the pastor painted similar pictures of defendant's practice of sexually abusing young girls with whom he had established a trusting relationship. A.J.,[7] one of the Rule 404(b) witnesses, testified that defendant, who was like a grandfather to her, talked to her about sex when she was thirteen years old and instructed her on how to perform certain sex acts. S.W., a second Rule 404(b) witness, testified that defendant was the youth director at her church when she was a teenager and that defendant would initiate sexual conversations and ask her about her sexual interactions with her boyfriend. S.W.'s testimony was corroborated by a friend to whom she had talked about some of defendant's behavior at the time it was happening, by her uncle to whom she had also spoken, and by the pastor at the church. The pastor testified that defendant was banned from church property because of a "gathering of things," including the allegations made by S.W.

Given all the above evidence, we conclude that defendant has failed to show that, absent the expert opinion testimony (as to the generalized characteristics of child sexual abuse victims and reasons for delayed reporting), there is a reasonable possibility that the jury would have reached a different result. We are mindful, though, of the wise words of the Court of Appeals in *State v. Moncree*: "Although we determine defendant was not prejudiced, we note the State should comply with statutory discovery requirements. District attorneys are elected public officials, and therefore North Carolina citizens trust the people who serve as district attorneys." 188 N.C. App. 221, 227, 655 S.E.2d 464, 468 (2008).

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7. Again, we use initials to protect the identity of the victims. N.C. R. App. P. 4(e).

Accordingly, for the reasons stated above the decision of the Court of Appeals upholding defendant's convictions is modified and affirmed. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to those matters remains undisturbed.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
DEMARIO LAMONT SNEAD

No. 90PA15

Filed 15 April 2016

1. Evidence—authentication—video surveillance

The Court of Appeals erred by reversing defendant's conviction for felony larceny based on a video showing defendant stealing shirts from a Belk Department Store. By presenting evidence that the video surveillance system was reliable and that the video presented at trial had not been altered, the State properly authenticated the video.

2. Appeal and Error—preservation of issues—failure to timely object

Defendant failed to make a timely objection in a felony larceny case to a witness's testimony regarding the video surveillance, and thus, he failed to preserve that issue for appellate review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 768 S.E.2d 344 (2015), finding no error in part, affirming in part, and vacating and remanding for entry of judgment and resentencing in part, judgments entered on 13 March 2014 by Judge Christopher W. Bragg in Superior Court, Cabarrus County. Heard in the Supreme Court on 15 February 2016.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

C. Scott Holmes for defendant-appellee.

NEWBY, Justice.

This case is about whether the State properly authenticated a surveillance video showing defendant stealing shirts from a Belk Department Store (Belk) and whether a witness's lay opinion testimony based on that video was admissible. By presenting evidence that the video surveillance system was reliable and that the video presented at trial had not been altered, the State properly authenticated the video. Moreover, because defendant failed to make a timely objection to the witness's testimony, he failed to preserve that issue for appellate review. Accordingly, we reverse the decision of the Court of Appeals on those issues.

Defendant was indicted for felony larceny and conspiracy to commit felony larceny after he and another man stole shirts from Belk. The indictment alleged that on 1 February 2013, defendant stole and conspired to steal "clothing including but not limited to Ralph Lauren Polo shirts" worth more than one thousand dollars. *See* N.C.G.S. §§ 14-2.4, -72(a) (2015). Belk's surveillance system captured the theft on video, and defendant admitted that he committed the act depicted therein. The only contested issue at trial was the value and quantity of the stolen shirts. Specifically, the State argued that defendant stole twenty to thirty Ralph Lauren shirts worth more than one thousand dollars, while defendant claimed he only stole seven, non-brand-name shirts worth less than one thousand dollars.

At trial the State called Toby Steckler, a regional loss prevention manager for Belk, to authenticate the surveillance video for admission into evidence and to offer his opinion about the contents of the video. Steckler testified that he was familiar with how Belk's video surveillance system works. He testified that the Belk store in question operates surveillance cameras connected to a digital video recorder, which stores between thirty and sixty days of video. The video recorder is "industry standard" and has safeguards to prevent tampering, including a watermark and a time and date stamp. When an incident occurs in the store, such as a theft, it is "common business practice" for Belk to copy the video from the digital video recorder to a compact disc (CD). Steckler testified that on 1 February 2013, the digital video recorder captured a person later identified as defendant and another man stealing shirts from Belk. Steckler viewed the incident after the fact on the digital video recorder, and he later reviewed the incident after it was burned onto a CD. Steckler testified that the video copied to the CD and presented as evidence at trial was the same as that on the digital video recorder.

Defendant objected to introduction of the video into evidence, arguing the State failed to properly authenticate it. Outside the presence of the jury, defense counsel argued that because Steckler was not at

Belk on the date of the theft, he could not properly testify that the video "captured fairly and accurately what occurred on that date." The trial court overruled defendant's objection. Before the jury returned to the courtroom, however, the State played the video, which showed defendant grabbing stacks of shirts from a table while a second man grabbed sweatshirts hanging on a rack. The video also showed both men run out of the store with the merchandise and jump into a vehicle, driven by a third person. At the conclusion of the video, defendant stated that he had no further objections to admission of the video.

Before the jury returned to the courtroom, defendant objected to any testimony by Steckler regarding the value of the stolen shirts, arguing that this information had not been provided in discovery and was not based on Steckler's personal knowledge. During voire dire, Steckler testified that he knew defendant stole Ralph Lauren Polo shirts because the shirts were located in the Ralph Lauren section of the store and the table from which defendant took shirts was specifically designated for Ralph Lauren Polo shirts. Steckler further testified that although he did not know specifically what was on the table on 1 February 2013, or the exact quantity of shirts that were stolen, he estimated that defendant stole twenty to thirty shirts based on the fact that Ralph Lauren typically requires Belk to pile six to eight shirts per stack and defendant took multiple stacks of shirts.

The trial court ruled that Steckler could not testify that the shirts on the table were Ralph Lauren shirts, but he could testify that the shirts were located in the Ralph Lauren Polo section of the store, that if they were Ralph Lauren Polo shirts, they would have been stacked a certain way to meet Ralph Lauren's standards, and that Ralph Lauren Polo shirts were priced at "X number of dollars" on 1 February 2013.

The jury then returned to the courtroom and the State played the video. Steckler testified that "[y]ou can see [defendant] stacking shirts" while "the other gentleman grab[s] the armful of sweatshirts." Steckler testified that he is "familiar with the merchandise" in Belk stores and that both the table and the rack of sweatshirts were located in the Ralph Lauren Polo section. He explained that Ralph Lauren Polo shirts are uniformly folded in a specific fashion and are stacked six to eight shirts per pile. Based on the video, Steckler estimated that defendant stole twenty to thirty polo shirts and that the second man stole five to eight sweatshirts. According to Steckler's testimony, on 1 February 2013, the fair market value of one Ralph Lauren Polo shirt was between eighty-five and eighty-nine dollars and fifty cents, and the value of each sweatshirt was ninety-five dollars. Defendant did not object to Steckler's estimate

of the value or number of shirts stolen at the time the State elicited this testimony before the jury. The jury convicted defendant of felony larceny and conspiracy to commit felony larceny.

In a unanimous opinion, the Court of Appeals held, *inter alia*, that the trial court erred by admitting the video of defendant shoplifting because the video was not properly authenticated, *State v. Snead*, ___ N.C. App. ___, ___, 768 S.E.2d 344, 347 (2015), and abused its discretion by admitting Steckler's estimate of the value of the stolen shirts because the testimony was not based on Steckler's firsthand knowledge or perception, *id.* at ___, 768 S.E.2d at 349-50. The Court of Appeals concluded that these errors were prejudicial because the State presented no other evidence to establish that the value of the stolen property exceeded one thousand dollars. *Id.* at ___, 768 S.E.2d at 348-50.[1] Accordingly, the Court of Appeals vacated defendant's conviction for felony larceny and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny.[2] *Id.* at ___, 768 S.E.2d at 350. We allowed the State's petition for discretionary review.

[1] We agree with the State that Steckler's testimony was sufficient to authenticate the surveillance video under North Carolina Rule of Evidence 901. Rule 901(a) requires that evidence be authenticated by showing "that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2015). Rule 901(b) lists ten examples of authentication that meet the requirements of subsection (a). *Id.*, Rule 901(b) (2015). "Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process" under Rule 901(b)(9). 2 Kenneth S. Broun et al., *McCormick on Evidence* § 216, at 39-40 (7th ed. 2013).[3] Evidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence. *See* N.C.G.S. § 8-97 (2015); *see also State v. Campbell*, 311 N.C.

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1. The Court of Appeals also found no error in defendant's conviction for conspiracy to commit felony larceny and affirmed his conviction of having attained habitual felon status. *Snead*, ___ N.C. App. at ___, 768 S.E.2d at 351. These matters are not before this Court.

2. The State and defendant agree that the Court of Appeals ordered the wrong remedy. Because we conclude that the trial court did not err in admitting the video or lay opinion testimony, however, we need not reach that issue.

3. *McCormick on Evidence* refers to Federal Rule of Evidence 901; however, North Carolina Rule of Evidence 901 "is identical to [the federal rule] except that in [subdivision (b)(10)] the word 'statute' is inserted in lieu of the phrase 'Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.' " N.C.G.S § 8C-1, Rule 901 cmt. (2015).

386, 388, 317 S.E.2d 391, 392 (1984) ("[R]eal evidence is properly received into evidence" if it is "identified as being the same object involved in the incident and it [is] shown that the object has undergone no material change."); *State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E.2d 626, 627 (1982) ("If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." (quoting Edward W. Cleary et al., *McCormick on Evidence* § 212 (2d ed. 1972))), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983); *United States v. Pinke*, 614 F. App'x 651, 653 (4th Cir. 2015) (per curiam) (concluding that a witness's explanation of "the manner in which the . . . video system operates, the means by which he obtained the video, and that he downloaded it onto the DVD that was played for the jury" was sufficient to authenticate the video).

"A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392; *Kistle*, 59 N.C. App. at 726, 297 S.E.2d at 627 ("[T]he State need not establish a complete chain of custody [when a] witness who had inspected the film immediately after processing testified that the photographs introduced at trial were the same as those he had inspected immediately after processing."); *accord United States v. Van Sach*, No. 1:09CR03, 2009 WL 3232989, at *3 (N.D. W. Va. Oct. 1, 2009) (unpublished order) ("Establishing a formal chain of custody of evidence is no longer required [to support a finding that evidence is authentic]. Rather, it is sufficient for the party offering the [videotape] simply to satisfy the trial court that the item is what it purports to be and has not been altered." (citation omitted)). "[A]ny weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392 (citations omitted).

Given that defendant freely admitted that he is one of the two people seen in the video stealing shirts and that he in fact stole the shirts, he offered the trial court no reason to doubt the reliability or accuracy of the footage contained in the video. Regardless, Steckler's testimony was sufficient to authenticate the video under Rule 901. Steckler established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced

by the surveillance system contain safeguards to prevent tampering. Moreover, Steckler established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Steckler's testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

[2] Furthermore, we agree with the State that defendant failed to preserve the issue of whether Steckler's estimate of the value of the stolen shirts was admissible lay opinion testimony. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' " *State v. Ray*, 364 N.C. 272, 277 & n.1, 697 S.E.2d 319, 322 & n.1 (2010) (quoting and discussing *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000) (emphasis omitted), *cert. denied*, 531 U.S. 1155 (2001)). An objection made "only during a hearing out of the jury's presence prior to the actual introduction of the testimony" is insufficient. *Id.* at 277, 697 S.E.2d at 322 (citing *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806); *State v. Brent*, 367 N.C. 73, 76, 743 S.E.2d 152, 154 (2013) (same); *accord State v. Gladden*, 315 N.C. 398, 414, 340 S.E.2d 673, 684 ("[A] defendant is not entitled to relief where there was no objection made *at the time the evidence was offered*." (citation omitted)), *cert. denied*, 479 U.S. 871 (1986).

Here defendant objected to testimony related to the value of the shirts only outside the presence of the jury. He did not subsequently object when the State elicited Steckler's testimony before the jury. Therefore, defendant failed to preserve the alleged error for appellate review, and "the Court of Appeals erred by reaching the merits of defendant's arguments on this issue." *Ray*, 364 N.C. at 278, 697 S.E.2d at 322.

Because the State properly authenticated the surveillance video under Rule 901 and defendant failed to make a timely objection to Steckler's lay opinion testimony, the trial court did not err in admitting either at trial. Accordingly, we reverse the decision of the Court of Appeals on those issues and instruct that court to reinstate defendant's conviction for felony larceny and the trial court's resulting judgment thereon. The remaining issues addressed by the Court of Appeals are not before this Court, and its decision as to these matters remains undisturbed.

REVERSED.

O'NEAL v. INLINE FLUID POWER, INC.

[368 N.C. 817 (2016)]

RICHARD O'NEAL, EMPLOYEE	)	
v.	)	
INLINE FLUID POWER, INC. & AUTOMOTIVE PARTS CO., INC., EMPLOYER	)	N.C. INDUSTRIAL COMMISSION
AND	)	
AUTO OWNERS INSURANCE COMPANY, CARRIER	)	

No. 261PA15

ORDER

Upon consideration of the Plaintiff's Petition for Discretionary Review, the Plaintiff's Petition for Discretionary Review is allowed as to issue number two only. The petition is denied as to any remaining issues. Further, Plaintiff's Motion to Amend Petition for Discretionary Review is allowed; Plaintiff's Motion to Strike Response to Motion to Amend Petition for Discretionary Review is denied.

By order of this Court in Conference, this 13th day of April, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of April, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

13 APRIL 2016

013P16	Landover Homeowners Association, Inc. v. Thomas B. Sanders; Anna B. Sanders; Sanders Equipment Company, Inc.; and Sanders Development	1. Defs' Motion for Temporary Stay (COA14-1337) 2. Defs' Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/15/2016** Dissolved **04/13/2016** 2. Denied 3. Denied
016P16	Maurice Antonio Burris v. Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles	1. Petitioner's Motion for Temporary Stay (COA15-312) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent's Motion to Strike Appendix to PDR	1. Allowed **01/20/2016** Dissolved **04/13/2016** 2. Denied 3. Denied 4. Dismissed as moot
027P16	State v. Keyshawn Jones	1. State's Motion for Temporary Stay (COA15-804) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/26/2016** 2. Allowed 3. Allowed
030P16	State v. Ryan Patrick Hare	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-808)	Denied
032A16	Orban, et al. v. Pike Corporation, et al.	Def's (Pike Corporation) Consent Motion to Withdraw and Dismiss Appeals	Allowed **03/29/2016**
035PA12-2	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 (COA14-1351) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **01/06/2016** Dissolved **04/13/2016** 2. Denied 3. Denied
036P16	State v. James Anthony Barnett, Jr.	1. State's Motion for Temporary Stay (COA15-200) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/05/2016** 2. Allowed 3. Allowed

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

13 APRIL 2016

044P16	Jeffrey J. Johnson and wife, Donna N. Johnson, and Gary A. Proffitt and wife, Betty Jo Proffitt v. Starboard Association, Inc., A North Carolina non-profit Corporation, John McGuirt, Charles Adams, Eric O'Brian, William Carter, Helen Bunch, Syd Schenk, Cathy Moss, Bud Ayers, Betty Graham, Darryl Rice, individually and as Members of the Board of Directors of Starboard Association, Inc., and Abbot Enterprises, Inc., A North Carolina corporation	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-457)	Denied
056P16	State v. Willie Hubert DuBoise	Def's PDR Under N.C.G.S. § 7A-31 (COA15-852)	Denied
059P16	State v. Gary Roger Thomson	Def's PDR Under N.C.G.S. § 7A-31 (COA15-390)	Denied
060P16	North Carolina Department of Public Safety v. Kenneth Shields	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-154)	Denied
061P16	State v. Carlton Washington Tomlinson	1. Def's Motion for Temporary Stay (COA15-585) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/25/2016** Dissolved **04/13/2016** 2. Denied 3. Denied
065P16	State v. Jerome Shaw, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA15-573)	Denied

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

13 APRIL 2016

073P16 074P16 075P16	American Mechanical, Inc. v. Jeffrey L. Bostic, Michael Hartnett, and Joseph E. Bostic, Jr. --- Yates Construction Company, Inc. v. Jeffrey L. Bostic, Michael Hartnett, and Joseph E. Bostic, Jr. --- Phillips and Jordan, Inc. v. Jeffrey L. Bostic, Michael Hartnett, and Joseph E. Bostic, Jr.	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-385; COA15-422; COA15-525)	Denied
076A16	Daniel and Lisa Holt, Administrators of the Estate of Hunter Daniel Holt; Steven Grier Price, Individually; Steven Grier Price, Administrator of the Estate of McAllister Grier Furr Price; Steven Grier Price, Administrator of the Estate of Cynthia Jean Furr v. North Carolina Department of Transportation	1. Plts' Motion to Dismiss Appeal 2. Plts' Motion to Withdraw Motion to Dismiss Appeal	1. --- 2. Allowed
080P16	State v. Raul Oliveros	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA15-411) 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
082P16	State v. Larry J. Edwards	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Orange 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 **Ervin, J., recused**

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

13 APRIL 2016

083P04-2	State v. Philip Ray Dawkins	1. Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP14-945) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court Stanly County 3. Def's Motion to Hold Petition for *Writ of Certiorari* in Abeyance	1. Dismissed 2. Dismissed 3. Dismissed as moot
084A16	Faires, et al. v. State Board of Elections, et al.	John V. Orth's Motion for Leave to File Amicus Brief	Allowed **03/30/2016** **Edmunds, J. recused**
092P16	State v. Ray Charles Strickland	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied
102P13-3	State v. Charles Anthony Ball	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
109P16	State v. Curtis Joel Smith	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-545)	Denied **03/30/2016**
113P16	State v. Austin Lynn Miller	1. State's Motion for Temporary Stay (COA15-636) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/31/2016** 2. 3. 4.
125P16	State v. Mark Wayne Ballard	1. Def's *Pro Se* Motion for Leave of the Court to File Notice of Appeal (COAP15-832) 2. Def's *Pro Se* Motion for Extension of Time to File Notice of Appeal 3. Def's *Pro Se* Motion for Equitable Tolling 4. Def's *Pro Se* Motion to Stay 5. Def's *Pro Se* Motion for Appointment of Counsel	1. 2. 3. 4. Dismissed **04/06/2016** 5.
131P16	State v. Somchoi Noonsob	1. Def's *Pro Se* Motion for Appropriate Relief/Release (COAP16-103) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **04/13/2016** 2. Allowed **04/13/2016**

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

13 APRIL 2016

132A16	State v. Calvin Sherwood Watts	1. State's Motion for Temporary Stay (COA15-358) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **04/13/2016** 2. Allowed **04/13/2016**
234P05-3	State v. Gregory Allen Gant	Petitioner's *Pro Se* Motion for PDR (COAP16-157)	Denied **03/31/2016**
241P11-5	State v. Delton Maynor	Def's *Pro Se* Motion for PDR of *Writ of Certiorari* (COAP15-396)	Dismissed
261P15	Richard O'Neal, Employee v. Inline Fluid Power, Inc. & Automotive Parts Co., Inc., Employer and Auto Owners Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1144) 2. Plt's Motion to Amend PDR 3. Plt's Motion to Strike Response to Motion to Amend PDR	1. Special Order 2. Special Order 3. Special Order
272A14	State v. Jonathan Douglas Richardson (DEATH)	Def's Motion Regarding Sealed Transcript	Allowed
276P15	In the Matter of the Foreclosure by Rogers Townsend & Thomas, PC, Substitute Trustee of a Deed of Trust Executed by Julia Weskett Beasley, dated February 12, 2007 and recorded on February 16, 2007 in Book No. 1211 at Page 169 of the Carteret County Registry, North Carolina	Respondent's (Julia Weskett Beasley) PDR Under N.C.G.S. § 7A-31 (COA14-387)	Allowed
300P15	Edward Battle, Jr., Employee v. Meadowbrook Meat Company, Inc., Employer, Self-Insured (Sedgwick Claims Management Services, Inc., Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA14-1059) 2. Plt's Motion to Withdraw Petition for Discretionary Review	1. --- 2. Allowed

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

13 APRIL 2016

311P15	State v. Thedford Roy Rorie, Jr.	1. State's Motion for Temporary Stay (COA14-886) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/08/2015** Dissolved **04/13/2016** 2. Denied 3. Denied
354P15-2	Christopher Mosby v. John Ingram, Sheriff, et al.	1. Petitioner's *Pro Se* Motion for Notice of Appeal of Civil Contempt 2. Petitioner's *Pro Se* Motion for Petition for Appellate Review (COAP15-597)	1. Denied 2. Denied
368P15	Johnnie Wilkes, Employee v. City of Greenville, Employer, Self-Insured (PMA Management Group, Third-Party Administrator)	1. Def's Motion for Temporary Stay (COA14-1193) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. N.C. Association of Self-Insurers, N.C. Association of County Commissioners, N.C. League of Municipalities, and N.C. School Boards Association's Motion for Leave to File *Amicus* Brief 5. N.C. Association of Defense Attorneys, N.C. Chamber, N.C. Retail Merchants Association, and N.C. Home Builders Association's Conditional Motion for Leave to File *Amicus*	1. Allowed **11/12/2015** 2. Allowed 3. Allowed 4. Allowed 5. Allowed
376A15	Paramount Rx, Inc. v. Robert E. Duggan and Agelity, Inc.	1. Plt's Joint Motion to Lift Stay 2. Plt's Joint Motion to Dismiss Appeal	1. Allowed **04/01/2016** 2. Allowed **04/01/2016**
390P15	The Residences at Biltmore Condominium Owners' Association, Inc. v. Power Development, LLC and Mountain Mortgage, Inc.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA14-1222) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
402P11-7	State v. Sylvester Eugene Harding, III	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Petition for *Writ of Mandamus* and/or Prohibition	1. Denied **04/01/2016** 2. Denied **04/01/2016**

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

13 APRIL 2016

402P11-8	State v. Sylvester Eugene Harding, III	1. Def's *Pro Se* Motion for Petition for Extraordinary Writ as to the All Writ Act of 1789 2. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Def's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed **04/13/2016** 2. Denied **04/13/2016** 3. Dismissed **04/13/2016**
402P15	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414) 2. State's Motion to Strike Def's Reply to State's Response 3. Def's Motion to Hold PDR in Abeyance 4. Def's Motion for Temporary Stay 5. Def's Petition for *Writ of Supersedeas*	1. 2. 3. Allowed **04/13/2016** 4. Allowed **12/17/2015** 5.
409P15	Gregory P. Nies and Diane S. Nies v. Town of Emerald Isle, a North Carolina Municipality	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA15-169) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Admit J. David Breemer *Pro Hac Vice* 4. Def's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed 4. Allowed
415P15	State v. Jamie Rieson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court of Rockingham 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
426P15	State v. Andrew Clayton Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-322) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
465A06-3	State v. Ryan Gabriel Garcell (DEATH)	1. Def's Motion to Hold in Abeyance the Time in Which to File Petition for *Writ of Certiorari* 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court of Rutherford County	1. Dismissed as moot **04/13/2016** 2.

FAIRES v. STATE BD. OF ELECTIONS

[368 N.C. 825 (2016)]

SABRA FAIRES, BENNETT LITTLE COTTEN, AND DIANE P. LAHTI
v.
STATE BOARD OF ELECTIONS; A. GRANT WHITNEY, JR., CHAIR, AND RHONDA K. AMOROSO, JOSHUA D. MALCOLM, MAJA KRICKER, AND JAMES L. BAKER, MEMBERS OF THE STATE BOARD, IN THEIR OFFICIAL CAPACITIES ONLY; AND KIM WESTBROOK STRACH, EXECUTIVE DIRECTOR OF THE STATE BOARD, IN HER OFFICIAL CAPACITY ONLY

No. 84A16

Filed 6 May 2016

Appeal pursuant to N.C.G.S. § 7A-27(a1) from a judgment entered on 4 March 2016 by a three-judge panel of the Superior Court, Wake County, appointed by the Chief Justice under N.C.G.S. § 1-267.1. Heard in the Supreme Court on 13 April 2016.

Tharrington Smith, LLP, by Michael Crowell, Deborah Stagner, Stephen Rawson, and Neal Ramee, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General; Elizabeth A. Fisher, Assistant Solicitor General; Alexander McC. Peters, Senior Deputy Attorney General; and Melissa L. Trippe, Special Deputy Attorney General, for defendant-appellants.

Graebe, Hanna & Sullivan PLLC, by Mark R. Sigmon; American Civil Liberties Union of North Carolina Legal Foundation, by Christopher Brook and Jenifer Wolfe; and Civitas Institute, Center for Law and Freedom, by Elliot Engstrom, for American Civil Liberties Union of North Carolina Legal Foundation and Civitas Institute, Center for Law and Freedom, amici curiae.

John V. Orth, pro se, amicus curiae.

PER CURIAM.

Justice EDMUNDS 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 judgment of the three-judge panel of the Superior Court, Wake County. Accordingly, the judgment of the three-judge panel of the Superior Court, Wake County is left undisturbed and stands without precedential value. *See, e.g.*, *State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam); *State v. Greene*, 298 N.C. 268, 258 S.E.2d 71 (1979) (per curiam).

AFFIRMED.

STEVEN CRAIG HERNDON
v.
ALISON KINGREY HERNDON

No. 363A15

Filed 10 June 2016

1. Constitutional Law—right against self-incrimination—not invoked—voluntary witness

The trial court did not infringe upon defendant's Fifth Amendment right against self-incrimination in a Domestic Violence Protective Order proceeding where defendant did not invoke the privilege against self-incrimination and defendant was in control of her testimony by virtue of her decision to take the stand. The right against self-incrimination operates differently depending on whether a witness is compelled to testify or testifies voluntarily. A voluntary witness cannot claim an immunity from cross-examination on the matters he has himself put in dispute.

2. Appeal and Error—preservation of issues—no objections—compelled self-incrimination

North Carolina Rules of Evidence Rule 614(c) provides that "[n]o objections are necessary with respect to . . . questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." This rule operates to preserve for appellate review the impropriety of a trial court's interrogation of a witness even if a party does not object. It does not apply when, as here, a party argues that the trial court's inquiry infringed upon a litigant's privilege against compelled self-incrimination.

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. ___, 777 S.E.2d 141 (2015), vacating an order entered on 10 September 2014 by Judge Doretta L. Walker in District Court, Durham County, and remanding for further proceedings. Heard in the Supreme Court on 17 February 2016.

Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for plaintiff-appellant.

Tharrington Smith, LLP, by Jill Schnabel Jackson and Evan B. Horwitz, for defendant-appellee.

BEASLEY, Justice.

We consider whether the Court of Appeals erred by granting defendant a new hearing based upon the conclusion that the trial court violated defendant's Fifth Amendment rights. For the reasons stated herein, we reverse the decision of the Court of Appeals.

On 21 May 2014, Steven Craig Herndon (plaintiff) filed a Complaint and Motion for Domestic Violence Protective Order (DVPO) against his wife, Alison Kingrey Herndon (defendant). Plaintiff also sought temporary custody of their four minor children. The complaint alleged that on several occasions, defendant placed in plaintiff's food and drink unknown substances that caused him to become incapacitated, and that during those periods of incapacitation, defendant would leave the home occupied by plaintiff and their children to visit the home of her paramour. The district court judge entered an ex parte DVPO against defendant, ordering that there be no contact between plaintiff and defendant and awarding temporary custody of the children to plaintiff. On 27 May 2014, in a separate action, defendant filed a complaint seeking temporary and permanent custody of the minor children. On 23 July 2014, plaintiff filed an answer and counterclaim seeking child custody.

On 10 September 2014, plaintiff's motion for DVPO and defendant's custody complaint came on for hearing before the Honorable Doretta L. Walker in District Court, Durham County. Several witnesses took the stand, including a computer forensics expert, a private investigator, plaintiff, defendant's paramour, defendant's friend, and defendant. After plaintiff rested his case-in-chief and before defendant took the stand, the following exchange occurred:

> [DEFENSE COUNSEL]: Call Alison Herndon.
>
> THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?
>
> [DEFENSE COUNSEL]: No, she's not.
>
> THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: Okay. Call your witness.

[DEFENSE COUNSEL]: Alison Herndon.

Defendant testified on direct examination about her work schedule, her relationship with plaintiff and the children, and her affair. Defendant also discussed plaintiff's allegation that on 11 April 2014, defendant put an incapacitating substance in his mashed potatoes during one of their daughter's birthday party. When defense counsel concluded her examination of defendant, the trial court denied plaintiff's counsel the opportunity to cross-examine defendant because the time allotted for the hearing had almost expired. Instead, the trial court asked defendant questions related to the events of 11 April 2014 and certain exhibits that had been admitted into evidence by plaintiff related both to text messages and photographs exchanged between defendant and her paramour. After hearing the evidence, the trial court entered a DVPO and temporary custody order in favor of plaintiff, granting defendant supervised visitation. The trial court did not make any ruling on defendant's separate permanent custody action.

On appeal to the Court of Appeals, defendant argued that the trial court's comments preceding her testimony "had a chilling effect on the defense," thereby depriving defendant of her right against self-incrimination.[1] Defendant cited the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 23 of the North Carolina Constitution, and *Malloy v. Hogan*, 378 U.S. 1, 6, 12 L. Ed. 2d 653, 658 (1964), in support of her argument.

A divided panel of the Court of Appeals held that the trial court infringed upon defendant's right against self-incrimination, relying principally on the United States Supreme Court's decision in *Brown v. United States*, 356 U.S. 148, 2 L. Ed. 2d 589 (1958). *Herndon v. Herndon*, ___ N.C. App. ___, ___, ___, 777 S.E.2d 141, 143, 145 (2015). First, the Court of Appeals acknowledged that a witness, by taking the stand, waives the Fifth Amendment privilege on cross-examination "with regard to 'matters raised by [the witness's] own testimony on direct examination.' " *Id.* at ___, 777 S.E.2d at 144 (alteration in original) (quoting *Brown*, 356 U.S. at 156, 2 L. Ed. 2d at 597). Second, the Court of Appeals observed that a trial court cannot determine whether a witness may invoke the privilege based solely upon the witness's physical act of taking the stand. *Id.* at ___, 777 S.E.2d at 144 (citing *Brown*, 356 U.S. at 157, 2 L. Ed. 2d at 598).

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1. Defendant also argued that the trial court erred by admitting into evidence certain electronic communications, and that, consequently, there was insufficient evidence to support the trial court's findings that defendant had committed domestic violence against plaintiff.

The Court of Appeals majority reasoned that the trial court erred by requiring defendant to choose between "forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination." *Id.* at ___, 777 S.E.2d at 144. Moreover, the Court of Appeals majority concluded that the trial court's line of questioning was outside the scope of defendant's direct examination, in violation of the rule articulated in *Brown*. *Id.* at ___, 777 S.E.2d at 144. For those reasons, the Court of Appeals vacated the trial court's order and remanded the case for a new hearing with instructions that the trial court disregard defendant's previous testimony and "assess any invocation of the Fifth Amendment under the test established by the Supreme Court in *Brown*." *Id.* at ___, 777 S.E.2d at 145.

The dissenting judge would have found that defendant waived her Fifth Amendment privilege. *Id.* at ___, 777 S.E.2d at 147 (Bryant, J., dissenting). The dissent criticized the majority's reading of *Brown* as "overly technical" and reasoned that *Brown* stands for the proposition that when a witness voluntarily testifies, she cannot "invoke the privilege against self-incrimination as to relevant matters." *Id.* at ___, 777 S.E.2d at 148 (citing *McKillop v. Onslow County*, 139 N.C. App. 53, 64-65, 532 S.E.2d 594, 601 (2000)). The dissent concluded that "it was within the inherent power of the trial court to ascertain from defendant that she chose to testify voluntarily and waive her privilege against self-incrimination," and added that, despite "the less than artful phraseology," the trial court's statements put defendant on notice of her duty to testify truthfully. *Id.* at ___, 777 S.E.2d at 149 (citing *Brown*, 356 U.S. at 156, 2 L. Ed. 2d at 597).

Plaintiff gave timely notice of appeal based upon the dissent. We review alleged violations of constitutional rights de novo. *E.g.*, *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

[1] Before this Court, plaintiff argues that the trial court did not violate defendant's right against self-incrimination because the trial court's inquiry was entirely within the scope of the testimony elicited on direct examination. We agree.

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *Malloy*, 378 U.S. at 6, 12 L. Ed. 2d at 658, provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Fifth Amendment protection extends to civil proceedings. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964) (citation omitted),

superseded in part by statute, Act of June 21, 1977, ch. 649, sec. 1, 1977 N.C. Sess. Laws, 761, 761-62. "[T]he claim of privilege 'should be liberally construed.' " *State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 167 (1997) (quoting *Allred*, 261 N.C. at 35, 134 S.E.2d at 189). Moreover, the privilege "protects against real, not remote and speculative dangers." *State v. Ballard*, 333 N.C. 515, 520, 428 S.E.2d 178, 181 (citing *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972)), *cert. denied*, 510 U.S. 984, 126 L. Ed. 2d 438 (1993). "The privilege, to be sustained, need be evident only from the implications of the question and in the setting in which it is asked. These must show only that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 520, 428 S.E.2d at 181 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-87, 95 L. Ed. 1118, 1124 (1951)).

Depending on whether a witness is compelled to testify or testifies voluntarily, the right against self-incrimination operates differently. This distinction, explored by the Supreme Court in *Brown*, arises from a need to balance the constitutional right to protect against self-incrimination with a party's interest in attacking the credibility of a witness and the interest of the court in ascertaining the truth. *Brown*, 356 U.S. at 155-56, 2 L. Ed. 2d at 597. A compelled witness "has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate." *Id.* at 155, 2 L. Ed. 2d at 597. When the compelled witness's privilege is triggered, the normal right of cross-examination becomes secondary to the constitutional protection against compulsory self-incrimination. *Id.* at 155, 2 L. Ed. 2d at 597. By contrast, a voluntary witness has the benefit of choosing whether to testify and "determines the area of disclosure and therefore of inquiry." *Id.* at 155, 2 L. Ed. 2d at 597. For that reason, a voluntary witness cannot claim "an immunity from cross-examination on the matters he has himself put in dispute." *Id.* at 156, 2 L. Ed. 2d at 597.

The Court of Appeals majority identified the trial court's error as follows:

> In *Brown*, the Supreme Court held that the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness "said on the stand." [*Brown*, 356 U.S.] at 157. In other words, the determination that a witness may not invoke the Fifth Amendment

> cannot be made simply because the witness "physically took the stand." *Id.*
>
> That is precisely what happened here.

Herndon, ___ N.C. App. at ___, 777 S.E.2d at 144 (majority).

In *Brown* the petitioner was subjected to a denaturalization hearing after being charged with fraudulently procuring citizenship by falsely swearing, *inter alia*, that she had not been a member of the Communist Party. 356 U.S. at 149, 2 L. Ed. 2d at 593-94. In the proceeding, during the Government's case-in-chief, the petitioner refused to answer the Government's questions related to her participation in Communist activities and successfully asserted her Fifth Amendment privilege. *Id.* at 150, 2 L. Ed. 2d at 594. Subsequently, during the petitioner's case-in-chief, the petitioner took the stand as a witness on her own behalf and answered the questions posed by her attorney related to Communist activities, but refused to answer the questions posed by the Government on cross-examination, claiming a Fifth Amendment privilege. *Id.* at 150-52, 2 L. Ed. 2d at 594-95. The trial court overruled the petitioner's claim of privilege, reasoning that "by taking the stand in her own defense petitioner had abandoned the privilege." *Id.* at 152, 2 L. Ed. 2d at 595. The trial court ultimately held the petitioner in contempt for continuing to refuse to answer questions on cross-examination. *Id.* at 152, 2 L. Ed.2d at 595. On appeal from her conviction for contempt of court, the petitioner argued that she did not waive her privilege against self-incrimination by taking the stand. *Id.* at 154, 2 L. Ed. 2d at 596. The Supreme Court affirmed the trial court's ruling, explaining that

> [i]n view of the circumstances surrounding this ruling and the testimony that preceded it, it is reasonably clear that the court meant to convey by "having taken the stand in her own defense" what she said on the stand, not merely that she physically took the stand. . . . Taken in context, the ruling of the District Court conveyed a correct statement of the law, and adequately informed petitioner that by her direct testimony she had opened herself to cross-examination on the matters relevantly raised by that testimony.

Id. at 157, 2 L. Ed. 2d at 598.

Like in *Brown*, the context in which the Fifth Amendment issue arose here is important. During plaintiff's case-in-chief plaintiff called defendant's paramour, a compelled witness, to the stand. The paramour invoked his Fifth Amendment right against self-incrimination

concerning questions related to his relationship with defendant and the text messages that had been exchanged between them. Thereafter, during defendant's case-in-chief but before defendant took the stand, the trial court asked defense counsel whether defendant intended to invoke the Fifth Amendment, to which counsel twice responded in the negative. At no point during direct examination or the trial court's questioning did defendant, a voluntary witness, give any indication that answering any question posed to her would tend to incriminate her. Put simply, defendant never attempted to invoke the privilege against self-incrimination, which distinguishes this case from *Brown*. We are not aware of, and the parties do not cite to, any case holding that a trial court infringes upon a witness's Fifth Amendment rights when the witness does not invoke the privilege.

In addition, the Court of Appeals majority concluded that the trial court's inquiry was improper because defendant's "direct testimony did not address her alleged drugging of her husband" or the "text messages that corroborated this allegation." *Herndon*, ___ N.C. App. at ___, 777 S.E.2d at 144. Yet, the record reveals otherwise. During defense counsel's direct examination of defendant, the following exchange occurred:

> Q. Did he ever say anything to you at all about being fearful?
>
> A. No, ma'am.
>
> Q. Or believing that you poisoned him?
>
> A. No, ma'am.
>
> . . . .
>
> Q. Did you drug him?
>
> A. No, ma'am.
>
> . . . .
>
> Q. And [the computer forensics expert] read text messages -- excuse me. He read text messages and I'm going [sic] summarize where it appeared to make reference to drugging Craig or giving him an Ambien and do you -- what do you know about those text messages?
>
> A. I mean, I only know what [plaintiff's counsel] has given me, text message-wise, or what I've read that they had printed out.

Q. Did you send the text messages?

A. I sent some text messages. Did I send text messages about drugging Craig? No.

Q. Do you recall ever making a joke about -- about drugging him to anyone?

A. I don't remember -- I don't recall making jokes about drugging him. I -- I remember joking about -- I don't -- I mean, I don't know exactly what it said, but I -- I would -- I very likely said -- I don't -- I really don't know.

At the completion of defendant's direct examination, the trial court asked defendant whether she sent the text messages referenced in plaintiff's exhibit number four,[2] to which defendant replied, "I don't recall, Your Honor." The trial court also asked defendant whether she sent the photographs in plaintiff's exhibit number twenty-three,[3] to which defendant replied, "Well, the ones on April 11th are the ones with my bathing suit on. Yes, ma'am. I probably did." It is clear that defendant's direct testimony did, in fact, address the allegation that defendant drugged plaintiff and the text messages that tended to corroborate the allegation. The trial court, in its questioning of defendant, inquired into matters within the scope of that which was put into dispute on direct examination by defendant. Therefore, even if defendant had attempted to invoke the Fifth Amendment, under the rule in *Brown* the privilege was not available to defendant during the trial court's inquiry.

Defendant contends that the Court of Appeals decision in *Qurneh v. Colie*, 122 N.C. App. 553, 471 S.E.2d 433 (1996), controls the outcome in this case. Specifically, defendant argues that in *Qurneh* the plaintiff was given the opportunity to invoke the Fifth Amendment privilege and still pursue his custody claim, whereas defendant was required to choose between invoking the privilege and going to jail, or pursuing her temporary custody claim. We are not persuaded.

In *Qurneh* the plaintiff-father invoked the Fifth Amendment to avoid responding to questions posed during a custody hearing about his

---

2. Plaintiff's exhibit number four contained text messages allegedly sent by defendant to her paramour indicating that on 11 April 2014, she intentionally put pills in plaintiff's food so that he would "pass out," giving her the opportunity to leave the house and meet with the paramour.

3. Plaintiff's exhibit number twenty-three contained photographs extracted from text messages allegedly sent from defendant to her paramour.

involvement with illicit drugs. 122 N.C. App. at 556, 471 S.E.2d at 434-35. Balancing the interests of the parties, the trial court concluded that the plaintiff used the privilege as both a shield and a sword by introducing evidence of his fitness and then prohibiting the defendant from rebutting that evidence with proof of his unfitness. *Id.* at 558, 471 S.E.2d at 436. As a result, the Court of Appeals affirmed the trial court's dismissal of the plaintiff's custody claim, reasoning that "the trial court was unable to consider pertinent information in determining plaintiff's fitness," *id.* at 559, 471 S.E.2d at 436, which was an element of the plaintiff's prima facie case, *id.* at 558-60, 471 S.E.2d at 436-37. The present case is factually distinguishable from *Qurneh*. Unlike in *Qurneh*, the trial court here was able to consider all the pertinent evidence because defendant did not invoke the Fifth Amendment privilege. Instead, defendant voluntarily took the stand and testified about the domestic violence allegations against her, her marriage, her relationship with her children, and her ability to care for them. The Court of Appeals decision in *Qurneh* does not support a conclusion that the trial court in this case violated defendant's Fifth Amendment rights.

We hold, therefore, that the Court of Appeals erred by granting defendant a new hearing. We acknowledge that the trial court's conduct was inappropriate and that the trial judge should not have threatened defendant with jail; however, we do not believe the trial judge's actions amounted to a constitutional violation. Defendant did not invoke the privilege against self-incrimination. Defense counsel did not make an offer of proof, object, or otherwise demonstrate a concern for defendant's constitutional rights.[4] Defendant was in control of her testimony by virtue of her decision to take the stand. Defense counsel asked defendant plainly whether she drugged plaintiff and the trial court asked questions tending to corroborate plaintiff's domestic violence allegations. We cannot say, in view of these circumstances, that the trial court infringed upon defendant's Fifth Amendment right against self-incrimination.

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4. **[2]** We recognize that North Carolina Rules of Evidence Rule 614(c) provides that "[n]o objections are necessary with respect to . . . questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." This rule operates to preserve for appellate review the impropriety of a trial court's interrogation of a witness even if a party does not object. It does not apply when, as here, a party argues that the trial court's inquiry infringed upon a litigant's privilege against compelled self-incrimination. *Cf. State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." (citations omitted)), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's alternative bases for appeal.

REVERSED AND REMANDED.

IN THE MATTER OF: D.L.W., D.L.N.W., AND V.A.W.

No. 252PA15

Filed 10 June 2016

1. Termination of Parental Rights—neglect—domestic violence between parents—placed children at risk

The trial court did not err by terminating respondent-mother's parental rights on the basis of neglect due to domestic violence between the parents. In its order terminating respondent's parental rights, the trial court found that the domestic violence between the parents put the children at risk and that one of the children had intervened in an argument between the parents; that there were further incidents of domestic violence after the adjudication order; and that respondent could not articulate what she had learned in her domestic violence counseling sessions. The trial court's findings were sufficient to support its conclusion that there would be a repetition of neglect based upon the juveniles "liv[ing] in an environment injurious to [their] welfare." The Court of Appeals erred by concluding that the ongoing domestic violence was irrelevant to a determination of whether the juveniles were neglected.

2. Termination of Parental Rights—failure to make reasonable progress—budgeting, housing, transportation, domestic violence

The trial court did not err by terminating respondent-mother's parental rights for failure to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children. The trial court found that respondent had failed to budget her funds, resulting in continuing failure to use incoming funds to meet her children's needs; that she had not maintained consistent housing and had been evicted from several residences for failure to pay rent; that she had lost employment due to incarceration as a result of a domestic violence incident with

the father; and that she continued to drive without a valid North Carolina driver's license. These findings demonstrated that respondent's failure to correct the conditions that led to the removal of her children was not simply a result of poverty, and the Court of Appeals erred by holding that the trial court did not have the authority to order respondent to comply with the corresponding requirements of her case plan.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 773 S.E.2d 504 (2015), affirming in part and reversing in part an order entered on 29 September 2014 by Judge Kathryn Overby in District Court, Alamance County. Heard in the Supreme Court on 21 March 2016.

Jamie L. Hamlett for Alamance County Department of Social Services, and Derrick J. Hensley, Guardian ad Litem Program Attorney, for the minor children, petitioner-appellants.

Jeffrey William Gillette for respondent-appellee mother.

Kathleen Arundell Jackson and Rachael Hawes for North Carolina Association of Department of Social Services Attorneys, amicus curiae.

JACKSON, Justice.

In this case we consider whether the trial court erred by terminating respondent's parental rights on the basis of neglect and failure to correct conditions that led to the removal of her children. We hold that the findings in the trial court's order were sufficient to support termination of parental rights based upon both of these grounds. Therefore, we reverse the decision of the Court of Appeals to the contrary.

On 1 March 2013, the Alamance County Department of Social Services (DSS) filed a petition alleging that minor children D.L.W., D.L.N.W., and V.A.W. were neglected and dependent juveniles. The petition alleged that DSS had received information that the three juveniles were residing with their mother, Marisha Wade (respondent), and their father "in a van located in the woods that is heated by a kerosene heater," that the parents refused to disclose the van's location or cooperate with DSS's investigation into safety and risk issues, and that the juveniles did not bathe, brush their teeth, or receive adequate nutrition. The petition

also alleged "significant domestic violence between the parents that places the juveniles at risk." Around this same time, the juveniles were placed in the custody of DSS.

At the 1 May 2013 adjudication hearing, based upon stipulations entered into by the parties, the trial court made the following findings relevant to its determination that the juveniles were neglected:

> [9.]e. At the time of the filing of the petition the Respondent Mother and Father were residing at times with their three children in a van located in the woods.
>
> f. The Respondent Mother denies the van is heated with a kerosene heater but states the van is run during the night to keep warm, but also states the van is cool enough to store milk.
>
> g. The Respondent Parents refused to disclose the location of the van so that the Alamance County Department of Social Services can assess safety and risk issues.
>
> h. It is reported there was domestic violence between the parents that places the juveniles at risk. For example, [V.A.W.] has intervened when the parents are arguing.
>
> . . . .
>
> j. At times, the family has difficulty providing for basic necessities such as housing, baths and so forth. Their skin is very pale and dry, needing lotion.
>
> . . . .
>
> l. The Respondent Father is not employed.
>
> m. The Respondent Mother is employed at AW-NC as a factory worker. She works from 6:00 a.m. until [between] 2:30 p.m. [and] 6:00 p.m. She has been employed for approximately ten months.
>
> n. The Respondent Mother reports she made the van payment for the first time in several months a few weeks ago. She reports the van is not drivable because the finance company turned the car off. [sic]

o. The Respondent Mother reports she did not have enough money to maintain a household since becoming a permanent employee on February 18, 2013.

Based upon these and other findings, the trial court concluded as a matter of law that the juveniles were "neglected" as defined by N.C.G.S. § 7B-101(15) and that removal of the children from parental custody was in the children's best interests. The parents were ordered to cooperate with their out-of-home family service case plans, attend and participate in mental health assessments, submit to and comply with random drug screenings, pay child support, obtain or maintain employment, participate in visitation, maintain weekly contact with a social worker, and enroll in domestic violence counseling. In addition, the trial court approved placement of the children with their maternal grandmother.

Following subsequent review and permanency planning hearings, the trial court filed an order on 18 November 2013 reporting the parents' general lack of progress in meeting the goals outlined in their case plans, including that they were living in motels, maintaining only sporadic contact with social workers, and not participating consistently in visitation with the children. The order also reported that although respondent had maintained a full-time job, she could not account for how her money was being spent and had not "provide[d] the agency with a budgeting plan that can account for where the funds coming into the household go," as the trial court had ordered. The trial court endorsed reunification as the primary plan, ordered continued placement with the maternal grandmother, and again ordered that the parents address the problems that were preventing reunification.

After further proceedings on 18 December 2013, the trial court changed its recommendation for the primary plan for the juveniles to adoption, noting the parents' continued failure to comply with their case plans. Specifically, the trial court found that respondent had failed to create a budgeting plan, obtain appropriate housing, or follow the recommendation for treatment of her "social phobia," as diagnosed in her mental health assessment. In addition, the trial court found the status of respondent's required participation in domestic violence courses to be "[u]nknown," stating that although respondent-mother "has indicated in the past that she is taking part," she had "not provided documentation or the location" where the courses were taking place. The trial court concluded as a matter of law that "the parents have acted inconsistently with their constitutionally protected rights" by previously allowing "the children to reside in an injurious environment" and thereafter failing to take prescribed measures to allow the juveniles to safely "return to or be

in their care." The order contained a further conclusion that termination of parental rights was in the children's best interest.

DSS filed a motion for termination of parental rights on 11 March 2014, and the hearing took place over the course of four days in August and September 2014. On 29 September 2014 the trial court filed an order terminating both parents' parental rights based upon neglect pursuant to N.C.G.S. § 7B-1111(a)(1), and based upon a finding that they willfully left the juveniles in foster care for more than twelve months without making sufficient progress in correcting the conditions that led to removal, in accordance with N.C.G.S. § 7B-1111(a)(2).[1] The findings in the order summarized the procedural history of the case and some information contained in previous orders, including the findings in the May 2013 adjudication order based upon the stipulations of the parties. The trial court also made a number of findings regarding its ongoing concerns:

> 38. Since the removal of the juveniles, the parents have resided at three different addresses in Alamance County, North Carolina. They were evicted from all three residence[s] for nonpayment of rent.
>
> 39. The evictions took place for nonpayment of rent despite the fact that, at times during residing at the residences, the parents were employed making between $11.00 and $13.00 an hour for 40-60 hours a week. The employment of the parents was not consistent.
>
> . . . .
>
> 45. The Respondent Mother entered into and was court ordered to comply with [an] out-of-home family services agreement. She was to obtain a mental health assessment. She did an initial assessment which indicated diagnoses of social phobia and cannabis dependency full remission. She did not seek out services to address social phobia.
>
> 46. The Respondent Mother obtained a second mental health assessment and did answer questions but was not completely truthful reporting stressors in her life. At

1. In addition to terminating the father's parental rights pursuant to subdivisions 7B-1111(a)(1) and (a)(2), the court found an additional statutory ground for terminating his parental rights.

no point did she get treatment for social phobia. Initially, she was asked to sign releases and did not, but later did.

. . . .

48. The Respondent Mother was to obtain and maintain appropriate housing. She did obtain three different homes, and, at times, resided with friends in Durham. She was not stable, would pay rent for one month but not subsequently without good reason and she does not currently have appropriate housing as she is residing at Allied Churches emergency shelter.

49. The Respondent Mother was to obtain and maintain employment. She was employed at AW working 65 hours a week earning between $11.00 and $13.00 an hour. The money was direct deposited in [her] account. She could not figure out why she could not pay bills or where the money went. In March of 2014, she lost her employment due to incarceration. Initially she lied about the loss of employment, saying she resigned, then that she lost employment due to snow days and then due to incarceration.

50. The Respondent Mother was to develop a reliable means of transportation. She does not have a valid North Carolina driver's license. She continued to drive without a valid driver's license. In December of 2013, she was charged with careless and reckless and fleeing to elude still [sic]. She drove a vehicle registered in the Respondent Father's name with his knowledge that she did not have a license.

. . . .

52. The Respondent Mother was to attend counseling for victims of domestic violence and be able to articulate what she has learned. She attended seven sessions of the support group at Family Abuse Services in 2013. She attended several meetings since losing her job in March of 2014 but has not consistently attended and has not articulated an[ ] understanding of what she has learned. She continued in a relationship with the Respondent Father and there were significant issues regarding ongoing domestic violence.

. . . .

62. The Respondent Parents were required to do a budgeting plan but failed to do so despite being employed for periods of more than one month. Their failure to appropriately budget their funds has continued to result in instability.

. . . .

65. On two differen[t] occasions in 2014, law enforcement has been called to the home of the parents due to domestic violence between the parents.

66. At one point the mirror on the car was broken off and on another occasion[ ] the Respondent Father was scratched and bleeding. During the same incident the Respondent-Mother's belongings were destroyed and damaged.

67. The Respondent Mother indicated that she paid, at some point, $60.00 a month for storage of items and would take half days from work [to] get business done, obtain copies of court documents and get her hair done. However, she could not attend visitation due to her work schedule.

. . . .

73. There is a likelihood of repetition of neglect of the minor child[ren] in that neither the mother nor the father have made reasonable progress given their individual circumstance[s] in the twelve months preceding the filing of the motion for termination of parental rights.

Both respondent and the father appealed.

In a unanimous opinion filed on 19 May 2015, the North Carolina Court of Appeals reversed the order terminating respondent's parental rights. *In re D.L.W.*, ___ N.C. App. ___, ___, ___, ___, 773 S.E.2d 504, 505, 510, 511 (2015). The Court of Appeals determined that the findings regarding respondent did not support a conclusion that she neglected the juveniles pursuant to N.C.G.S. § 7B-1111(a)(1) because none of the findings addressed respondent's relationship, care, visitation, or support of her children; "[r]ather, they address[ed] [her] interactions and relationship with DSS and respondent-father." *Id.* at ___, 773 S.E.2d at 509.

In addition, the Court of Appeals concluded that the trial court had no authority pursuant to N.C.G.S. § 7B-904 to order respondent to make reasonable progress to comply with several aspects of her case plan, including creating a budgeting plan and obtaining treatment for social phobia, because there was no evidence that the social phobia or lack of a budgeting plan were causes of neglect or removal of the juveniles. *Id.* at ___, 773 S.E.2d at 509-10. Thus, the Court of Appeals determined that the trial court failed to make findings establishing either respondent's willfulness or her lack of reasonable progress to remedy the conditions that led to removal of the juveniles, pursuant to subdivision 7B-1111(a)(2). *Id.* at ___, 773 S.E.2d at 509-10. The Court of Appeals affirmed the portion of the trial court's order terminating the father's parental rights. *Id.* at ___, 773 S.E.2d at 510-11. We allowed a petition for discretionary review filed by DSS and the juveniles' guardian ad litem.[2]

[1] In their appeal petitioners contend that the Court of Appeals incorrectly determined that the trial court's findings failed to support a disposition of termination on the basis of neglect. Specifically, petitioners argue that the Court of Appeals erred when it concluded that the trial court's findings regarding domestic violence solely concerned respondent's relationship with the father and were not linked sufficiently to the care of the juveniles. We agree.

The procedure for termination of parental rights involves a two-step process. N.C.G.S. §§ 7B-1109, -1110 (2015). In the initial adjudication stage, the trial court must determine whether grounds exist pursuant to N.C.G.S. § 7B-1111 to terminate parental rights. *Id.*, § 7B-1109(e). If it determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614-15 (1997); N.C.G.S. § 7B-1110.

"At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. at 247, 485 S.E.2d at 614; *see also* N.C.G.S. § 7B-1109(f). An appellate court then considers whether the trial court abused its discretion in determining that termination of parental rights was in the best interests of the child. *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984).

2. The father is not a party to this appeal.

Subdivision 7B-1111(a)(1) authorizes the trial court to terminate parental rights if "[t]he parent has abused or neglected the juvenile" as defined in N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1) (2015). Pursuant to section 7B-101, a neglected juvenile is one who "does not receive proper care, supervision, or discipline" from a parent or guardian, or one who "lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2015). Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent. *In re Ballard*, 311 N.C. 708, 713-15, 319 S.E.2d 227, 231-32 (1984).

Here the trial court stated its concerns about domestic violence between the parents when it first adjudicated the juveniles as neglected in May 2013. In the adjudication order, the court found that there were reports of "domestic violence between the parents that places the juveniles at risk. For example, [V.A.W.] has intervened when the parents are arguing." As a result, respondent was ordered by the court to "participate in a domestic violence counseling course."

Subsequently, at the termination hearing, the trial court received police reports and heard testimony regarding respondent's participation in multiple incidents involving domestic violence since the 2013 adjudication and removal of the juveniles. For example, the father testified that the bloody scratch on his face observed by law enforcement following an altercation at the home in March 2014 was inflicted by respondent. Although there was conflicting testimony regarding the details of these encounters,[3] the trial judge had the responsibility to "pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citation omitted).

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3. As the Court of Appeals recognized in its opinion, respondent's testimony changed during the course of the termination hearing:

> She acknowledged having told police on 16 March 2014 that respondent-father "beat [her] up all the time," but claimed she had lied to the police in an attempt to get them to leave her residence. . . .
>
> After respondent-father testified, the tenor of respondent-mother's testimony changed the following day. She disavowed her previous testimony as untrue and proceeded to describe a longstanding pattern of abusive, controlling behavior by respondent-father toward her.

In re D.L.W., ___ N.C. App. at ___, 773 S.E.2d at 508 (alteration in original).

In the order terminating respondent's parental rights, the trial court recited its previous findings from the adjudication order, made new findings regarding further incidents of domestic violence, and found that respondent had not articulated an understanding of what she learned in her domestic violence counseling sessions. The court found that respondent "continued in a relationship with the Respondent Father and there were significant issues regarding ongoing domestic violence." Ultimately, the court concluded as a matter of law that "[t]he parent has neglected the juveniles [within] the meaning of G.S. 7B-101 and there is a likelihood of repetition of such neglect if the juveniles are returned to her care."

Although the Court of Appeals concluded that the ongoing domestic violence was irrelevant to a determination of whether the juveniles were neglected, the trial court found that the violence in the home put the children at risk and that one of the juveniles had intervened in an argument between the parents. The trial court's findings support the conclusion that there would be a repetition of neglect based upon the juveniles' "liv[ing] in an environment injurious to [their] welfare." N.C.G.S. § 7B-101(15). Accordingly, we hold that the Court of Appeals erred by concluding that insufficient findings supported termination of respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

[2] Next, petitioners argue that termination of parental rights also was warranted pursuant to N.C.G.S. § 7B-1111(a)(2). Petitioners contend that the Court of Appeals erred by holding that the trial court did not have authority to order respondent to comply with several specific requirements in her case plan, such as creating a budgeting plan. As a result, petitioners contend that the Court of Appeals incorrectly concluded that respondent's failure to comply with these requirements could not justify the termination of her parental rights. We agree.

Subdivision 7B-1111(a)(2) allows a court to terminate parental rights if the parent

> has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

Id. § 7B-1111(a)(2) (2015). Subdivision 7B-904(d1)(3) authorizes the trial court to order that a parent "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." *Id.* § 7B-904(d1)(3) (2015).

The findings in the adjudication order indicate that domestic violence, as well as a lack of consistent and adequate housing and the parents' inability to meet the minimal needs of the juveniles, were reasons for their removal and their adjudication as neglected. In one finding the trial court noted that respondent "has two other children who are not in her placement due to her inability to provide stability." Following this statement, the trial court made findings describing how respondent had been employed for ten months, but reported that she "did not have enough money to maintain a household since becoming a permanent employee on February 18, 2013." The trial court further found that respondent had trouble providing basic necessities for the three juveniles and was residing with them "at times in a van in the woods."

At the termination hearing, the trial court heard testimony that respondent did not know why she could not pay bills and could not account for where her money was going, yet she would buy "figurines on lay-a-way," and take half days off from work to get her hair done, and the father would take "hundreds and hundreds of dollars from [her]." Respondent did not know what the father did with the money but believed he used much of it to play "a lot of lottery." The trial court found that the parents' "failure to appropriately budget their funds . . . continued to result in instability." Because the conditions and instability described in the findings appeared to be worsened by the parents' failure to make appropriate use of incoming funds to meet the needs of the juveniles, it was entirely appropriate for the court to have ordered respondent to create a budgeting plan. Respondent's failure to meet this requirement "despite being employed for periods of more than one month" was among the findings in the termination order and was a proper basis for terminating her parental rights for failing to make progress in correcting a condition that led to the removal of the juveniles.

In the termination order, the court also found that respondent had not maintained consistent housing since the juveniles were removed and adjudicated as neglected, noting that respondent had been evicted from multiple residences "for nonpayment of rent despite the fact that, at times during residing at the residences, the parents were employed making between $11.00 and $13.00 an hour for 40-60 hours a week." The court found that respondent "was not stable, would pay rent for one

month but not subsequently without good reason and she does not currently have appropriate housing" in that she was residing in an emergency shelter. Further, the court noted that respondent lost employment because of incarceration, which respondent testified was a result of a domestic violence "incident that happened." The court also found that respondent had not sought treatment for a "social phobia" diagnosis following her court-ordered mental health assessment, that she continued to drive without a valid North Carolina driver's license, and that she "was charged with careless and reckless and fleeing to elude still [sic]."

Respondent argues that the trial court's findings are not sufficiently linked to conditions that led to removal of the juveniles or indicate a likelihood of future neglect, and instead are more related to poverty. We disagree. These findings demonstrate that respondent's failure to correct the conditions that led to the removal of the juveniles was not simply the result of poverty. Respondent had income and did not know why she could not pay her bills, but she refused to comply with the trial court's order that she create a budgeting plan. Respondent continued in a relationship fraught with domestic violence, repeatedly participated in additional acts of domestic violence, caused injury to the father and damage to personal property, and was incarcerated as a result of her conduct.[4] We conclude that the trial court's findings supported its conclusion that respondent failed to make reasonable progress under the circumstances toward correcting conditions that led to the removal of the juveniles.

For these reasons, we hold that sufficient findings supported termination of respondent's parental rights pursuant to subdivisions 7B-1111(a)(1) and (a)(2). Having properly found that these grounds existed, we cannot conclude, based upon these circumstances, that the trial court abused its discretion when it determined that termination of respondent's parental rights was in the best interest of the juveniles.

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4. We note that the Court of Appeals concluded that respondent's failure to obtain treatment for her "social phobia" could not be considered as a factor in determining whether respondent failed to make progress toward correcting the conditions that led to removal of the juveniles. The trial court did not state that there was any link between respondent's "social phobia" and the conditions that led to removal and there is no indication in the trial court's order that it weighed respondent's failure to treat her "social phobia" as a factor in its decision. Instead, the trial court simply mentioned the issue of "social phobia" in passing before basing its ultimate determination on respondent's failure to obtain housing, failure to obtain transportation, failure to create a budgeting plan, driving without a valid license, and continuing involvement in domestic violence.

Accordingly, the judgment of the Court of Appeals is reversed as to the issue before this Court on appeal, and the trial court's order terminating respondent's parental rights is reinstated.

REVERSED.

EVERETTE E. KIRBY AND WIFE, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, AS EXECUTOR OF THE ESTATE OF FRANCES HENDRIX; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL; STEVEN DAVID STEPT; JAMES W. NELSON AND WIFE, PHYLLIS H. NELSON; AND REPUBLIC PROPERTIES, LLC, A NORTH CAROLINA COMPANY (GROUP 1 PLAINTIFFS)

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 56PA14-2

Filed 10 June 2016

Eminent Domain—inverse condemnation—Map Act—recordation of highway corridor map—taking without just compensation

The Court of Appeals did not err by reversing the dismissal of plaintiffs' inverse condemnation claim. The use of the Map Act by defendant Department of Transportation to record the pertinent highway corridor map resulted in a taking of plaintiffs' property rights without just compensation. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before and after the corridor map was recorded, taking into account all pertinent factors including the restriction on each plaintiff's fundamental rights as well as any effect of the reduced ad valorem taxes.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 769 S.E.2d 218 (2015), reversing orders entered on 8 January 2013 and 20 June 2013 by Judge John O. Craig, III in Superior Court, Forsyth County, and remanding for further proceedings. Heard in the Supreme Court on 16 February 2016.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, Kenneth C. Otis III, and W. Kirk Sanders, for plaintiff-appellees.

Roy Cooper, Attorney General, by John F. Maddrey, Solicitor General, for defendant-appellant.

Jonathan D. Guze for John Locke Foundation, amicus curiae.

Hansen Law Firm, PLLC, by Jessica O. Wilkie and Joshua D. Hansen; and Van Winkle Law Firm, by Jones P. Byrd, for North Carolina Advocates for Justice, amicus curiae.

Martin & Gifford, PLLC, by G. Wilson Martin, Jr.; and Wait Law, P.L.L.C., by John L. Wait, for North Carolina Association of Realtors, Inc., amicus curiae.

Carlene McNulty for North Carolina Justice Center, amicus curiae.

Elliot Engstrom for Civitas Institute, Center for Law and Freedom; and Mark Miller, pro hac vice, for Pacific Legal Foundation, amici curiae.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for Wilmington Urban Area Metropolitan Planning Organization, amicus curiae.

NEWBY, Justice.

In this case we consider whether the use of the Map Act by the North Carolina Department of Transportation (NCDOT) resulted in a taking of certain property rights of plaintiffs without just compensation. Upon NCDOT's recording of the highway corridor maps at issue here, the Map Act restricted plaintiffs' fundamental rights to improve, develop, and subdivide their property for an unlimited period of time. These restraints, coupled with their indefinite nature, constitute a taking of plaintiffs' elemental property rights by eminent domain. The extent to which plaintiffs may be entitled to just compensation, however, depends upon market valuation of the property before and after the taking. Such determinations must be made on an individual, property-by-property basis. We therefore affirm the decision of the Court of Appeals.

In 1987 the General Assembly adopted the Roadway Corridor Official Map Act (Map Act). Act of Aug. 7, 1987, ch. 747, sec. 19, 1987 N.C. Sess. Laws 1520, 1538-43 (codified as amended at N.C.G.S. §§ 136-44.50

to -44.54 (2015)); *see also* N.C.G.S. §§ 105-277.9 to -277.9A, 160A-458.4 (2015). Under the Map Act, once NCDOT files a highway corridor map with the county register of deeds, the Act imposes certain restrictions upon property located within the corridor for an indefinite period of time. N.C.G.S. § 136-44.51. After a corridor map is filed, "no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor." *Id.* § 136-44.51(a); *see also id.* § 153A-335(a) (2015) (" '[S]ubdivision' means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions are created for the purpose of sale or building development (whether immediate or future) and includes all division of land involving the dedication of a new street or a change in existing streets . . . ."); *id.* § 160A-376(a) (2015) (same). Recognizing the impact of these restrictions, the General Assembly also designated the property as a "special class" for *ad valorem* tax purposes, assessed at reduced rates of "twenty percent (20%) of the appraised value" for unimproved property, *id.* § 105-277.9, and "fifty percent (50%) of the appraised value" for improved property, *id.* § 105-277.9A. Despite the restrictions on improvement, development, and subdivision of the affected property, or the tax benefits provided, NCDOT is not obligated to build or complete the highway project.

Owners whose properties are located within the highway corridor may seek administrative relief from these restrictions by applying for a building permit or subdivision plat approval, *id.* § 136-44.51(a)-(c), a variance, *id.* § 136-44.52, or an "advanced acquisition" of the property "due to an imposed hardship," *id.* § 136-44.53. In the first instance, if after three years a property owner's application for a building permit or subdivision plat has not been approved, the "entity that adopted the transportation corridor official map" must either approve the application or initiate acquisition proceedings, or else the applicant "may treat the real property as unencumbered." *Id.* § 136-44.51(b). In the second instance, "[a] variance may be granted upon a showing that: (1) Even with the tax benefits authorized by this Article, no reasonable return may be earned from the land; and (2) The requirements of G.S. 136-44.51 result in practical difficulties or unnecessary hardships." *Id.* § 136-44.52(d). In the third instance, an "advanced acquisition" may be made upon establishing "an undue hardship on the affected property owner." *Id.* § 136-44.53(a). Property approved under the hardship category must be acquired within three years or "the restrictions of the

map shall be removed from the property." *Id.* In all instances, however, the restrictions imposed upon the property remain indefinitely, absent affirmative action by the owner and either approval from the State or a certain lapse of time.

Plaintiffs are landowners whose properties are located within either the Western or Eastern Loops of the Northern Beltway, a highway project planned around Winston-Salem. Plaintiffs allege that the project "has been planned since 1965, and shown on planning maps since at least 1987 with the route determined by the early 1990s."

On 6 October 1997, in accordance with the Map Act, NCDOT recorded a highway transportation corridor map with the Forsyth County Register of Deeds that plotted the Western Loop of the Northern Beltway. Plaintiffs whose properties are located within the Western Loop had all acquired their properties before NCDOT recorded the pertinent corridor map. On 26 November 2008, NCDOT recorded a second map that plotted the Eastern Loop. Plaintiffs whose properties are located within the Eastern Loop had also purchased their properties before NCDOT recorded that corridor map, some as recently as 2006. The parties do not dispute that the Map Act imposed restrictions on property development and division as soon as NCDOT recorded the corridor maps.

The NCDOT has voluntarily purchased at least 454 properties within the beltway through condemnation proceedings, and since July 2010, has continued to purchase property located in the Western and Eastern Loops. In June 2013, NCDOT announced a public hearing regarding modification of the Western Loop boundaries, noting that "[a] 'Protected Corridor' has been identified that includes the areas of the beltway that the Department expects to purchase to build the proposed road." At the hearing an NCDOT official advised that "no funding for the proposed Western Section of the Northern Beltway had been included in the current" budget through 2020 and that there was "no schedule" establishing when construction would start.

From October 2011 to April 2012, following denial of their motion for class certification, *Beroth Oil Co. v. NCDOT (Beroth II)*, 367 N.C. 333, 347, 757 S.E.2d 466, 477 (2014), *aff'g in part and vacating in part Beroth Oil Co. v. NCDOT (Beroth I)*, 220 N.C. App. 419, 725 S.E.2d 651 (2012), plaintiffs filed separate complaints against NCDOT, asserting various, similar constitutional claims related to takings without just compensation, including inverse condemnation. On 31 July 2012, the Chief Justice certified plaintiffs' cases as "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, and

the trial court subsequently consolidated plaintiffs into the same group for case management purposes.[1]

The NCDOT timely answered, asserted various affirmative defenses, including, *inter alia*, lack of standing, and moved to dismiss plaintiffs' claims under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 8 January 2013, the trial court entered an order denying NCDOT's motion to dismiss the claim for inverse condemnation.

All parties moved for summary judgment. The trial court first determined that plaintiffs failed to establish a taking, reasoning that "a regulatory taking" by police power only occurs when the legislation "deprive[s] the property of *all* practical use, or of *all* reasonable value" (citing and quoting *Beroth I*, 220 N.C. App. at 436-39, 725 S.E.2d at 661-63), and that the "mere recording of project maps do[es] not constitute a taking" (citing, *inter alia*, *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135-36, 139 S.E.2d 227, 230-31 (1964)). Therefore, the trial court concluded the inverse condemnation claim was "not yet ripe" and granted summary judgment for NCDOT, dismissing the claim without prejudice.[2] Plaintiffs appealed the dismissal and summary judgment orders to the Court of Appeals, and NCDOT cross-appealed the same, arguing for dismissal "with prejudice."

The Court of Appeals reversed the dismissal of plaintiffs' inverse condemnation claim. *Kirby v. NCDOT*, ___ N.C. App. ___, ___, 769 S.E.2d 218, 236 (2015).[3] The Court of Appeals concluded that, unlike

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1. For clarity we will refer to plaintiffs' similar collective "claims" in the singular—for example, plaintiffs' inverse condemnation claim. Other plaintiffs were consolidated into other groups; however, those claims are not before this Court on appeal here.

2. Plaintiffs alleged the taking occurred solely on the dates "the maps were published" and not "on any other dates." The trial court noted that "in the future, the police powers granted by the Map Act could deprive the landowners of all practical use or all reasonable value of their land," but that plaintiffs had failed to establish a sufficient level of deprivation for a taking at that time. Not at issue here, the trial court also dismissed plaintiffs' remaining takings claims with prejudice and dismissed plaintiffs' claim for declaratory judgment without prejudice.

3. The Court of Appeals declined to reach plaintiffs' other claims because its "disposition allow[ed] the trial court, upon consideration of evidence to be presented by Plaintiffs, to award Plaintiffs the relief they sought in their respective complaints." *Kirby*, ___ N.C. App. at ___, 769 S.E.2d at 236. The court "further decline[d] to address any remaining assertions for which Plaintiffs and NCDOT—as appellants and cross-appellants, respectively—have failed to present argument supported by persuasive or binding legal authority." *Id.* at ___, 769 S.E.2d at 236.

regulations under the police power, which the State deploys to protect the public from injury, "the Map Act is a cost-controlling mechanism," *id.* at ___, 769 S.E.2d at 232, that employs the power of eminent domain, allowing NCDOT "to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels," *id.* at ___, 769 S.E.2d at 232 (quoting *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part)). The Court of Appeals determined that the Map Act imposed restrictions on "Plaintiffs' ability to freely improve, develop, and dispose of their own property," *id.* at ___, 769 S.E.2d at 235, that "never expire," *id.* at ___, 769 S.E.2d at 234 (quoting *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478), and that, as a result, the Map Act effectuated a taking of their "elemental [property] rights," *id.* at ___, 769 S.E.2d at 234. Therefore, the Court of Appeals concluded that plaintiffs' inverse condemnation claim was ripe and remanded the matter for a "discrete fact-specific inquiry," *id.* at ___, 769 S.E.2d at 235 (quoting and discussing *Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474 (majority opinion)), to determine "the amount of compensation due," *id.* at ___, 769 S.E.2d at 236.

We allowed NCDOT's petition for discretionary review. We review orders granting summary judgment and dismissal de novo and "view the allegations as true and the supporting record in the light most favorable to the non-moving party." *E.g.*, *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

The NCDOT contends that the Map Act is a valid, regulatory exercise of the police power, not the power of eminent domain, and that therefore no taking has occurred. The NCDOT asserts that "cost-cutting" is not the only underlying purpose of the Map Act and, quoting *Blades v. City of Raleigh*, 280 N.C. 531, 546, 187 S.E.2d 35, 43 (1972), argues that the Act promotes the general welfare of the public "by conserving the values of other properties and encouraging the[ir] most appropriate use." The NCDOT points to "facilitating orderly and predictable development" with "the least impact on the natural and human environments, and minimizing the number of businesses, homeowners and renters who will have to be relocated when a [highway] project is authorized for right-of-way acquisition and road construction" in support of its contentions. While these policies are laudable, we do not agree that the Map Act is a valid, regulatory exercise of the police power. We concur with the analysis of the Court of Appeals.

The fundamental right to property is as old as our state. *See* N.C. Const. of 1776, Declaration of Rights § XII; *Bayard v. Singleton*,

1 N.C. (Mart.) 5, 9 (1787); *see also* 1 William Blackstone, *Commentaries* *138 ("The third absolute right, inherent in every [man], is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."). Public policy has long favored the "free and unrestricted use and enjoyment of land." *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty., Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981) (citations omitted); *see* N.C.G.S. § 47B-1(1) (2015) ("Land . . . should be made freely alienable and marketable so far as is practicable."). "Property" encompasses "every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value" and includes "not only the thing possessed but . . . the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Hildebrand v. So. Bell Tel. & Tel. Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941).

From the very beginnings of our republic we have jealously guarded against the governmental taking of property. *See* John Locke, *Two Treatises of Government* 295 (London, Whitmore & Fenn et al. 1821) (1689) ("The great and *chief end*, therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property.*"); James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906) ("Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses."). Though our state constitution does not contain "an express constitutional provision against the 'taking' or 'damaging' of private property for public use" without payment of just compensation, we have long recognized the existence of a constitutional protection against an uncompensated taking and "the fundamental right to just compensation as so grounded in natural law and justice" that it is considered "an integral part of 'the law of the land' within the meaning of Article 1, Section 19 of our [North Carolina] Constitution." *Long v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.E.2d 101, 107-08 (1982) (footnotes and citations omitted), *superseded on other grounds by statute*, Act of July 10, 1981, ch. 919, sec. 28, 1981 N.C. Sess. Laws 1382, 1402; *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 67-72 (2d ed. 2013) (discussing the development and interpretation of the Law of the Land Clause). "Property" clearly includes the rights to improve, develop, and subdivide, which were severely and indefinitely restricted here by the Map Act. Our recognition of the impact of the Map Act's restrictions on property rights, however, does not end the inquiry.

Determining if governmental action constitutes a taking depends upon "whether a particular act is an exercise of the police power or of the power of eminent domain." *Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (quoting 11 Eugene McQuillin, *The Law of Municipal Corporations* § 32.27, at 319 (Ray Smith ed., Callaghan & Co. 3d ed. 1950)). Under the police power, the government *regulates* property to prevent injury to the public. *Beroth II*, 367 N.C. at 351, 757 S.E.2d at 479 (Newby, J., dissenting in part and concurring in part); *City of Durham v. Eno Cotton Mills*, 141 N.C. 615, 637, 54 S.E. 453, 461 (1906) ("[T]he right of property . . . [is] enjoyed subject to reasonable regulations . . . ." "The safety of the people is the supreme law . . . ."). Police power regulations must be "enacted in good faith, and ha[ve] appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." *Eno Cotton Mills*, 141 N.C. at 642, 54 S.E. at 462 (quoting *Mugler v. Kansas*, 123 U.S. 623, 666, 8 S. Ct. 273, 299, 31 L. Ed. 205, 212 (1887)). An exercise of police power outside these bounds may result in a taking. *See Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208-09 (1983).

Under the power of eminent domain, the government *takes* property for public use because such action is advantageous or beneficial to the public. *Beroth II*, 367 N.C. at 351, 757 S.E.2d at 479. "[T]he sovereign determines the nature and extent of the property required . . . [and] may take for a limited period of time or in perpetuity . . . an easement, a mere limited use, . . . [or] an absolute, unqualified fee . . . ." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) (citations omitted). As such, "[t]he state must compensate for property rights taken by eminent domain; [however,] damages resulting from the [proper] exercise of [the] police power are noncompensable." *Barnes*, 257 N.C. at 514, 126 S.E.2d at 738 (quoting *State v. Fox*, 53 Wash. 2d 216, 220, 332 P.2d 943, 946 (1958)).

The language of the Map Act plainly points to future condemnation of land in the development of corridor highway projects, thus requiring NCDOT to invoke eminent domain. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." (citations omitted)). Section 136-44.50 contemplates the filing of "a transportation corridor official map" that has been adopted or amended by a governing board overseeing a "long-range transportation plan," and "establishment of" an "official map or amendment" triggers

the beginning of "environmental impact studies" and "preliminary engineering work." Sections 136-44.51 to 44.53 provide not only for approval of a building permit or variance but establish procedures for "advanced acquisition of" the property.

The Map Act's indefinite restraint on fundamental property rights is squarely outside the scope of the police power. *See Eno Cotton Mills*, 141 N.C. at 641-42, 54 S.E. at 462. No environmental, development, or relocation concerns arise absent the highway project and the accompanying condemnation itself. *See, e.g.*, *Town of Wake Forest v. Medlin*, 199 N.C. 83, 85-86, 154 S.E. 29, 30-31 (1930) (providing examples of police power regulations for protection against nuisances). Justifying the exercise of governmental power in this way would allow the State to hinder property rights indefinitely for a project that may never be built. *See State v. Vestal*, 281 N.C. 517, 523, 189 S.E.2d 152, 157 (1972) ("His property may not be taken . . . without compensation, under the guise of a regulation of his business pursuant to the police power."). Though the reduction in acquisition costs for highway development properties is a laudable public policy, economic savings are a far cry from the protections from injury contemplated under the police power. *See, e.g.*, *Medlin*, 199 N.C. at 85-86, 154 S.E. at 30-31. The societal benefits envisioned by the Map Act are not designed primarily to prevent injury or protect the health, safety, and welfare of the public. Furthermore, the provisions of the Map Act that allow landowners relief from the statutory scheme are inadequate to safeguard their constitutionally protected property rights.

A taking effectuated by eminent domain does not require "an actual occupation of the land," but "need only be a substantial interference with elemental rights growing out of the ownership of the property." *Long*, 306 N.C. at 198-99, 293 S.E.2d at 109 (citations omitted). These elemental rights are generally considered "an important feature of" the land and, as such, are accounted for within the valuation of the land. *See Town of Midland v. Wayne*, 368 N.C. 55, 66, 773 S.E.2d 301, 309 (2015) (stating that "development rights" are "an important feature of the condemned land and not a separate, compensable property right"); *Brown v. W.T. Weaver Power Co.*, 140 N.C. 333, 345, 52 S.E. 954, 958-59 (1905) ("The market value of property includes its value for any use to which it may be put." (citation omitted)); *see also Beroth II*, 367 N.C. at 343-44, 757 S.E.2d at 474-75 (majority opinion) (discussing various valuation methods).

Through inverse condemnation the owner may "recover to the extent of the diminution in his property's value" as measured by "the difference in the fair market value of the property immediately

before and immediately after the taking." *Long*, 306 N.C. at 201, 293 S.E.2d at 110-11 (citations omitted); *see* N.C.G.S. § 136-112(1) (2015). "Obviously, not every act or happening injurious to the landowner, his property, or his use thereof is compensable." *Long*, 306 N.C. at 199, 293 S.E.2d at 109. Thus, to pursue a successful inverse condemnation claim, a plaintiff must demonstrate not only a substantial interference with certain property rights but also that the interference caused a decrease in the fair market value of his land as a whole.

By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before the corridor map was recorded and the value of the land afterward, taking into account all pertinent factors, including the restriction on each plaintiff's fundamental rights, as well as any effect of the reduced *ad valorem* taxes. *See*, *e.g.*, *Nantahala Power & Light Co. v. Moss*, 220 N.C. 200, 205-06, 17 S.E.2d 10, 13-14 (1941) (discussing principles involved in fair market valuation); *see also Beroth II*, 367 N.C. at 343-44, 757 S.E.2d at 474-75. Accordingly, the trial court improperly dismissed plaintiffs' inverse condemnation claim. Therefore, we affirm the decision of the Court of Appeals, which reversed the trial court's ruling to the contrary and remanded this case for further proceedings as described above.

AFFIRMED.

MORRIS v. SCENERA RESEARCH, LLC

[368 N.C. 857 (2016)]

ROBERT PAUL MORRIS
v.
SCENERA RESEARCH, LLC AND RYAN C. FRY

No. 429PA13

Filed 10 June 2016

1. Employer and Employee—Wage and Hours Act—patent bonuses—patents pending when employment ended

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err by denying the employer's motions for direct verdict and judgment notwithstanding the verdict on the issue of whether plaintiff was entitled to patent issuance bonuses for patents still pending when his employment ended. Plaintiff presented more than a scintilla of evidence supporting his Wage and Hours Act claim: Plaintiff testified that his bonuses were earned at the time the patents were filed, and another witness confirmed that bonuses were earned at the time patents were filed.

2. Employer and Employee—Wage and Hours Act—patent bonuses—calculability—question for jury

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Supreme Court affirmed the holding of the Court of Appeals that the question of whether a wage is "calculable" under the Wage and Hours Act is one of fact, not law, and that the trial court properly submitted the question to the jury. Plaintiff argued at trial that value of the patent issuance bonuses for patent applications still pending with the U.S. Patent and Trademark Office could be calculated using the following formula: 150 outstanding patents x $5,000 for each successfully issued patent x 90% patent issuance success rate = $675,000. The employer failed to offer any other formula at trial, and the meaning of "calculable" includes "capable of being estimated."

3. Employer and Employee—patent bonuses—liquidated damages

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not abuse its discretion by concluding that plaintiff was not entitled to liquidated damages on the jury's award of issuance bonuses associated with unissued patents.

The employer had reason to believe that it did not owe plaintiff the bonuses.

4. Employer and Employee—patent bonuses—Retaliatory Employment Discrimination Act damages—not trebeled

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err when it declined to treble the jury's award of Retaliatory Employment Discrimination Act (REDA) damages. Proving a willful violation of N.C.G.S. § 95-241 requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute. Competent evidence supported the trial court's decision to not treble plaintiff's REDA award.

5. Employer and Employee—patent bonuses—rescission—money damages sufficient remedy

In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Court of Appeals erred by holding that plaintiff was entitled to rescission. A party may pursue rescission only when a material breach occurs *and* all legal remedies fall short of compensating the injured party for its loss. Plaintiff claimed that his employer owed him $5,000 to $10,000 for each patent at issue, and money damages provided him with a complete remedy.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 229 N.C. App. 31, 747 S.E.2d 362 (2013), finding no error in part, affirming in part, and reversing in part a memorandum opinion entered on 4 January 2012, a judgment entered on 14 May 2012, and an order entered on 27 June 2012, all by Judge James L. Gale in Superior Court, Wake County, and remanding in part for further judgment. On 18 December 2014, the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 18 May 2015.

Young Moore and Henderson P.A., by Walter E. Brock, Jr., Andrew P. Flynt, and Patrick M. Aul, for plaintiff-appellee/appellant.

Parker Poe Adams & Bernstein LLP, by Catharine B. Arrowood, Scott E. Bayzle, and Catherine R.L. Lawson, for defendant-appellants/appellees.

Smith Moore Leatherwood LLP, by Richard A. Coughlin and Matthew Nis Leerberg, for North Carolina Chamber of Commerce, North Carolina Association of Defense Attorneys, and North Carolina State University, amici curiae.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Thomas Holderness, for Qualcomm Incorporated, Qualcomm Technologies, Incorporated, Cisco Systems, Inc., Microsoft Corp., and Cree, Inc., amici curiae.

BEASLEY, Justice.

This appeal arises out of a compensation and intellectual property dispute between Robert Paul Morris ("plaintiff") and his former employer Scenera Research, LLC and its CEO Ryan Fry (collectively, "defendants"). In 2004, Stanley Fry, defendant Ryan Fry's father, hired plaintiff as Scenera's first employee. The parties did not sign a written employment agreement. They did, however, have several discussions concerning the details of plaintiff's employment. Plaintiff expressed interest in inventing, but testified at trial that he had no obligation to invent. According to plaintiff, inventing was not part of his regular job duties for which he received a base salary.

Plaintiff participated in Scenera's patent bonus program (the "bonus program"), under which he received $5000 for every patent application submitted to the United States Patent and Trademark Office ("PTO") and another $5000 if and when the patent issued. Defendant Ryan Fry became concerned with the bonus program's viability and suspended Scenera's bonus program for all employees effective 1 January 2008. Plaintiff testified that Scenera owed him $210,000 in patent bonuses at this time. Plaintiff voluntarily suspended receipt of payments beginning in January 2008, believing that defendant Fry had promised to reinstate the original bonus program if Scenera did not create a new compensation plan and, thereafter, provide plaintiff a written employment contract.

As of 2009, the parties had not been able to agree on a new compensation plan and plaintiff still had no written contract. Frustrated with this lack of progress, plaintiff hired a lawyer and threatened to sue under the North Carolina Wage and Hour Act ("WHA") for the $210,000 in bonuses owed. The parties dispute the events that followed. Plaintiff claimed that Scenera fired him in retaliation for his threatening to bring a lawsuit, thereby violating the North Carolina Retaliatory Employment Discrimination Act ("REDA"). Defendants countered that plaintiff

clearly intended to leave the company and that his lawyer indicated the only option was to negotiate a severance package—thus, plaintiff "effectively resigned" and defendants merely accepted the resignation. Defendants tendered plaintiff a check for $210,000 on the condition that he acknowledge Scenera's ownership of patent applications filed and patents issued between 1 January 2008 and 17 June 2009. Plaintiff did not accept defendants' offer.

Plaintiff filed a complaint against defendants alleging breach of contract, fraudulent inducement, unjust enrichment, and WHA and REDA violations. On 1 April 2011, the Chief Justice designated this action as a complex business case and assigned it to the North Carolina Business Court. Defendants asserted a counterclaim for declaratory judgment that (1) Scenera owns all inventions plaintiff developed during his employment, and (2) plaintiff was not entitled to bonuses for patent applications filed or patents issued any time after January 2008. Defendants also sought damages for breach of fiduciary duty and for plaintiff's failure to support prosecution of patent applications to the PTO.

Both parties moved for summary judgment. The trial court granted defendants' motion in part, concluding that plaintiff was "hired to invent," and that ownership of the patents presumptively rested with Scenera, with the onus on plaintiff to prove that an agreement between the parties vested ownership with him. The trial court also granted defendants' summary judgment on plaintiff's claims for fraudulent inducement and unjust enrichment. The trial court denied the remainder of plaintiff's and defendants' motions for summary judgment.

Trial began on 30 January 2012. At the close of the evidence, the trial court granted defendants' motion for a directed verdict with respect to the issue of patent ownership, but denied defendants' motion for a directed verdict on the WHA and REDA claims. The trial court submitted the rest of the issues to the jury, and the jury awarded plaintiff (1) $210,000 in patent bonuses under the WHA for applications filed or patents issued between 1 January 2008 and 17 June 2009, (2) $675,000 under the WHA in patent issuance bonuses for patent applications pending as of 17 June 2009, (3) and $390,000 for REDA violations.

Plaintiff then requested liquidated damages and attorneys' fees under the WHA, and treble damages and attorneys' fees under REDA. The trial court denied plaintiff's request to treble damages, awarded $450,000 in attorneys' fees, and awarded $210,000 in liquidated damages for patents that have already issued. The trial court denied plaintiff's request for liquidated damages under the WHA for patents that had not yet issued. The trial court further ruled that Scenera owned all of the inventions,

patents, and patent applications listed in plaintiff's complaint, required plaintiff to assign any unassigned patent applications to Scenera, and ruled that Scenera could not recover damages under its counterclaims. Defendants moved for judgment notwithstanding the verdict (JNOV), and the trial court denied the motion. All parties appealed.

The Court of Appeals affirmed the trial court's ruling on the motions for directed verdict and JNOV, liquidated damages, WHA damages, and REDA damages. The court reversed, however, the trial court's ruling that plaintiff could not pursue rescission. *Morris v. Scenera Research, LLC*, 229 N.C. App. 31, 747 S.E.2d 362 (2013). All parties appealed.

I

A

[1] Defendants contend that the trial court should have granted their motions for directed verdict and JNOV as to whether plaintiff was entitled to patent issuance bonuses for patents still pending when his employment with Scenera ended. To survive a motion for directed verdict or JNOV, the non-movant must present "more than a scintilla of evidence" to support its claim. *Stark v. Ford Motor Co.*, 365 N.C. 468, 480, 723 S.E.2d 753, 761 (2012) (citation omitted). While a scintilla is "very slight evidence," *State v. Hawkins*, 155 N.C. 466, 470, 71 S.E. 326, 328 (1911) (quoting *State v. White*, 89 N.C. 462, 464-65 (1883)), the non-movant's evidence must still "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) (citation omitted). The trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986) (citations omitted). We review this question of law de novo. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013) (citations omitted).

The WHA provides:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs.

N.C.G.S. § 95-25.7 (2015).

At trial, plaintiff testified that he, like other Scenera employees, had a unique bonus plan, and that he was never informed that continued employment with Scenera was a prerequisite for receiving patent issuance bonuses. Plaintiff confirmed in his testimony that "the issuance bonus . . . was earned at the time the patent application was filed." He further testified that after a patent was filed and he assigned the corresponding rights to Scenera, "I was entitled to $5,000. . . . There was nothing as far as work with respect to the patent that I needed to do in order to earn that bonus." Moreover, Mona Singh, an inventor and witness for Scenera, confirmed that "whatever bonuses applied to [her] agreement became earned and due at the time the patent was filed." Singh also testified that she had received five or six issuance bonuses after leaving Scenera.

We hold that plaintiff has carried his minimal burden of presenting more than a scintilla of evidence supporting his WHA claim. While defendants cite conflicting evidence (some of which we discuss below), in the context of a directed verdict and JNOV, the trial court must resolve these conflicts in plaintiff's favor. Accordingly, we affirm the Court of Appeals' holding that the trial court properly submitted the question of whether plaintiff was entitled to the issuance bonuses to the jury and properly denied defendants' directed verdict and JNOV motions.

B

[2] Defendants further argue that the Court of Appeals erred in construing the term "calculable" under the WHA to mean capable of being estimated. As a preliminary matter, we address the Court of Appeals' holding that the question of whether a wage is "calculable" under the WHA is one of fact, not law, and that therefore the trial court could properly submit the question to the jury. The Court of Appeals explained that determining whether a wage is calculable "requires a weighing of the evidence and, thus, falls in a jury trial within the exclusive purview of the jury." *Morris*, 229 N.C. App. at 44, 747 S.E.2d at 370 (citations omitted). As we have explained, it is for the trial court "to determine whether the evidence . . . is sufficient to permit a legitimate inference of the facts essential to recovery; and it is the province of the jury to weigh the evidence and to determine what it proves or fails to prove." *Sneed v. Lions Club of Murphy, N.C., Inc.*, 273 N.C. 98, 101, 159 S.E.2d 770, 772 (1968) (citations omitted). "It is still for the jury if reasonable [minds] may differ as to its truth or if conflicting inferences may reasonably be drawn from" the evidence. *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E.2d 297, 314 (1971) (citations omitted). Because determining whether a wage is

calculable involves a weighing of the evidence, we affirm the Court of Appeals' holding that this issue presents a question of fact.

At trial, plaintiff argued that the value of the patent issuance bonuses for patent applications still pending with the PTO could be calculated using the following formula: 150 outstanding patents x $5,000 for each successfully issued patent x 90% patent issuance success rate = $675,000. The trial court instructed the jury to determine whether it could calculate the issuance bonuses owed, and if so, to compute that amount. The Court of Appeals first noted that neither the WHA nor case law define the term "calculable." The court therefore consulted the *American Heritage College Dictionary*, which defined calculable as " '[t]hat [which] can be calculated or *estimated*.' " *Morris*, 229 N.C. App. at 45, 747 S.E.2d at 371 (quoting *The American Heritage College Dictionary* 198 (3d ed. 1997) (emphasis added)). The court concluded that plaintiff's proffered formula "was at least one reasonable way to calculate" the bonuses and therefore held that the trial court did not err in submitting this question to the jury. *Id.* at 45, 747 S.E.2d at 371.

Defendants again argue that "calculable" does not mean capable of being estimated because this interpretation would allow impermissible speculation as to future wages. Defendants cite the rule that "the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987) (citation omitted). Plaintiff's formula, they contend, does not allow for the reasonably certain determination of issuance bonuses associated with pending patent applications.

We disagree. In other contexts in which a party seeks to recover lost profits, that party must show "both the amount and [the] cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of the loss must be shown with reasonable certainty." *Cary v. Harris*, 178 N.C. 624, 628, 101 S.E. 486, 488 (1919) (quoting *Nance v. W. Union Tel. Co.*, 177 N.C. 314, 317, 98 S.E. 838, 840 (1919)). The evidence indicated that plaintiff had completed all the work required for the patents to issue. An employer must pay "those wages and benefits due *when the employee has actually performed the work required to earn them*." *Kornegay v. Aspen Asset Grp.*, 204 N.C. App. 213, 229, 693 S.E.2d 723, 735 (2010) (quoting *Narron v. Hardee's Food Sys., Inc.*, 75 N.C. App. 579, 583, 331 S.E.2d 205, 208 (emphasis added), *disc. rev. denied*, 314 N.C. 542, 335 S.E.2d 316 (1985)).

We further note that defendants presented no evidence at trial challenging the adequacy of plaintiff's formula. Because defendants offered no other formula, this Court need only be concerned that the result reached, based on the evidence presented, is reasonable. *See Jenrette Transp. Co.*, 236 N.C. at 539-40, 73 S.E.2d at 485. We therefore affirm the Court of Appeals' holding that determining calculability of wages under the WHA is a question of fact to be submitted to a jury.

II

[3] We next address plaintiff's argument that the Court of Appeals erred in affirming the trial court's decision to refrain from awarding plaintiff liquidated damages on the jury's award of issuance bonuses associated with unissued patents. First, we must determine the appropriate standard of review. Plaintiff contends that de novo review applies, while defendants contend that we should apply a three-tiered standard as used by federal courts addressing claims under the Fair Labor Standards Act ("FLSA").

In *Kornegay v. Aspen Asset Group, LLC*, the Court of Appeals adopted the latter approach.

> [T]he traditional standard of review that applies to a trial court's factual findings—in federal court, the "clearly erroneous" standard and in North Carolina, the "competent evidence" standard—applies to findings of fact made by a trial court in addressing a claim for liquidated damages. In reviewing the trial court's conclusions of law, the courts have held that review is de novo, including on the issue whether the findings of fact support the conclusions of law.

204 N.C. App. at 245, 693 S.E.2d at 745. The trial court's final decision to award or refrain from awarding liquidated damages is then reviewed for abuse of discretion. *Id.* at 244, 693 S.E.2d at 744. We adopt the Court of Appeals' reasoning in *Kornegay* and review the trial court's decision to not award plaintiff liquidated damages for an abuse of discretion.

We hold that the trial court did not abuse its discretion in concluding that plaintiff was not entitled to liquidated damages.

The WHA provides:

> In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be

> due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

N.C.G.S. § 95-25.22(a1)(2015).

Plaintiff argues that defendants committed a per se WHA violation that was unreasonable as a matter of law when they did not notify him that he would not receive the issuance bonuses when his employment ended. The trial court held, however, that defendants had reasonable grounds for believing that their act or omission was not a violation of the WHA. We agree with the trial court. In considering the evidence, defendants had reason to believe that they did not owe plaintiff issuance bonuses. Therefore, we hold that defendants acted reasonably in not notifying defendant that he would not receive those bonuses.

Plaintiff's own testimony and complaint strongly support the conclusion that defendants acted reasonably. At his deposition, plaintiff stated that he was entitled to receive the issuance bonus "when the patent issued from the U.S. Patent Office." When asked at trial if "Scenera's obligated to pay an issuance bonus only if the patent issues," plaintiff responded, "Under the agreement that I had, yes." Plaintiff also testified that "[t]he issuance bonus was due when the patent issued." Finally, plaintiff's complaint alleged that the issuance bonus became due "when a patent issued."

We thus affirm the Court of Appeals' holding that the trial court properly denied plaintiff's request for liquidated damages on the jury's award of patent issuance bonuses.

III

[4] We next address whether the Court of Appeals erred by affirming the trial court's decision not to treble the jury's award of REDA damages. The REDA provides that if "the court finds that the employee was injured by a willful violation of [the section prohibiting discriminatory or retaliatory action by an employer], the court shall treble the amount awarded." N.C.G.S. § 95-243(c) (2015). But REDA does not define the

term "willful," and we have not addressed the term in this context. The Court of Appeals adopted the standard used by federal courts in addressing the Fair Labor Standards Act (FLSA), holding that a willful FLSA violation is "one in which the employer 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the] statute.' " *Morris*, 229 N.C. App. at 51, 747 S.E.2d at 375 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 100 L. Ed. 2d 115, 123 (1988)). Again looking to federal law for guidance, the Court of Appeals held that the determination of willfulness is a question of fact, *id.* at 52, 747 S.E.2d at 375 (citing *Formby v. Farmers & Merchs. Bank*, 904 F.2d 627, 632 (11th Cir. 1990) (*per curiam*) (determination of willfulness under Age Discrimination in Employment Act is a question of fact)), and adopted the competent evidence standard used in bench trials, *id.* at 52, 747 S.E.2d at 375 (citing *In re Estate of Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007)). Finally, the Court of Appeals held that a determination of "willfulness" under REDA is "for the jury to decide, not for the judge." *Id.* at 52, 747 S.E.2d at 375.[1]

We agree with the Court of Appeals' definition of "willfulness," as well as its determination that whether defendants' violation of REDA was willful is one of fact. But, we disagree with its decision that the determination of willfulness is one for the jury. The statute clearly establishes that damages shall be trebled under REDA if "the *court* finds that the employee was injured by a willful violation." N.C.G.S. § 95-243(c) (emphasis added). Thus, the trial court must make the finding of willfulness, and a reviewing court must uphold the trial court's finding of willfulness if there is competent evidence to support that finding.

The record supports the trial court's finding that defendants did not willfully violate REDA. Plaintiff was the first party to suggest that he and Scenera "part ways" and "negotiate a termination agreement." Plaintiff speculates that defendants' retention of counsel is evidence that defendants attempted to conceal their REDA violations; however, plaintiff cites no specific evidence indicating the existence of a cover-up, and the record shows none. Defendants' retention of counsel may simply demonstrate that they wished to comply with REDA.

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1. Nonetheless, the court recognized that a party can waive its right to have a jury determine questions of fact and that plaintiff did so here by "explicitly concur[ring] with the business court's suggestions that . . . Scenera's 'willfulness' under REDA was for the court to decide." *Id.* at 52, 747 S.E.2d at 375.

We thus hold that proving a willful violation of N.C.G.S. § 95-241 requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute and affirm the Court of Appeals' holding that competent evidence supported the trial court's decision to not treble plaintiff's REDA award.

IV

[5] Finally, we address defendants' argument that plaintiff is not entitled to rescission. Defendants argue that plaintiff is not entitled to rescission because monetary damages provide plaintiff with an adequate remedy, and because rescission would return plaintiff to a status quo that never existed. We agree.

Rescission is an equitable contract remedy that differs from its legal counterparts. While legal remedies generally compensate the nonbreaching party as if there were no breach, rescission treats both parties as if there were no contract. *Brannock v. Fletcher*, 271 N.C. 65, 73-74, 155 S.E.2d 532, 541 (1967). "Rescission is not merely a termination of contractual obligation. It is abrogation or undoing of it from the beginning." *Id.* at 74, 155 S.E.2d at 542 (citing *Dooley v. Stillson*, 46 R.I. 332, 335, 128 A. 217, 218 (1925)). As with all equitable remedies, rescission "will not lend its aid in any case where the party seeking it has a full and complete remedy at law." *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945) (citations omitted). A party may pursue rescission only if "there is a material breach of the contract going to the very heart of the instrument." *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 242, 243 (1964).

The Court of Appeals incorrectly applied the test for rescission. The court held that Scenera's failure to pay plaintiff his patent bonuses was prima facie evidence of a material breach, and, because defendants breached the contract materially, plaintiff could pursue rescission. But, rescission cannot be the remedy for every material breach. A party may pursue rescission only when a material breach occurs and all legal remedies fall short of compensating the injured party for its loss. *Id.* at 43, 134 S.E.2d at 243, *see Jefferson Standard Life Ins. Co.*, 225 N.C. at 300, 34 S.E.2d at 434.

Here, although defendants materially breached their contract with plaintiff, monetary damages sufficiently compensate plaintiff for his loss. Plaintiff's entire claim is that defendants owe him $5,000 to $10,000 for each patent he created while employed at Scenera. Defendants owed plaintiff no other obligation under the contract, and monetary damages provide plaintiff with a full and complete remedy.

To hold otherwise would seriously undermine the rationale of the hired-to-invent doctrine.[2] As this Court explained in *Speck*, an employer takes a risk when hiring an employee to invent, because the employer has no guarantee of a return on its investment. 311 N.C. at 686, 319 S.E.2d at 143 (in which this Court adopted the hired-to-invent doctrine, holding that if the employee succeeds in inventing, "then the invention belongs to the employer even though the terms of employment contain no express provision dealing with the ownership of whatever inventions may be developed." (quoting *Nat'l Dev. Co. v. Gray*, 316 Mass. 240, 247, 55 N.E.2d 783, 787 (1944)). If an employee is hired to invent but could later rescind that agreement and claim ownership of inventions made during his or her employment, the employee would end up in a far better position, and the employer in a far worse position, than when the parties reached their original bargain. The employer's risk would increase exponentially, thereby discouraging businesses and universities from undertaking valuable research efforts that could benefit our State and Nation.

For these reasons, the Court of Appeals' holding that plaintiff may pursue rescission is reversed.

V

In conclusion, we affirm the Court of Appeals' holding that the trial court properly submitted the issue of whether plaintiff was entitled to the issuance bonuses to the jury and properly denied defendants' directed verdict and JNOV motions. We likewise affirm the Court of Appeals' holding that determining calculability of wages under the WHA is a question of fact to be submitted to a jury. We also affirm the Court of Appeals' holdings that plaintiff is not entitled to liquidated damages based on the WHA or treble damages based on REDA. Finally, we reverse the Court of Appeals' holding that plaintiff may pursue rescission.

AFFIRMED IN PART; REVERSED IN PART.

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2. The trial court concluded that plaintiff was "hired to invent." However, the Court of Appeals stated that this conclusion by the trial court was "inapposite" to the issue of rescission. *Morris*, 229 N.C. App. at 62, 747 S.E.2d at 381. We assume, without deciding, that plaintiff was hired to invent.

STATE v. BISHOP

[368 N.C. 869 (2016)]

STATE OF NORTH CAROLINA
v.
ROBERT BISHOP

No. 223PA15

Filed 10 June 2016

Constitutional Law—freedom of speech—cyberbullying statute unconstitutional

The Court of Appeals erred by finding no error in defendant's conviction for cyberbullying. The cyberbullying statute under N.C.G.S. § 14-458.1(a)(1)(d) (2015) was declared unconstitutional because it violated the First Amendment's guarantee of freedom of speech. It restricted speech, not merely nonexpressive conduct; the restriction was content based, not content neutral; and it was not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 337 (2015), finding no error after appeal from a judgment entered on 5 February 2014 by Judge G. Wayne Abernathy in Superior Court, Alamance County. Heard in the Supreme Court on 17 February 2016.

Roy Cooper, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

Ellis & Winters LLP, by C. Scott Meyers; and Eugene Volokh, pro hac vice, UCLA School of Law, for Electronic Frontier Foundation, amicus curiae.

HUDSON, Justice.

On 9 February 2012, defendant Robert Bishop was arrested and charged with one count of cyberbullying under North Carolina's cyberbullying statute, N.C.G.S. § 14-458.1. Under that statute, it is "unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or

torment a minor." N.C.G.S. § 14-458.1(a)(1)(d) (2015). On 5 February 2014, defendant was convicted on that sole charge by a jury in the Superior Court in Alamance County. On appeal, the Court of Appeals concluded that the cyberbullying statute "prohibits conduct, not speech"; that any burden on speech is "merely incidental"; and that this "incidental" burden "is no greater than necessary" to further the State's "substantial" interest in protecting children from the harmful effects of bullying and harassment. *State v. Bishop*, ___ N.C. App. ___, ___, ___, 774 S.E.2d 337, 344-45, 349 (2015). We now conclude that N.C.G.S. § 14-458.1(a)(1)(d) restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. Accordingly, we reverse the decision of the Court of Appeals and hold that the statute violates the First Amendment as applied to the states through the Fourteenth Amendment.

I. FACTS AND PROCEDURAL BACKGROUND

During the 2011-2012 school year, defendant and Dillion Price were students at Southern Alamance High School. Starting in the fall of 2011, some of Price's classmates began to post negative pictures and comments about Price on Facebook, including on Price's own Facebook page. In September 2011, a male classmate posted on Facebook a screenshot of a sexually themed text message Price had inadvertently sent him. Below that post, several individuals commented, including Price and defendant. Price accused the posting student of altering or falsifying the screenshot and threatened to fight him over the matter; defendant commented that the text was "excessively homoerotic" and accused others of being "defensive" and "pathetic for taking the [I]nternet so seriously."

At least two other Facebook postings with similar tone and attitude followed, all involving Price, defendant, and other commenters. Many of the messages that ensued included comments and accusations about each other's sexual proclivities, along with name-calling and insults.

Late one night in December 2011, Price's mother found him very upset in his room, crying, throwing things, and hitting himself in the head. She saw on his cellphone some of the comments and pictures that his classmates had posted. Fearing for his well-being and concerned that Price might harm himself, Price's mother contacted the police, who used undercover Facebook accounts to view the Facebook postings and take screenshots of postings relevant to the investigation.

On 9 February 2012, defendant was arrested and charged with one count of cyberbullying in violation of N.C.G.S. § 14-458.1. Some, but not all, of the other students involved in these discussions were also arrested or charged under the cyberbullying statute.[1]

Defendant was tried and convicted in district court, after which he appealed to the Superior Court in Alamance County for a trial de novo. In the superior court, defendant filed a pretrial motion to dismiss, contending that N.C.G.S. § 14-458.1(a)(1)(d) is unconstitutional under the First and Fourteenth Amendments. After hearing the matter on 24 April, the trial court denied defendant's motion in an order entered on 17 May 2013. Defendant's case came on for trial at the 3 February 2014 criminal session of the Superior Court in Alamance County, and on 5 February, defendant was convicted by a jury of one count of cyberbullying. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant argued, *inter alia*, that the cyberbullying statute, specifically N.C.G.S. § 14-458.1(a)(1)(d), restricts speech protected under the First Amendment; that this restriction is content based; and that it sweeps too broadly to satisfy the exacting demands of strict scrutiny. In a unanimous opinion, the Court of Appeals rejected those arguments. Instead, applying de novo review, that court concluded that N.C.G.S. § 14-458.1(a)(1)(d) regulates conduct, not speech, and specifically that the statute "punishes the *act* of posting or encouraging another to post on the Internet *with the intent* to intimidate or torment" a minor. *Bishop*, ___ N.C. App. at ___, 774 S.E.2d at 343. The Court of Appeals also concluded that "[t]o the extent the Cyber-bullying Statute touches upon or regulates some aspects of some speech, the burden on speech and expression is merely incidental." *Id.* at ___, 774 S.E.2d at 344 (citing *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 300, 749 S.E.2d 429, 437 (2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 99 (2013)). And regarding that "incidental" burden, the Court of Appeals concluded that it "is no greater than necessary" because the statute "only prohibits disclosure of 'private, personal, or sexual information pertaining to [a] minor' on the Internet with the specific intent to intimidate or torment a minor" and "does not prohibit any other speech or communication on the Internet outside of this context." *Id.* at ___, 774 S.E.2d at 344-45 (quoting N.C.G.S. § 14-458.1(a)(1)(d)). Partly on this basis, and after rejecting several other arguments defendant raised before that court,

1. According to the trial transcript, it appears that six students were charged in connection with these online conversations.

the Court of Appeals ultimately found no error in defendant's conviction under the cyberbullying statute. *See id.* at ___, 774 S.E.2d at 349. On 20 August 2015, we allowed defendant's petition for discretionary review.

II. ANALYSIS

Here, defendant again contends that the cyberbullying statute, specifically N.C.G.S. § 14-458.1(a)(1)(d), is unconstitutional under the First Amendment, as incorporated and applied to the states through the Fourteenth Amendment, because it criminalizes protected speech based on its content, and because, in doing so, the law extends well beyond the government's asserted interest in protecting children from the harms caused by online bullying. The challenged provision makes it "unlawful for any person to use a computer or computer network" to "[p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). For the reasons that follow, we hold that section 14-458.1 restricts speech, and not just nonexpressive conduct; that the restriction created is content based, not content neutral; and that the statute's scope is not sufficiently narrowly tailored to serve the State's asserted interest in protecting children from the harms resulting from online bullying. Accordingly, we conclude that N.C.G.S. § 14-458.1(a)(1)(d) violates the First Amendment. We therefore reverse the decision of the Court of Appeals.

A. The Statute Burdens Speech, Not Just Nonexpressive Conduct.

We must first determine whether N.C.G.S. § 14-458.1(a)(1)(d) restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct. Answering this question determines whether the First Amendment is implicated. *See*, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989) (stating that conduct acquires First Amendment protection only when it "possesses sufficient communicative elements"). Yet this inquiry is not always easy or straightforward. On one hand, the Supreme Court of the United States has recognized that expressive conduct falls within the ambit of the First Amendment's protections—at least when that conduct is "inherently" expressive. *Rumsfeld v. Forum for Acad. & Inst'l Rights*, *Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 1310 (2006) ("Instead, we have extended First Amendment protection only to conduct that is inherently expressive[, such as flag burning]." (citing *Johnson*, 491 U.S. at 406, 109 S. Ct. at 2540)). On the other, that Court has also long held that otherwise proscribable criminal conduct does not become protected by the First

Amendment simply because the conduct happens to involve the written or spoken word. *See, e.g.*, *United States v. Alvarez*, ___ U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (noting that "speech integral to criminal conduct" remains a category of historically unprotected speech); *accord Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 691 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (citations omitted)); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 389, 112 S. Ct. 2538, 2546 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets) . . . ."); *State v. Camp*, 59 N.C. App. 38, 42-43, 295 S.E.2d 766, 768-69 (opining that a statute barring use of a telephone to harass another person implicated conduct, not speech, and therefore did not violate the First Amendment), *appeal dismissed and disc. rev. denied*, 307 N.C. 271, 299 S.E.2d 216 (1982). Against this blurred doctrinal landscape, the line is not always bright between what is protected by the First Amendment and what is not.

Here, however, we are satisfied that N.C.G.S. § 14-458.1(a)(1)(d) applies to speech and not solely, or even predominantly, to nonexpressive conduct. As noted, the statute prohibits anyone, on threat of criminal punishment, from "[p]ost[ing] or encourag[ing] others to post on the Internet [any] private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). In contrast with the statute we upheld in *Hest*, which proscribed operating or placing into operation "an electronic machine or device" to conduct a sweepstakes, 366 N.C. at 292, 749 S.E.2d at 432, this statute outlawed posting particular subject matter, on the internet, with certain intent. The statute at issue in *Hest* regulated conduct, *id.* at 296, 749 S.E.2d at 434; the statute here regulates protected speech.

Posting information on the Internet—whatever the subject matter—can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long protected by the First Amendment. *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 669 (1938) ("The [First Amendment] is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest."); *see also Jamison v. Texas*, 318 U.S. 413, 416, 63 S. Ct. 669, 672

(1943) ("This right [to express one's views in an orderly fashion] extends to the communication of ideas by handbills and literature as well as by the spoken word." (citations omitted)). Such communication does not lose protection merely because it involves the "act" of posting information online, for much speech requires an "act" of some variety—whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 18-19, 26, 91 S. Ct. 1780, 1784-85, 1789 (1971) (holding that wearing a jacket with an antiwar vulgarity constituted protected speech, not merely conduct). Nor is such communication subject to any lesser protection simply because it occurs online. As the United States Supreme Court has made clear, the protections of the First Amendment extend in full not just to the Internet, *see Reno v. ACLU*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."), but to all new media and forms of communication that progress might make available, *see Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 131 S. Ct. 2729, 2733 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S. Ct. 777, 781 (1952))). Accordingly, we conclude that N.C.G.S. § 14-458.1(a)(1)(d) of North Carolina's cyberbullying statute implicates the First Amendment because that provision restricts speech and not merely conduct.

B. The Statute is Content Based.

Having concluded that N.C.G.S. § 14-458.1(a)(1)(d) limits speech, we now consider a second threshold inquiry: whether this portion of the cyberbullying statute is content based or content neutral. This central inquiry determines the level of scrutiny we apply here. Content based speech regulations must satisfy strict scrutiny. Such restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, ___ U.S. ___, ___, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V.*, 505 U.S. at 395, 112 S. Ct. at 2549 and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S. Ct. 501, 508, 509 (1991)). In contrast, content neutral measures—such as those governing only the time, manner, or place of First Amendment-protected expression—are subjected to a less demanding but still rigorous form of intermediate scrutiny. The government must

prove that they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, ___ U.S. ___, ___, 134 S. Ct. 2518, 2529 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989)).

Until recently, it was unclear how a court should determine whether a speech restriction is content based or content neutral. In some cases, the Supreme Court of the United States has suggested that a reviewing court should focus on the intent behind the measure; in others, it has emphasized the plain text of the statute and how it would operate in practice. *Compare Ward*, 491 U.S. at 791, 109 S. Ct. at 2754 ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295, 104 S. Ct. 3065, 3070 (1984))), *with McCullen*, ___ U.S. at ___, 134 S. Ct. at 2531 ("The Act would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383, 104 S. Ct. 3106, 3119 (1984))), *and R.A.V.*, 505 U.S. at 391, 112 S. Ct. at 2547 ("In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."). At times, the Court suggested both emphases within the course of a single opinion. *Compare Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64, 131 S. Ct. 2653, 2663 (2011) ("On its face, [the challenged measure] enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."), *with id.* at 565, 131 S. Ct. at 2663-64 ("Given the legislature's expressed statement of purpose, it is apparent that [the challenged measure] imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint.").

Recently, however, in *Reed v. Town of Gilbert* that Court clarified that several paths can lead to the conclusion that a speech restriction is content based and therefore subject to strict scrutiny. This determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message.[2] In short, "[b]ecause strict

2. As the Supreme Court of the United States summarized:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content

scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed*, ___ U.S. at ___, 135 S. Ct. at 2228.

Here, it is clear that the cyberbullying statute is content based, on its face and by its plain text, because the statute "defin[es] regulated speech by [its] particular subject matter." *Id.* at ___, 135 S. Ct. at 2227. The provision under which defendant was arrested and prosecuted prohibits "post[ing] or encourag[ing] others to post . . . private, personal, or sexual information pertaining to a minor." N.C.G.S. § 14-458.1(a)(1)(d). The statute criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication. The State's justification for the cyberbullying statute "cannot transform [this] facially content based law into one that is content neutral," *Reed*, ___ U.S. at ___, 135 S. Ct. at 2228, and we therefore reverse the Court of Appeals holding to the contrary.

C. The Statute Fails Strict Scrutiny.

Because we have concluded that N.C.G.S. § 14-458.1(a)(1)(d) creates a content based restriction on protected speech, we can uphold this portion of the cyberbullying statute only if the State can demonstrate that it satisfies strict scrutiny. To do so, the State must show that the statute serves a compelling governmental interest, and that the law is narrowly tailored to effectuate that interest. *See*, *e.g.*, *id.* at ___, 135 S. Ct. at 2226.

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based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys. Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, ___ U.S. at ___, 135 S. Ct. at 2227 (brackets, internal citations, and internal quotation marks omitted).

That protecting children from online bullying is a compelling governmental interest is undisputed. While the State would normally be required specifically to "identify an 'actual problem' in need of solving," *Entm't Merchs. Ass'n*, 564 U.S. at 799, 131 S. Ct. at 2738 (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822, 120 S. Ct. 1878, 1891 (2000)), and to "demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial' " *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, ___, 133 S. Ct. 2411, 2418 (2013) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 98 S. Ct. 2733, 2756 (1978) (plurality opinion)), here the State asserts, and defendant agrees, that the General Assembly has a compelling interest in protecting children from physical and psychological harm. We also note that the special status of minors is a subject for which the Supreme Court of the United States has shown a particular solicitude. That Court's longstanding recognition that "youth is more than a chronological fact," *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 877 (1982), has led it, on one hand, to recognize a compelling interest in the protection of minors, *see, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989), and, on the other, to prohibit the imposition of the most serious criminal punishments for offenses committed before the age of eighteen, *see Roper v. Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 1198 (2005) (holding that the death penalty cannot be imposed for offenses committed by a juvenile); *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); *Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2460 (2012) ("[M]andatory life without parole for those under the age of 18 at the time of their crimes [even for homicide offenses] violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (quoting U.S. Const. amend. VIII)). Accordingly, in line with these consistent and converging strands of precedent, we reaffirm that the State has "a compelling interest in protecting the physical and psychological well-being of minors." *Sable Commc'ns*, 492 U.S. at 126, 109 S. Ct. at 2836.

But just as the Court has shown a particular cognizance of the vulnerabilities of minors, so too has it shown a particular wariness of allowing strict scrutiny to become "strict in theory but feeble in fact." *Fisher*, ___ U.S. at ___, 133 S. Ct. at 2421. The State must show not only that a challenged content based measure addresses the identified harm, but that the enactment provides "the least restrictive means" of doing so. *McCutcheon v. FEC*, ___ U.S. ___, ___, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (citing *Sable Commc'ns*, 492 U.S. at 126, 109 S. Ct. at 2836). Given this "exacting scrutiny," *id.* at ___, 134 S. Ct. at 1444, it is

perhaps unsurprising that few content based restrictions have survived this inquiry. *See Williams–Yulee v. Fla. Bar*, ___ U.S. ___, ___, 135 S. Ct. 1656, 1672 (2015) (upholding a provision that prohibited judicial candidates from personally soliciting campaign contributions but allowed them to raise funds in other ways and to conduct other campaign activities); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 38-39, 130 S. Ct. 2705, 2729-30 (2010) (upholding, in the interest of national security, a specific application of a statute barring the provision of material aid to foreign terrorist groups); *Burson v. Freeman*, 504 U.S. 191, 210-11, 112 S. Ct. 1846, 1857-58 (1992) (plurality opinion) (upholding a buffer zone around election sites as a measure to safeguard the right to vote freely and effectively); s*ee also Wood v. Moss*, ___ U.S. ___, ___, 134 S. Ct. 2056, 2061 (2014) (holding, in light of the "overwhelming importance" of "safeguarding the President," that the Secret Service had not violated the clearly established rights of protestors by moving them farther away than supporters during an unexpected presidential stop).

With these principles in mind, we now turn to sub-subdivision 14-458.1(a)(1)(d) of the cyberbullying statute. Again, that provision makes it a criminal offense "for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). The central question then becomes whether this language embodies the least restrictive means of advancing the State's compelling interest in protecting minors from this potential harm.

We hold that it does not. At the outset, it is apparent that the statute contains no requirement that the subject of an online posting suffer injury as a result, or even that he or she become aware of such a posting. In addition, as to both the motive of the poster and the content of the posting, the statute sweeps far beyond the State's legitimate interest in protecting the psychological health of minors. Regarding motive, the statute prohibits anyone from posting forbidden content with the intent to "intimidate or torment" a minor. However, neither "intimidate" nor "torment" is defined in the statute, and the State itself contends that we should define "torment" broadly to reference conduct intended "to annoy, pester, or harass."[3] The protection of minors' mental well-being

3. Similarly, the State encourages us to define "to intimidate" as "to make timid; fill with fear." While we need not, and do not, address a hypothetical statute limited to proscribing unprotected "true threats"—which the United States Supreme Court has defined as "those statements where the speaker means to communicate a serious expression of

may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.

The description of the proscribed subject matter is similarly expansive. The statute criminalizes posting online "private, personal, or sexual information pertaining to a minor." *Id.* Again, these terms are not defined by the statute. The State has suggested that we interpret this language by defining "private" to mean "[s]ecluded from the sight, presence, or intrusion of others," or "[o]f or confined to the individual." The State would then define "personal" as "[o]f or relating to a particular person," or "[c]oncerning a particular person and his or her private business, interests, or activities." And it would define "sexual" as "[o]f, relating to, involving, or characteristic of sex, sexuality, the sexes, or the sex organs and their functions," or "[i]mplying or symbolizing erotic desires or activity." While all of these definitions are broad, the State's proposed definition of "personal" as "[o]f or relating to a particular person" is especially sweeping. Were we to adopt the State's position, it could be unlawful to post on the Internet any information "relating to a particular [minor]." Such an interpretation would essentially criminalize posting *any* information about *any* specific minor if done with the requisite intent.

Finally, we note that, while adding a mens rea requirement can sometimes limit the scope of a criminal statute, reading the motive and subject matter requirements in tandem here does not sufficiently narrow the extensive reach of the cyberbullying statute. Even under the State's proposed construction of the statutory terms, N.C.G.S. § 14-458.1(a)(1)(d) could criminalize behavior that a robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior. Civility, whose definition is constantly changing, is a laudable goal but one not readily attained or enforced through criminal laws.

In sum, however laudable the State's interest in protecting minors from the dangers of online bullying may be, North Carolina's cyberbullying statute "create[s] a criminal prohibition of alarming breadth." *United States v. Stevens*, 559 U.S. 460, 474, 130 S. Ct. 1577, 1588 (2010), *superseded by statute*, Pub. L. No. 111-294, § 3(a), 124 Stat. 3178 (2010)

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an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548 (2003) (citations omitted)—we do note that such a statute might present a closer constitutional question. *Cf. Elonis v. United States*, ___ U.S. ___, ___, ___,135 S. Ct. 2001, 2004, 2012 (2015) (reversing the defendant's conviction under a federal statute that made "it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another,' " and for that reason, seeing no need to consider related First Amendment concerns (alteration in original) (quoting 18 U.S.C. § 875(c))).

(narrowing the scope of the law at issue). Even under the State's interpretation of N.C.G.S. § 14-458.1, the statute prohibits a wide range of online speech—whether on subjects of merely puerile interest or on matters of public importance—and all with no requirement that anyone suffer any actual injury. In general, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Entm't Merchs. Ass'n*, 564 U.S. at 799, 131 S. Ct. at 2738 (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. at 818, 120 S. Ct. at 1889). Certainly, N.C.G.S. § 14-458.1(a)(1)(d) of the cyberbullying statute is not.

III. CONCLUSION

For the foregoing reasons, we conclude that N.C.G.S. § 14-458.1(a)(1)(d) restricts speech, not merely nonexpressive conduct; that this restriction is content based; and that it is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. As such, the statute violates the First Amendment's guarantee of the freedom of speech. We therefore reverse the decision of the Court of Appeals finding no error in defendant's conviction for cyberbullying.

REVERSED.

STATE OF NORTH CAROLINA
v.
CHARLES ANTHONY McGRADY

No. 72PA14

Filed 10 June 2016

1. Evidence—expert witness testimony—standards—adoption of federal standard

A 2011 amendment to Rule 702(a) of the North Carolina Rules of Evidence adopted the federal standard for the admission of expert witness testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its line of cases. The proper interpretation of Rule 702(a) remains an issue of state law, and previous N.C. cases are still good law if they do not conflict with the *Daubert* standard.

2. Evidence—expert witness testimony—standards—application of new rule

Rule 702(a) of the North Carolina Rules of Evidence has three main parts, and expert testimony must satisfy each to be admissible. Expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience and must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case" for its own. Expertise can come from practical experience as much as from academic training, but the question remains whether the witness has enough expertise to be in a better position than the trier of fact to have an opinion on the subject. And, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case.

3. Evidence—expert witness testimony—excluded—no abuse of discretion

The trial court did not abuse its discretion in a first-degree murder prosecution in which defendant claimed self-defense by excluding evidence from a defense expert, Mr. Cloutier, on the use of force. The trial court concluded that Mr. Cloutier's testimony about pre-attack cues and use of force variables would not assist the jury because those matters were within the jurors' common knowledge; that Mr. Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system; and that Mr. Cloutier's reaction time testimony was based on speculation and not reliable.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 232 N.C. App. 95, 753 S.E.2d 361 (2014), finding no error after appeal of a judgment entered on 8 August 2012 by Judge R. Stuart Albright in Superior Court, Wilkes County. Heard in the Supreme Court on 17 March 2015.

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McGuinness Law Firm, by J. Michael McGuinness, for National Association of Police Organizations, Southern States Police Benevolent Association, and North Carolina Police Benevolent Association, amici curiae.

MARTIN, Chief Justice.

This appeal arises from defendant Charles Anthony McGrady's first-degree murder conviction for the shooting death of his cousin James Allen Shore Jr. Defendant admitted to shooting Mr. Shore. The central issue at trial was whether defendant shot and killed Mr. Shore in lawful defense of himself and his adult son Brandon McGrady. Defendant sought to introduce expert witness testimony on this issue. We allowed discretionary review to address whether amended Rule 702(a) of the North Carolina Rules of Evidence now incorporates the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and whether the trial court abused its discretion in excluding the testimony of defendant's expert under the amended rule.

I

Defendant and his cousin Mr. Shore lived in mobile homes across the street from each other in Hays, North Carolina. Various other members of their family also lived nearby. The two men had a combative history, having engaged in multiple verbal and physical altercations. Defendant testified that, on the evening of 19 December 2011, Mr. Shore threatened to kill defendant and his family. The following day, defendant was driving his golf cart between his home and his mailbox with his son Brandon in the passenger seat. Brandon had an AR-15 assault rifle with him, and defendant had a 9-millimeter Beretta handgun in his pocket. Defendant was also carrying an audio cassette recorder.

After stopping at his mailbox and starting to drive toward Brandon's mailbox down the road, defendant saw Mr. Shore in the distance. Defendant testified that Mr. Shore began yelling at him and moving toward the golf cart. Defendant turned on the tape recorder and stopped the golf cart. The tape recorder captured much of the argument that

ensued between defendant and Mr. Shore. Defendant accused Mr. Shore of threatening to kill his family the night before. Mr. Shore accused defendant of shining a spotlight on him that same night. (A witness testified that defendant had previously shined an assault rifle's laser sight on Mr. Shore.) Defendant said to Mr. Shore, "You stole from me, you motherf---er!" After more arguing, Mr. Shore said to defendant, "Get over here and get you some!" Defendant responded, "I'll put you in the grave, man; I'll put you in the morgue, motherf---er!" Brandon testified that Mr. Shore then walked up to the golf cart, put his hands on the roof, and began shaking the cart.

According to defendant, as the argument continued, Mr. Shore threatened Brandon and defendant with a knife, causing defendant to ask Brandon to hand him the AR-15 in an attempt to "defuse the situation." Defendant testified that, as Brandon was handing the rifle to him, Mr. Shore dove into the golf cart, grabbed the rifle, and pulled it away from defendant. Another witness testified that Mr. Shore tried to grab the rifle but did not take it from defendant. According to defendant, Brandon exited the golf cart and began moving toward Mr. Shore, who then pointed the rifle at Brandon's head. Defendant exited the golf cart, removed the Beretta pistol from his pocket, and fired it approximately seven times at Mr. Shore, hitting him four or five times in the front and side and twice in the back. Defendant then said, "What about now, Bobo? What about now, motherf---er?"[1] Mr. Shore died from these gunshot wounds before he could be taken to the hospital. Defendant was indicted for first-degree murder and tried noncapitally.

At trial, defendant claimed that he shot Mr. Shore in defense of himself and his son. He sought to call Dave Cloutier as an expert in "the science of the use of force" to testify in support of this claim. The State objected, and the trial court held a voir dire hearing. After hearing Mr. Cloutier's voir dire testimony and reviewing his expert report, the trial court sustained the State's objection and ruled that Mr. Cloutier's expert testimony did not meet the standard for admissibility set forth in Rule 702(a) of the North Carolina Rules of Evidence. Following trial, the jury unanimously found defendant guilty of first-degree murder, and the trial court sentenced him to life in prison without the possibility of parole. Defendant entered notice of appeal in open court.

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1. It is somewhat unclear whether defendant called Mr. Shore "Bobo" or "Bozo." Defendant's own testimony is not consistent on this point. We opt to use "Bobo" because defendant testified that "Bobo" was a nickname for James Shore, whom he also called Jimmy or Jimbo.

Before the Court of Appeals, defendant argued that the trial court ignored the liberal standard that Rule 702(a) establishes and abused its discretion in excluding Mr. Cloutier's proposed testimony. *State v. McGrady*, 232 N.C. App. 95, 103, 753 S.E.2d 361, 368 (2014). The Court of Appeals held that the 2011 amendment to Rule 702(a) effectively adopted the standard set forth in *Daubert*, *id.* at 101, 753 S.E.2d at 367, and that the trial court did not abuse its discretion in applying that standard, *id.* at 105-06, 753 S.E.2d at 369-70. The Court of Appeals rejected defendant's arguments and found no error in defendant's conviction. *Id.* at 106, 110-11, 753 S.E.2d at 370, 373. We allowed defendant's petition for discretionary review and now affirm the decision of the Court of Appeals.[2]

II

[1] Our first task is to determine the correct interpretation of Rule 702(a) of the North Carolina Rules of Evidence, as it was amended in 2011. We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases. The General Assembly amended North Carolina's rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule.

The General Assembly has the power to create and modify rules of evidence for the superior and district courts. *See* N.C. Const. art. IV, § 13(2); *State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 56-57 (1952) (deferring to the General Assembly for the creation of a new rule of evidence); *see also State v. Smith*, 312 N.C. 361, 366, 323 S.E.2d 316, 319 (1984) (recognizing that the General Assembly can create new exceptions to the hearsay rule). When the General Assembly amended Rule 702(a) in 2011, its federal counterpart already had a settled meaning.

In 1993, the United States Supreme Court interpreted Rule 702 of the Federal Rules of Evidence in *Daubert*. *See* 509 U.S. at 588-98. The Court held that Rule 702 required federal district courts to determine, before they admitted expert testimony, "that any and all scientific testimony

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2. Defendant also argued before the Court of Appeals that the trial court erred in excluding testimony from another witness regarding Mr. Shore's "proclivity toward violence." *Id.* at 106, 753 S.E.2d at 370. He further claimed that the exclusion of testimony from Mr. Cloutier and this other witness violated his Sixth Amendment right to present a defense. *Id.* at 106, 110-11, 753 S.E.2d at 370, 373. The Court of Appeals rejected these arguments. *Id.* Because defendant did not seek discretionary review of these issues, they are not before us.

or evidence admitted is not only relevant, but reliable." *Id.* at 589. This determination entailed "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. According to the Court, Rule 702 gave federal district courts a "gatekeeping role." *Id.* at 597. The Court further clarified the *Daubert* standard in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The Court indicated that these three cases established "exacting standards of reliability" for the admission of expert testimony. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

In 2000, the Supreme Court adopted an amendment to Federal Rule 702. *Amendments to Federal Rules of Evidence*, 529 U.S. 1189, 1191, 1195 (2000). This amendment added three requirements governing the admission of expert testimony to the text of the rule: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Id.* at 1195.

The new text did not expressly mention *Daubert*, *Joiner*, or *Kumho*, or use precise language from those three cases. But the note from the Advisory Committee on the Federal Rules of Evidence that accompanied the amendment stated that the federal rule was amended to incorporate the standard delineated by those cases.[3] *See* Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("Rule 702 has been amended in response to *Daubert* . . . and to the many cases applying *Daubert*, including *Kumho* . . . .") (also citing, inter alia, *Joiner*). And federal appellate courts confirmed that the changes to Rule 702 had precisely that effect. *See*, *e.g.*, *United States v. Diaz*, 300 F.3d 66, 73 (1st Cir. 2002) ("The three numbered criteria were added to Rule 702 in a recent amendment codifying the Supreme Court's decision in *Daubert* . . . and its progeny, including *Kumho* . . . ."); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 n.1 (4th Cir. 2001) ("As the Advisory Committee Notes indicate, the amendment to Rule 702 is consistent with the district court's gatekeeping function as articulated in *Daubert* and *Kumho Tire*."); *see also United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*,

3. The United States Supreme Court has looked to advisory committee notes to help clarify ambiguities in the Federal Rules of Evidence and the Federal Rules of Civil Procedure. *See*, *e.g.*, *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550-51 (2010) (using advisory committee notes to interpret Rule 15(c) of the Federal Rules of Civil Procedure); *Tome v. United States*, 513 U.S. 150, 160-63 (1995) (plurality opinion) (using advisory committee notes to interpret Rule 801 of the Federal Rules of Evidence).

608 F.3d 871, 894 (D.C. Cir. 2010) (per curiam) ("In 2000, the Supreme Court amended Rule 702 to reflect the *Daubert* line of cases, outlining general standards that the trial court must use to assess the reliability and relevance of testimony."), *cert. denied*, 563 U.S. 987 (2011). Thus, the meaning of the federal rule as amended was clear: It now codified the *Daubert* standard.

The original text of North Carolina's Rule 702 was largely identical to the original text of Federal Rule 702. *Compare* N.C.G.S. § 8B-1, Rule 702 (1983), *with* 28 U.S.C. app. Rule 702 (1976). But the judicial construction of North Carolina's rule took a different path. In the wake of the *Daubert* line of cases, this Court addressed whether North Carolina followed the *Daubert* approach. *See Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 455, 597 S.E.2d 674, 684 (2004). In *Howerton*, we examined the development of Rule 702(a)[4] in North Carolina law and concluded that "North Carolina is not, nor has it ever been, a *Daubert* jurisdiction." *Id.* at 469, 597 S.E.2d at 693. Our cases instead delineated "a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* at 458, 597 S.E.2d at 686 (citations omitted).

Though this test "share[s] obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Id.* at 464, 597 S.E.2d at 690 (quoting *Weisgram*, 528 U.S. at 455). This Court was concerned that the federal "gatekeeping" approach required judges to evaluate "the substantive merits of the scientific or technical theories undergirding an expert's opinion." *Id.* at 464, 597 S.E.2d at 690. We found this gatekeeping role especially troubling when pretrial *Daubert* proceedings became "case-dispositive," as parties could use them to exclude expert testimony necessary to prove an element of a claim and thereby "bootstrap motions for summary judgment that otherwise would not likely succeed." *Id.* at 467, 597 S.E.2d at 691. North Carolina law, we concluded, favored liberal admission of expert witness testimony and left the role of determining its weight to the jury. *Id.* at 468-69, 597 S.E.2d at 692-93.

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4. What had been North Carolina's Rule 702 became Rule 702(a) in 1995, when the General Assembly added subsections 702(b) through (h). Act of June 20, 1995, ch. 309, sec. 1, 1995 N.C. Sess. Laws (1995 Reg. Sess.) 611, 611-13 (codified at N.C.G.S. § 8C-1, Rule 702 (2015)).

In 2011, the General Assembly added language to North Carolina's Rule 702(a) that was virtually identical to the 2000 amendment to the federal rule. Our rule now reads in relevant part:

> (a) 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, *or otherwise, if all of the following apply*:
>
> *(1) The testimony is based upon sufficient facts or data.*
>
> *(2) The testimony is the product of reliable principles and methods.*
>
> *(3) The witness has applied the principles and methods reliably to the facts of the case.*

Act of June 17, 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Laws (2011 Reg. Sess.) 1048, 1049 (codified at N.C.G.S. § 8C-1, Rule 702(a)) (new text in italics).

When we interpret the North Carolina Rules of Evidence, as when we interpret other statutes, "[t]he cardinal principle . . . is to discern the intent of the legislature." *State v. Jones*, 359 N.C. 832, 835, 616 S.E.2d 496, 498 (2005). In determining this intent, "we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). And when the General Assembly adopts language or statutes from another jurisdiction, "constructions placed on such language or statutes are presumed to be adopted as well." *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981). The commentary to the North Carolina Rules of Evidence supports this presumption in the specific context of the Rules:

> A substantial body of law construing [the Federal Rules of Evidence] exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and

> should be a goal of our courts in construing those rules that are identical.

N.C. R. Evid. 102 commentary.[5]

By adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well. In other words, North Carolina's Rule 702(a) now incorporates the standard from the *Daubert* line of cases. Whatever this Court's reservations about the *Daubert* standard were, *see Howerton*, 358 N.C. at 464-69, 597 S.E.2d at 690-93, the General Assembly has made it clear that North Carolina is now a *Daubert* state.

This is not to say, however, that the 2011 amendment to Rule 702(a) abrogated all North Carolina precedents interpreting that rule. Our previous cases are still good law if they do not conflict with the *Daubert* standard. Nor does this mean that the interpretation of Rule 702(a) is now a federal question. The proper interpretation of Rule 702(a) remains an issue of state law, and any future judicial gloss by the federal courts on the meaning of Federal Rule 702 will not dictate the meaning of the North Carolina rule. Federal case law that continues to refine the *Daubert* standard may, of course, be helpful. But unlike *Daubert*, *Joiner*, and *Kumho*—all of which were decided before the General Assembly amended North Carolina's rule in 2011—this case law could not have been incorporated into the amended state rule.

Here, both parties seem to agree that the 2011 amendment to North Carolina's Rule 702(a) incorporated the standard announced in *Daubert* itself. Defendant, however, seems to overlook the fact that the 2000 amendment to the federal rule codified more than *Daubert* alone. As explained above, the federal rule's amended language codified not only *Daubert*, but also *Joiner* and *Kumho*. To determine the proper application of North Carolina's Rule 702(a), then, we must look to the text of the rule, to all three of these United States Supreme Court cases, and also to our existing precedents, as long as those precedents do not conflict with the rule's amended text or with *Daubert*, *Joiner*, or *Kumho*.

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5. While the commentaries printed with the Rules of Evidence do not have the force of law, we have repeatedly given them "substantial weight in our efforts to comprehend legislative intent." *State v. Hosey*, 318 N.C. 330, 338 n.2, 348 S.E.2d 805, 810 n.2 (1986); *accord State v. Bogle*, 324 N.C. 190, 202-03 & 203 n.5, 376 S.E.2d 745, 752 & n.5 (1989); *State v. Chul Yun Kim*, 318 N.C. 614, 620 & n.3, 350 S.E.2d 347, 351 & n.3 (1986).

Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible.[6] First, the area of proposed testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. R. Evid. 702(a). This is the relevance inquiry discussed in both *Daubert* and *Howerton*. *See Daubert*, 509 U.S. at 591; *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688-89. As with any evidence, the testimony must meet the minimum standard for logical relevance that Rule 401 establishes. *See Howerton*, 358 N.C. at 462, 597 S.E.2d at 688 ("[W]e defer to the traditional definition of relevancy set forth in the North Carolina Rules of Evidence . . . ." (citing N.C.G.S. § 8C-1, Rule 401 (2003))). In other words, the testimony must "relate to [an] issue in the case." *Daubert*, 509 U.S. at 591 (quoting 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 702[02], at 702-18 (1988)). But relevance means something more for expert testimony. In order to "assist the trier of fact," N.C. R. Evid. 702(a), expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience. An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to "substitut[e] [the expert's] judgment of the meaning of the facts of the case" for its own. *Burrell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 114, 657 S.E.2d 712, 719, *disc. rev. denied*, 362 N.C. 469, 665 S.E.2d 738 (2008); *accord* N.C. R. Evid. 704 commentary ("These provisions [including Rule 702] afford ample assurance[s] against the admission of opinions which would merely tell the jury what result to reach . . . ." (quoting Fed. R. Evid. 704 advisory committee's note)).

Second, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. Evid. 702(a). This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? *Id.* at 461, 597 S.E.2d at 688. The

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6. For simplicity's sake, we address these three parts in the order in which they appear in the rule. That is not to say, however, that a trial court must necessarily do the same. *Cf. Howerton*, 358 N.C. at 458-62, 597 S.E.2d at 686-89 (discussing reliability first, then qualifications, and then relevance).

rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. *Id.* at 461-62, 597 S.E.2d at 688. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. *Cf. Daubert*, 509 U.S. at 589. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: "(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702(a)(1)-(3). These three prongs together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, *Joiner*, 522 U.S. at 146, "not on the conclusions that they generate," *Daubert*, 509 U.S. at 595. However, "conclusions and methodology are not entirely distinct from one another," and when a trial court "conclude[s] that there is simply too great an analytical gap between the data and the opinion proffered," the court is not required "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146.

The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test. *See Kumho*, 526 U.S. at 152-53. The trial court "must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant testimony is reliable." *Id.* at 152. Many previous cases, both federal and state, articulate particular factors that may indicate whether or not expert testimony is reliable. In its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3).

In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review

and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, so they do not form "a definitive checklist or test," *id.* at 593. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

> (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations.
>
> (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).

[2] Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3). The court has discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures of whether the expert's testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case. *See Kumho*, 526 U.S. at 150-53.

This three-step framework—namely, evaluating qualifications, relevance, and reliability—is not new to North Carolina law. We recognized the same steps in *Howerton*. *See* 358 N.C. at 458, 597 S.E.2d at 686. The 2011 amendment to Rule 702(a) did not change the basic structure of the inquiry under that rule. But the amendment did change the level of rigor that our courts must use to scrutinize expert testimony before admitting it. *Cf. id.* at 464, 597 S.E.2d at 690 (noting that the then-existing North Carolina approach was "decidedly less . . . rigorous" than the *Daubert* approach). A rule governing the admission of expert testimony necessarily strikes a balance between competing concerns since the testimony "can be both powerful and quite misleading" to a jury "because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)). The interpretation we gave to Rule 702(a) in *Howerton* struck one such balance; the *Daubert* standard, now incorporated into North Carolina law, strikes another.

Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a). N.C.G.S. § 8C-1, Rule 104(a) (2015); *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686; s*ee also Daubert*, 509 U.S. at 592 n.10. In answering this preliminary question, the trial judge "is not bound by the rules of evidence except those with respect to privileges." N.C. R. Evid. 104(a). To the extent that factual findings are necessary to answer this question, the trial judge acts as the trier of fact. N.C. R. Evid. 104(a) commentary. The court must find these facts by the greater weight of the evidence. *See Daubert*, 509 U.S. at 592 n.10 ("These matters should be established by a preponderance of proof." (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987) (using the term "preponderance of the evidence" synonymously with "preponderance of proof"))); *Cincinnati Butchers Supply Co. v. Conoly*, 204 N.C. 677, 679, 169 S.E. 415, 416 (1933) (equating "preponderance of the evidence" with "greater weight of the evidence").

As with other findings of fact, these findings will be binding on appeal unless there is no evidence to support them. *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 540 (2012).

The trial court then concludes, based on these findings, whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability. This ruling "will not be reversed on appeal absent a showing of abuse of discretion." *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. And "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes "outcome determinative." *Joiner*, 522 U.S. at 142-43.

Rule 702(a), as amended in 2011, does not mandate particular "procedural requirements for exercising the trial court's gatekeeping function over expert testimony." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The trial court has the discretion to determine "whether or when special briefing or other proceedings are needed to investigate reliability." *Kumho*, 526 U.S. at 152. A trial court may elect to order submission of affidavits, hear voir dire testimony, or conduct an *in limine* hearing. *See* Fed. R. Evid. 702 advisory committee's note to 2000 amendment. More complex or novel areas of expertise may require one or more of these procedures. *See Kumho*, 526 U.S. at 152. In simpler cases, however, the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury. *See id.* The court should use a procedure that, given the circumstances of the case, will "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.C.G.S. § 8C-1, Rule 102(a) (2015).

III

[3] Using this analytical framework, we now address whether the trial court abused its discretion in excluding Mr. Cloutier's proposed expert witness testimony under Rule 702(a).

Mr. Cloutier received a bachelor's degree in criminal justice from North Carolina Wesleyan College and also graduated from the FBI National Academy in Quantico, Virginia. He worked as an officer of the

Goldsboro Police Department for almost sixteen years, retiring as a captain. He then spent about eleven years at the North Carolina Justice Academy, working as an instructor and school director. Mr. Cloutier developed and taught courses there in areas such as "subject control and arrest techniques" and the use of lethal and non-lethal force. After retiring from the Academy in 2001 and through the time of the trial in this case, he provided expert testimony about the use of force and crime scene investigation, and also trained civilians in martial arts and some of the "legal aspects of [the] use of force."

Mr. Cloutier intended to offer expert testimony on three principal topics: (1) that, based on the "pre-attack cues" and "use of force variables" present in the interaction between defendant and Mr. Shore, defendant's use of force was a reasonable response to an imminent, deadly assault that defendant perceived; (2) that defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and (3) that reaction times can explain why some of defendant's defensive shots hit Mr. Shore in the back. Defense counsel encouraged this Court at oral argument to focus on the reaction time testimony, conceding that the trial court was probably correct to exclude much of Mr. Cloutier's other testimony either because it was unhelpful to the jury or because Mr. Cloutier was not qualified to give it. We agree with this admission, but need not rely on it to conclude that the trial court acted within its discretion in excluding all of Mr. Cloutier's expert testimony under Rule 702(a).[7] We address each portion of Mr. Cloutier's testimony in turn.[8]

First, the trial court did not abuse its discretion when it concluded that Mr. Cloutier's testimony about "pre-attack cues" and "use of force variables" would not assist the jury. In his expert report, Mr. Cloutier stated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack." According to the report, pre-attack cues include "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." Relatedly, Mr. Cloutier

7. In addition to the Rule 702(a) issue, the parties disagree on whether the trial court also properly excluded Mr. Cloutier's testimony under Rule 403, and whether defendant has properly preserved his objection to that ruling. Because the testimony was properly excluded under Rule 702(a), however, the issues related to Rule 403 are moot.

8. Because expert testimony is inadmissible if it fails to meet any part of the Rule 702(a) standard, we need not address the entire three-part test for each portion of Mr. Cloutier's testimony.

testified at voir dire that the phrase "use of force variables" refers to additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat. Mr. Cloutier's expert report indicated that use of force variables include the age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors.

The trial court concluded that Mr. Cloutier's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common knowledge. This ruling was not an abuse of discretion. The factors that Mr. Cloutier cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions. Mr. Cloutier's own expert report stated that, even without formal training, individuals recognize and respond to these cues and variables when assessing a potential threat. And if these cues and variables are logically relevant at all, they are relevant precisely *because* they are within the understanding of a layperson. Though defendant served in the military, he did not testify that he relied on any specialized training in threat assessment when he evaluated the threat that Mr. Shore posed to his life and the life of his son. Nor was there any evidence that he relied on anything other than common experience and instinct when he did so. Jurors possess this experience and instinct as well, which is exactly why they are tasked with deciding whether a defendant has acted in self-defense. In this instance, therefore, it was reasonable for the trial court to conclude that expert testimony would not assist the jury as required by Rule 702(a).

Next, the trial court acted within its discretion in concluding that Mr. Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. Mr. Cloutier's expert report stated that instinctive survival response to fear "can activate the body's sympathetic nervous system and create a condition commonly referred [to] as the 'fight or flight' response." Mr. Cloutier also indicated that defendant's perception of an impending attack would cause a surge of adrenalin in the body to "activate instinctive, powerful and uncontrollable survival responses as a means to prevent or minimize serious injury or death." This nervous system response, Mr. Cloutier maintained, causes "perceptual narrowing," which focuses a person's attention on the threat and leads to a loss of peripheral vision and other changes in visual perception. According to Mr. Cloutier, the nervous system's response to a threat can also cause "fragmented memory," or an "inability to recall

specific events" related to the threatening encounter. Defendant testified at trial that he did not remember the number of shots that he fired at Mr. Shore. He indicated that, during his encounter with Mr. Shore, all of his attention was focused on the threat. Mr. Cloutier's testimony on stress responses was therefore intended to show that the state of defendant's memory and defendant's description of what he experienced were consistent with having perceived a threat to his life and the life of his son.

The trial court excluded this portion of Mr. Cloutier's testimony because it concluded that he was not "qualified to talk about how something affects the sympathetic nervous system." Mr. Cloutier testified at voir dire that he was not a medical doctor but that he had studied "the basics" of the brain in general psychology courses in college. He also testified that he had read articles and been trained by medical doctors on how adrenalin affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses.

Though Rule 702(a) does not create an across-the-board requirement for academic training or credentials, *see Howerton*, 358 N.C. at 462, 597 S.E.2d at 688, it was not an abuse of discretion in this instance to require a witness who intended to testify about the functions of an organ system to have some formal medical training. As we have already said, expertise can come from practical experience. *Id.* But that does not mean that a trial court can never require an expert witness to have academic training. The propriety of imposing such a requirement in a given case is likely to be highly case specific.

Whenever a trial court assesses an expert witness's qualifications under Rule 702(a), the court must look to see whether the witness's knowledge and experience are sufficient to qualify the witness in the particular field of expertise at issue. Different fields require different "knowledge, skill, experience, training, or education." N.C. R. Evid. 702(a). For example, a witness with a Ph.D. in organic chemistry may be able to describe in detail how flour, eggs, and sugar react on a molecular level when heated to 350 degrees, but would likely be less qualified to testify about the proper way to bake a cake than a career baker with no formal education. Mr. Cloutier, conversely, has strong practical experience in police training and tactics but not much medical expertise in human physiology. So while he may have been eminently qualified to testify about standard police practices regarding the use of force, he was far less qualified to testify about the sympathetic nervous system. In this context, it was not "manifestly without reason" for the trial court to exclude Mr. Cloutier's testimony because he lacked medical or scientific training.

Finally, the trial court did not abuse its discretion when it concluded that Mr. Cloutier's testimony regarding reaction times was unreliable. Mr. Cloutier testified at voir dire that, because a person can turn his torso in less time than it takes to perceive a threat and fire a weapon, defendant could have perceived a threat from Mr. Shore while Mr. Shore was facing him but still end up shooting Mr. Shore in the back.

Mr. Cloutier's voir dire testimony included statistics on average reaction times as well as his opinion about how those statistics applied to this case. He testified specifically that an individual can turn his or her body 90 degrees in approximately 0.31 seconds, and can turn 180 degrees in approximately 0.676 seconds. He also testified that it takes a person approximately 0.2 seconds to perceive a threat and decide to shoot, and then another 0.365 to 0.677 seconds to begin firing, depending on whether the shooter's finger is already inside the trigger guard. Another witness had previously indicated that it took defendant 1.82 seconds to fire all seven rounds at Mr. Shore. Mr. Cloutier stated that this testimony was consistent with the literature he had read, as well as with his own experiments. Given the total time that it would take an average person to perceive a threat, decide to shoot, begin shooting, and fire seven rounds, Mr. Cloutier concluded that "it's very possible and likely that during the course of firing . . . Mr. Shore could have, in fact, turned 90 to 180 degrees, or, in fact, could have turned 360 degrees." Defendant offered this reaction time testimony to rebut any assumption in the jurors' minds that he could not have acted defensively if he shot Mr. Shore in the back.

During voir dire, defense counsel elicited testimony from Mr. Cloutier relating to the reliability factors in amended Rule 702(a). Mr. Cloutier testified that he interviewed defendant and other witnesses, reviewed interviews of defendant and Brandon and the case file and physical evidence collected by the Wilkes County Sherriff's Department, and visited the location where defendant shot Mr. Shore. This portion of his testimony appears to address the "sufficient facts or data" requirement in Rule 702(a)(1).

Mr. Cloutier also indicated that the average reaction time numbers he relied on to form his opinion came primarily from two studies: a 1972 Federal Aviation Administration study on the reaction times of aircraft pilots when avoiding midair collisions, and a university study focusing on how quickly college students could both shoot and turn their torsos. He stated that the results from these studies were consistent with testing that he worked on at the Justice Academy on the reaction times of police officers. According to Mr. Cloutier, these studies were reliable and

had been used extensively in his field over the previous fifteen years. All of this information deals with whether Mr. Cloutier's testimony before the jury would be "the product of reliable principles and methods" under Rule 702(a)(2).

On cross-examination and during questioning by the trial court, however, Mr. Cloutier provided testimony that undermined the reliability of his previous testimony about reaction times. He testified that the manner and speed at which a victim can turn could be affected by previous injuries, clothing, and body position. He also admitted that his opinion could change if the shooter had a back injury, and he admitted to being aware that defendant had a back injury and a disability rating from the military. But he did not consider this or anything else about defendant's or Mr. Shore's medical history when he formed his opinions about their relative reaction times. He indicated that he had not thought these factors relevant at the time because he believed that adrenalin would overcome any physical impairment. Yet when pressed further, he admitted that, though he believed that "adrenalin plays a factor," he was not certain how adrenalin would affect reaction times. Mr. Cloutier also admitted that he was unaware of the error rates in any of the studies that he cited.

The trial court concluded that Mr. Cloutier's proffered testimony about reaction times did not satisfy the reliability test in Rule 702(a)(1) to (a)(3). The trial court found that Mr. Cloutier had not provided the court with known or potential error rates for the studies on reaction times that he used. The trial court also found that Mr. Cloutier acknowledged that variables could affect his opinions about the reaction times in this case, and that he knew that defendant suffered from a physical disability but did not consider this in reaching his conclusions. For these reasons, the trial court concluded that Mr. Cloutier's reaction time testimony was based on speculation and was not reliable in this case.

This decision was not an abuse of discretion, either. The trial court properly focused on the three prongs of the reliability test in Rule 702(a)(1) to (a)(3), ruling on each one. And the specific factors that it chose to focus on in assessing the reliability of Mr. Cloutier's testimony were reasonable measures of reliability in this case. *See Kumho*, 526 U.S. at 152-53. Mr. Cloutier based his testimony about average reaction times on statistics from two studies, but he was not aware if those studies reported error rates in their findings and, if so, what those error rates were. A trial judge could reasonably conclude that Mr. Cloutier's degree of unfamiliarity with these studies rendered his testimony about them, and the conclusions about this particular case that he drew from

them, unreliable. And the court's finding about Mr. Cloutier's failure to consider defendant's back injury directly relates both to the sufficiency of the facts and data that Mr. Cloutier relied on and to whether he applied his own methodology reliably in this case. It was not manifestly without reason for the trial court to be skeptical of Mr. Cloutier's opinion testimony when he had failed to consider any pertinent medical conditions that defendant or Mr. Shore had, despite being aware that at least one of them was partly disabled, and when Mr. Cloutier's own testimony established that a disability could affect reaction time.

In sum, our review of the record in this case demonstrates that the trial court properly fulfilled its gatekeeping role. Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, *see State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007), but instead to decide whether the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Here, the trial court recognized the incorporation of the *Daubert* standard into amended Rule 702(a), carefully considered each aspect of the expert testimony that defendant wished to elicit from Mr. Cloutier, and permissibly exercised its discretion to conclude that Mr. Cloutier's proffered testimony should be excluded in its entirety. The Court of Appeals likewise concluded that North Carolina is now a *Daubert* state, and found no error in the trial court's exclusion of Mr. Cloutier's testimony. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

**THOMAS JEFFERSON CLASSICAL ACAD. CHARTER SCH.
v. CLEVELAND CTY. BD. OF EDUC.**

[368 N.C. 900 (2016)]

THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT COMMUNITY CHARTER SCHOOL, AND LINCOLN CHARTER SCHOOL
v.
CLEVELAND COUNTY BOARD OF EDUCATION D/B/A CLEVELAND COUNTY SCHOOLS

No. 400A15

Filed 10 June 2016

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. ___, 778 S.E.2d 295 (2015), affirming a judgment entered on 29 January 2015 by Judge Jesse B. Caldwell, III in Superior Court, Cleveland County. Heard in the Supreme Court on 18 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for plaintiff-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for defendant-appellant.

Christine T. Scheef, Staff Attorney, and Allison B. Schafer, Legal Counsel, North Carolina School Boards Association, amicus curiae.

PER CURIAM.

AFFIRMED.

ROBERT E. KING AND WIFE, JO ANN O'NEAL	)	
v.	)	From Cumberland County
MICHAEL S. BRYANT, M.D., AND VILLAGE SURGICAL ASSOCIATES, P.A.	)	

No. 294PA14

ORDER

On 21 August 2015, this Court certified this case to the trial court for additional findings of fact as to "[w]hether a physician-patient relationship existed at the time Mr. King signed the arbitration agreement." On 6 November 2015, the trial court entered additional findings of fact.

On 22 February 2016, this Court ordered the parties to submit supplemental briefs addressing the effect, if any, of the trial court's additional findings of fact on the proceedings in this case. Appellants and Appellees submitted supplemental briefs on 21 March 2016 and 18 April 2016, respectively.

The Court, on its own motion, now orders that this case be set for oral argument.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

THE NORTH CAROLINA STATE BAR	)	
	)	From North Carolina State Bar
v.	)	(15DHC7)
	)	
JERRY R. TILLETT	)	

No. 208PA15

ORDER

On 28 January 2016, the Court denied review in the above-captioned case, which concerns the authority of the North Carolina State Bar to initiate disciplinary proceedings against a sitting judge. Upon reconsideration, the Court, *ex mero motu*, deems the question presented by this case to be of such importance that the invocation of our supervisory jurisdiction is warranted. Accordingly, the Court now issues a writ of certiorari to review the question presented in defendant's petition:

> Do the North Carolina State Bar Council and the Disciplinary Hearing Commission have the jurisdictional authority to discipline a judge of the General Court of Justice for conduct as a judge for which the judge has already been disciplined by the Judicial Standards Commission?

All other proceedings in this matter are hereby stayed pending full briefing by the parties in this Court and our determination of this question.

The Record is due on or before 10 June 2016. The briefing schedule is as provided by the North Carolina Rules of Appellate Procedure.

By order of the Court in Conference, this the 27th day of May, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of May, 2016.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES REVIEW COMMISSION	)	

No. 110P16

ORDER

Defendants' Petitions for Writ of Certiorari are allowed for the limited purpose of vacating the order entered by the Court of Appeals on 2 March 2016 allowing Plaintiff-Appellee State Board of Education's Motion to Dismiss on the grounds that the Order entered by Judge Paul G. Gessner in this case on 2 July 2015 did not "hold[] that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal," N.C.G.S. § 7A-27(a1), and remanding this case to the Court of Appeals for consideration of defendants' challenges to the validity of the trial court's order on the merits. In light of that determination, Defendant's Petitions for Discretionary Review are dismissed and Defendant North Carolina Rules Review Commission's Notice of Appeal is dismissed *ex mero motu*.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

STATE v. CAMPBELL

[368 N.C. 904 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cleveland County
	)	
THOMAS CRAIG CAMPBELL	)	

No. 252PA14-2

ORDER

The State's Petition for Discretionary Review is allowed only as to whether the Court of Appeals erred in invoking Rule 2 of the North Carolina Rules of Appellate Procedure under the circumstances of this case. The State's Petition for Discretionary Review is otherwise denied.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. COXTON

[368 N.C. 905 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
DAMARIO MONTREAL COXTON		

No. 121A16

ORDER

This matter is before this Court on defendant's Notice of Appeal based on a Constitutional Question, seeking review of the Court of Appeals' opinion dismissing defendant's appeal and denying defendant's petition for writ of *certiorari* filed before that court. The State's Motion to Dismiss Appeal is ALLOWED. This Court on its own motion, however, vacates the denial of defendant's petition writ of *certiorari* at the Court of Appeals and remands this case to the Court of Appeals with directions to allow defendant's petition for writ of *certiorari* as filed before that court.

By Order of this Court, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Union County
	)	
TAE KWON HAMMONDS	)	

No. 389A15

ORDER

On 11 December 2012, defendant was placed on watch at Carolinas Medical Center Union Hospital (a 24-hour facility) after being involuntarily committed upon a finding by a Union County Magistrate that he was "mentally ill and dangerous to self or others." On 12 December 2012, while defendant was still under the involuntary commitment order, two detectives from the City of Monroe Police Department questioned him about his involvement in a recent armed robbery. Defendant made incriminating statements and was subsequently indicted for robbery with a dangerous weapon on 4 February 2013. On 30 June 2014, defendant moved to suppress the statements he made while in the hospital, arguing that he was subjected to a custodial interview without having been read his *Miranda* rights and that his confession was involuntary. *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

After a hearing on the matter, the trial court denied defendant's motion to suppress and made the following pertinent findings of fact, among others:

> 11. . . . Nurse Kansella had been on duty approximately two hours when two detectives arrived from the Monroe Police Department. They checked with her before they went to the defendant's room, and she told them that he was alert, oriented, and they were welcome to talk with him. She did not ask the defendant if he wished to speak with them, and did not tell the officers why the defendant was there, although it is clear from the conversation that they were aware that he was actually involuntarily committed at that time.
>
> . . . .
>
> 13. The defendant was interviewed by Detective Williams of the Monroe Police Department and Detective T.J. Goforth at approximately five p.m. on December the 12th. They spoke with the defendant for approximately one and half hours [sic]. No Miranda Rights were given to

> the defendant. On at least three occasions, however, the defendant was told that, "there were no arrest warrants with the officers," and that they were not here to "lock you up." . . . . Throughout the conversation the defendant never asked the officers to leave or to stop talking. . . . The defendant was unable to leave the hospital. He was not actually at a police station and was not told that he could not stop the conversation or request that the officers leave. He was never threatened, voices were never raised. The only promises made were such that the officers would tell the D.A. about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.

Therefore, the trial court concluded:

> 2. Based on the totality of the circumstances, the Court finds the defendant was not in custody at the time he was interviewed. Based on the totality of the circumstances, the Court finds the defendant made a knowing, voluntary, and understanding statement to the officers on December the 11th [sic] of 2012.

Defendant appealed. The majority of the Court of Appeals affirmed the trial court, concluding that, given the totality of the circumstances, "defendant was not 'in custody' for purposes of *Miranda*." *State v. Hammonds*, ___ N.C. App. ___, ___, 777 S.E.2d 359, 368 (2015). Judge Inman dissented, and defendant filed an appeal of right pursuant to N.C.G.S. § 7A-30, along with a petition for discretionary review as to additional issues, which we allowed. The case was heard by this Court on 18 May 2016, in session in the Old Burke County Courthouse in the City Morganton, pursuant to N.C.G.S § 7A-10(a).

On our own motion, this Court hereby VACATES the opinion of the Court of Appeals filed in this case 20 October 2015 and the trial court's orders denying the motion to suppress (a one-page form order signed on 1 July 2014, and a nine-page order with findings and conclusions signed on 22 July and entered on 24 July 2014). This Court further ORDERS this case certified to the trial court for a new hearing on defendant's motion to suppress, during which the trial court shall apply a totality of the circumstances test, as set out in *Howes v. Fields*, ___ U.S. ___, ___, 132 S. Ct. 1181, 1194 (2012) (holding that an imprisoned suspect was not in custody for *Miranda* purposes after "[t]aking

into account all of the circumstances of the questioning—including *especially* the undisputed fact that [the inmate] was told that he was free to end the questioning and to return to his cell" (emphasis added)). The trial court shall consider all factors, including the important factor of whether the involuntarily committed defendant "was told that he was free to end the questioning." *Id.* at ___, 132 S. Ct. at 1194.

Upon the conclusion of the new suppression hearing, the trial court shall make new findings of fact and conclusions of law regarding whether defendant was in custody at the time of the interview, and whether the motion to suppress should be allowed or denied. The trial court is directed to hold the necessary hearing and certify its order to this Court within 120 days of the filing date of this order.

Once the trial court's order is certified back to this Court, this Court ORDERS that the parties submit supplement briefs addressing the new order. Defendant's supplemental brief shall be filed no later than thirty days after the certification, and the State's supplemental brief shall be filed no later than thirty days after defendant's filing.

By order of the Court in Conference, this the 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. MILLER

[368 N.C. 909 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
BRENT TYLER MILLER	)	

No. 199PA15

ORDER

The following order has been entered on the motion filed on the 19th of April 2016 by defendant and designated Defendant-Appellee's Motion to Vacate Bill of Costs: The motion is allowed. Not having been found guilty in the above-captioned matter, defendant is not obligated to pay court costs.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

STATE v. PINEDA

[368 N.C. 910 (2016)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake County
	)	
NICOLAS OLIVARES PINEDA	)	

No. 70P16

ORDER

The opinion of the Court of Appeals in this case states as follows: "the jury found Pineda guilty of violating N.C. Gen. Stat. § 90-95(a)(1) by trafficking heroin by sale and by delivery." The Record on Appeal, however, reveals that defendant was convicted under N.C.G.S. § 90-95(h)(4). Accordingly, we allow the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of the correct statute of conviction.

By order of the Court in Conference, this 9th day of June, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of June, 2016.

J. BRYAN BOYD
Clerk, Supreme Court
of North Carolina

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

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

9 JUNE 2016

005PA15	Commscope Credit Union v. Butler and Burke, LLP, et al.	1. Third-Party Defs' Motion to Withdraw as Counsel of Record 2. Third-Party Defs' Motion to Substitute Counsel	1. Allowed **04/25/2016** 2. Allowed **04/25/2016**
026P16	Shaka Greene v. Trustee Services of Carolina, LLC and U.S. Bank, N.A. --- In the Matter of the Foreclosure of Real Property Under Deed of Trust from Jeffrey S. Kenley and Laura L. Kenley, in the Original Amount of $296,700, and Dated September 29, 2005 and Recorded on September 30, 2005, in Book 3935 at Page 425, of Union County Registry	1. Plt's Motion for Temporary Stay (COA15-90 & COA15-97) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/22/2016** Dissolved **06/09/2016** 2. Denied 3. Denied
031P16	Shapemasters, Inc. v. Angelo Accetturo, Wilderness Trail Development Corporation, and Wilderness Trail Holdings, LLC.	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-741)	Denied
035P16	State v. William Miller Baker	1. State's Motion for Temporary Stay (COA15-649) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR	1. Allowed **02/05/2016** 2. Allowed 3. Allowed
039P14-2	Robert S. Chamberlain v. Kristy M. Newton and Kristin C. McCrary	Petitioner's *Pro Se* Motion for Complaint/ Grievance/Petition	Dismissed **Ervin, J., recused**
042P04-7	State v. Larry McLeod Pulley	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/15/2016**

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

9 JUNE 2016

042P16	Richard B. Spoor, Individually and Derivatively v. John M. Barth, Jr., John M. Barth, John Does 1-5, and J.R. International Holdings, LLC	1. Def's (John M. Barth) PDR Under N.C.G.S. § 7A-31 (COA15-172) 2. Def's (John M. Barth, Jr.) PDR Under N.C.G.S. § 7A-31 3. Def's (John M. Barth) Motion to Admit Michael J. Small and David B. Goroff *Pro Hac Vice* 4. Def's (John M. Barth) Petition for *Writ of Certiorari* to Review Order of COA 5. Def's (John M. Barth, Jr.) Petition for *Writ of Certiorari* to Review Order of COA 6. Plt's Motion to Strike Reply in Support of PDR	1. Denied 2. Denied 3. Dismissed as moot 4. Denied 5. Denied 6. Allowed
043P16	State v. Peter Michael Vallejo	Def's PDR Under N.C.G.S. § 7A-31 (COA15-388)	Denied
055P16	State v. Evans Aine, II	Def's PDR Under N.C.G.S. § 7A-31 (COA15-490)	Denied
058P16	In the Matter of Q.C.R. and L.Q.W.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-504)	Denied
063P16	State v. Michael Anthony York	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-419) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
064A16	In the Matter of the Foreclosure of a Deed of Trust Executed by William Gerald Price in the Original Amount of $190,000.00 Dated December 12, 2002, Recorded in Book 286, Page 113, Ashe County Registry Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-639) 2. Petitioner's Motion to Dismiss Appeal	1. --- 2. Allowed
069A16	State v. Wendy M. Dale	Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-105)	Dismissed *ex mero motu*

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

9 JUNE 2016

070P16	State v. Nicolas Olivares Pineda	1. State's Motion for Temporary Stay (COA15-800)	1. Allowed **03/04/2016** Dissolved **06/09/2016**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Special Order
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Denied
071P16	State v. Ronald Anthony Miller	Def's PDR Under N.C.G.S. § 7A-31 (COA15-162)	Denied
072P16	Christina D'Alessandro v. Adam D'Alessandro	1. Def's Motion for Temporary Stay (COA15-357)	1. Allowed; Existing Bond Extended **03/07/2016** Dissolved **06/09/2016**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
083P16	State v. Nashid Porter	Def's *Pro Se* Motion to Dismiss – Grounds Applicable to All Criminal Proceedings	Dismissed
086A16	In the Matter of Kay Frances Redmond, by and through Linda Nichols, Administratrix of the Estate of Kay Frances Redmond, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	1. Claimant's Notice of Appeal Based Upon a Dissent (COA15-763)	1. ---
		2. Claimant's PDR as to Additional Issues	2. Denied
		3. Claimant's Motion to Consolidate Appeals	3. Allowed
		4. State's Notice of Appeal Based Upon a Dissent	4. ---
		5. State's PDR as to Additional Issues	5. Allowed
		6. State's Motion to Consolidate Appeals	6. Allowed

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087A16	In the Matter of Mary Lucille Hughes, by and through Virginia Hughes Ingram, Administratrix of the Estate of Mary Lucille Hughes, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	1. Claimant's Notice of Appeal Based Upon a Dissent (COA15-699) 2. Claimant's PDR as to Additional Issues 3. Claimant's Motion to Consolidate Appeals 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. State's Motion to Consolidate Appeals	1. --- 2. Denied 3. Allowed 4. --- 5. Allowed 6. Allowed
088A16	In the Matter of Tommie Junior Smith, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	1. Claimant's Notice of Appeal Based Upon a Dissent (COA15-829) 2. Claimant's PDR as to Additional Issues 3. Claimant's Motion to Consolidate Appeals 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. State's Motion to Consolidate Appeals	1. --- 2. Denied 3. Allowed 4. --- 5. Allowed 6. Allowed
089P16	Dora P. Bullock v. Adam Hopler, Hopler & Wilms, LLP	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-537) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
090A16	Victor Howard v. Patricia E. Chambers; Mattocks Enterprises, Inc.; Steve N. Mattocks, Individually; Jason L. Panciera, Individually; and Cawthorne, Moss & Panciera, P.C.	Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-590)	Dismissed *ex mero motu*
091P16	Robert Andrew Bartlett, Sr. v. David Barber	1. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* (COA15-72) 2. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed

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094PA13-3	State v. George Victor Stokes	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA12-810 and COA12-810-2) 2. Def's *Pro Se* Motion for Arrest of Judgment 3. Def's *Pro Se* Motion for a New Trial	1. Denied 2. Dismissed 3. Dismissed
094P16	State v. Harold Lamont Fletcher	Def's PDR Under N.C.G.S. § 7A-31 (COA14-1312)	Allowed
095P16	Cynthia Walker, D.D.S. v. The North Carolina State Board of Dental Examiners	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-337)	Allowed
096P16	Rodney Hall, Dante Branham, Ehramis Chism, Tyriuq Gordan, M.M. (minor) by his Guardian Ad Litem, Benika Rayford, Benika Rayford, Individually, and Erik Staley v. Michael L. Greene and Mount Zion Christian Academy	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-486)	Denied
097A16	State v. Thomas P. Knight	1. Def's Notice of Appeal Based Upon a Dissent (COA14-1015) 2. State's Notice of Appeal Based Upon a Constitutional Question 3. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	1. --- 2. Dismissed *ex mero motu* 3. Allowed
098P16	Robert Fuhs, Sr. v. Summer Fuhs, Constance C. Moore, and Legal Aid of North Carolina, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-945)	Denied
099P16	State v. Daniel Lynn Bowlin	Def's PDR Under N.C.G.S. § 7A-31 (COA15-701)	Denied
104P16	State v. William Gerald Price	Def's *Pro Se* Motion for Notice of Appeal	Dismissed

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105P16	In the Matter of C.R.B., D.G.B., and C.M.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA15-644)	Denied
106P16	Kimarlo Antonio Ragland v. N.C. Department of Public Instruction	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-141)	Denied
107P16	State v. Soyer Lewis Moll	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Onslow County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**
108P16	State v. Jonathan Udell Teeter	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-570)	Denied
110P16	North Carolina State Board of Education v. The State of North Carolina and The North Carolina Rules Review Commission	1. Def's (N.C. Rules Review Comm.) Notice of Appeal Based Upon a Constitutional Question (COA15-1229) 2. Def's (N.C. Rules Review Comm.) PDR Under N.C.G.S. § 7A-31 3. Def's (N.C. Rules Review Comm.) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (State of N.C.) PDR Under N.C.G.S. § 7A-31 5. Def's (State of N.C.) Petition for *Writ of Certiorari* to Review Order of COA	1. Special Order 2. Special Order 3. Special Order 4. Special Order 5. Special Order
111P16	Paul L. Erickson v. Clayton Siegel, DC, Individually and on Behalf of the Other Named Defendants Identified in Exhibit A to the Plaintiff's Complaint	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA15-984)	Denied
112P16	Foremost Insurance Company of Grand Rapids, Michigan v. Charles Raines, Martha Rains, and Sherri Griggs	Defs' (Charles Raines and Martha Raines) PDR Under N.C.G.S. § 7A-31 (COA15-978)	Denied

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113P16	State v. Austin Lynn Miller	1. State's Motion for Temporary Stay (COA15-636) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1. Allowed **03/31/2016** 2. Allowed 3. --- 4. Allowed 5. Allowed
115P16	Willie T. Kelly, Jr. v. P. McCrory, Governor, et al.	1. Plt's *Pro Se* Motion for Tort Claim Civil Complaint 2. Plt's *Pro Se* Motion for Summons to Appear in Civil Complaint	1. Dismissed 2. Dismissed
116P16	Linda M. Bennett, Executrix for Elizabeth H. Maynard, Deceased, Lisa M. Bennett, Personally on Behalf of Herself and All Others Similarly Situated v. Hospice & Palliative Care Center of Alamance-Caswell, Community Home Care and Hospice, LLC, The Oaks of Alamance, LLC, Jeffrey Brown, M.D., Beth Hodges, M.D., Does 1-10, Inclusive	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-667) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
117P16	B S K Enterprises, Inc., and B. Kelley Enterprises, Inc. v. Beroth Oil Company	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-189) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
118P16	DWC3, Inc., RYFO, LLC, Paul Miller, and Kathleen Miller v. William G. Kissel and Diane L. Kissel	Defs' PDR Under N.C.G.S. § 7A-31 (COA15-252)	Denied
120P16	State v. Bobby Frederick Walls, Jr.	Def's *Pro Se* Motion for PDR (COA15-289)	Denied

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121A16	State v. Damario Montreal Coxton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-575) 2. State's Motion to Dismiss Appeal	1. Special Order 2. Special Order
124A16	Jillian Murray v. The University of North Carolina at Chapel Hill	1. Def's Notice of Appeal Based Upon a Dissent (COA15-375) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed
125P16	State v. Mark Wayne Ballard	1. Def's *Pro Se* Motion for Leave of the Court to File Notice of Appeal (COAP15-832) 2. Def's *Pro Se* Motion for Extension of Time to File Notice of Appeal 3. Def's *Pro Se* Motion for Equitable Tolling 4. Def's *Pro Se* Motion to Stay 5. Def's *Pro Se* Motion for Appointment of Counsel	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed **04/06/2016** 5. Dismissed as moot
126P16	State v. Warren H. Summers	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP16-245)	Denied
127P16	State v. Dakota Covington	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion in the Alternative for Petition for Writ of Error *Coram Nobis* 3. Def's *Pro Se* Motion for Evidentiary Hearing	1. Dismissed 2. Dismissed 3. Dismissed
128P16	In the Matter of The Estate of La-Reko A. Williams	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA15-619) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
130P16	State v. Jamario Jermaine McClure	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA15-266)	Denied
131P01-12	State v. Anthony Dove	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion to Expedite Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**

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134P16	Ronald Thompson Corbett v. State of North Carolina Department of the Secretary of State	Petitioner's *Pro Se* Motion for Notice of Appeal	Dismissed
135P16	State v. Robert Antwain Stanback	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Randolph County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
136P16	State v. Maurice Parker	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Dismissed
137P16	State v. Reid Wilburn McLaughlin	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-333) 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
139P16	State v. Maurice Shepherd	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Northampton 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
142P16	State v. Sylvia Dyson Sprinkle	Def's PDR Under N.C.G.S. § 7A-31 (COA15-657)	Denied
143P16	Shawn Blackburn v. N.C. Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-556)	Denied
145P16	State v. Christopher Lynn Hallum	Def's PDR Under N.C.G.S. § 7A-31 (COA15-526)	Denied
148P16	State v. John Wesley Hearne	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-163)	Dismissed
149P16	State v. Ronald Audra Ingram	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA15-794)	Dismissed

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150P16	Jason Lee Mutter v. Michael Ball, Superintendent of Avery Mitchell Correctional Institution	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-519) 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Denied **04/25/2016** 2. Allowed **04/25/2016** 3. Dismissed as moot **04/25/2016** **Ervin, J., recused**
151P14-3	Kimberly Shreve v. North Carolina Department of Justice, Kristen Fetter, Colon Willoughby, and Tina Hoagland Byrd	1. Plt's *Pro Se* Motion for Leave to File Amended Complaint 2. Plt's *Pro Se* Motion for Review and Appeal 3. Plt's *Pro Se* Motion for Leave to File Amended Complaint	1. Dismissed 2. Dismissed 3. Dismissed
151P16	State v. James L. Johnson	1. State's Motion for Temporary Stay (COA15-793) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2016** 2. 3.
152P16	Catawba County, by and through its Child Support Agency, ex rel., Shawna Rackley v. Jason Loggins	1. Plt Catawba County's Motion for Temporary Stay (COA15-711) 2. Plt Catawba County's Petition for *Writ of Supersedeas*	1. Allowed **04/25/2016** 2.
153P16	State v. Nashid Porter	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed **05/23/2016** 2. Dismissed as moot **05/23/2016** 3. Dismissed as moot **05/23/2016**
153P16-2	State v. Nashid Porter	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	Denied **06/07/2016**
157P16	State v. Danielle Star Reynolds	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Onslow County	Dismissed **05/19/2016**

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158P06-7	Derrick D. Boger v. Pat McCrory, Governor; W. David Guice, Commissioner; George T. Solomon, Director; D.R. Mitchell, Superintendent; Captain Ms. Mem; Captain Gernmany; Mr. Ingram	Plt's *Pro Se* Motion for Tort Claim Civil Complaint	Dismissed
158P16	Larry Brandon Moore v. Judge Jesse B. Caldwell, III	Plt's *Pro Se* Motion for Petition for Order to Show Cause Under Common Law	Dismissed
161P16	State v. Roger Christopher Oxendine	Def's PDR Under N.C.G.S. § 7A-31 (COA15-508)	Denied
163P16	State v. Arkeem Hakim Jordan	Def's *Pro Se* Motion for Writ of Error	Dismissed **Ervin, J., recused**
164P16	State v. David Michael Wilson	1. Def's *Pro Se* Motion for PDR *of Certiorari* 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
166P16	State v. Jaahkii Quran Harris	1. State's Motion for Temporary Stay (COA15-770) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2016** 2. 3.
167P16	State v. William Edward Godwin, III	1. State's Motion for Temporary Stay (COA15-766) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2016** 2. 3.

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174P16	State v. Travis Taylor Dail	1. State's Motion for Temporary Stay (COAP16-291) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **05/11/2016** 2. 3.
175P16	N.C. Department of Health and Human Services, Division of Medical Assistance v. Parker Home Care, LLC --- Division of Medical Assistance, N.C. Department of Health and Human Services v. Parker Home Care, LLC	1. State's Motion for Temporary Stay (COA15-1026; COA15-1033) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2016** 2. 3.
180P16	State v. John Wayne Bonetsky	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-811) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas* 4. Def's Motion to Amend PDR and File Notice of Appeal 5. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Allowed **05/13/2016** Dissolved **06/09/2016** 3. Denied 4. Denied **05/18/2016** 5. Dismissed as moot **Ervin, J., recused**
188P16	State v. Timothy Allen Foxworth	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA15-1092) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 4. Def's *Pro Se* Motion for Subpoena *Duces Tecum*	1. Dismissed 2. Denied 3. Denied 4. Dismissed as moot **Ervin, J., recused**
190P16	Joseph Earl Clark, II v. N.C. Department of Public Safety	Petitioner's *Pro Se* Motion for PDR (COAP16-282)	Denied **05/27/2016**

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191P16	Owen D. Leavitt v. State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP14-977) 3. Petitioner's *Pro Se* Motion for PDR 4. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 5. Petitioner's *Pro Se* Motion to Reconsider Denial of Petition for *Writ of Habeas Corpus*	1. Denied **05/19/2016** 2. Dismissed 3. Dismissed 4. Allowed 5. Denied **06/01/2016**
192P16	Owen D. Leavitt v. State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Alexander County 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
193P16	State v. Calvin Renard Carter	1. State's Motion for Temporary Stay (COA15-1234) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/24/2016** 2.
194A16	State v. Michael Antonio Bullock	1. State's Motion for Temporary Stay (COA15-731) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/23/2016** 2.
199PA15	State v. Brent Tyler Miller	Def's Motion to Vacate Bill of Costs	Special Order
199P16	State v. Joseph M. Romano	1. State's Motion for Temporary Stay (COA15-940) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/24/2016** 2. 3.
200P16	North Carolina State Bar v. Dianne Michele Carter El Bey v. State of North Carolina, Paul G. Gessner, Individually and as Judge, North Carolina State Bar, David R. Johnson, Individually and as Judge, and Jennifer Knox, Individually and as Clerk	Def's *Pro Se* Motion for Writ of Prohibition for Usurpation of Power	Dismissed **06/07/2016** **Ervin, J., recused**

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208PA15	The North Carolina State Bar v. Jerry R. Tillett		Special Order **05/27/2016**
208P16	State v. Joshua Earl Holloman	1. State's Motion for Temporary Stay (COA15-1042) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/27/2016** 2. 3.
213P16	State v. Christopher Allen McKiver	1. State's Motion for Temporary Stay (COA15-1070) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/06/2016** 2. 3.
222A14	State v. Bernard George Lamp, Jr. (DEATH)	1. Def's Motion to File Juror Questionnaires Under Seal 2. Def's Motion to Supplement Record on Appeal 3. Def's Motion to Withdraw Appeal	1. Dismissed as moot 2. Dismissed as moot 3. Allowed
244P11-2	State v. Bruce Lamont Gorham	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Def's *Pro Se* Motion for Subpoena *Duces Tecum* 5. Def's *Pro Se* Motion to Amend	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed **Ervin, J., recused**
248P99-3	State v. Howard Cleveland, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Rowan County	Dismissed

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248PA13-2	The Estate of Donna S. Ray, by Thomas D. Ray and Robert A. Wilson, IV, Administrators of the Estate of Donna S. Ray, and Thomas D. Ray, Individually v. B. Keith Forgy, M.D., P.A., Individually and as Agent/ Apparent Agent of Grace Health Care System, Inc., Blue Ridge Health Care Systems, Inc., Carolinas Health Care System, Inc., and as an Agent/ Apparent Agent, Employee, and Shareholder of Mountain View Surgical Associates, Grace Hospital, Inc., Grace Health Care System, Inc., Blue Ridge Health Care System, Inc., and Carolinas Health Care System, Inc.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA15-236) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot **Jackson, Beasley, and Ervin, JJ., recused**
252PA14-2	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/10/2015** 2. Allowed 3. Special Order
273A01-3	State v. Avenger Ridgeway	1. Def's *Pro Se* Motion for PDR (COAP16-120) 2. Def's *Pro Se* Motion to Amend Petition	1. Dismissed 2. Allowed **Ervin, J., recused**
289P06-6	State v. Steve Morrison	1. Def's *Pro Se* Petition for *Writ of Certiorari* 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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294PA14	Robert E. King and wife, Jo Ann O'Neal v. Michael S. Bryant, M.D., and Village Surgical Associates, P.A.		Special Order
322P15-4	Raymond Griffin v. Debora Shandler, Assistant District Attorney of Wake County and Donald W. Stephens, Senior Resident Superior Court Judge	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **06/07/2016**
334P15	Ashley Keith Pittman, and wife, Deanna Pittman v. Henry Moncure Motors, Inc., Mobile Home Sales, a Corporation, and Crestline Homes, Inc., a Corporation	Def's (Henry Moncure Motors, Inc.) PDR Under N.C.G.S. § 7A-31 (COA14-1186)	Denied
368PA15	Wilkes v. City of Greenville	Def's Motion to Amend New Brief	Allowed **05/27/2016**
370P09-2	State v. Michael Harrison Hunt, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 2. Def's *Pro Se* Motion to Proceed I*n Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Beasley, J., recused**

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374P13-6	State v. Marvin Wade Millsaps	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Consider Universal Rights be Reinstated 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel 5. Def's *Pro Se* Motion for Extraordinary Writ 6. Def's *Pro Se* Motion to Modify/Vacate Old Age Conviction	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Dismissed **Ervin, J., recused**
375P09-6	State v. Avenger Ridgeway	1. Def's *Pro Se* Motion to Supplement PDR 2. Def's *Pro Se* Motion for Petition for Moratorium 3. Def's *Pro Se* Motion for Request to Order Public Records	1. Dismissed as moot 2. Dismissed 3. Dismissed **Ervin, J., recused**
389A15	State v. Tae Kwon Hammonds	Def's Motion to File Amended Brief (COA15-53)	Allowed **04/27/2016**
389A15	State v. Tae Kwon Hammonds	State's Motion for Extension of Time to File Brief (COA15-53)	Allowed **04/29/2016**
392PA13-3	State v. Robert Timothy Walston, Sr.	1. State's Motion for Temporary Stay (COA12-1377-3) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/18/2015** 2. Allowed 3. Allowed
409PA15	Nies v. Town of Emerald Isles	1. Civitas Institute Center for Law and Freedom's Motion for Leave to File Amicus Brief 2. Owners' Counsel of America and Professor David L. Callies' Motion for Leave to File Amicus Brief 3. Motion to Admit Robert H. Thomas *Pro Hac Vice*	1. Allowed **05/25/2016** 2. Allowed **05/25/2016** 3. Allowed **05/25/2016**
411P15-2	State v. John W. Hearne	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP15-829)	Dismissed

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421P10-4	Robert Allen Lillie v. Michael Ball, Superintendent, Avery-Mitchell Correctional Inst.	Petition for *Writ of Certiorari* to Review Denial of Petition for *Writ of Habeas Corpus*	Denied **05/18/2016**
424P15	State v. John Thomas Patterson, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-138) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Amend Notice of Appeal and PDR 4. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed
449P11-13	State v. Charles Everette Hinton	1. Petitioner's *Pro Se* Motion to Take Judicial Notice of Adjudicative Facts 2. Petitioner's *Pro Se* Motion for Necessary Joinder of Parties 3. Petitioner's *Pro Se* Motion for Joinder of Claims and Remedies 4. Petitioner's *Pro Se* Motion for Evidentiary Oral Hearing and Findings and Conclusions by the Court 5. Petitioner's *Pro Se* Motion for Inquiry into Restraints on Liberty; Petition for *Writ of Habeas Corpus;* Relief from Judgments 6. Petitioner's *Pro Se* Motion for Calendaring Cause	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Denied **02/19/2016** 6. Dismissed **Ervin, J., recused**
491P02-7	Dontez Simuel v. Senior Resident Superior Judge Donald Stephens and Senior Resident Judge Paul C. Ridgeway	Plt's *Pro Se* Motion for Writ of Prohibition	Denied **Ervin, J., recused**
514PA11-2	State v. Harry Sharod James	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **05/20/2016** 2.
580P05-14	In re David L. Smith	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed **Ervin, J., recused**

APPENDIXES

PORTRAIT CEREMONY OF
CHIEF JUSTICE EXUM

PORTRAIT CEREMONY OF
CHIEF JUSTICE FRYE

PORTRAIT CEREMONY OF
CHIEF JUSTICE MITCHELL

PORTRAIT CEREMONY OF
JUSTICE WAINWRIGHT

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
PRO BONO PRACTICE

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
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AMENDMENTS TO THE RULES OF THE BOARD
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STATE OF NORTH CAROLINA

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MEMBERSHIP

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

CHIEF JUSTICE'S COMMISSION
ON PROFESSIONALISM

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING
THE BOARD OF LAW EXAMINERS

AMENDMENT TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE CONTINUING
LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE LEGAL
SPECIALIZATION PROGRAM

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE CONTINUING
LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND
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SPECIALIZATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

Presentation of the Portrait of

JAMES G. EXUM, JR.

Chief Justice
Supreme Court of North Carolina
1986-1994

Associate Justice
Supreme Court of North Carolina
1975-1986

October 13, 2015

OPENING REMARKS
and
RECOGNITION of ANDY LITTLE
by
CHIEF JUSTICE MARK MARTIN

The Chief Justice welcomed the guests with the following remarks:

Good afternoon, Ladies and Gentlemen, and thank you Reverend Inman for the Invocation. Reverend Inman practiced law with Chief Justice Exum at Smith Moore Leatherwood prior to entering seminary, and I know it is special to him to have you here.

I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Chief Justice James G. Exum, Jr.

The presentation of portraits has a long tradition at the Court, beginning 127 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Chief Justice Exum's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

When Jim Exum was Chief Justice, the Court was just beginning to understand and use the internet. Just a few years before Chief Justice Exum's tenure began, Chief Justice Branch had purchased the first Xerox machine, ending the need for seven carbon copies of each of the Justices' opinions. The Court was not necessarily moving at "lightning speed" towards embracing technology that could make our work easier. Chief Justice Exum hired our first technology staff, and he encouraged the members of the Court to try the "new-fangled" email as a way to communicate with their fellow Justices, rather than carrying paper from office to office to get votes! His campaign to improve the workings of the Court included changing the structure of how we deliver opinions

to positioning the name of the Justice who wrote the opinion ahead of the statement of facts – a tradition that continues to this day.

Chief Justice Exum has served with distinction in two branches of state government. One of his lasting impacts has been appointing the "Commission for the Future of Justice and the Courts in North Carolina," now known as the "Medlin Commission." When Chief Justice Exum appointed this Commission, he noted that it was time for a "fresh approach." As he stated when he charged the members of the Commission: "What you have been asked to do is not to predict the future and design the court system around that prediction. You have been asked to design a court system of the future and tell us how to get there." They did. From the recommendations of the Medlin Commission, we established family courts, created a Judicial Council, accelerated efforts in alternative dispute resolution, developed a long-range technology plan, established better communication methods, and began the utilization of trial court administrators.

I have spoken often of Chief Justice Exum's efforts, as I recently began my own efforts to look yet again at our Courts in a different time, with different developing issues, to see how we can strengthen our courts from today and into the next twenty years. Chief Justice Exum made a difference on many levels of our Judicial Branch, and we are pleased to have the opportunity to honor him today.

At this time, it is my pleasure to recognize Chief Justice Exum's friend and Past Chair of the North Carolina Dispute Resolution Commission, Andy Little, and invite him to the podium for remarks.

Thank you, Mr. Little, for those excellent remarks. They were a fitting tribute to our former colleague.

RECOGNITION of JUDGE LUCY INMAN by CHIEF JUSTICE MARK MARTIN

We also are fortunate to have Judge Lucy Inman, a Judge on the North Carolina Court of Appeals and a former Research Assistant of Chief Justice Exum, to make some remarks.

Thank you Judge Inman for your remarks.

RECOGNITION of CHIEF JUSTICE JAMES G. EXUM, JR. by CHIEF JUSTICE MARK MARTIN

Chief Justice Exum has asked for time for rebuttal, and we are very pleased to welcome the Chief to the podium for remarks.

Thank you, Chief Justice Exum.

ACCEPTANCE of CHIEF JUSTICE EXUM'S PORTRAIT by CHIEF JUSTICE MARK MARTIN

I am delighted to ask the four grandchildren of Chief Justice Exum: Bella, Sawyer, Rosemary, and Ava (whose twelfth birthday is tomorrow) to unveil the portrait of their grandfather.

On behalf of the Supreme Court, we accept this portrait of Chief Justice Exum as a part of our collection. We are pleased to have this fine work of art done by a well-known artist, Mr. Tom Donahue, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Chief Justice Exum's portrait will be hung in this Courtroom and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina Reports.

Your participation today makes this ceremony special, and we are honored that all of you could be with us. At the close of this ceremony, Chief Justice Exum and his family will move to the History Center on the first floor of this building, and the Court will follow.

On behalf of the Exum family, and with appreciation to the law firm of Smith Moore Leatherwood and Elon University School of Law, who are graciously providing the reception in Chief Justice Exum's honor, I invite all of you to a reception in the History Center.

Please allow Chief Justice Exum and his family, as well as the Court, a few moments to get to the History Center prior to your leaving

the Courtroom. The Research Assistants will help guide you. We ask that you remain at your seats until your row is called. Again, thank you for being with us today.

REMARKS by ANDY LITTLE

Mr. Chief Justice and other members of the court, I've been asked by our honoree to say a few words about a facet of his work that has been particularly important and satisfying to him and it is an assignment that I am honored to undertake at this time.

In 1982 and 83, Justice Exum and other thoughtful lawyers and jurists around the country began to observe that the courts of our land were becoming places of first rather than last resort for the settlement of disputes among its citizens. Noting that the vast majority of cases brought to trial involved factual rather than important legal or constitutional issues, Justice Exum wrote that such cases frequently could be resolved outside the courtroom. In addition, he noted, and I quote, "that litigation can be especially harmful when it is between persons who have a meaningful relationship. Usually, these kinds of disputes involve, as Judge Braxton Craven once said, people problems and not legal problems. When we're dealing primarily with people problems, he said, the courtroom does not have nearly the resolving power of other, less structured dispute settling devices. Litigation in these cases is frequently a severe obstacle to reconciliation between the parties." Justice Exum went on to say, "most litigation, as those of us who have spent our lives engaging in it know, is often not a healing process. It is better, to be sure, than physical violence between the disputants but litigation itself can be a form of violence, verbal violence, which in its long-lasting effect on an individual can be even more damaging than physical strife."

In 1983, as Justice Exum examined the current state of the courts, he also thought about the role of lawyers in advising and representing clients, who often come to us as lawyers thinking that the courts are the only step available to them to right the wrongs that have been inflicted upon them by others. And as he did he was reminded of the many spiritual traditions throughout history that have emphasized a spirit of settlement and reconciliation in the field of human conflict. In his own spiritual tradition, a portion of the Gospel of Mark known as The Beatitudes came to his mind, specifically the one that says, "Blessed are the peacemakers for they shall be called the children of God." Later in 1983, Justice Exum was invited to give an address on that theme at a national conference in Wheaton College in Ohio sponsored by the Christian Legal Society. The talk was entitled "The Lawyer as Peacemaker," and it was much discussed afterwards by those in attendance, especially by those lawyers who were there from North Carolina. Upon returning from that event, Justice Exum began making similar

talks at district bars around the state, and ultimately his remarks were written up in an article for the North Carolina Bar Association's publication, Bar Notes. It received wide distribution and acclaim throughout the state. In that article, he said the following: "The time has clearly come for lawyers to begin to emphasize their role as mediators, conciliators, and peacemakers, as counsellors for what is right, not merely advocates for what is legally possible. Lawyers need to remind themselves that the courtroom is often not a place that is conducive to peacemaking, or conflict healing, yet peacemaking and conflict healing are the first obligations of our profession." One of the lawyers in North Carolina who was moved and inspired by Justice Exum's vision of lawyering in that article was Charlie Fulton, then President of the North Carolina Bar Association. Building upon Justice Exum's vision of a lawyer as peacemaker, and a growing national interest in judicial reform, Fulton appointed an Alternatives to Litigation Task Force of the North Carolina Bar Association Board of Governors. He appointed Wade Barbour, initially, to chair the effort; Larry Sitton to chair the subcommittee on community-based alternatives to litigation; and Justice Exum to chair the subcommittee on court-based alternatives. Those appointments and the work of those people created quite an exciting time in the development of the North Carolina court system, but as dedicated and as excited as those participants were, none of them could have predicted the changes in our court system and in the practice of law that they and their successors would bring about. So let me walk you through some of the changes that we have seen in the thirty-two years that have elapsed since the establishment of that task force, bearing in mind that this is the perspective of only one lawyer who lived through those years.

In 1983, few of us lawyers initiated settlement discussions for fear that we would signal weakness by doing so. As a result, cases settled on the eve of trial and sometimes literally on the courthouse steps, and lawyers often lost valuable weekends to trial preparations for cases that were never tried. In 1983, court dockets were soft because no one knew what cases really needed to be tried. As a result, litigants often paid for multiple trial preparations because their cases would be continued multiple times from court term to court term. In 1983, most settlement efforts were made in lawyer to lawyer phone calls and correspondence without the participation of their clients, who often didn't understand how and why their cases settled. In 1983, there was no such thing as settlement conferences. It was almost unthinkable that lawyers, their clients, and insurance representatives, could or would meet together and devote a full day to negotiating the settlement of their cases. In 1983, our civil procedure was devoted almost exclusively to procedures for trying civil lawsuits. Settlement events and settlement procedures were

non-existent. Today, in almost every contested case in state courts, federal courts in North Carolina, in the Office of Administrative Hearings, and in the Industrial Commission, the parties and their attorneys meet, and participate in some kind of settlement event, usually a conference moderated by a trained mediator. Today, lawyers and their clients actively participate together in settlement discussions, carefully analyzing their case and their goals in developing settlement proposals together. Today, lawyers know better which cases they will have to prepare for trial well in advance of that trial. As a result, their trial preparation is better organized and scheduled. Today, the time for disposition of cases in our courts has dropped dramatically, and more cases are settled. Today, court dockets are firmer and fewer litigants have to pay for multiple trial preparations. In 1983, few of us studied the art and science of negotiations. When mediation was first installed as a mandatory settlement event, lawyers were forced to negotiate in more of a public setting then they were used to and our performances in that regard were not always pretty. In 1983, there was no emphasis on negotiation training in law school, and almost no one signed up for the one elective negotiation course available every other semester. When my class was admitted to the Bar, we had no preparation for settling litigated matters. Today, our system of legal education is changing. Courses in ADR, negotiation, and mediation are being offered on a regular basis, and, in some schools, clinical training in negotiation or mediation is being provided. Today, many law students are graduating with the thought that they want to practice law in a different way. Some want to become collaborative lawyers who help their clients define their goals, discover the facts of their dispute, analyze their legal options and remedies, and negotiate directly with opposing counsel and their clients to settle their clients' conflict, but they do not want to represent their clients in contested proceedings. Still other law students graduating today want to go directly into the practice of mediation to help disputing parties settle their dispute whether they have legal claims or not. Today, practicing lawyers are seeking out CLE courses on negotiation and mediation. Many of them have devoted an entire week to mediation training, not because they want to mediate, but because they want to become better negotiators and advisors to their clients. In 1983, many said that lawyers, rather by training or temperament, could never be good mediators. Today, there are over 1400 trained and certified lawyer mediators in North Carolina, who mediate the settlement of civil litigation throughout the state. In 1983, few law offices had conference room facilities in which to meet and counsel clients, or to host meetings with opposing parties to negotiate the settlement of litigation. Today, new law offices are designed and built to host those meetings. In 1983, most of our courthouses were built in an era when watching trials was a community

activity, and our courtrooms were built to accommodate large numbers of people. Today, our new courthouse spaces are being designed and built with conference rooms in mind, rooms in which lawyers can meet and counsel with their clients during court proceedings, and rooms in which settlement conferences can be convened in a neutral setting. So we have come full circle. In 1983, Justice Exum called on lawyers to take on and live the life of peacemakers and to work to ensure that our courts would be places of last, rather than first, resort for the settlement of disputes among our citizens. Who among us could have suspected that his vision would transform the education we receive, the law practices we build, and the courts in which we work. Clearly, ADR is no longer alternative in North Carolina. It is now woven seamlessly into the fabric of our courthouses, our law practices, and our civil procedure. Today, we remember that highest calling of our profession that Jim Exum so simply and eloquently described for us many years ago: the lawyer as peacemaker, and in this room, along with many others who are not here, we are filled with gratitude for his service, his vision, and his inspiration. Thank you.

REMARKS by LUCY INMAN

MAY IT PLEASE THE COURT:

I am humbled and highly honored to present to the Court, on behalf of the Exum family, the portrait which will be unveiled in a few minutes. It was painted by Tom Donahue of Memphis, Tennessee. Mr. Donahue's other subjects included a college president, law school dean and state governor as well as Frank Sinatra, Lauren Bacall and Danny Thomas. It's fitting that his body of work also includes the portrait of a man once described in our state bar journal as "one of the most handsome and charming of our chief justices" and who brought energy, wit, and unwavering courage to this great institution.

James Gooden Exum, Jr. is a native of Snow Hill, a small town and the county seat of Greene County. He was born at the nearest hospital in Kinston on September 14, 1935, the first son of James G. Exum, Sr. and Mary Wall Bost Exum. He and his younger brothers Ashe and Joe grew up steeped in their parents' homegrown business, Happy Jack Dog Remedies, Inc., manufacturer of remedial products for dogs. Happy Jack is still in business and still owned and operated by the Exum family.

Chief Justice Exum was not the first public servant in his family. His grandfather, James Thomas Exum, represented Greene County in the state legislature and was a trustee of the University of North Carolina at Chapel Hill. And through his mother, Chief Justice Exum later discovered, he is a descendent of Chief Justice Thomas Ruffin.

After graduating as valedictorian of his class at Snow Hill High School, Exum attended the University of North Carolina at Chapel Hill as a Morehead Scholar. He earned a bachelor's degree in English in 1957. His college summers were spent working as a counselor at Camp Sea Gull on the Lower Neuse River near Arapahoe. He attended New York University School of Law as a Root-Tilden Scholar, receiving his law degree in 1960.

During law school, Exum worked as a summer associate at a prominent firm in New York and was offered a job there when he graduated. He decided instead to accept an offer from Associate Justice, later Chief Justice, Emery B. Denny of the North Carolina Supreme Court, to work as his law clerk.

The young law clerk cut his teeth on legal research and writing memos as directed by Justice Denny. Exum acknowledges that he could

not have had a better mentor than Justice Denny, who had been an experienced, well-regarded attorney before joining the Court and who was thorough and meticulous in the preparation of his opinions. Exum celebrated when a sentence or two, or occasionally a paragraph, from his memos appeared in one of Justice Denny's published opinions. Decades later, Chief Justice Exum would allow me the same opportunity when I worked as one of his law clerks.

While clerking for Justice Denny, future Chief Justice Exum planned to set up practice back home in Snow Hill. But in the spring of 1961, he received a call from attorney McNeill Smith, who invited him to become an associate with the firm of Smith Moore Smith Schell & Hunter in Greensboro when he finished his clerkship. Exum accepted the offer. While with the firm, he represented the firm's clients in municipal court, jury trials, and appeals to this Court. At the same time, he served in the Army Reserves, retiring as a Captain in the JAG Corp, served as vice president of the Greensboro Jaycees, and served on the vestry of Holy Trinity Episcopal Church.

In 1961, during his first summer in Greensboro, he met Judith Jamison on a blind date. They married in June 1963, and together raised their three children, James III, Steven, and Mary March. Eventually, all three children graduated from the University of North Carolina at Chapel Hill and pursued their own careers.

In 1966, at the age of 31, the future Chief Justice was elected by voters in Guilford County to the state House of Representatives. In just one session in 1967, he successfully supported our state's first clean water legislation, helped bring A&T University into the University of North Carolina system, and championed the first act to protect endangered sea turtles and their eggs. To lawmakers from the coast, who skeptically asked how a Piedmont lawyer knew so much about turtles, the freshman representative replied with a quotation from Ogden Nash: "The turtle lives twixt plated decks, which practically conceal its sex. I think it clever of the turtle in such a fix to be so fertile."

Near the end of the legislative session, Governor Dan Moore summoned Representative Exum to his office and asked him to accept appointment to a newly created resident Superior Court judgeship in Guilford County. The offer was a complete surprise, but fortunately the young lawyer accepted it. He became known as a hardworking and skilled trial judge; and, in 1974, he was elected to the North Carolina Supreme Court.

In 1986, he was elected Chief Justice of this Court, succeeding Chief Justice Rhoda Billings. He was re-elected in 1990. These two chiefs eventually worked together to steer our state toward a method of selecting judges that promotes judicial independence above partisan politics. Nearly thirty years later, that effort continues.

In two decades at this Court, Associate Justice, and later Chief Justice, Exum wrote 402 opinions for the Court and another 208 concurring or dissenting opinions.

In his first year on the Court, he consistently dissented, along with Chief Justice Susie Sharp and Justice William Copeland, to numerous decisions affirming death sentences. *See*, *e.g.*, *State v. Williams*, 286 N.C. 422, 212 S.E.2d 113 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E.2d 280 (1975) *vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976). The dissents did not argue that capital punishment was unconstitutional per se, but rather that because the General Assembly had not yet enacted a death penalty statute to replace the statute invalidated by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972), a foundation of our government — the separation of powers —prohibited this Court from creating such a law on its own.

Once the Legislature enacted a new death penalty statute, then Associate Justice Exum concurred for the first time in a decision upholding a death sentence. He wrote a concurring opinion in that case, *State v. Woodson*, 287 N.C. 578, 597, 215 S.E.2d 607, 619 (1975) *rev'd*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976), to explain his vote. He wrote at length to reiterate his personal opposition to capital punishment, but he concluded with his bottom line, which must surely be the bottom line for all judges. "The point is[,]" he wrote, "that as a judge I cannot substitute my personal will for that of the Legislature merely because I disagree with its chosen policy." *Id.* at 600, 215 S.E.2d at 621.

It generally takes more work to write a concurring or dissenting opinion than to join the majority. Chief Justice Exum did not shy from the task when he believed it necessary to fulfill his duty of standing by his convictions and explaining his legal reasoning.

In a series of dissenting opinions in the 1980's, Associate Justice Exum raised concern about North Carolina's capital sentencing law because it could be construed to prohibit any juror from considering mitigating factors not found to exist by a unanimous vote. *See*, *e.g.*, *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983) (Exum J., concurring in result on sentencing but disagreeing with majority on this point).

A few years later, the United States Supreme Court in *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988) struck down Maryland's capital sentencing law because of its unanimity requirement for mitigating factors. A majority of this Court in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988) (Exum, C. J., and Frye, J., dissenting) *vacated*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), distinguished North Carolina's capital sentencing law from that in Maryland, held that Mills was not controlling, and upheld the death sentence. Chief Justice Exum, now joined by Justice, later Chief Justice, Frye, dissented on the unanimity requirement. The United States Supreme Court allowed a petition for certiorari, and, in *McKoy v. North Carolina*, 494 U.S. 433, 440, 108 L. Ed. 2d 369 (1990), reversed this Court's decision. Writing for the majority, United States Supreme Court Justice Thurgood Marshall quoted a passage from Chief Justice Exum's dissent in support of the Court's decision.

Included among a number of his significant opinions are two written for the Court while he was an Associate Justice: *Rutledge v. Tultex* Corp., 308 N.C. 85, 301 S.E.2d 359 (1983) and *Delconte v. State*, 313 N.C. 384, 329 S.E.2d 636 (1985), and one while he was Chief Justice: *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

Rutledge involved a textile worker who was totally disabled because of chronic obstructive pulmonary disease caused in part by her exposure to cotton dust and in part by smoking; emphysema and chronic bronchitis were components of the disease. The Court, for the first time, held that chronic obstructive lung disease could be an occupational disease and the worker compensated for total disability under our Workers' Compensation Act "provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development . . . even if other non-work-related factors also make significant contributions, or were significant causal factors." 308 N.C. at 101, 301 S.E.2d, at 369-70.

In *Delconte v. State*, the Court held, for the first time, that home schooling by a father of his two children fell within the category of "nonpublic school" allowed by the State's compulsory school attendance statutes. 313 N.C. 384, 329 S.E.2d 636.

Woodson v. Rowland held that an employee who is injured or killed by the intentional conduct of his employer that the employer knows "is substantially certain to cause serious injury or death" may pursue a civil action against the employer and is not limited to recovery under the Workers' Compensation Act. The Court concluded that such conduct is "tantamount to an intentional tort." 329 N.C. at 340-41, 407 S.E.2d, at 226.

Chief Justice Exum's judicial philosophy matured during his tenure. Shortly after becoming Chief Justice, he said the Supreme Court is "at the cutting edge of the law . . . . at that place in between where the law is and where it ought to go."[1] As he approached retirement from the Court a decade later, he acknowledged that he had come to value the need for predictability in the law, noting that although courts must "move the law along in one direction or another. . .we can only do this in very small steps indeed and not in terms of giant leaps."[2]

As Andy Little has mentioned already today, Chief Justice Exum also helped changed our judicial system by his work not found in published decisions. He opened courts to the public by allowing media cameras in courtrooms. He helped bring computer technology to the courts. He worked to persuade bench and bar to open avenues to alternative dispute resolution in the civil court proceedings, and he helped to introduce needed reforms in criminal sentencing, resulting in the modern model of structured sentencing.

During Chief Justice Exum's years as a Superior Court judge and for most of his tenure at this Court, North Carolina's trial judges had virtually unfettered discretion in meting out criminal punishments. The length of sentences and the choice between prison and probation were determined solely by the trial judge. Plea proceedings were as much as gamble as jury trials.

As chair of the American Bar Association's Criminal Justice Standards Committee from 1990-93, Chief Justice Exum worked to develop a model for state legislatures to determine uniform sentencing guidelines, allowing trial judges enough discretion to tailor punishments to individual cases, but not so much as to foment concerns of irrational, capricious, and unfair sentencing. The "ABA Standards for Criminal Justice Sentencing Third Edition" were approved by the ABA House of Delegates in 1993 and published in 1994.

In 1994, the North Carolina Structured Sentencing Act, based on the principles underlying the ABA model, established a sentencing policy commission and mandated a sentencing grid for all crimes, assigning a maximum and minimum sentence determined by the class of crime, the

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1. Don Pride, "Exum Court Stronger, More Progressive?" *Charlotte Observer* (December 12, 1987)

2. "Retiring Justice Jim Exum says he believes old ways still the best" *The Associated Press* (December 1994)

offender's criminal history, and by statutorily defined aggravating and mitigating factors.

Chief Justice Exum has published a number of articles[3] and a book chapter.[4] His scholarship on the North Carolina State Constitution has revealed to judges and practitioners a layer of the law that had been largely overlooked.[5]

After he retired from the Court in 1994, Chief Justice Exum chose his next chapter carefully, taking a sabbatical that included time for family, reading, sailing, working on his tennis game, and exploring this country on his motorcycle. In 1996, he returned to the successor of the firm he had left in 1967, to become a judge. The firm is now Smith Moore Leatherwood. He organized and led the firm's first appellate practice group. He has argued cases in the North Carolina Court of Appeals, the Fourth Circuit and has appeared several times before this Court in cases ranging from commercial disputes to constitutional challenges. He was a founding member of the Board of Advisors of Elon University School of Law; and, since 2013, he has served on its faculty as a Distinguished Professor of the Judicial Process. Beyond the classroom and the courtroom, Chief Justice Exum has served as a mentor to many fortunate North Carolina lawyers and judges.

I will close with reference to a speech Chief Justice Exum made to commemorate the 175th anniversary of this Court more than 20 years ago. His message resonates as loudly now as it did then. "The truth," Chief Justice Exum said, "is that lawyers are primarily peacemakers. They take the passions of their clients and of their times and channel them from the din of the streets and the cry of the mob into the orderly discourse of the courtroom and the conference room." He pleaded for a spiritual revival, noting, "The law cannot cause people not to hate, and it cannot replace intolerance with tolerance. Matters of the heart, attitudes, tolerance for others who are different from us are matters of faith,

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3 E.g. "The Death Penalty in North Carolina," 8 Campbell L. Rev. 1 (1985); "The Legal Profession: How Do We See Ourselves," *North Carolina State Bar Quarterly*, Vol. 35, No. 2 (1988); "Regarding Professionalism," *International Society of Barristers Quarterly*, Vol. 27, No 2 (1992)

4. "The Warren Court and State Constitutional Law," Schwartz, *The Warren Court*, (Oxford Univ. Press, 1996)(Chapter Co-written with then Professor Louis D. Bilionis, UNC School of Law)

5. "Rediscovering State Constitutions," 70 N.C. L. Rev. 2301 (1992); "Foreword," Orth, *The North Carolina State Constitution*" (Oxford Univ. Press 2011)

not law. Conversely, "None of us can possibly know what God would do in every difficult societal controversy that comes along. Resolution of these specific controversies [is a matter for] law, not faith." He concluded, "Neither faith nor law can do all things. Without law, faith is unsafe. Without faith, law is hopeless."[6]

Thank you, Chief Justice Exum, for your place in our law, our history, and our spirits.

6. "Faith and Law: Different Roads to Peace and Justice," *North Carolina State Bar Quarterly* (Vol. 41, No. 1, 1994)

REMARKS by CHIEF JUSTICE JAMES G. EXUM, JR.

Mr. Chief Justice, Associate Justices, May it Please the Court.

For the first time after saying those words standing at this podium, I have no argument to make. I can almost hear the sighs of relief. Really, now I realize I shouldn't be here at all. I should have just left well enough alone. But I did want just to say a few thank yous. Just a few thank yous. First, to Your Honors for your time and attention to this event and to you, Mr. Chief Justice, for your kind remarks. Thank you. And to those who participated in this event, the Reverend Jenny Inman, Mr. Andy Little, Judge Lucy Inman, thank you. To my former colleagues on the Court who are with us today, Chief Justices Billings, Mitchell, Frye, Lake, and Parker and Justices Wichard, and Carlton – it was a real privilege to work with all of you. Thank you for your collegiality. Thank you for your comradery when we worked together. And especially for your continued friendship. To the greatest clerk of all, Christie Cameron Roeder, for her expertise in putting this event together and her patience with me. Thanks to Elon University and Smith Moore Leatherwood for sponsoring the reception. And finally, I want to say a word of thank you to my wife, Judy. In the year 2000, Judy took charge of this portrait business, this portrait project. She researched the artists, she found one she liked, she made all the necessary appointments and arrangements to get it done. All I had to do was sit still and pay the bill. Stand up, Judy. And during this process, I want the Court to know that we really grew to like and admire the artist, Tom Donohue. He was kind, thoughtful, and very thorough. He insisted on our driving from Greensboro to this room so that he could look at all the work of all the other artists both here and in the hall and he actually recognized the work of many, recognized the artists of many of the portraits. Judy and I were saddened by his sudden, unexpected death in 2012 at a relatively young age. We had hoped he could have been here today. We like the portrait that he created. There have been times when it seemed that Judy loved the portrait more than me. But Judy and I hope that all assembled—and I thank all of you for being here, all of you and especially to the Court—we hope you will like it, too. Thank you.

Presentation of the Portrait of

HENRY E. FRYE

Chief Justice
Supreme Court of North Carolina
1999-2000

Associate Justice
Supreme Court of North Carolina
1983-1999

December 8, 2015

OPENING REMARKS
and
RECOGNITION of
FORMER GOVERNOR JAMES B. HUNT, JR.
by
CHIEF JUSTICE MARK MARTIN

The Chief Justice welcomed the guests with the following remarks:

Good afternoon, Ladies and Gentlemen, and thank you Reverend Frye for the Invocation.

I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Chief Justice Henry E. Frye.

The presentation of portraits has a long tradition at the Court, beginning 127 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition in the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Chief Justice Frye's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

We will hear more about Chief Justice Frye and his trailblazing career and achievements in a few minutes from several distinguished North Carolinians, but I would like to share a few comments about what an impact this man has made on this Court and the Justice System in North Carolina. I had the privilege of serving with Chief Justice Frye both when he was an Associate Justice and later when he served as Chief Justice. With all the "firsts" he has accomplished in his life, and his great renown for them, he was, and remains, as humble and approachable a Justice as we have ever had on this Court. He was highly esteemed on the Court for his thoroughness in preparing for Court and in reviewing petitions and opinions. The legal history of this state has been enriched by the many scholarly contributions he has made to our law.

Chief Justice Frye, however, was much more to the Court than his scholarly work. He was a friend ready to listen to the other Justices, and he would often respond to questions in prose. Thank you notes, memos, and even court deliberations were enriched by his ability to repeat a poem or write a poem on a court pad or a napkin. As Chief, he used this talent in speeches and would even disarm tense situations with a simple poem. (Evidently, he used the same tact in the Legislature, and one of his poems written after a very heated debate is in the 1975 House Journal!)

Chief Justice Frye's tenure as Chief Justice emphasized his commitment to equity and accessibility in the Courts. He ensured that the statewide court systems were using Y2K compliant systems, implemented a disaster recovery plan for the state court system's mainframe, and initiated electronic traffic citations that were connected to local trial courts.

Chief Justice Frye had a remarkable capability to understand the complexities of a case or the complexities of the court system, and in each, he used his background, his intellect, his thoughtfulness, his humor, and his humility to make sound decisions for the courts and the people we serve. As noted in a column by Rob Christensen when he was appointed as Chief Justice in 1999: "The soft-spoken Frye has always been a workhorse, not a show horse."

Chief Justice Frye's confident yet humble style of leadership in administration and in decision making comes from a character that is forged over a lifetime. Leaders with that level of integrity will always be a credit to the people that they represent. We are fortunate that Chief Justice Frye was willing to give so many years of service, in so many capacities, to the people of this great State, and we are all better for his many contributions.

At this time, it is my pleasure to recognize former Governor James B. Hunt, Jr. and invite him to the podium for remarks.

Thank you, Governor Hunt, for those excellent remarks. They were a fitting tribute to our former colleague.

RECOGNITION of
JUDGE JAMES A. WYNN, JR.
by
CHIEF JUSTICE MARK MARTIN

We also are fortunate to have Judge James A. Wynn, Jr., a Judge on the Fourth Circuit Court of Appeals and a former Justice on this Court, to make some remarks.

Thank you Judge Wynn for your remarks. It is always a pleasure to have you back at the Court.

RECOGNITION of
JAMES T. WILLIAMS, JR.
by
CHIEF JUSTICE MARK MARTIN

Next we recognize James T. Williams, Jr., a partner in Brooks Pierce McLendon Humphrey & Leonard, for the presentation of the portrait.

Thank you, Mr. Williams, for your warm recap of Chief Justice Frye's remarkable career.

RECOGNITION of
CHIEF JUSTICE HENRY E. FRYE
by
CHIEF JUSTICE MARK MARTIN

Chief Justice Frye has asked for time for "reflections," which sounds a lot like an opportunity for rebuttal to me. We are very pleased to welcome the Chief to the podium for remarks.

Thank you, Chief Justice Frye.

ACCEPTANCE of CHIEF JUSTICE FRYE'S PORTRAIT
by
CHIEF JUSTICE MARK MARTIN

I am delighted to ask Chief Justice Frye's son Harlan and his three granddaughters, Whitney, Jordan, and Endya to unveil the portrait of their father and grandfather.

On behalf of the Supreme Court, we accept this portrait of Chief Justice Frye as a part of our collection. We are pleased to have this fine work of art done by a well-known artist, Victoria Carlin Milstein, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

We are fortunate to have Ms. Milstein and her husband Ron in the audience with us today, and at this point, I would like to have her stand and accept our appreciation for this talented work. I would also refer you to the back of the program for her description of this portrait from the artist's eyes.

Chief Justice Frye's portrait will be hung soon in this Courtroom and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina Reports.

Your participation today makes this ceremony special, and we are honored that all of you could be with us. At the close of this ceremony, Chief Justice Frye and his family, as well as the members of this Court, will form a receiving line in the front of the Courtroom. The research assistants will assist you in forming a line to greet the Fryes and the Justices.

On behalf of the Frye family, and with appreciation to the law firm of Brooks Pierce McLendon Humphrey and Leonard, that is graciously providing the reception in Chief Justice Frye's honor, I invite all of you to a reception in the History Center on the first floor of this building.

If you will, please allow Chief Justice Frye and his family, as well as the Court, a few moments to form the receiving line prior to your coming forward. The Research Assistants will help guide you. Again, thank you for being with us today.

Even though the ceremony is now coming to an end,
We hope you will stay as we continue to honor our dear friend.
We look forward to greeting each one of you
In the receiving line and the History Center, too.

REMARKS by GOVERNOR JAMES B. HUNT, JR.

May it Please the Court:

I am delighted to be here today as the Governor who had the honor of appointing Henry Frye to the Supreme Court of North Carolina – and then as Chief Justice. I was pleased when the Chief called me to invite me to come today: Like for you to come. And, Governor, like for you to hold your remarks to two minutes.

Henry Frye personifies the achievement of the American dream. And his personal success and great leadership of this Court was a high point for the judicial system of North Carolina and the cause of justice for our people.

In appointing him twice, I learned about the man and his life of accomplishment, overcoming limits on opportunities and overt racial prejudice. I learned about his positive view of life – his optimism – indeed, his humor – often expressed in his poetry.

I learned about his love of and dedication to the law – and his accomplishments as an excellent attorney.

I learned about his wonderful family – and when I appointed him – all who knew him and his family will understand that the attributes of his wife, Shirley, didn't hurt him one bit.

I learned about his leadership in the business, legal, and religious communities of Greensboro and his commitment to fair treatment of all people.

His appointment and his service was history-making and Chief Justice Henry Frye has made history – and all of us – better.

It is most appropriate that his portrait be hung in this, the Supreme Court of our great state of North Carolina.

REMARKS by JUDGE JAMES A. WYNN, JR.

May it please the Court:

If I might say, it is quite a pleasure to stand before this Court and look at each one of you and recognize that I served with all of you, and even Paul and I have a relationship because you defeated me in an election.

Members of the Court, we tell the story of a successful life in the language of achievements, by recalling events that make headlines—headlines that garner attention, respect, and honor. Those moments of attainment, of esteemed degrees and prestigious posts, stand as a shorthand for the hours, the days, the weeks, the months, and the years, of toil and struggle.

So we gather here today to recall and honor Chief Justice Henry E. Frye, his years of achievements chronicled by headlines that garnered him attention, earned him respect, and bestowed upon him honor. And there are many.

In 1956, as you may well know, he was the first African-American to enroll as a first-year law student in the University of North Carolina. In the spring of '58, his case commentary, which was published in the North Carolina Law Review, made him the first African-American student and author and editor of that publication. And then in the fall of 1962, he became the first African-American in North Carolina to serve as an Assistant U.S. Attorney. In '68 he became the first African-American to become elected to the North Carolina General Assembly. And then on February 3rd, 1983, Henry Frye became the first African-American to ever serve on the Supreme Court of North Carolina, to be followed up sixteen years later to be the first to ever serve as the Chief Justice of the Supreme Court of North Carolina.

This list of accomplishments would be more than enough to justify ending these remarks here, but to do so would not do justice to the life of this justice. That's because Henry Frye not only achieved extraordinary things, but he achieved them in an extraordinary way—with his charismatic and characteristic humility. Chief Justice Frye once said that he did the type of things that don't make very big headlines, the kind of things that are a little dull. But Henry Frye did make headlines that garnered attention. They earned him respect and bestowed upon him honor. Those headlines, which did not always come immediately, captured not only what he did but how he did it, why he did it, and for

whom he did it. Most importantly, those headlines captured his reputation for being prepared, inquisitive, and effective.

I say prepared: Chief Justice Frye prides himself on being prepared. And others have noticed it. When he arrived in Raleigh as a freshman legislator, he planned to read every last one of the bills, from page to page. But then he discovered that such a goal would involve reading 2,347 pieces of proposed legislation, many of them quite lengthy. So instead he set out to read every bill synopsis in the Institute of Government's daily bulletin, and then he read the interesting bills word for word. He gained a reputation for being meticulous and thorough, often introducing amendments in order to add missing words, to correct punctuation, and identify awkward drafting. If the Court pleases, Representative Frye's reputation for being prepared is a fact that is so well known, and authoritatively attested to, that it cannot be reasonably doubted.

Inquisitive. Chief Justice Henry Frye has a well-deserved reputation for asking a lot of questions. He said, "I ask more questions than, I guess, anybody else. I was always asking questions and probing. I found out a lot of things by doing that." But he didn't simply ask questions to learn. He knew that a question, particularly an uncomfortable question, could be powerful. So, when various heads of agencies appeared before the Appropriations Subcommittee on Health and Welfare, Representative Frye studied their books and questioned them on why they had employed virtually no African-Americans and why their funding went disproportionately to white institutions. Those questions led to results. The legislature ultimately increased the employment of minorities in those agencies, and the legislature worked to address the disparity in funding. If the Court pleases, I submit this evidence firmly establishes Representative Frye's reputation for being inquisitive.

Effective, I say. In the legislature, Representative Frye worked tirelessly on a bill that he sponsored to eliminate the state's literacy test. When a fellow legislator opposed that bill, contending that the literacy test had been adopted without regard to race, creed, or color, Representative Frye countered by telling that legislator of his experience of being refused the right to vote in his hometown of Ellerbe, North Carolina, when he could not name a particular U.S. president or signers of the Declaration of Independence. But he didn't just rely on that experience. Instead, he worked diligently to get the votes necessary to pass that bill. He personally obtained the legislative directory and drew three columns next to each other, singling out those who were "yes" votes, those who were "no" votes, and those who were "question" votes. He spoke to every legislator, he responded to their questions, he noted

their likely vote in the appropriate column before the vote was ever taken. As a result of his efforts, both houses passed that bill to submit a referendum to amend the constitution by eliminating the literacy test. And even though that literacy test was not in fact taken up by the voters in the referendum for elimination, Representative Frye went on to serve on the election law committee, where he eased voter registration requirements and absentee voting procedures. And throughout the '70s, Representative Frye repeatedly co-sponsored legislation to strengthen protection for tenants. I again submit to you, Mr. Chief Justice and the Justices of this Court, that this is very appropriate and conclusive evidence that Chief Justice Frye is effective.

But then it came time for him to move from being Representative Frye to Justice Frye. In 1983 he came to this bench, and he brought that vast professional experience to this bench. Like in the legislature, on the Court he was prepared, he was inquisitive, and he was effective. Throughout that time he was known for his thoroughness in his preparation. On his first day at the Supreme Court, he not only read the opposing briefs of the parties and his clerks' memos, but he also read the trial court's transcript word for word—painstakingly paying attention to detail—and it remained a habit for him throughout his time on the bench. Justice Frye had a ritual, I'm told, of sitting down next to his law clerks and reading opinion drafts out loud, word for word, listening for errors.

And Justice Frye didn't tolerate any shortcuts. If you'll allow me to recall a personal experience: As a young judge on the state Court of Appeals, I brought to him a rather routine document for a reference, and on that document were a few small little blank spots that I thought were rather unimportant. But my good friend, my good confidant, my good buddy, would not sign that document until I had filled in every last blank on that document. That lesson has stayed with me in so many ways.

You know his legislative experience was particularly valuable on this Court. For instance, in the case of Stanley v. Moore, Chief Justice Frye was tasked with interpreting a 1981 revision to the Residential Rental Agreements Act, the statute he himself had sponsored when he was in the General Assembly. And though he brought his legislative experience and industrious habits to the bench, Chief Justice Frye quickly recognized and accepted the limits of his role as a judge. While in the legislature, his role was to make the law, he clearly understand that as a judge it was not to make the law but to follow the law and to interpret the law.

And perhaps that gap of the role as a legislator and as a judge was not so wide as it was when he had to confront the issue of capital punishment. By the time he was appointed to the Supreme Court of North Carolina, Representative Frye had long opposed the death penalty, believing it to be discriminatory, ineffective, and, given the possibility of putting an innocent person to death, immoral. Nevertheless, believing in his charge as a judge, not a legislator, he affirmed the death penalty when he believed it had been lawfully imposed and dissented otherwise. In one notable dissent, State v. Maynard, Justice Frye determined that the conviction was valid but found that the defendant was entitled to a new sentencing hearing where the trial court permitted the jury to hear the complete contents of the two judgments and two bills of indictments. Justice Frye's dissent may have influenced the ultimate outcome when the Governor decided to commute the defendant's sentence.

Justice Frye's persistent commitment to the marginalized persons out there was evident in his opinions. In *Amos v. Oakdale Knitting Company*, he held that employees who were fired upon refusing to work for less than minimum wage could sue for wrongful termination under the public policy exception to the employment at will doctrine. In *Oaks v. Jag*, Justice Frye preserved the negligence cause of action for homeowners against a general contractor, even where the plaintiff was not the original purchaser of the home. In *Meiselman v. Meiselman*, he articulated the landmark standards for protection of minority shareholders in a closely held corporation. Justice Frye developed a particular interest and expertise in the law of insurance, particularly automobile liability insurance. In this area, too, we see his inclination toward support those with less money and less lawyers. This is evident in *State Capital Insurance Company v. Nationwide Mutual Insurance Company*.

In the end, it is difficult to encapsulate the legal legacy of Justice Frye in any single theme. His most-cited cases define the ringing legal standards in such wide-ranging areas as interference with contract, the admissibility of expert testimony, res judicata and collateral estoppel, consumer protection, and the theory of constructive possession.

Once, about ten years ago, after being appointed to the bench, Justice Frye was asked about his hopes for the future. He responded, "I would like to see North Carolina live up to is motto, to be rather than to seem. And by that I mean to do a better job of being fair and open in everything, from employment in the state government to encounters in the cities." Now, more than twenty years after Justice Frye expressed those hopes, our state motto and all that it represents continues to loom. In our ever-continuing efforts to make progress, at least we have the

model of Henry Frye. Thankfully, we have not only his achievements to give us confidence that barriers can be broken. We also have this person with his character, which ought to remind us that change is hard work to be undertaken with deliberate preparedness, humble inquisitiveness, and courageous effectiveness.

And in the words of Chief Justice Frye, "Sometimes, we have to take one step at a time." So, Mr. Chief Justice and Justices of the Court, I started these remarks by asking the Court to be pleased. If indeed you are, then my fears are eased, for the man I speak of has achieved so much that all he has done I cannot touch. But suffice it to say on this special day that this man did it his way. And that gives us more than reason why we should hang this portrait of Henry Frye.

REMARKS by JAMES T. WILLIAMS, JR.

May it please the Court:

My name is Jim Williams. I'm a member of the Bar of this Court, and I practice law with Brooks Pierce in Greensboro.

It's been my good fortune to call Justice Frye my friend for many years and to practice law with him since 2001. We've shared a great deal during these last fifteen years, including our assistant, who is here today, Pat Miller. Justice Frye has added much to our firm over the years. He's an excellent lawyer. He's had remarkable experience as a practitioner. He's been an Assistant U.S. Attorney. He's been a banker. He's been a legislator. He's been a justice. And he's been a chief justice. So much in one life is hard to imagine. He's been so generous with us in the firm with his advice, with his wisdom—and he is a wise person. He's also shared his good humor and a good deal of his verse. For me and my colleagues at Brooks Pierce, he's been the man to see when we have a vexing problem or just need to talk. He's been a lawyer's lawyer for us for many years.

Today I'll use my time to focus on his first term in the legislature—and I will repeat some of the things Judge Wynn said. The legislature for Justice Frye was one of his many firsts in life, and this first term will probably provide some insight into the qualities of the man that made today possible.

In 1966, at the ripe old age of thirty-three, Justice Frye ran for one of Guilford County's six house seats. At the time, this legislature was one of the most powerful in the country. The governor had no veto and had one four-year term. Justice Frye paid his filing fee of $17.50 with money collected by his law students at North Carolina College in Durham. At that point in time, there were no African-Americans in the legislature, and there had not been since the turn of the 20th century. Justice Frye ran an unsuccessful campaign the first time, losing to someone else who has been a chief justice in this Court and whose portrait will soon hang on the wall, Justice Jim Exum.

Undeterred, however, Henry Frye ran again in 1968. By then, he was all of thirty-five years old. This time, he ran in a county-wide field of eleven candidates, and he was elected. He finished third in the primary, and he finished third in the general election. His election to the North Carolina House of Representatives took a bit more than twelve years

after he was denied the right to register to vote in his hometown of Ellerbe. That was an important twelve years in his life and in the life of the state.

After election, Justice Frye was invited to speak across the state and across the country, including Harvard's Kennedy School of Government. He and Shirley were on the Governor-Elect's inaugural committee, which was a high honor for a freshman legislator. The 1969 House of Representatives included 120 representatives, a future governor, a future lieutenant governor, two congressmen to be, four future speakers of the house, and several others who would later hold statewide office. Henry Frye was the only African-American among those 120 people.

Justice Frye was elected from Guilford County, but African-Americans from across the state claimed him to be their representative, regardless of where they lived. He soon realized he couldn't represent every African-American North Carolinian and do his job for the county that elected him. He had a formidable task just to learn how to effectively represent the county and to pursue issues that were central to his reason for running for the legislature in the first place. So he resolved this dilemma by deciding to introduce folks from other counties to their own elected representatives. An important legacy from his first term was to introduce many North Carolinians to their legislators and how their system of government worked. His decision also had the added benefit of allowing him to get to know many of his colleagues and to work with many of these colleagues early on in his career.

His early committee assignments included budget, banking, education, house judiciary, rules committee, and public welfare. He was assigned seat number seventy-three in the house chamber, and a pocket-sized legislator directory and house rulebook were his constant companions. As Judge Wynn just said, he started out reading every word of every bill. But over 2,300 bills kept him from doing that. But it didn't stop him from reading the ones he was interested in and the ones he thought were important. He was meticulous about language and punctuation. He frequently made suggestions to his colleagues in their offices and on the floor of the house about wording and punctuation to make bills more understandable. In time, his colleagues came to really appreciate his thorough and honest approach to his responsibilities. And remember, he's a freshman representative at this point.

He introduced a bill to amend the North Carolina Constitution to eliminate the literacy test, as Judge Wynn said. There was a spirited

debate on the floor of the House, and it was his rebuttal in that debate, where he related his story about Ellerbe, that carried the day. And that rebuttal caused the House to approve the bill, and the Senate quickly approved it. Justice Frye was deeply involved in many other pieces of legislation as well. One was a bill to allow Greensboro to set an election for changes in its charter. Another was a banking bill to address allowable interest rates. And in the budget committee, he pushed on issues of state employment of African-Americans. He also introduced a bill to regulate relationships between landlords and tenants. That effort didn't bear fruit for eight more years, but it was passed in 1977 as the Residential Agreement Act, which was the first act to really protect renters. On one occasion, Justice Frye requested that the House adjourn in Dr. Martin Luther King's memory. And it received an almost-unanimous vote. It was a small but important step in his legislative career.

The members of the House also appreciated his wit and talent for verse. I will read you an excerpt from the *Raleigh Times*: "The North Carolina General Assembly's self-appointed poet-laureate, Representative Henry Frye, Democrat-Guilford, has penned an epic about the Equal Rights Amendment, which is on its way from the House Constitutional Amendments Committee to the full House. Justice Frye wrote down the lengthy rhyme entitled 'A Routine Meeting of the Constitutional Amendments Committee' last Wednesday during the brief period between the morning committee meeting and the full House session at noon. What he wrote is as follows: 'From far and near, they have come today; the pros and the cons and the neutrals too, have come to see what we will do; the committee is here, each member on time; anxious not to miss a single line, of what is written or what is said, for if the wrong move is made, we're all dead (politically, I mean); as some would say, so they hate to vote for the ERA; not yet, said one member out of loyal devotion; I would like to make a substitute motion; but while looking around for help, I reckon, the motion died for lack of a second; then the motion was made; it was a bit unnerving; hold up everything and bring in Sam Erving; with the weekend over, the time will be right, to report the bill on Monday night; on Tuesday the matter will be brought to the floor, and ERA decided forever more; we can send over yonder to the Senate, for the lords across the way to sweat and ponder; let them take the telephone calls and take all the rap; let's put ERA issue in the senators' lap.' "

On the closing day of the 1969 session, a legislator from the western part of the state stood and praised Henry Frye's work. And a thirty-five-year-old freshman representative was given a standing ovation by the members of the House. That encapsulates his first service in the

legislature, and it shows the great appreciation that his colleagues had for him. He went on to serve in the House for ten years and the Senate for one term. I salute Justice Frye, a North Carolinian, an American who has lived by example, who has made a difference, and whose life and career personify the very best qualities of our state and nation. His portrait, which will be unveiled today, will do honor to this chamber, the Court, the Bar, and our fellow citizens. Thank you.

REMARKS by CHIEF JUSTICE HENRY E. FRYE

Chief Justice Martin, Senior Associate Justice Edmunds, and other members of the Court and May It Please the Court:

I believe this is the first time I've been on this side since I left the Court, if I remember correctly. I want to thank you, the Court, first of all, for the opportunity of being here today, and I want to thank you for the cooperation that I've had and Shirley has had in trying to get everything arranged and for just being good people in terms of working together trying to get things done. I want to especially thank you for that and also especially thanks to the Clerk's office, headed by a Clerk who I happened to have something to do with bringing here a long time ago and she's still here and doing a great job, and her staff really worked with us very well with everything and we appreciate that so very much.

I also want to thank all of those who are on the program, the rest of them. I caught Chief Justice Martin on the program because he said some mighty nice things about me. I'm not sure they were 80%, but I'll take it. I thought it was about 78, something like that. But to those who are on the program, Jim Hunt, thank you for your remarks and thank you for the appointments and thank you for supporting me after making the appointments. And also Judge Wynn. We had a chance to work together on many occasions, and thank you to Judge Wynn. He's the real speaker for today.

Of course, I want to thank my son for giving the prayer today, the invocation. And my senior law partner – not senior in age, now – Jim Williams, who is one of the two people who came and talked to me about joining the firm a long time ago and I'm still there for the next few days, I hope.

I don't know how to thank everybody except to say that everybody from my clerks, to my former people who worked with me to the young lady who did the portrait. Thank you for sticking with me even though I complained a lot about sitting and standing and posing. I didn't like that; I got tired of it, but she sort of encouraged me, "you want it to be right; you want it to be right." And I thought I was a detail person. You haven't met anybody more detailed than this young lady.

To other members of the firm and to other members of my family, I won't try to call them by name but I do have to say a couple of words about Shirley. The Governor took part of what I'd intended to say so I

won't say that. But, 59 years and 3 months and 13 days ago, E. Shirley Taylor and I became husband and wife, each pledging to the other those sacred words, to have and to hold from this day forward and I think it's forevermore, if I remember correctly. I don't think we took that out. Without her, I don't know where I would be today. She's been my companion and supporter in so many ways and I better get over that and get to the other part. But she did have some skepticism when I told her that I was thinking about organizing a bank. She looked me straight in the eye and asked the question real sharply, "I don't understand how you're going to start a bank when you don't have any money." But she had faith in me and on November the 2nd, 1971, Greensboro National Bank opened its doors in Greensboro, Henry Frye, President. You can applaud if you want to, for that.

I want to say this and then I've got a couple of more things I want to say. It's the last part of a poem that I did not write, but I read it when I was a very young person and the last paragraph is like this:

There are thousands to tell you it cannot be done,

There are thousands to prophesy failure;

There are thousands to point out to you, one by one,

The dangers that wait to assail you.

But just buckle right in with a bit of a grin,

Just take off your coat and go to it;

And start in to sing as you tackle the thing

That 'cannot be done,' and you'll do it.

I tell that to young people a lot, but I always preface that with this: be sure that the thing you are trying to do is the right thing. Otherwise, the poem will not help you one bit.

My wife, Shirley and I, drove over this morning from Greensboro listening to the radio. Good, slow, dancing music on 90.1. Then as we approached Durham, we changed the dial to 90.7, and enjoyed smooth jazz with Dr. Billy Taylor and others. It was a good ride on a beautiful day on Interstates I-85 and I-40. As I drove along, my mind reflected back to my days of long ago when I seldom drove to Raleigh, and when I did, I remember that it was Highway 70, for we had no interstate highways and you had to leave a lot earlier than we had to leave this morning in order to be here. I also recall listening to WPTF radio, and these words in a voice much heavier than mine, "So goes the story of today.

And remember, SD in your fertilizer bag means Square Deal." I think that one of our goals in life ought to be to give every occasion and every person, a square deal.

A lot of things have changed in North Carolina since those days. Some good, some bad, others only time will tell. But I pause momentarily to make one point: leaving out the weather, progressive change does not come by osmosis. Progressive change does not come, first, simply with the passage of time. Things get better because people decide that things are not what they ought to be and go to work to change the status quo. People like you and me get together, make plans, and then go to work, turning our plans into action and making our dreams come true.

When I was in the Air Force, I served for a short time in Japan and Europe. I came back to the United States on a ship, many days on the vast Pacific Ocean. And as we pulled into the harbor, I heard a band playing the Star Spangled Banner. "Oh, say, can you see, by the dawn's early light." Somehow, I was happy to be back home. So I had a dream, which continues, to help my state, as Judge Wynn said, to be, rather than to seem. And I've tried to work toward that. I think we've made some progress, but there's still a long way to go. I hope that we all will rededicate ourselves to making our state, and our country, the best that it can be.

Thank you for today.

Presentation of the Portrait of

BURLEY B. MITCHELL, JR.

Chief Justice
Supreme Court of North Carolina
1995-1999

Associate Justice
Supreme Court of North Carolina
1982-1995

August 10, 2016

OPENING REMARKS
and
RECOGNITION of
FORMER GOVERNOR JAMES B. HUNT, JR.
by
CHIEF JUSTICE MARK MARTIN

The Chief Justice welcomed the guests with the following remarks:

Good afternoon, Ladies and Gentlemen, and thank you Ms. McFarland for the Invocation.

I am pleased to welcome each of you to your Supreme Court on this very special occasion.

As I begin, it is important to note that we have two extraordinary public servants in the courtroom today that have each left an indelible impression on our great State. One is former Governor James B. Hunt, Jr. Governor Hunt, we are thankful for your presence here today.

The other, of course, is the individual we are here to honor – Chief Justice Burley B. Mitchell, Jr.

The presentation of portraits is one of the most beloved traditions here at the Court. The first portrait was presented on March 5, 1888, and is the one directly behind me, that of Chief Justice Thomas Ruffin. The Court takes great pride in continuing this tradition 128 years later. In fact, this Court proudly boasts one of the most complete sets of portraits in the nation. For those of you who may not be familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and the ones in the hall here on the third floor are those of former Associate Justices.

Courts exist to preserve the rule of law, and as such, are bodies of tradition, precedent, and respect for history. Our portrait collection is one small part of this greater tradition, helping us to remember our past and to honor the invaluable service of those who have come before us. Chief Justice Mitchell's portrait will serve as a lasting monument to his great contributions to this Court and to our great State.

Although we will hear more about Chief Justice Mitchell shortly, I would like to take a few moments and share, from my perspective,

about his many accomplishments here at the Court and his legacy in our court system. I admit, however, that I do so at great risk! Chief Justice Mitchell once said that we "have too much work to do for me to spend these precious few moments reflecting on past achievements."[1] But on an occasion like this, I think I'll take my chances. After all, Chief, everyone here today is here to recognize your tremendous contributions to and impact on this Court, the legal profession, and all who have had the great privilege to know you and to serve alongside you.

Burley Mitchell was the Chief Justice when I joined this Court over seventeen years ago. He was then, and continues to be today, the standard to which many of us aspire as members of this Court. Upon his retirement from thirty years of public service, he remarked: "I have taken the duties of the Office of Chief Justice very seriously, but I know, that it is the Office I hold that is important and not me as a person. We who hold public offices must remember that the people entrust them to us and that we should return them to the public in better shape than when we took them."

Chief Justice Mitchell surely exemplified these words. His life's work has shown him to be the personification of a servant-leader to his family, his community, and his country. Whether serving in the United States Navy 7th Asian Fleet or furthering the important work of this Court, Burley Mitchell has always dedicated himself to the public good.

As a jurist, Chief Justice Mitchell authored 484 appellate opinions for the Court of Appeals and for this Court. Among these opinions is *Leandro v. North Carolina*, the landmark opinion which recognized that our State Constitution grants to its citizens a "right to the privilege of education." This decision received national attention and is one of many that shows the impact of this Court's work on the every-day lives of the citizens we serve. It continues to this day to affect the lives of over one and a half million school children in all parts of our state.

Yet, Chief Justice Mitchell left his mark on far more than just the jurisprudence of our state. Under his leadership as Chief Justice, we saw the establishment of the North Carolina Business Court, at a time when there were very few around the country. Chief Justice Mitchell also led in the creation of the Chief Justice's Commission on Professionalism. This Commission, one of only fifteen in the entire nation, does amazing work to promote civility among the bench and the bar, and public trust

1. Remarks by Chief Justice Burley B. Mitchell, Jr. at the Campbell University Norman Adrian Wiggins School of Law Hooding Ceremony, May 10, 1998.

and confidence in our court system. Just last year, Chief Justice Mitchell received the Chief Justice's Professionalism award for his lifelong commitment to exhibiting professionalism himself and encouraging it in others.

Chief Justice Mitchell led the effort to eliminate the backlog of court cases across the state. He suspended rotation and sent the Superior Court judges back to their home districts, with instructions to resolve cases and eliminate backlogs. Here at the Supreme Court, he and the Justices who served with him endured countless long weeks of oral argument—up to 27 cases during some weeks—to ensure that justice was not delayed or denied in his day. He was truly a leader who led by example, and we all greatly admire and respect Chief Justice Burley Mitchell. Of course, anyone who knows Burley knows of his humility, his compassion, and . . . his sense of humor. There are, indeed, many *other* stories we could tell about this great man.

Burley, I count myself very fortunate to have been able to work with you on the Court, and I am so proud to be a part of this great day. We deeply appreciate your service to the Court system, and to our state, and we are grateful for this opportunity to honor you today.

At this time, it is my pleasure to recognize former Governor James B. Hunt, Jr. and invite him to the podium for remarks.

Thank you, Governor Hunt, for those excellent remarks. They were a fitting tribute to our former colleague.

RECOGNITION of
RETIRED ASSOCIATE JUSTICE WILLIS P. WHICHARD
by
CHIEF JUSTICE MARK MARTIN

Next we recognize Associate Justice Willis Whichard, a former member of this Court, and invite him to the podium for remarks and to present the portrait.

Thank you, Justice Whichard, for your warm recap of Chief Justice Mitchell's remarkable career. It is always a pleasure to have you back at the Court.

RECOGNITION of CHIEF JUSTICE BURLEY B. MITCHELL, JR. by CHIEF JUSTICE MARK MARTIN

Chief Justice Mitchell has asked for time for "remarks," which sounds a lot like an opportunity for rebuttal to me. We are very pleased to welcome the Chief to the podium for remarks.

Thank you, Chief Justice Mitchell.

ACCEPTANCE of CHIEF JUSTICE MITCHELL'S PORTRAIT by CHIEF JUSTICE MARK MARTIN

I am delighted to ask Chief Justice Mitchell's granddaughters, Mary Catherine and Margaret Bayard to unveil the portrait of their grandfather.

On behalf of the Supreme Court, we accept this portrait of Chief Justice Mitchell as a part of our collection. We are pleased to have this fine work of art done by a well-known artist, Dean Paules, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Chief Justice Mitchell's portrait will be hung in this Courtroom and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina Reports.

Your participation today makes this ceremony special, and we are honored that all of you could be with us. At the close of this ceremony, Chief Justice Mitchell and his family, as well as the members of this Court, will form a receiving line in the front of the Courtroom. The research assistants will assist you in forming a line to greet the Mitchells and the Justices.

On behalf of the Mitchell family, I invite all of you to a reception in the History Center on the first floor of this building.

If you will, please allow Chief Justice Mitchell and his family, as well as the Court, a few moments to form the receiving line. Again, thank you for being with us today.

REMARKS by GOVERNOR JAMES B. HUNT, JR.

May it please the Court:

I am honored to speak to this Court and this assemblage of the life and service to North Carolina of Chief Justice Burley Mitchell (and of the goodness and steadfastness of his wife, Lou). There are many great jurists who have served in this chamber and are honored with their portraits here. Chief Justice Mitchell's career is surely one of the most distinguished and valuable to our state.

I knew him and his roots from my first days in public life because our fathers were friends and early leaders in the cause of "soil conservation" after Franklin D. Roosevelt committed America to that work in the New Deal.

Burley attended North Carolina's public schools, served in the Navy, and graduated from two of our great public universities.

I first noted his service to our state and his personal determination and "toughness" when he was the District Attorney for the 10th District (Wake Co.) in the mid-1970s. He was the scourge of criminals. At a time when "continuances" were easily obtained and dockets long—a condition too often existing in our criminal courts—District Attorney Burley Mitchell "cleaned up" the docket and speedy trials were held, more criminals were "off the streets," and the people of Wake County were better protected.

He continued protecting us as one of North Carolina's best Secretaries of Crime Control and Public Safety, Chairman of the Governor's Crime Commission, and as Chairman of Governor Jim Martin's Advisory Board on Prisons and Punishment.

A second area of Chief Justice Mitchell's service to North Carolina is in the field of education.

He has been an invaluable member of the North Carolina State University Board of Trustees and the Board of Governors of our University of North Carolina system. And he encouraged innovation in our K-12 public schools as Chairman of the "North Carolina New Schools."

But he made history when he wrote the decision for a unanimous court in *Leandro v. State of N.C.* that all children have a fundamental state constitutional right to the "opportunity to receive a sound basic education." Chief Justice Mitchell and this court defined a sound basic education in some detail and ruled that the State of North Carolina (*not* local school districts) has the *constitutional* obligation to deliver every child's *Leandro* right.

The full implementation of this decree is, in the opinion of a large number of North Carolinians, our greatest and most urgent challenge.

We will shortly see the portrait of Justice Mitchell to be hung in this court and meditated on by our State's lawyers and judges.

Maybe we ought to have a replica of the Chief's fine portrait hung in the Legislative Building of North Carolina, where all can think of *Leandro* and our "constitutional responsibility" for our children's and North Carolina's future.

The third key area of service by Justice Mitchell (and the one we most celebrate here today) is his service as a great jurist. It was my privilege to appoint him to the North Carolina Court of Appeals in 1977, to this Supreme Court in 1982, and as Chief Justice taking office January 3, 1995.

His services on this Court were noted by a strong work ethic, wise decisions, and creative leadership of the entire judicial branch of our state.

But he did more. He created the Chief Justice's "Commission on Professionalism." He appointed our state's first Special Superior Court Judge for Complex Business Cases, he was Chairman of the National Conference of Chief Justices "Committee on Professionalism" and was a member of the American Bar Association's "Presidential Task Force on Corporate Responsibility."

Throughout his public career the citizens of North Carolina trusted and felt secure in the wise decisions and leadership of Justice Burley Mitchell.

Indeed, people recognize and honor him in public life as one of our greatest chief justices. And it is my privilege to present him to you today.

REMARKS by WILLIS P. WHICHARD

Burley Bayard Mitchell, Jr., was born in Oxford, North Carolina, to Burley Mitchell, Sr. and Dorothy Ford Champion Mitchell, on December 15, 1940. He grew up in Raleigh, North Carolina, where he attended the public schools. Following service with the United States Navy's 7th Fleet in Asia from 1958-1963, he received degrees from North Carolina State University in 1966 and the University of North Carolina School of Law in 1969.

From his law school graduation in 1969 until his retirement from this Court in 1999, a period of thirty consecutive years, Burley Mitchell was engaged in public service: Assistant Attorney General of North Carolina, 1969-1972; District Attorney for the Tenth Judicial District, 1972-1977; Judge of the North Carolina Court of Appeals, 1977-1979; Secretary of the North Carolina Department of Crime Control and Public Safety, 1979-1982; Associate Justice of the North Carolina Supreme Court, 1982-1994; and Chief Justice of the North Carolina Supreme Court, 1995-1999. In addition to holding these positions, he chaired the Governor's Advisory Board on Prisons and Punishment from 1989-92 and the Governor's Crime Commission from 1977-79. He also served on the Courts Commission, the News Media Administration of Justice Council, and the North Carolina State University Graduate School Board of Advisors.

In his post-judicial life Chief Justice Mitchell has continued to fill a variety of public-service capacities, including service on the North Carolina State University Board of Trustees from 2005-2009 and on the University of North Carolina Board of Governors from 2009-2013.

Extensive public responsibilities notwithstanding, Burley Mitchell has been married to Mary Lou Willett Mitchell for 54 years. The marriage produced two children, David Bayard Mitchell, now deceased, and Dr. Catherine Morris Mitchell Fuentes. The Mitchells have two grandchildren, Mary Catherine Fuentes and Margaret Bayard Fuentes.

Given the limitations on our time, it is appropriate to focus today on Chief Justice Mitchell's Supreme Court years, and particularly the years as Chief Justice. William Bobbitt, the justice for whom I clerked, always refused when asked to select the most important of his opinions. "I'll leave that to history," he would say. I would expect Burley Mitchell to do the same. The man told us something about himself, though, by referring to three old North Carolina cases when he took his oath as

Chief Justice. The cases were Bayard v. Singleton, a 1787 case that established the principle of judicial review in North Carolina sixteen years before John Marshall did it for the country in Marbury v. Madison; Foy v. University of North Carolina, an 1805 case that was the first in the United States to establish modern principles of due process; and State v. Darnell, a 1914 case that struck down racially segregated housing laws at a time when segregation of the races was not only the strong custom but legally sanctioned. By referencing these cases, he was highlighting his commitment to preserving the proper – indeed, essential – role of the judicial branch in our system of government; to according fairness and due process to all litigants appearing before the courts of North Carolina; and to according equal treatment before the law to all such litigants. The references were more than rhetoric. In his near half decade as Chief Justice, he worked actively to fulfill these commitments.

While Chief Justice Mitchell might not want to choose his most important opinions, he has said of his tenure on the bench: "I think I've added to North Carolina's body of law, especially in the area of freedom of expression." Indeed, he has. Two cases come readily to mind – one a suit against the Salisbury Post, the other a case involving a statute making criminal the distribution of unsigned campaign literature. In the latter he was alone among the seven justices in concluding that the First Amendment rights of free speech and expression trumped the statute, as the United States Supreme Court later held in a case from another state on the identical issue.

He was equally zealous in protecting and preserving other constitutional rights. He once said, "It's going to be very tempting to give up some rights so people can feel safe, so their children can feel safe. But I don't trust government, and I've been in government for thirty years."

It is fairly safe to predict that history will remember him for both defining and preserving one particular constitutional right – the right the children of North Carolina have under the state Constitution to "a sound basic education." Theologians have a concept called "progressive revelation." The Leandro opinion evolved in the same way for the North Carolina Supreme Court under Chief Justice Mitchell's leadership. It was not an easy case, but ultimately his eloquent pen came to this conclusion:

> An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.

Education, he said, must give students the opportunity to succeed as adults and as citizens.

"It's one time," he later said of the opinion, "when I think the mind and the heart were able to work together." Those of us who have closely observed his years of public service would say it was not the only time a great mind and a great heart worked together to produce a result with long-term potential benefits to the people of North Carolina.

At the beginning of his tenure as Chief Justice, Mitchell said: "We're restoring the confidence in the court system." That was indeed his goal, and he made considerable strides toward achieving it. We hear a lot about "education governors." It is not hyperbole to call Mitchell an "education chief justice," for it was a significant part of his mission to educate the public about the courts and the legal system.

With his judicial robe now resting easily on the rack, we can identify, briefly, certain themes that emerge from his efforts to restore public confidence in the court system. He was determined to improve court administration. Early in his chief justiceship he temporarily suspended the rotation of superior court judges, assigning them back to their home districts for a vigorous attack on the backlog of cases. And not without effect. Court dockets were reduced considerably during his tenure. His own Court, at the top of the system, was not exempt. In his first year as chief justice, it heard and decided almost twice as many cases as it had in the previous year, and when he left it in September 1999, it had no backlog of unargued cases.

As a part of improving the efficiency of the courts, he was a vigorous advocate with the legislature for adequate funding for the judicial branch. In the process he courageously called a spade a spade. He let legislators know that the prison population had almost doubled while there had been no substantial increase in the number of judges. Failing to provide adequate resources to the courts, and the resulting overload, he said, ensures that the public is frustrated and angry. Even something as seemingly sacrosanct as the Victims Rights Amendments did not escape his expressions of concern. They would become "a false promise," he said, if the General Assembly did not appropriate sufficient funds to do the job they required. Any call for legislation creating new crimes or substantially increasing punishment for existing crimes would, he told the lawmakers, simply amount to demagoguery if not accompanied by adequate increases in court resources.

Obtaining and retaining good judges was a part of his program for restoring the public's confidence in the courts. He thus, throughout his chief justiceship and even before it, championed the merit selection of judges. "Judges should not be representatives of the people," he said with candor, "we are representatives of the law." The partisan election of judges was, in his view, moving us toward a system in which judges are at least sorely tempted to be representatives of the people rather than servants of the law. He perceived the trend and its danger vividly, and he tried to stop it. Some efforts, he would undoubtedly and sadly concede, take longer than others.

He recognized, too, that jurors have an important role in determining public confidence in the system. He therefore started the annual observance of Juror Appreciation Month in North Carolina – "to commemorate the role of jurors under our democratic system" and "to better educate North Carolinians about the importance of jury service under our democratic system and to praise the efforts of the many citizens who fulfill their civic responsibility and serve on juries." "The jury becomes the state of North Carolina," he said: "We give them the authority to speak for seven million people." It thus was appropriate that their fellow citizens should recognize them for their service.

The problem of substance abuse had his constant attention as chief justice. He knew from his experience as a district attorney that it was involved in the overwhelming majority of the crimes committed in North Carolina. He knew from his association with other lawyers that many of them were its victims as well. The State Bar's PALS program had his vigorous and active support. He urged lawyer participation in Barcares, a program providing professional and personal counseling services for lawyers around the calendar and around the clock. His last day as chief justice found him appealing to the editors of the News and Observer for more coverage of substance abuse problems, which fuel crime and ruin lives, and their possible solutions.

The final plank in his effort to restore confidence in the courts was an active and abiding concern for professionalism. He frequently quoted Roscoe Pound as follows:

> There is much more in a profession than a traditionally dignified calling. The term refers to a group…pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood.

With equal frequency, he quoted Louis Brandeis:

> Some men buy diamonds and rare works of art, others delight in automobiles or in yachts. My luxury is to invest my surplus effort in the pleasure of taking up a problem and solving…it for the people without receiving any compensation…. I have only one life, and it is short enough. Why waste it on the things I don't want most? I don't want money or property most. I want to be free.

In the spirit of Pound and Brandeis, Chief Justice Mitchell called on his profession to both be and give its best. He urged his new clerks to read Harper Lee's novel, To Kill a Mockingbird, to gain a notion of what a lawyer is supposed to be. His clerks learned to model themselves after Atticus Finch, the dignified attorney in the novel who practiced his profession with honor and with eloquent wisdom. But in the process, they were also, perhaps unconsciously, learning to model themselves after Mitchell himself.

Near the end of his tenure, Chief Justice Mitchell appointed a Commission on Professionalism and defined professionalism as "doing what's right by the public." It is doing what you should do," he said, "not just what you must do in order to keep your license." "We are going to make people treat each other more decently and treat their clients better," he concluded. Time has proven him right, despite the undeniable fact of lingering concerns in this area.

Some years ago the Joint Report of the American Association of Law Schools and the American Bar Association said this:

> A profession, to be worthy of the name, must inculcate in its members a strong sense of the specific obligations that attach to their calling. One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. This work must find its direction within a larger frame. All that he does must evidence a dedication not merely to a specific assignment, but to the enduring ideals of his vocation. Only such a dedication will enable him to reconcile fidelity to those he serves with an equal fidelity to an office that must at all times rise above the involvements of individual interest.

Burley Mitchell's career in public service has epitomized the ideals thus expressed. He has evidenced a dedication to the enduring ideals of his vocation.

Benjamin Cardozo said membership in the bar is a privilege burdened with conditions. Chief Justice Mitchell has honored the privilege by recognizing and honoring its conditions. As a consequence, he will, as Governor Hunt said upon the announcement of his retirement, "certainly go down in history as one of our greatest Chief Justices."

It should be said that all along the way he has kept his sense of humor about himself. Michelle Rippon accurately described him some years ago as "humorously irreverent." An example from soon after he left the Court proved that the high office of chief justice did not cause him to lose that quality. You perhaps saw his picture with a bulldog in the Womble Carlyle announcement that he had joined the firm. The firm billed him as the "Top Dog [with] New Turf." At the time a Court employee chided him for using a bulldog in the ad rather than her favorite kind of dog, a golden retriever. His response was: "Oh, … that dog is a professional model. He's getting paid a lot more than I am."

I hope you will tolerate a brief personal recollection, one which also reflects our subject's sense of humor. I am between six and seven months older than Chief Justice Mitchell. When we were on the Court together, and at times since, from May to December he would from time to time tease me about my old age, frail health, and rapidly failing and fading persona. Once his birthday arrived in December, however, we were again the same age, and the teasing ceased – but only until my birthday the next May, when it resumed. For some reason that has not occurred this year. I strongly suspect it is only because he has known that I would have the podium for this auspicious occasion at which he does not get rebuttal time. Further, unlike our customary banter on the subject, these remarks will enter the permanent records of this Court. Once they are completed, however, I will not be shocked if the friendly banter about my old age and rapid decline resumes, to again cease for a time on December 15th.

In addition to maintaining a sense of humor, it should be said that all along the way Chief Justice Mitchell kept his essential humanity intact. Those of us who were privileged to serve with him watched him participate in all the events of the Court's 175th anniversary in 1994 with outward equanimity while inwardly experiencing, inevitably, the turmoil that having a seriously ill family member would cause anyone. We also

walked out of the building with him after long, hard days, knowing that his day was not over, for he was on his way to visit his elderly mother. We knew that his assistant could not have a baby, christen a child, or give one a birthday party without him coming. We knew that he spent a portion of Thanksgiving Day serving food to the homeless. He was an excellent member of this Court, both as an associate justice and as the chief justice, but he was and is an even better human being.

When Chief Justice Mitchell's father died, the chief said of him: "he gave a lot more to the community and the people in it than he ever asked of them." The same clearly can be said of him. He set out to correct public misconceptions about the courts, to make the court system more responsive in the process, and to enhance the image of lawyers, whom he described as "a terribly stressed and distressed group." We are all the better for his efforts. The News and Observer editorialists got it right when they said: "North Carolina's system of justice is much better today because [the judicial] robes proved to be a perfect fit [for him]." The citizens of North Carolina and the members of the legal profession are all in his debt for being a positive force in building the credibility of the courts and the profession with ordinary citizens.

Those of you who now occupy this bench, and your successors, will work in Chief Justice Mitchell's shadow, will benefit from his efforts, and will find inspiration in his great human spirit. The portrait by the late Dean Paules which we will unveil today will serve for all of his successors on this Court as a tangible reminder of his work here and the great mind and spirit behind it, which will abide as unspoken presences before this bench as long as this Court endures.

Presentation of the Portrait of

GEORGE L. WAINWRIGHT, JR.

Associate Justice
Supreme Court of North Carolina
1999-2006

March 29, 2016

OPENING REMARKS
and
RECOGNITION of
MICHAEL PHILLIPS
by
CHIEF JUSTICE MARK MARTIN

The Chief Justice welcomed the guests with the following remarks:

Good afternoon, Ladies and Gentlemen, and thank you Ms. McFarland for the Invocation.

I am pleased to welcome each of you to your Supreme Court on this very special occasion in which we honor the service on this Court of Associate Justice George L. Wainwright, Jr.

The presentation of portraits has a long tradition at the Court, beginning 128 years ago. The first portrait to be presented was that of Chief Justice Thomas Ruffin on March 5, 1888. Today the Court takes great pride in continuing this tradition into the 21st century. For those of you who are not familiar with the Court, the portraits in the courtroom are those of former Chief Justices, and those in the hall here on the third floor are of former Associate Justices.

The presentation of Justice Wainwright's portrait today will make a significant contribution to our portrait collection. This addition allows us not only to appropriately remember an important part of our history but also to honor the service of a valued member of our Court family.

We will hear more about Justice Wainwright in the coming moments, but I would like to share from a personal and Court perspective how very special and admired this man has been as both a "brother" on the Court and as a friend. Justice Wainwright did not take the direct road into law as many of us have. He spent six years as either active military or in the US Coast Guard reserve unit. He received high honors, and he commanded a Coastal Forces Unit of specially selected reservists with the purpose of warding off the threat of coast sabotage along our beaches.

Upon completion of active duty, Justice Wainwright served for fourteen years as the managing director of a major corporation engaged in agribusiness, tobacco, insurance, and real estate. He served on the

Board of Directors of a Bank, and upon completion of law school, he was in the private practice of law for five years. He then served as a District Court Judge, before being elected as a Resident Superior Court Judge. Each of these experiences brought perspective and a wealth of knowledge to the Supreme Court when George Wainwright arrived as an Associate Justice after the 1998 election.

During Justice Wainwright's eight years on the Supreme Court, he wrote significant opinions dealing with a wide range of issues: the reach of homeowners' associations, the public duty doctrine, involuntary annexation, comprehensive storm water management, and utilities rate-making cases, among others. His intelligence and ability to comprehend the variety of complex issues that came across his desk was shown in the conference room and in the final written product. He was a voice of common sense in the Conference Room with his trial, judicial, corporate, and military experience. George was the ultimate "low maintenance" associate justice. He did all his work, and he did it well. He volunteered freely to assist with matters at the Court, and he continually exemplified the highest standards of civility and professionalism.

Justice Wainwright was a half voice for the Demon Deacons with Chief Justice Lake, having gone to law school at Wake Forest, but he kept his allegiance to UNC having been a Morehead Scholar.

Since leaving the Court, Justice Wainwright has continued his public service. Having received yet another degree as a graduate of the National Judicial College in Special Jurisdiction Courts from the University of Nevada at Reno, he chaired a committee to research and report on the feasibility of implementation of a National Judicial College located in the School of Government in Chapel Hill, which has now been established with Jim Drennan as the Acting Director. Justice Wainwright is currently serving as the Chairman of the North Carolina State Ethics Commission.

At this time, it is my pleasure to recognize Justice Wainwright's former research assistant and attorney with Bell Davis Pitt in Winston-Salem, North Carolina, Michael Phillips, and invite him to the podium for remarks and to present the portrait.

Thank you, Mr. Phillips, for those excellent remarks. They were a fitting tribute to our former colleague.

ACCEPTANCE of JUSTICE WAINWRIGHT'S PORTRAIT
by
CHIEF JUSTICE MARK MARTIN

Now, I am delighted to ask Kennon and Ashton Wainwright to unveil the portrait of their father.

On behalf of the Supreme Court, we accept this portrait of Justice Wainwright as a part of our collection. We are pleased to have this fine work of art, and we sincerely appreciate the efforts of all who helped to make this presentation possible.

Justice Wainwright's portrait will be hung in this building and will be a continuous reminder to us and our successors of the great history and traditions of this Court. Additionally, these proceedings will be printed in the North Carolina reports.

Your participation today makes this ceremony special, and we are honored that all of you could be with us. At the close of this ceremony, Justice Wainwright and his family will move to the History Center on the first floor of this building, and the Court will follow. On behalf of the Wainwright family, I invite all of you to a reception in the History Center.

Please allow Justice Wainwright and his family, as well as the Court, a few moments to get to the History Center prior to your leaving the Courtroom. The Research Assistants will help guide you. We ask that you remain at your seats until your row is called. Again, thank you for being with us today.

REMARKS by MICHAEL PHILLIPS

Chief Justice Martin, distinguished Associate Justices: May it please the Court.

Good afternoon. It is a great privilege to present to the Supreme Court of North Carolina this portrait of Justice George L. Wainwright, Jr., honoring his service to the citizens and judiciary of the State of North Carolina.

When I was first asked to speak about Justice Wainwright at this portrait presentation, I initially thought there must have been a mistake. Justice Wainwright certainly could have had any number of far more prominent members of the Bar do so—distinguished lawyers with titles such as "Chief Justice," "Associate Justice," and "Judge." But as I worked through the process of assembling the input of Justice Wainwright's colleagues, friends, and family, it became apparent that his selection of one of his former law clerks made perfect sense for a man who, as I shall try my best to capture, is grounded by humility, team-mindedness, and family. For those of you who worked with Justice Wainwright, it will come as no surprise that he was adamant that my remarks be brief.

George Lindeman Wainwright, Jr., was born on December 10, 1943 in Wilson County, North Carolina, the son of George and Susan Wainwright. "Bucky," as he was called in his childhood, proudly attended Fike High School in Wilson, where, according to lifelong friends, he knew almost everyone and excelled in almost everything he did. Academics and education were an essential part of Bucky's upbringing for the simple reason that he had to make good grades in order to play sports, which were at the heart of his youth in Wilson County. He was a starter on the high school football, basketball, and baseball teams, but his greatest passion was on the gridiron, where he was an all-state running back, a most valuable player, and a member of a conference championship team. George Wainwright graduated from Fike High School in 1962.

Although he could have pursued college football elsewhere, George was awarded the prestigious Morehead Scholarship to attend the University of North Carolina at Chapel Hill. George majored in political science and was a well-rounded student who epitomized a Morehead scholar. He was an active member of the Phi Delta Theta fraternity, where he formed many lifelong friendships.

George graduated from the University of North Carolina in 1966, following which he served in the United States Coast Guard and Coast Guard Reserve until 1972. He then returned to his hometown of Wilson, where he became a successful farmer and agricultural businessman.

In 1980, George Wainwright married Carol McChesney of Rocky Mount, North Carolina. They were married in August, which in the life of a farmer meant tobacco season, market time, and regrettably no honeymoon. It was the beginning of an extraordinary partnership that George promised Carol on their wedding day "would not be dull." And it most definitely was not.

This was also a time when great change was beginning to emerge in North Carolina agriculture. George had the foresight to recognize the turbulent future that the tobacco industry would soon confront and the impact such change would have on his farm and livelihood.

And so in 1981, George and Carol made the decision to leave the farm in Wilson and head to Winston-Salem, where George entered law school at Wake Forest University. At the time, George was thirty-eight years old, married, and tackled the challenge with the same resounding determination and work ethic that had propelled him to success since his youth.

In 1984, George Wainwright earned his juris doctor degree from Wake Forest University. Following graduation, George spent the summer of 1984 immersed in preparation for two big events, both of which incredibly were scheduled to take place on the exact same day—the bar exam and the birth of George and Carol's son, Kennon. Mercifully, Kennon was late.

With a new legal career and a growing family, George and Carol were eager to return to Eastern North Carolina. George was fortunate to be hired at the law firm of Wheatly, Wheatly, Nobles and Weeks in Beaufort, North Carolina. Under the mentorship of the late Claud Wheatly, Jr., George quickly found his stride as a lawyer and developed an active practice in Carteret and surrounding counties. He was eager and ambitious. And, not surprisingly, he was already looking to new horizons.

In 1991, Governor Jim Martin appointed George Wainwright as a district court judge in Carteret County. The same year as this important

milestone in his legal career, Judge Wainwright and Carol celebrated the arrival of their daughter, Ashton.

It did not take long for Judge Wainwright to earn an excellent reputation within the Bar and local community, and he was elected to a full term on the district court bench in 1992. There he remained until 1994, when Governor Jim Hunt appointed Judge Wainwright as a superior court judge for North Carolina judicial district 3B, serving Carteret, Craven, and Pamlico counties.

As a trial court judge in the district and superior court divisions of our General Court of Justice, Judge Wainwright presided over the broadest array of civil and criminal cases. He was widely regarded as a judge who was intelligent, measured, and tough but fair. Judge Wainwright also developed tremendous respect for the lawyers who appeared before him and the often daunting legal challenges of trial work. These experiences as a trial court judge proved to be an invaluable, if not defining, component of the skillset he later brought to the appellate bench.

Although most would have been quite content with such remarkable achievement, Judge Wainwright was never one to rest on his laurels. He once again set his sights on new goals in public service—this time, the highest court in the State of North Carolina.

In the 1998 general election, Judge Wainwright was elected as an Associate Justice on the Supreme Court of North Carolina. Here in this courtroom, Justice Wainwright had the honor of serving under four distinguished Chief Justices: Burley Mitchell, Henry Frye, Beverly Lake, Jr., and Sarah Parker; and alongside current Chief Justice Mark Martin, Associate Justice Robert Edmunds, and Associate Justice Paul Newby.

According to former colleagues, Justice Wainwright brought a calm and level-headed presence to the Court. He was resolute in his beliefs of what was right and wrong, but was never strident or dogmatic. "The perfect judicial temperament" is how he was described by one former Chief Justice. Another Chief Justice noted that Justice Wainwright had a unique ability to concisely crystalize the issues and, because of his experience as a trial court judge, was often a sounding board for testing legal theory against pragmatism.

In this regard, Justice Wainwright's opinions reflect a practical wisdom forged from decades of hard work on the farm, in business, and on

the trial court bench. All of us who had the privilege of serving as one of his law clerks know that Justice Wainwright had little patience contemplating how many angels could dance on the head of a pin.

Instead, Justice Wainwright was a "cut to the chase" type of judge who strived for sound, pragmatic rulings that provided clear direction to practitioners—the trial court lawyers and judges who ultimately would have to apply the legal interpretations of this Court in county courthouses across the state, much as Justice Wainwright did as a practicing lawyer and judge in the earlier days of his legal career.

Teamwork was not just a characteristic of the Wainwright chambers, it was a requirement. Justice Wainwright understood that his contribution to the Court depended upon the collective effort of all his teammates—his fellow Justices, the Supreme Court staff, his law clerks, and his Executive Assistant—each of whom played an invaluable role essential to the overall success of the team.

Not surprisingly, Justice Wainwright was quick to give credit to everyone on that team, not the least of whom was his dedicated Executive Assistant, Susan Owens, whose knowledge, intelligence, and decades of experience at the Court were essential to the success of the Wainwright chambers. It did not go unnoticed that Justice Wainwright always said Susan worked *with* him, not *for* him. This simple choice of words reflects the effortless respect and collegiality that Justice Wainwright extended to everyone in his Court family.

With a collaborative and supportive approach, Justice Wainwright mentored many outstanding law clerks who have gone on to successful legal careers as lawyers in private practice, state government, and our court system. In particular, Justice Wainwright asked that we recognize the late Clyde Alexander Cheek, III ("Trey") as representative of the distinguished service of all law clerks and the finest of our Court family.

Justice Wainwright served his eight-year term at the Supreme Court of North Carolina with purpose and dedication. Although he might well have enjoyed many more years with the Court, he did not seek re-election and left the bench at the end of his term in 2006 so he could spend more time in Morehead City with his wife and family. There, he returned to the trial court bench as an emergency superior court judge for several years, after which he developed a successful practice as a mediator. In the most recent (but certainly not the last) chapter of his

legal career, Governor Pat McCrory appointed Justice Wainwright to the State Ethics Commission in 2014, upon which he currently serves as the Chairman.

Of all his achievements, however, none shine brighter for Justice Wainwright than his family. He has been married to Carol McChesney Wainwright for more than thirty-five years. Their two children, Kennon and Ashton, are graduates of the University of North Carolina and successful young adults who have made their parents proud. While we are all here today to honor Justice Wainwright's remarkable legal career, Justice Wainwright is here today to honor his extraordinary family—Carol, Ashton, Kennon, and Kennon's wife, Katherine. Justice Wainwright will quickly tell you that his achievement in the legal profession would not have been possible without their enduring love and support. Indeed, it was a team effort of which the entire Wainwright family can be proud.

In keeping with Justice Wainwright's insistence that I be brief, I will close by saying to Justice Wainwright, thank you for your service to the citizens and judiciary of the State of North Carolina. And thank you for allowing us the privilege of honoring you today with the presentation of your portrait to the Supreme Court of North Carolina.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING *PRO BONO* PRACTICE

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 17, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning *pro bono* practice as particularly set forth in 27 N.C.A.C. 1D, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0905 Pro Bono Practice by Out of State Lawyers

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth:

(1) ...

(d) Upon receipt of a petition and other information satisfying the provisions of this rule, the council may, in its discretion, enter an order permitting the petitioner to provide legal services to indigent persons on a *pro* *bono* basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1...

(e) A petitioner may be a compensated employee of a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and, if granted *pro bono* practice status, may provide legal services to the indigent clients of that corporation subject to the following conditions:

(1) the petitioner has filed an application for admission with the North Carolina Board of Law Examiners (BLE) and has never previously been denied admission to the North Carolina State Bar for any reason; a copy of the petitioner's application shall be provided with the petition for *pro bono* practice;

(2) if the petitioner is granted *pro bono* practice status, that status will terminate when the BLE makes its final ruling on the petitioner's application for admission; and

(3) the petitioner is supervised in the provision of all legal services to indigent persons as set forth in paragraph (d).

(f) A lawyer who is paid in-house counsel for a business organization with offices in North Carolina may petition under this rule to provide legal services to indigent persons on a *pro bono* basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

~~(e)~~ (g) ...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, 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 April 17, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization

.1801 Incomplete Applications: Reconsideration of Applications Rejected by Specialty Committee; and Reconsideration Procedure

(a) Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. An application is incomplete if it does not include complete answers to every question on the application and copies of all documents requested on the application. The applicant will be notified in writing if an application is incomplete. The applicant must submit the information necessary to complete the application within 21 days of the date of the notice. If the applicant fails to provide the required information during the requisite time period, the executive director will return the application to the applicant together with a refund of the application fee less a fifty dollar ($50) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information. This provision does not apply to an application with respect to which fewer than five completed peer review forms have been timely filed with the board.

(b) Denial of Application by Specialty Committee.

...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015, in consequence of a resolution adopted by the Board of Law Examiners on June 12, 2015, a copy of which is attached hereto.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended as follows (additions are underlined):

Rules Governing Admission to the Practice of Law

.0101 Website Address

The Board of Law Examiners of the State of North Carolina shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.

.0202 Definitions

For purposes of this Chapter, the following shall apply:

(1) "Chapter" or "Rules" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

(2) "Board" refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(3) "Executive Director" refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(4) "Filing or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail or other commonly recognized and accepted delivery service, properly addressed to the Board of Law Examiners, and bearing sufficient first class postage or like delivery cost and postmarked by the United States Postal Service or date-stamped by the recognized delivery service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked or date-stamped after a deadline or which if postmarked or date-stamped on or before a deadline and do not include required

fees or which include a check in payment of required fees which is not honored due to insufficient funds will not be considered as timely filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or which answers to the questions are not complete will not be considered filed and will be returned.

(5) Any reference to a "state" shall mean one of the United States, and any reference to a "territory" shall mean a United States territory.

(6) "Panel" means one or more members of the Board specially designated to conduct hearings provided for in these Rules.

.0204 List

As soon as possible after each filing deadline for applications, the Executive Director shall prepare and maintain a list of general applicants for the ensuing examination.

.0401 How to Apply

Applications for admission must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by submitting a written request to the Board or by accessing the application via the Board's website: www.ncble.org.

.0402 Application Form

(1) The Application for Admission to Take the North Carolina Bar Examination form requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, current mental and emotional impairment, and bar admission and discipline history. Applicants must list references and submit as part of the application:

- -- Certificates of Moral Character from four (4) individuals who know the applicant;
- -- A recent photograph;
- -- Two (2) sets of clear fingerprints;
- -- Two executed informational Authorization and Release forms;
- -- A birth certificate

- Transcripts from the applicant's undergraduate and graduate schools;
- A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;
- A certificate from the proper court or agency of every Jurisdiction in which the applicant is or has been licensed, that the applicant is in good standing, or otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charge of misconduct;
- Copies of any legal proceedings in which the applicant has been a party.

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who has aptly filed a complete Application for Admission to take the North Carolina Bar Examination for a particular bar examination may file a Supplemental Application on forms supplied by the board, along with the applicable fee for the next subsequent bar examination. An applicant who has filed a Supplemental Application as provided by this rule immediately preceding the filing deadline specified in Rule .0403 of this chapter may file a subsequent Supplemental Application along with the applicable fees for the next examination. The Supplemental Application will update the information previously submitted to the Board by the applicant. Said SUPPLEMENTAL APPLICATION must be filed by the deadline set out in Rule .0403 of this Chapter.

.0403 Filing Deadlines

(1) Applications shall be filed and received by the Executive Director at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $250 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application will not be allowed to take the Bar Examination designated on the application.

(4) Any applicant who has aptly filed a General Application for the February or July written bar examination may make application to take the next immediately following bar examination by filing a Supplemental Application with the Executive Director of the Board at the offices of the Board on or before the following dates:

(a) If the applicant aptly filed a General Application for the February bar examination, the Supplemental Application for the following July bar examination must be filed on or before the first Tuesday in May immediately preceding the July examination; and

(b) If the applicant aptly filed a General Application for the July bar examination, the Supplemental Application for the following February bar examination must be filed on or before the first Tuesday in October immediately preceding the February Examination.

.0404 Fees

Every application by an applicant who:

(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $700.00.

(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,500.00.

(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.

(4) is filing after the deadline set out in Rule .0403(1), but before the deadline set forth in Rule .0403(2), shall be accompanied by a late fee of $250.00 in addition to all other fees required by these rules.

.0405 Refund of Fees

Except as herein provided, no part of the fee required by Rule .0404 (1), (2), or (3) of this Chapter shall be refunded to the applicant unless the applicant shall file with the Executive Director a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the applicable fee may be refunded to the applicant at the discretion of the Board. No portion of any late fee will be refunded.

However, when an application for admission by examination is received from an applicant who, in the opinion of the Executive Director after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application; and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

.0502 Requirements for Comity Applicants

The Board in its discretion shall determine whether attorneys duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided the conditions required by the state, or territory of the United States or the District of Columbia, for attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination. A list of "approved jurisdictions", as determined by the Board pursuant to this rule, shall be available upon request.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary, or legal proceedings, whether currently mentally or emotionally impaired, references, the nature of the applicant's practice of law, and familiarity with the code of Professional Responsibility as promulgated by the North Carolina State Bar.

(b) That the applicant furnishes the following documentation:

i. Certificates of Moral Character from four (4) individuals who know the applicant;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

vii. A certificate of admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every jurisdiction in which the applicant is licensed therein that he is in good standing, or otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $2,000.00, no part of which may be refunded to:

(a) an applicant whose application is denied; or

(b) an applicant who withdraws, unless the withdrawing applicant filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions relied upon by the applicant for admission to practice law in North Carolina, that each jurisdiction relied upon by the applicant has been or should be approved by the Board, pursuant to this rule, for admission to practice

law in North Carolina without examination, and that the applicant has been for at least four out of the last six years, immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the full-time practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal Service with the United States, a state or federal territory, the District of Columbia, or any local governmental bodies or agencies, including military service ; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to practice law in that additional jurisdiction, and that additional jurisdiction is not an "approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in every jurisdiction within each State, territory of the United States, or the District of Columbia, in which the applicant is licensed or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing the applicant's comity application;

(8) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

.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 Executive Director, 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 servicemember of the United States Uniformed Services; and

(c) Is residing, or intends within the next six months, to be residing in North Carolina due to the service member's military orders for a permanent change of station to the State of North Carolina.

(3) **Procedure.** In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the servicemember's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the servicemember.

(4) **Fee.** A Military Spouse Comity Applicant shall pay a fee of $1,500.00 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee, appointed by the Chairman of the Board, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a Panel may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms

provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee the such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

.0802 Format

A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the Executive Director

(a) if a general applicant, before the date the applicant is scheduled to be examined; or

(b) if a comity applicant, before the date of the applicant's final appearance before a Panel.

.0803 Notification; Right to Withdraw

The Executive Director shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Executive Director a written withdrawal as a candidate for admission.

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law, the person or persons making the protest and the applicant in question shall appear before a Panel or the Board at a time and place to be designated by the Board Chair. If the applicant is an applicant for admission by examination and a hearing on the protest is not held before the written examination, the applicant may take the written examination.

.1001 Review

An applicant for admission by examination who has failed the written examination may, in the Board's offices, examine the applicant's answers to the essay portion of the examination and such other answers as the Board determines will be of assistance to the applicant.

.1002 Fees

The Board will furnish an unsuccessful applicant a copy of the applicant's essay examination at a cost to be determined by the Executive

Director, not to exceed an amount determined by the Board. No copies of the Board's grading guide will be made or furnished to the applicant.

.1005 Board Representative

The Executive Director of the Board serves as the representative of the Board during this review of the written bar examination by an unsuccessful applicant. The Executive Director is not authorized to discuss any specific questions and answers on the bar examination.

.1201 Nature of Hearings

(1) All general applicants may be required to appear before the Board or a Panel at a hearing to answer inquiry about any matter under these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

(2) Each comity applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502.

.1203 Conduct of Hearings

(1) All hearings shall be heard by the Board except that the Chair may designate two or more members or Emeritus Members as that term is defined by the Policy of the North Carolina State Bar Council creating Emeritus Members to serve as a Panel to conduct the hearings.

(2) The Panel will make a determination as to the applicant's eligibility for admission to practice law in North Carolina. The Panel may grant the application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the Executive Director at the offices of the Board within ten (10) days following receipt of the Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board.

(3) The Board or a Panel may require an applicant to make more than one appearance before the Board or a Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations,

pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination while the Board or a Panel makes a final determination that the applicant possesses the qualifications and general fitness requisite for an attorney and counselor at law, is possessed of good moral character, and is entitled to the confidence of the public.

.1204 Continuances; Motions for Such

Continuances will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuances should be made to the Executive Director and will be granted or denied by the Board Chair or by a Panel designated for the applicant's hearing.

.1205 Subpoenas

(1) The Board Chair, or the Board Chair's designee, shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(2) The Executive Director is delegated the power to issue subpoenas in the Board's name.

.1206 Depositions and Discovery

(1) A deposition may be used in evidence when taken in compliance with the North Carolina Rules of Civil Procedure, G.S. 1A-1.

(2) A Panel or the Board may consider sworn affidavits as evidence in a hearing. The Board will take under consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

.1302 Licenses for General Applicants

Upon compliance with the rules of the Board, and all orders of the Board, the Executive Director, upon order of the Board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

.1401 Appeals

An applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility for admission to practice law in North Carolina.

.1402 Notice of Appeal

Notice of Appeal shall be provided, in writing, within twenty (20) days after notice of such ruling or determination. This Notice shall contain written exceptions to the ruling or determination and shall be filed with the Superior Court for Wake County, North Carolina. A filed copy of said Notice shall be given to the Executive Director. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

.1403 Record to be Filed

Within sixty (60) days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the Executive Director shall prepare, certify, and file with the Clerk of the Superior Court of Wake County the record of the case, comprising;

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony when taken at the hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

.1404 Wake County Superior Court

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence

not offered at the hearing shall be taken, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse, or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

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 Admission to the Practice of Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on July 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of 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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 25, 2014.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined in bold type, deletions are interlined):

Rule 5.3, *Responsibilities Regarding Nonlawyer ~~Assistants~~ Assistance*

[text of rule is unchanged]

Rule 5.5, *Unauthorized Practice of Law; Multijurisdictional Practice of Law*

[text of rule is unchanged]

Rule 7.3, *~~Direct Contact with Potential~~ Solicitation of Clients*

[text of 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 25, 2014.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows be amended (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 5.6(b) Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) …; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy ~~between private parties~~.

Comment

[1] ….

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17. The Rule also does not prohibit restrictions on a lawyer's right to practice that are included in a plea agreement or other settlement of a criminal matter or the resolution of a disciplinary proceeding where the accused is a 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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, 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 July 17, 2015.

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 .0300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0300, Permanent Relinquishment of Membership in the State Bar

Section .0300 ~~Election and Succession of Officers~~ Permanent Relinquishment of Membership in the State Bar

[All rules currently in this section withdrawn and relocated, in their entirety, to the beginning of Section .0400.]

.0301 Effect of Relinquishment

(a) Order of Relinquishment. Pursuant to the authority of the council to resolve questions pertaining to membership status as specified in N.C. Gen. Stat. 84-23, the council may allow a member of the State Bar to relinquish his or her membership in the State Bar subject to the conditions set forth in this section. Upon the satisfaction of those conditions, the council may enter an order declaring that the individual is no longer a member of the State Bar and no longer has the privileges of membership set forth in N.C. Gen. Stat. 84-16 and in the rules of the State Bar.

(b) Requirements to Return to Practice of Law. If an individual who has been granted relinquishment of membership desires to return to the practice of law in the state of North Carolina, he or she must apply to the North Carolina Board of Law Examiners and satisfy all of the requirements to obtain a license to practice law in the state of North Carolina as if for the first time.

(c) Prohibition on Representations. Effective upon the date of the order of relinquishment, the former licensee is prohibited from representing that he or she is

(1) a lawyer in North Carolina,

(2) licensed to practice law in North Carolina,

(3) able to provide legal services in North Carolina, or

(4) a member of the North Carolina State Bar.

.0302 Conditions for Relinquishment

A member of the State Bar may petition the council to enter an order of relinquishment. An order of relinquishment shall be granted if the petition demonstrates that the following conditions have been satisfied:

(a) Unresolved Complaints. No open, unresolved allegations of professional misconduct are pending against the petitioner in any jurisdiction.

(b) No Financial Obligation to State Bar. The petitioner has paid all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, and all fees, fines, and penalties owed to the Board of Continuing Legal Education.

(c) Wind Down of Law Practice. The petitioner has completed the wind down of his or her law practice in compliance with the procedure for winding down the law practice of a suspended or disbarred lawyer set forth in paragraphs (a), (b), and (e) of Rule .0124 of Subchapter 1B and with any other condition on the wind down of a law practice imposed by state, federal, and administrative law. The petition must describe the wind down of the law practice with specificity.

(d) Acknowledgment. The petitioner acknowledges the following: the State Bar's authority to take the actions described in Rule .0303 of this section; that the sole mechanism for regaining active membership status with the State Bar is to apply to the North Carolina Board of Law Examiners for admission and to satisfy all of the requirements to obtain a license to practice law in the state of North Carolina as if for the first time; and that he or she is not entitled to confidentiality under Rule .0129 of Subchapter 1B of any information relating to professional misconduct received by the State Bar after the date of the entry of the order of relinquishment.

(e) Address. The petition includes a physical address at which the State Bar can communicate with the petitioner.

(f) Notarized Petition. The petition is signed in the presence of a notary and notarized.

.0303 Allegations of Misconduct Received by the State Bar On or After the Date of Relinquishment

(a) Post Relinquishment Action by State Bar. Relinquishment is not a bar to the initiation or investigation of allegations of professional misconduct and shall not prevent the State Bar from prosecuting a disciplinary action against the former licensee for any violation of the Rules of Professional Conduct that occurred prior to the date of the order of relinquishment.

(b) Procedure for Investigation. Allegations of misconduct shall be investigated pursuant to the procedures set forth in Section .0100 of Subchapter 1B.

(c) Release of Information from Investigation. Information from the investigation of allegations of misconduct shall be retained in the State Bar's records and may be released by the State Bar as required by law or as necessary to protect the interests of the public. Release may be made to, but is not limited to, the North Carolina Board of Law Examiners, any professional licensing authority, or any law enforcement or regulatory body investigating the former licensee.

Section .0400 Election, Succession, and Duties of Officers

.0401 Officers

[Relocated Rule .0301 from Subchapter 1A, Section .0300]

.0402 Eligibility for Office

[Relocated Rule .0302 from Subchapter 1A, Section .0300]

.0403 Term of Office

[Relocated Rule .0303 from Subchapter 1A, Section .0300]

.0404 Elections

[Relocated Rule .0304 from Subchapter 1A, Section .0300]

.0405 Nominating Committee

[Relocated Rule .0305 from Subchapter 1A, Section .0300]

.0406 Vacancies and Succession

[Relocated Rule .0306 from Subchapter 1A, Section .0300]

.0407 Removal from Office

[Relocated Rule .0307 from Subchapter 1A, Section .0300]

~~.0401~~ .0408 Compensation of Officers

...

[Re-numbering remaining rules.]

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PRACTICAL TRAINING OF LAW STUDENTS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

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 supervision of law students, as particularly set forth in 27 N.C.A.C. 1C, Section 0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0200 Rules Governing the Board of Law Examiners and the Training of Law Students

Rule .0205 Supervision

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;

(2) supervise no more than two legal interns concurrently, provided, however, there is no limit on the number of legal interns who may be supervised concurrently by an attorney who is a full or part-time member of a law school's faculty or staff whose primary responsibility as a faculty member is supervising legal interns in a legal aid clinic and, further provided, that an attorney who supervises legal interns through an externship or outplacement program of a law school legal aid clinic may supervise up to five legal interns;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the

Council of the North Carolina State Bar at a regularly called meeting on July 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, 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 17, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .1800, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

Rule .1803 Reconsideration of Failed Examination

(a) Review of Examination. Within ~~30~~ 45 days of the date of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director...

(b) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within ~~45~~ 30 days ~~of the date of the notice of failure~~ after the last day of the exam review period and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded...

(c) ...

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 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 2015.

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 .1900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1900 Rules Concerning the Accreditation of Continuing Legal Education for the Purpose of the Board of Legal Specialization

Rule .1903 Accreditation Standards for Lecture-Type CLE Activities

(a) ...

(b) ...

(c) The CLE activity may be live; prerecorded in audio or video format; simultaneously broadcast by telephone, satellite, live web streaming (webcasting), or video conferencing; or online. ~~presented by either live instruction or mechanical or electronically recorded or reproduced material. If electronic transmission is used, an instructor should be present for comment or to answer questions. The board may reduce the hours of credit for electronic transmission when no instructor is present.~~ A prerecorded audio or video CLE activity must comply with the minimum registration and verification of attendance requirements in Rule .1604(d) of this chapter.

(d) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the

Council of the North Carolina State Bar at a regularly called meeting on July 17, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 2015.

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 24th day of September, 2015.

s/Mark Martin
Mark D. Martin, 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 24th day of September, 2015.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Sections .1500 and .1600, be amended as follows (additions are underlined, deletions are interlined):

27 NCAC 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1513 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: ….

(b) Investment Criteria - ….

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council….

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund; provided, however, that a portion of each sponsor or attendee fee, in an amount to be determined by the council ~~but not to exceed $1.00 for each credit hour~~, shall be paid to the Chief Justice's Commission on Professionalism and to the North Carolina Equal Access to Justice Commission for administration of the activities of ~~the commission~~ these commissions. Excess funds may be expended by the council on lawyer competency programs approved by the council.

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1606 Fees

(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is ~~$3.00~~ $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; ~~$.050~~ $1.00 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit:

Fee: ~~$3.00~~ $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee (~~$1800~~ $2100.00)

(b) Attendee Fee - The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney will be invoiced for any attendees fees owed following the submission of the attorney's annual report form pursuant to Rule .1522(a) of this subchapter. Payment shall be remitted within 30 (thirty) days of the date of the invoice. The amount of the fee, per approved CLE hour for which the attorney claims credit, is ~~$3.00~~ $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; ~~$.050~~ $1.00 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions.

It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit:

Fee: ~~$3.00~~ $3.50 x Total Approved CLE hours (3.0) = Total Attendee Fee (~~$9.00~~ $10.50)

(c) Fee Review - The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The council shall annually review the assessments for the Chief Justice's Commission on Professionalism and the North Carolina Equal Access to Justice Commission and adjust them as necessary to maintain adequate finances for the operation of the commissions.

(d) Uniform Application and Financial Responsibility - ….

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of October, 2015.

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. The amendments shall take effect on January 1, 2016.

This the 5th day of November, 2015.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of November, 2015.

s/Ervin, J.
For the Court

ORDER ADOPTING AMENDMENTS TO THE NORTH CAROLINA CODE OF JUDICIAL CONDUCT

Canons 2 and 7 of the North Carolina Code of Judicial Conduct are hereby amended, in part, to read as follows:

Canon 2

. . .

B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by this Code; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. A judge should not testify voluntarily as a character witness.

. . .

Canon 7

. . .

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself/herself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event;

. . .

Adopted unanimously by the Court this the 5th day of November 2015. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of November 2015.

s/Christie S. Cameron Roeder
CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

The Order establishing the Chief Justice's Commission on Professionalism is hereby amended to read as follows:

THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM.

The membership of the Commission shall be as follows:

The Commission's chair will be the Chief Justice or his or her designee. The chair will appoint the Commission's other members. The Commission's members will reflect the profession's four main constituents: practicing lawyers, judges, law school faculty, and the public. The chair will appoint from the constituents as follows:

1. Judges:

   (a) two judges chosen from those who serve actively or have served on the trial benches of the courts of North Carolina or the United States, and

   (b) an appellate court judge chosen from the Supreme Court of North Carolina, the North Carolina Court of Appeals, or the United States Court of Appeals.

2. Law School Faculty: two law school faculty members who are full-time faculty members from accredited North Carolina law schools, chosen on recommendations of the deans thereof.

3. Practicing Lawyers: seven practicing lawyers giving due and appropriate regard for diversity of representation and taking into account such factors as the chair shall deem just.

4. Public Members: Three non-lawyer citizens active in public affairs.

With the exception of the chairman, the members of the Commission shall serve for a term of three years provided, however, in the discretion of the chair, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

BY THIS ORDER, the Court issues to the Commission the following charge: The Commission's primary charge shall be to enhance professionalism among North Carolina's lawyers. In carrying out its charge, the Commission shall provide ongoing attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of clients and in the public good.

The Commission's major responsibilities should include:

1. to consider and encourage efforts by lawyers and judges to improve the administration of justice;

2. to examine ways of making the system of justice more accessible to the public;

3. to monitor and coordinate North Carolina's professionalism efforts in such institutional settings as the bar, the courts, the law schools, and law firms;

4. to monitor professionalism efforts in jurisdictions outside North Carolina;

5. to conduct a study and issue a report on the present state of lawyer professionalism within North Carolina;

6. to plan and conduct Convocations on Professionalism;

7. to provide guidance and support to the Board of Continuing Legal Education and to the various CLE providers accredited by the Board, in the implementation and execution of a CLE professionalism requirement of not less than one hour per year;

8. to implement a professionalism component in bridge-the-gap programs for new lawyers;

9. to make recommendations to the Supreme Court, the State Bar, the voluntary bars, and the Board of Continuing Legal Education concerning additional means by which professionalism can be enhanced among North Carolina lawyers;

10. to receive and administer grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities.

Provided, however, the Commission shall have no authority to impose discipline upon any members of the North Carolina State Bar or to

amend, suspend, or modify the rules and regulations of the North Carolina State Bar including the Revised Rules of Professional Conduct.

By order of the Court in Conference, this the 12th day of January, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of January, 2016.

s/Christie Speir Cameron Roeder
Clerk of the Supreme Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2015.

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 Board of Law Examiners, as particularly set forth in 27 N.C.A.C. 1C, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0100, Board of Law Examiners

.0101 Election

(a) ~~At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933. The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.~~ The Board of Law Examiners shall consist of 11 members. The members are elected for three-year terms to serve until expiration of the term, resignation, death, or other cause for termination of members' service.

(b) ~~No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.~~ The council, in making appointments to the Board of Law Examiners, shall make appointments for no more than four consecutive three-year terms, not counting any partial term which may have previously been served.

(c) The council shall elect board members for three-year terms at its annual meeting in October, with the term of service to begin on the following January 1. Election of a board member to complete an unexpired

term shall be conducted at the next meeting of the council following the termination of service by the member and the giving of notice of the vacancy.

(d) When vacancies occur for the Board of Law Examiners, notice shall be published in the official publication of the North Carolina State Bar giving the date by which any person desiring to make a suggestion for someone to be considered as a possible member of the Board of Law Examiners must submit the name to the North Carolina State Bar.

(e) In the selection process for an appointment to the Board of Law Examiners, the council may consult with current members of the Board of Law Examiners and consider factors such as geography, practice area, gender, and racial diversity.

(f) No member of the council shall be a member of the Board of Law Examiners.

(g) Any former Board of Law Examiners member being considered for appointment as emeritus member shall have served on the Board of Law Examiners for not less than five years.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of April, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1517 Exemptions

(a) Notification of Board.

...

(e) Law Teachers. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) …

(3) A full-time teacher of law-related courses at a graduate level professional school accredited by its respective professional accrediting agency.

(f) Special Circumstances Exemptions.

...

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 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .3200, be amended as follows (rules are entirely new, additions are not underlined):

27 N.C.A.C. 1D, Section .3200, Certification Standards for the Utilities Law Specialty

.3201 Establishment of Specialty Field
The North Carolina State Bar Board of Legal Specialization (the board) hereby designates utilities 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.

.3202 Definition of Specialty
The specialty of utilities law is the practice of law focusing on the North Carolina Public Utilities Act (Chapter 62 of the North Carolina General Statutes) and practice before the North Carolina Utilities Commission (the Commission) and related state and federal regulatory bodies.

.3203 Recognition as a Specialist in Utilities Law
If a lawyer qualifies as a specialist in utilities 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 Utilities Law."

.3204 Applicability of Provisions of the North Carolina Plan of Legal Specialization
Certification and continued certification of specialists in utilities 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.

.3205 Standards for Certification as a Specialist in Utilities Law
Each applicant for certification as a specialist in utilities 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 utilities 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 utilities 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 utilities law but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in utilities law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in utilities law includes, but is not limited to, practice before or representation in matters relative to the Commission, Federal Energy Regulatory Commission (FERC), Federal Communications Commission (FCC), Nuclear Regulatory Commission (NRC), Pipeline and Hazardous Materials Safety Administration (PHMSA), North Carolina Department of Environment and Natural Resources (NCDENR), North American Electric Reliability Corporation, utilities commissions of other states, and related state and federal regulatory bodies as well as participation in committee work of organizations or continuing legal education programs that are focused on subject matter involved in practice before the Commission or related state and federal regulatory bodies.

(4) “Practice equivalent” shall mean:

(A) Each year of service as a commissioner on the Commission during the five years prior to application may be substituted for a year of the experience necessary to meet the five-year requirement set forth in Rule .3205(b)(1).

(B) Each year of service on the legal staff of the Commission or of the Public Staff during the five years prior to application

may be substituted for a year of the experience necessary to meet the five-year requirement set forth in Rule .3205(b)(1).

(c) Continuing Legal Education – To be certified as a specialist in utilities law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in utilities law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in utilities law; the remaining 18 hours may be in related-field CLE. Utilities law CLE includes but is not limited to courses on the subjects identified in Rule .3202 and Rule .3205(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website.

(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 utilities 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 utilities 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 test the applicant's knowledge and application of utilities law.

.3206 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 .3206(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 .3205(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in utilities law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in utilities law, and the balance of 30 hours may be in the related fields set forth in Rule .3205(c).

(c) Peer Review - The specialist must comply with the requirements of Rule .3205(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 .3205 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 .3205 of this subchapter.

.3207 Applicability of Other Requirements
The specific standards set forth herein for certification of specialists in utilities 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 specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Education Program

.1518 Continuing Legal Education Program

(a) Annual Requirement.

...

(b) Carryover.

...

(c) Professionalism Requirement for New Members. Except as provided in paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar Professionalism for New Attorneys Program (PNA Program)...

> (1) Content and Accreditation. The State Bar PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management.…To be approved as a PNA Program, the program must be provided by an accredited sponsor under Rule .1603 of this subchapter and the ~~a~~ sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval. ~~At~~ at least 45 days prior to the presentation. ~~of a PNA Program, a sponsor must submit a detailed description of the program to the board for approval. Accredited sponsors shall not be exempt from the prior submission requirement and~~ A sponsor may not advertise a PNA Program until approved by the board. PNA Programs

shall be specially designated by the board and no course that is not so designated shall satisfy the PNA Program requirement for new members.

(2) Evaluation...

(d) Exemptions from Professionalism Requirement for New Members.

...

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 specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1602 Course Content Requirements

(a) Professional Responsibility Courses on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions

...

(h) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except as follows:

(1) ~~those~~ programs exempted by the board under Rule .1501(c)(10) of this subchapter;

(2) ~~or~~ as provided in Rule .1604(e) of this subchapter; and

(3) live programs on professional responsibility, professionalism, or professional negligence/malpractice presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

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 specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .2300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty

.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law

Each applicant for certification as a specialist in estate planning and probate 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 as a specialist in estate planning and probate law:

(a) Licensure and Practice -

...

(c) Continuing Legal Education - An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law (provided, however, that eight of the 45 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in ~~the~~ designated related fields ~~areas~~. A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website ~~of taxation, business organizations, real property, family law, elder law, Medicaid planning, and guardianship~~.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review.

...

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall ~~cover~~ test the applicant's knowledge and application of the law ~~in the following topics~~ of estate planning and probate.~~:~~ A list of the topics covered on the exam shall be maintained by the board on its official website.

~~(A) federal and North Carolina gift taxes;~~

~~(B) federal estate tax;~~

~~(C) North Carolina inheritance tax;~~

~~(D) federal and North Carolina fiduciary income taxes;~~

~~(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;~~

~~(F) North Carolina law of wills and trusts;~~

~~(G) North Carolina probate law, including fiduciary accounting;~~

~~(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts:~~

~~(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;~~

~~(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corporations) which may be encountered in estate planning and administration.~~

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 specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE 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 October 23, 2015.

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

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must ….

(b) Alternative Qualification Period.

...

(c) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) or (b), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual ~~has been~~

(A) was convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal~~,~~;; ~~or~~

(B) ~~has~~ engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation~~,~~;;

(C) engaged in the unauthorized practice of law; or

(D) has had a nonlegal state or federal occupational or professional license suspended or revoked for misconduct;

~~Provided~~ however, the board may certify an applicant whose application discloses conduct described in Rule .0119(c)(3) if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) the individual is not a legal resident of the United States.

(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 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a specially called meeting on February 1, 2016.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0200, Rules Governing Continuing Paralegal Education

.0204 Fees

Accredited Program Fee – Sponsors seeking accreditation for a particular program (whether or not the sponsor itself is accredited by the North Carolina State Bar Board of Continuing Legal Education), that has not already been approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, shall pay a non-refundable fee of $75.00. However, no fee shall be charged for any program that is offered without charge to attendees. ~~The~~ All programs ~~program~~ must be approved in accordance with Rule .0203(1). An accredited program may be advertised by the sponsor in accordance with Rule .0203(2).

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 specially called meeting on February 1, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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.

his the 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 23, 2015.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined except where noted):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 1.15 Safekeeping Property

This rule has ~~three~~ four subparts: Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; ~~and~~ Rule 1.15-3, Records and Accountings; and Rule 1.15-4, Trust Account Management in Multiple-Lawyer Firm. The subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all ~~three~~ four subparts as well as the annotations appear after the text for Rule ~~1.15-3~~ 1.15-4.

Rule 1.15-1 Definitions

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank~~; or~~ savings and loan association, or credit union chartered under North Carolina or federal law.

(b) ...

(k) "Legal services" denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

Rule 1.15-2 General Rules

(a) Entrusted Property.

...

(f) ~~Segregation of Lawyer's Funds.~~ Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary

services may not be deposited or maintained in a trust or fiduciary account. Additionally, ~~No~~ no funds belonging to ~~a~~ the lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer ~~may~~ shall withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Items Payable to Lawyer. Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item by client name, file number, or other identifying information the client from whose balance ~~on which~~ the item is drawn. Any item that does not include ~~capture~~ this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by any means ~~of a debit card~~.

(j) Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.

~~(j)~~ (k) No ~~Personal~~ Benefit to Lawyer or Third Party. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

~~(k)~~ (l) Bank Directive.

...

[Re-lettering intervening paragraphs.]

~~(o)~~ (p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(1). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.

~~(p)~~ (q) Interest on Deposited Funds.

...

~~(q)~~ (r) Abandoned Property. ….

(s) Signature on Trust Checks.

(1) Checks drawn on a trust account must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer. Prior to exercising signature authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.

(2) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures.

Rule 1.15-3 Records and Accountings

(a) Check Format...

(b) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts, and fiduciary accounts maintained at a bank shall consist of the following:

(1) ...;

(2) all canceled checks or other items drawn on the account, or ~~printed~~ digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client name, file number, or other identifying information of the client from whose ~~client~~ balance ~~against which~~ each item is drawn, provided, that:...

(c) Minimum Records for Accounts at Other Financial Institutions.

(1)...;

(2) a copy of all checks or other items drawn on the account, or ~~printed~~ digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(d) Reconciliations of General Trust Accounts.

(1) Quarterly Reconciliations. ~~At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank statement balance for the trust account as a whole~~. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

(A) The balance that appears in the general ledger as of the reporting date;

(B) The total of all subsidiary ledger balances in the general trust account, determined by listing and totaling the positive balances in the individual client ledgers and the administrative ledger maintained for servicing the account, as of the reporting date; and

(C) The adjusted bank balance, determined by adding outstanding deposits and other credits to the ending balance in the monthly bank statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) Monthly Reconciliations.

....

(3) The lawyer shall review, sign, date, and retain a ~~record~~ copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) Accountings for Trust Funds.

...

(i) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(4) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(g).

(j) Retention of Records in Electronic Format. Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a "digital signature" as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

Rule 1.15-4 Trust Account Management in a Multi-Member Firm [ENTIRELY NEW RULE, underlined font is not used]

(a) Trust Account Oversight Officer (TAOO). Lawyers in a law firm of two or more lawyers may designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits trust funds. The TAOO and the partners of the firm, or those with comparable managerial authority (managing lawyers), shall agree in writing that the TAOO will oversee the administration of any such trust account in conformity with the requirements of Rule 1.15, including, specifically, the requirements of this Rule 1.15-4. More than one partner may be designated as a TAOO for a law firm.

(b) Limitations on Delegation. Designation of a TAOO does not relieve any lawyer in the law firm of responsibility for the following:

(1) oversight of the administration of any dedicated trust account or fiduciary account that is associated with a legal matter for which the lawyer is primary legal counsel or with the lawyer's performance of professional fiduciary services; and

(2) review of the disbursement sheets or statements of costs and receipts, client ledgers, and trust account balances for those legal matters for which the lawyer is primary legal counsel.

(c) Training of the TAOO.

(1) Within the six months prior to beginning service as a TAOO, a lawyer shall,

(A) read all subparts and comments to Rule 1.15, all formal ethics opinions of the North Carolina State Bar interpreting Rule 1.15, and the North Carolina State Bar *Trust Account Handbook*;

(B) complete one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a lawyer to serve as a TAOO;

(C) complete two hours of training (live, online, or self-guided) presented by a qualified educational provider on one or more of the following topics: (i) financial fraud, (ii) safeguarding funds from embezzlement, (iii) risk assessment and management for bank accounts, (iv) information security and online banking, or (v) accounting basics; and

(D) become familiar with the law firm's accounting system for trust accounts.

(2) During each year of service as a TAOO, the designated lawyer shall attend one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a TAOO or one hour of training, presented by a qualified educational provider, on one or more of the subjects listed in paragraph (c)(1)(C).

(d) Designation and Annual Certification. The written agreement designating a lawyer as the TAOO described in paragraph (a) shall contain the following:

(1) A statement by the TAOO that the TAOO agrees to oversee the operation of the firm's general trust accounts in compliance with the requirements of all subparts of Rule 1.15, specifically including the mandatory oversight measures in paragraph (e) of this rule;

(2) Identification of the trust accounts that the TAOO will oversee;

(3) An acknowledgement that the TAOO has completed the training described in paragraph (c)(1) and a description of that training;

(4) A statement certifying that the TAOO understands the law firm's accounting system for trust accounts; and

(5) An acknowledgement that the lawyers in the firm remain professionally responsible for the operation of the firm's trust accounts in compliance with Rule 1.15.

Each year on the anniversary of the execution of the agreement, the TAOO and the managing lawyers shall execute a statement confirming the continuing designation of the lawyer as the TAOO, certifying compliance with the requirements of this rule, describing the training undertaken by the TAOO as required by paragraph (c)(2), and reciting the statements required by subparagraphs (d)(1), (2), (4), and (5). During

the lawyer's tenure as TAOO and for six years thereafter, the agreement and all subsequent annual statements shall be maintained with the trust account records (see Rule 1.15-3(g)).

(e) Mandatory Oversight Measures. In addition to any other record keeping or accounting requirement set forth in Rule 1.15-2 and Rule 1.15-3, the firm shall adopt a written policy detailing the firm's trust account management procedures which shall annually be reviewed, updated, and signed by the TAOO and the managing lawyers. Each version of the policy shall be retained for the minimum record keeping period set forth in Rule 1.15-3(g).

Comment [to follow Rule 1.15-4]

[1]….

Responsibility for Records and Accountings

[16]….

[17] The rules permit the retention of records in electronic form. A storage device is appropriate for backing up electronic records if it reasonably assures that the records will be recoverable despite the failure or destruction of the original storage device on which the records are stored. For a discussion of storage methods not solely under the control of the lawyer, see *2011 FEO 6.*

~~[17]~~[18] Many businesses….

[Renumbering the following paragraphs.]

Fraud Prevention Measures

[23] The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts. In addition, Rule 1.15-3(i)(2) requires quarterly reviews of a random sample of three transactions for each trust account, dedicated trust account, and fiduciary account including examination of the statement of costs and receipts, client ledger, and cancelled checks

for the transactions. Review of these documents will enable the lawyer to verify that the disbursements were made properly. Although not required by the rule, a larger sample than three transactions is advisable to increase the likelihood that internal theft will be detected.

[24] Another internal control to prevent fraud is found in Rule 1.15-2(s) which addresses the signature authority for trust account checks. The provision prohibits an employee who is responsible for performing the monthly or quarterly reconciliations for a trust account from being a signatory on a check for that account. Dividing the check signing and reconciliation responsibilities makes it more difficult for one employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.

[25] In addition to the recommendations in the North Carolina State Bar Trust Account Handbook (see the chapter on *Safeguarding Funds from Embezzlement*), the following fraud prevention measures are recommended:

> (1) Enrolling the trust account in an automated fraud detection program;
>
> (2) Implementation of security measures to prevent fraudulent wire transfers of funds;
>
> (3) Actively maintaining end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and periodic consultation with an information technology security professional to advise firm employees; and
>
> (4) Insuring that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

Lawyers should frequently evaluate whether additional fraud control measures are necessary and appropriate.

Duty to Report Misappropriation or Misapplication

[26] A lawyer is required by Rule 1.15-2(p) to report to the Trust Account Compliance Counsel of the North Carolina State Bar Office of Counsel if the lawyer knows or reasonably believes that entrusted property, including trust funds, has been misappropriated or misapplied. The rule requires the reporting of an unintentional misapplication of trust funds,

such as the inadvertent use of one client's funds on deposit in a general trust account to pay the obligations of another client, unless the lawyer discovers and rectifies the error on or before the next scheduled quarterly reconciliation. A lawyer is required to report the conduct of lawyers and non-lawyers as well as the lawyer's own conduct. A report is required regardless of whether information leading to the discovery of the misappropriation or misapplication would otherwise be protected by Rule 1.6. If disclosure of confidential client information is necessary to comply with this rule, the lawyer's disclosure should be limited to the information that is necessary to enable the State Bar to investigate. *See* Rule 1.6, cmt. [15].

Designation of a Trust Account Oversight Officer

[27] In a firm with two or more lawyers, personal oversight of all of the activities in the general trust accounts by all of the lawyers in the firm is often impractical. Nevertheless, any lawyer in the firm who deposits into a general trust account funds entrusted to the lawyer by or on behalf of a client is professionally responsible for the administration of the trust account in compliance with Rule 1.15 regardless of whether the lawyer directly participates in the administration of the trust account. Moreover, Rule 5.1 requires all lawyers with managerial or supervisory authority over the other lawyers in a firm to make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. Rule 1.15-4 provides a procedure for delegation of the oversight of the routine administration of a general trust account to a firm partner, shareholder, or member (see Rule 1.0(h)) in a manner that is professionally responsible. By identifying, training, and documenting the appointment of a trust account oversight officer (TAOO) for the law firm, the lawyers in a multiple-lawyer firm may responsibly delegate the routine administration of the firm's general trust accounts to a qualified lawyer. Delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.

[28] Nevertheless, designation of a TAOO does not insulate from professional discipline a lawyer who personally engaged in dishonest or fraudulent conduct. Moreover, a lawyer having actual or constructive knowledge of dishonest or fraudulent conduct or the mismanagement of a trust account in violation of the Rules of Professional Conduct by any firm lawyer or employee remains subject to professional discipline if the lawyer fails to promptly take reasonable remedial action to avoid the consequences of such conduct including reporting the conduct as required by Rule 1.15-2(p) or Rule 8.3. *See also* Rule 5.1 and Rule 5.3.

Limitations on Delegation to TAOO

[29] Despite the designation of a TAOO pursuant to Rule 1.15-4, each lawyer in the firm remains professionally responsible for the trust account activity associated with the legal matters for which the lawyer provides representation. Therefore, for each legal matter for which the lawyer is primary counsel, the lawyer must review and approve any disbursement sheet or settlement statement, trust account entry in the client ledger, and trust account balance associated with the matter. Similarly, a lawyer who establishes a dedicated trust account or fiduciary account in connection with the representation of a client is professionally responsible for the administration of the dedicated trust account or fiduciary account in compliance with Rule 1.15.

Training for Service as a TAOO

[30] A qualified provider of the educational training programs for a TAOO described in Rule 1.15-4(c)(1)(C) need not be an accredited sponsor of continuing legal education programs (see 27 N.C.A.C. 1D, Rule .1520), but must be knowledgeable and reputable in the specific field and must offer educational materials as part of its usual course of business. Training may be completed via live presentations, online courses, or self-guided study. Self-guided study may consist of reading articles, presentation materials, or websites that have been created for the purpose of education in the areas of financial fraud, safeguarding funds from embezzlement, risk management for bank accounts, information security and on-line banking, or basic accounting.

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) …..

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated

violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. A lawyer is not generally required by this rule to report the lawyer's own professional misconduct; however, to advance the goals of self-regulation, lawyers are encouraged to report their own misconduct to the North Carolina State Bar or to a court if the misconduct would otherwise be reportable under this rule. Nevertheless, Rule 1.15-2(p) *requires* a lawyer to report the misappropriation or misapplication of entrusted property, including trust funds, to the North Carolina State Bar regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.

[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 23, 2015.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 2016.

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 9th day of June, 2016.

s/Mark Martin
Mark D. Martin, 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 9th day of June, 2016.

s/Ervin, J.
For the Court

THE FOLLOWING TWO ORDERS, WHICH WERE ORIGINALLY PUBLISHED IN 92 N.C. APP. 761 (1988) AND 113 N.C. APP. 841 (1994), RESPECTIVELY, WERE INADVERTENTLY OMITTED FROM PUBLICATION IN THE NORTH CAROLINA REPORTS. THESE ORDERS ARE PRINTED IN THE FOLLOWING PAGES TO REMEDY THE OMISSION.

ORDER ADOPTING AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 3, 4, 7, 9, 10, 11, 12, 15, 21, 25, 27, 31, 34, and 39 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. All amendments shall be effective as follows:

Rules 15, 31 and 39: 1 January 1989;

Rules 25, and 34: 1 July 1989;

Rule 21: applicable to all cases in which the superior court order is entered on or after 1 July 1989; and

Rules 3, 4, 7, 9, 10, 11, 12, and 27: effective for all judgments of the trial division entered on or after 1 July 1989.

Adopted by the Court in Conference this 8th day of December 1988. These amendments shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

Rule 3

APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) *RESERVED.*

(c) *Time For Taking Appeal.* Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment *n.o.v.* whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a), (b), (c), (d)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 4

APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) *Manner and Time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 30 days after entry of the judgment or order or within 30 days after a ruling on a motion for appropriate relief made during the ten-day period following entry of the judgment or order.

(b) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 4 October 1978—(a)(2)—effective 1 January 1979;
13 July 1982—(d);
3 September 1987—(d)—effective for all judgments of the superior court entered on or after 24 July 1987;

8 December 1988—4(a)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) **Civil Cases.** Within 10 days after filing the notice of appeal the appellant shall order, in writing, from the court reporter a transcript of such parts of the proceedings not already on file as he deems necessary. A copy of the order shall be filed with the clerk of the trial tribunal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be filed, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts ordered by the appellee. At the time of ordering, a party shall make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

(2) **Criminal Cases.** Upon the filing of a notice of appeal, unless the parties file therewith a stipulation designating the parts of the proceedings which need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings and shall file a certificate of such order. The clerk's order shall include the caption of the case; date or dates of trial; portions of transcript requested; number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any.

(b) *Preparation and Delivery of Transcript.*

(1) From the date of the reporter's receipt of an order for a transcript, the reporter shall have 60 days for preparation and filing of the transcript in civil cases and non-capital criminal cases and shall have 120 days for preparation and filing of the transcript in capitally tried cases. The trial tribunal, in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter may extend the time for preparation of the transcript for an additional 30 days. Where the clerk's order is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for preparation of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The reporter shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
REPEALED: JULY 1, 1978.
(See note following Rule 17.)
Re-adopted: 8 December 1988—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 9

THE RECORD ON APPEAL

(a) *Function; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim tran-

script of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

k. exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. exceptions and assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors as-

signed, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

j. exceptions and assignments of error set out in the manner provided in Rule 10.

(b) *Form of Record; Amendments.* The record on appeal shall e in the format prescribed by Rule 26(g) and the appendixes to ıese rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate

court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate

that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented

by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) *Models, Diagrams, and Exhibits of Material.*

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 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 him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 10

ASSIGNING ERROR ON APPEAL

(a) *Function in Limiting Scope of Review.* Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) *Preserving Questions for Appellate Review.*

(1) **General.** In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel

taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) **Jury Instructions; Findings and Conclusions of Judge.** A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) **Sufficiency of the Evidence.** A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment as in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) *Assignments of Error.*

(1) **Form; Record References.** A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) **Jury Instructions.** Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) **Sufficiency of Evidence.** In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) **Assigning Plain Error.** In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial

action questioned is specifically and distinctly contended to amount to plain error.

(d) *Cross-Assignments of Error by Appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 11

SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* Within 35 days after the reporter's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal

constituted in accordance with the provisions of Rule 9. Within 15 days (30 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Judicial Order or Appellant's Failure to Request Judicial Settlement.* Within 15 days (30 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20

days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) *RESERVED.*

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—11(a), (b), (c), (e), and (f)—effective for all judgments of the trial division entered on or after 1 July 1989.

Note: Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the new version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

Rule 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—12(a) and (c)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(a) *Petition of Party.* Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in G.S. 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89, or in valuation of exempt property under G.S. Chap. 1C.

(b) *Same; Filing and Service.* A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) *Same; Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. 7A-31 for discretionary review. The petition shall state each question for which review is sought, and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after

determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present questions in addition to those presented by the petitioner, those additional questions shall be stated in the response.

(e) *Certification by Supreme Court; How Determined and Ordered.*

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) *Record on Appeal.*

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note *de novo* any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme

Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner to cover the costs thereof.

(g) *Filing and Service of Briefs.*

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 30 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 30 days after a copy of appellant's brief is served upon him. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme

Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) *Discretionary Review of Interlocutory Orders.* An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) *Appellant, Appellee Defined.* As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to the Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee," a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee," the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party appellant or appellee for purposes of proceeding under this Rule 15.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 7 October 1980—15(g)(2)—effective 1 January 1981;
18 November 1981—15(a);
30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988;
8 December 1988—15(i)(2)—effective 1 July 1989.

Rule 21

CERTIORARI

(a) *Scope of the Writ.*

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) *Petition for Writ; to Which Appellate Court Addressed.* Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The peti-

tion shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) *Response; Determination by Court.* Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

(f) *Petition for Writ in Post Conviction Matters—Death Penalty Cases.* A petition for writ of certiorari to review orders of the trial court denying motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 November 1981—21(a) and (e);
27 November 1984—21(a)—effective 1 February 1985;
3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987;
8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989.

Rule 25

PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply With Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989.

Rule 27

COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* 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 upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state. Such motions may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a) and (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial division entered on or after 1 July 1989.

Rule 31

PETITION FOR REHEARING

(a) *Time for Filing; Content.* A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) *How Addressed; Filed.* A petition for rehearing shall be addressed to the court which issued the opinion sought to be reconsidered. Two copies thereof shall be filed with the clerk.

(c) *How Determined.* Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) *Procedure When Granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 30 days after the case is certified for rehearing, and the opposing party's brief, within 30 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than 30 days after the filing of the petitioner's brief on rehearing.

(e) *Stay of Execution.* When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) *Waiver by Appeal from Court of Appeals.* The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) *No Petition in Criminal Cases.* The courts will not entertain petitions for rehearing in criminal actions.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—31(a)—effective 1 February 1985;
3 September 1987—31(d);
8 December 1988—31(b) and (d)—effective 1 January 1989.

Rule 34

FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed. If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989.

Rule 39

DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court, on paper, microform, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—39(b)—effective 1 January 1989.

ORDER ADOPTING AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 41 and 42 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. Rule 41 is added, and former Rule 41 is renumbered Rule 42. The amendments shall be effective 15 March 1994, and Rule 41 shall apply to all appeals docketed in the Court of Appeals on or after that date.

Adopted by the Court in conference this 3rd day of March 1994. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

s/Parker, J.
PARKER, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 8th day of March 1994.

s/Christie Speir Cameron
CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

Rule 41

APPEAL INFORMATION STATEMENT

(a) The Court of Appeals has adopted an APPEAL INFORMATION STATEMENT which will be revised from time to time. The purpose of the APPEAL INFORMATION STATEMENT is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file and serve the APPEAL INFORMATION STATEMENT as set out in this Rule.

(1) The Clerk of the Court of Appeals shall furnish an APPEAL INFORMATION STATEMENT form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

(3) If any party to the appeal concludes that the APPEAL INFORMATION STATEMENT is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within 7 days of the service of the APPEAL INFORMATION STATEMENT and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

ADMINISTRATIVE HISTORY

Adopted: 3 March 1994.
Effective 15 March 1994 for all appeals docketed in the Court of Appeals on or after 15 March 1994.

Rule 42

TITLE

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general reference or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. _____," is also appropriate.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 3 March 1994—renumbered—effective 15 March 1994

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APPEAL AND ERROR

Constitutionality of an act of General Assembly—required holding—record on appeal—Appeals from orders by a three-judge panel in Wake County concerning the constitutionality of the Boone Act were dismissed where two orders entered on 29 December 2014 did not hold that an act of the General Assembly was facially unconstitutional, as required by the plain text of the statute under which appeal was sought, N.C.G.S. § 7A-27(a1) (2014). Appeal of a subsequent July order that was otherwise appealable by right under that statute was premature because the parties had not settled and filed an appropriate record on appeal. **Town of Boone v. State of North Carolina, 420.**

Corrected Court of Appeals decision—reliance on original version—review by Supreme Court—The Supreme Court had authority under N.C. R. App. P. 16(a) to consider an issue raised by the decision of the Court of Appeals where neither party knew of the existence of a "corrected" version of the Court of Appeals' decision until two weeks before oral arguments in the Supreme Court. The differences between the two opinions that the Court of Appeals filed in this case went beyond changing the identity of the cases upon which the Court of Appeals relied in determining that the State's appeal should be dismissed to significantly changing the basis for the Court of Appeals' decision to dismiss the State's appeal. **State v. Miller, 729.**

Mootness—coal ash lagoons—superseding legislation—The Supreme Court considered whether the trial court erred by reversing a portion of a declaratory ruling issued by the North Carolina Environmental Management Commission (Commission) on 18 December 2012 relating to the application of the Commission's groundwater protection rules to coal ash lagoons. The General Assembly's enactment of Chapter 122 of the 2014 North Carolina Session Laws superseded the rule at issue with respect to coal ash lagoons located at facilities with active permits, and petitioners' appeal from the Commission's declaratory ruling was moot. **Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n, 92.**

Preservation of issues—failure to raise constitutional issue at trial—Although plaintiff deputy sheriff presented additional constitutional arguments on appeal in a wrongful termination case, they were not preserved based on plaintiff's failure to raise them at trial. **Young v. Bailey, 665.**

Preservation of issues—failure to timely object—Defendant failed to make a timely objection in a felony larceny case to a witness's testimony regarding the video surveillance, and thus, he failed to preserve that issue for appellate review. **State v. Snead, 811.**

Preservation of issues—no objections—compelled self-incrimination—North Carolina Rules of Evidence Rule 614(c) provides that "[n]o objections are necessary with respect to . . . questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." This rule operates to preserve for appellate review the impropriety of a trial court's interrogation of a witness even if a party does not object. It does not apply when, as here, a party argues that the trial court's inquiry infringed upon a litigant's privilege against compelled self-incrimination. **Herndon v. Herndon, 826.**

Preservation of issues—use of civil pleadings in criminal prosecution—objection required—The Court of Appeals erred in a prosecution for first-degree murder by determining that defendant was entitled to a new trial on the grounds that the admission of evidence concerning a wrongful death and declaratory judgment

APPEAL AND ERROR—Continued

action and a child custody action violated N.C.G.S. § 1-149. That statute provides that pleadings cannot be used in a criminal prosecution against the party as proof of a fact admitted or alleged, but the N.C. Supreme Court has clearly indicated that a failure to object to the admission of evidence that allegedly violates N.C.G.S. § 1-149 results in a waiver of the right to challenge the admission of that evidence on appeal. **State v. Young, 188.**

Redistricting plan—three-judge panel—appellate review—standard—The North Carolina Supreme Court's review of a three-judge panel trial court decision in a challenge to a redistricting plan was limited. Unchallenged findings were binding, as were findings supported by competent evidence. Conclusions of law were reviewed de novo to determine whether they were supported by the findings. **Dickson v. Rucho, 481.**

Standard of review—jury instructions—plain error—Plain error was the correct standard of review in determining whether the trial court's instructions to a deadlocked jury were improperly coercive where the instructions were to the entire jury and defendant failed to object. *State v. Wilson*, 363 N.C. 478, relied on by defendant, was distinguished. Applying the plain error standard, the trial court's instructions did not result in an unconstitutional coercion. **State v. May, 112.**

ATTORNEYS

Application to take Bar exam denied—candor and truthfulness—pattern of omitting past criminal offenses—The denial of petitioner's application to stand for the July 2011 North Carolina Bar Examination was affirmed where the Board of Law Examiners (Board) concluded that petitioner "failed to carry her burden of proving she possesses the requisite general fitness and good moral character expected of attorneys licensed to practice law in North Carolina." The Board considered the evidence in the record as a whole and concluded that petitioner had demonstrated "a lack of candor and truthfulness" in that she had committed a substantial number of criminal offenses throughout the 1980s and 1990s; failed to disclose six criminal convictions on her law school application; omitted seven criminal charges on her District of Columbia Bar application and six charges of failure to appear on her North Carolina Bar application; and her accounts of a shoplifting incident differed. Counsel for the Board did not dispute petitioner's assertion that she had turned her life around and subsequently "has done remarkable things in her life." The Board weighed all the evidence, reached a decision, and the Board's decision was supported by substantial evidence in view of the whole record. **In re Burke, 226.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Felony breaking or entering—place of religious worship—The State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship. The evidence showed that defendant unlawfully broke and entered Manna Baptist Church late at night, he did not have permission to be inside the church and could not remember what he did while there, and the pastor found defendant's wallet near the place where some of the missing equipment previously had been stored. **State v. Campbell, 83.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Sexual abuse by adult during sleepover—abuser not caretaker—not abused and neglected juvenile—The trial court erred by adjudicating a child an abused and neglected juvenile after she was sexually abused by an adult relative during a sleepover. The abuser's supervision of the child for one night did not render him a "caretaker" under N.C.G.S. § 7B-101(3). Factors that determine whether a person is "entrusted with a juvenile's care" include duration and frequency of care, location of care, and decision-making authority. **In re R.R.N., 167.**

CONSTITUTIONAL LAW

Freedom of speech—cyberbullying statute unconstitutional—The Court of Appeals erred by finding no error in defendant's conviction for cyberbullying. The cyberbullying statute under N.C.G.S. § 14-458.1(a)(1)(d) (2015) was declared unconstitutional because it violated the First Amendment's guarantee of freedom of speech. It restricted speech, not merely nonexpressive conduct; the restriction was content based, not content neutral; and it was not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying. **State v. Bishop, 869.**

Freedom of speech—wrongful termination based on political considerations—sheriff's deputy—The trial court did not err in a wrongful termination case by concluding plaintiff deputy sheriff's First Amendment free speech rights were not violated when she was fired allegedly based on her failure to support the sheriff's reelection. By standing in the elected sheriff's shoes, a deputy sheriff fills a role in which loyalty to the elected sheriff is necessary to ensure that the sheriff's policies are carried out. Mutual confidence and loyalty between a sheriff and a deputy are crucial in accomplishing the sheriff's policies and duties, and thus the dismissal of plaintiff based on political considerations was permissible. **Young v. Bailey, 665.**

North Carolina—Article I, Section 15—Opportunity Scholarship Program—sound basic education—The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article I, Section 15 of the North Carolina Constitution. Article I, Section 15 is not an independent basis for relief under the state constitution, and *Leandro v. State*, 346 N.C. 366 (1997), does not require the state to deliver a sound basic education outside of the public school system. The constitution envisions that children may be education outside of the public school system. **Hart v. State, 122.**

North Carolina—Article I, Section 19—Opportunity Scholarship Program—religious discrimination claim—standing—The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article I, Section 19 of the North Carolina Constitution. Plaintiffs' religious discrimination argument had no effect on the Court's analysis of the public purpose doctrine. Further, plaintiff taxpayers were not in the class of persons allegedly discriminated against by the Program, and they therefore lacked standing to make a standalone claim under Section 19. **Hart v. State, 122.**

North Carolina—Article V, Sections 2(1) and 2(7)—Opportunity Scholarship Program—public purpose—The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article V, Sections 2(1) and 2(7) of the North Carolina Constitution.

CONSTITUTIONAL LAW—Continued

By providing lower-income families monetary assistance to procure additional educational opportunities, the Program involved a "reasonable connection with the convenience and necessity of the [State]" and benefitted the public generally. Therefore, the Program was for a public purpose under Sections 2(1) and 2(7). **Hart v. State, 122.**

North Carolina—Article IX, Section 2(1)—uniformity clause—Opportunity Scholarship Program—educational initiative outside of public school system—The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article IX, Section 2(1) of the North Carolina Constitution. The uniformity clause of Section 2(1) applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system. **Hart v. State, 122.**

North Carolina—Article IX, Section 5—Opportunity Scholarship Program—appropriation from general funds—educational initiative outside of public school system—The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article IX, Section 5 of the North Carolina Constitution. Because Article IX, Section 6 permits the General Assembly to appropriate funds from the general revenue to support educational initiatives outside of the public school system, plaintiffs' arguments under Section 5—that the funding for the Program should have gone to the public schools—was without merit. **Hart v. State, 122.**

North Carolina—Article IX, Section 6—Opportunity Scholarship Program—appropriation from general funds—educational initiative outside of public school system—The trial court erred by granting summary judgment in favor of plaintiff taxpayers on their claim alleging that the Opportunity Scholarship Program violated Article IX, Section 6 of the North Carolina Constitution. While Section 6 mandates that funds from certain sources be used exclusively to support the state's public school system, the section does not prohibit the General Assembly from appropriating funds from the general revenue to support other educational initiatives outside of the public school system. **Hart v. State, 122.**

Review of state constitutional issues—de novo—presumed constitutionality—The North Carolina Supreme Court reviews constitutional questions de novo. In exercising de novo review, it is presumed that laws enacted by the General Assembly are constitutional, and a law will not be declared invalid unless it is determined that the law is unconstitutional beyond reasonable doubt. To determine whether the violation is plain and clear, the Supreme Court looks to the text of the state Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and the Court's precedents. **State ex rel. McCrory v. Berger, 633.**

Right against self-incrimination—not invoked—voluntary witness—The trial court did not infringe upon defendant's Fifth Amendment right against self-incrimination in a Domestic Violence Protective Order proceeding where defendant did not invoke the privilege against self-incrimination and defendant was in control of her testimony by virtue of her decision to take the stand. The right against self-incrimination operates differently depending on whether a witness is compelled to testify or testifies voluntarily. A voluntary witness cannot claim an immunity from cross-examination on the matters he has himself put in dispute. **Herndon v. Herndon, 826.**

CONSTITUTIONAL LAW—Continued

State constitution—appointments clause—authority of governor and legislature—Considering whether the appointments clause in Article III, Section 5(8) of the North Carolina Constitution prohibits the General Assembly from appointing statutory officers, the North Carolina Supreme Court concluded that this clause gives the Governor the exclusive authority to appoint constitutional officers whose appointments are not otherwise provided for by the constitution. The appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions. **State ex rel. McCrory v. Berger, 633.**

State constitution—separation of powers—legislative appointments to administrative commissions—Challenged statutory provisions involving legislative appointments to administrative commissions violated the separation of powers clause in the North Carolina Constitution by preventing the Governor from performing his constitutional duty. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself. **State ex rel. McCrory v. Berger, 633.**

CONTRACTS

Non-compete agreement—overbroad restrictions—court may not amend—blue pencil doctrine not available—The trial court correctly declined to enforce a covenant not to compete even though the parties expressly agreed in their contract that a court could rewrite overbroad temporal and territorial limitations that would otherwise render the covenant unenforceable. A court may not unilaterally amend the terms of a non-compete contract, and parties cannot contract to give a court power that it does not have. Further, the blue pencil doctrine could not save the non-compete agreement because the only restrictions in the agreement—restrictions to all of North Carolina and South Carolina—were unreasonable, and nothing would remain if the court struck out the unreasonable portions. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

COSTS

Expert witness fees—for actual time spent—not under subpoena—In a medical malpractice action, the trial court did not err by awarding expert witness fees as costs to defendants for the actual time the expert witnesses spent providing deposition testimony even though the expert witnesses were not under subpoena. N.C.G.S. § 7A-305(d)(11) allows the trial court to tax "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings" whether or not the expert witnesses were subpoenaed. **Lassiter v. N.C. Baptist Hosps., Inc., 367.**

CRIMINAL LAW

Deadlocked jury—instructions—no plain error—Where the trial court in three separate instructions repeatedly emphasized to deadlocked jurors the importance of their individual convictions, while giving instructions that substantially tracked the language of N.C.G.S. § 15A-1235(b), the court's instruction to continue deliberations for thirty minutes and the isolated mention of a retrial did not rise to the level of being so fundamentally erroneous as to constitute plain error. **State v. May, 112.**

DRUGS

Conspiracy to traffic in opium—motion to dismiss—circumstantial evidence—There was sufficient evidence to support defendant's conviction for conspiracy to traffic in more than four but less that fourteen grams of opium in violation of N.C.G.S. § 90-95(h)(4)(a). In the light most favorable to the State, the record showed that defendant mailed sixty Oxycodone pills in an unmarked pill bottle to a person whom he knew to have a history of using and selling controlled substances. The State may rely on circumstantial evidence to survive a motion to dismiss. **State v. Winkler, 572.**

Possession and transportation offenses—jury instructions—actual knowledge of identity of drugs—In defendant's trial resulting in his convictions for trafficking in at least 400 grams of cocaine by possession, trafficking in at least 400 grams of cocaine by transportation, and possession of cocaine with the intent to sell or deliver, the trial court did not err by failing to adequately instruct the jury that the State had to prove beyond a reasonable doubt that defendant actually knew that he had possessed and transported cocaine. Because defendant did not contend that he did not know the true identity of what he possessed, the trial court was not required to give the additional instruction that the jury must find that "defendant knew that what he possessed was cocaine." **State v. Galaviz-Torres, 44.**

Possession and transportation offenses—jury instructions—actual knowledge of identity of drugs—plain error review—In defendant's trial resulting in his convictions for trafficking in at least 400 grams of cocaine by possession, trafficking in at least 400 grams of cocaine by transportation, and possession of cocaine with the intent to sell or deliver, the trial court did not commit plain error by failing to adequately instruct the jury that the State had to prove beyond a reasonable doubt that defendant actually knew that he had possessed and transported cocaine. The State presented considerable evidence that defendant actually knew that he possessed and transported cocaine, and therefore the Supreme Court could not conclude that any error had a probable impact on the jury's verdict. **State v. Galaviz-Torres, 44.**

ELECTIONS

Redistricting—federal and state constitutional requirements—on remand—Where a previous decision of the North Carolina Supreme Court in a redistricting case was remanded by the U.S. Supreme Court for further consideration in light of its decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ____ (2015) (*Alabama*), the North Carolina Supreme Court held that the three-judge panel trial court decision fully complied with *Alabama*. In North Carolina, the General Assembly's priorities can only be implemented in accordance with the federal and state constitutional requirements as specified by the N.C. Supreme Court, whereas in *Alabama* the redistricting plan was drawn according to guidelines adopted by legislative committee; in *Alabama* the state was considered as a whole rather than

ELECTIONS—Continued

district by district, as in N.C.; there was a standing issue as to one plaintiff which was not relevant here; the Alabama legislature placed great emphasis on ensuring that no district deviated by more than a theoretical equal population ideal, while in North Carolina equal population criteria are a component of and intertwined with the state constitution's Whole County Provision and equal population is a part of the redistricting background but is not a factor to be weighed against the use of race to determine whether race predominates; and, lastly, in *Alabama* the U.S. Supreme Court held that the district court misinterpreted the requirements of section 5 of the Voting Rights Act in finding that the challenged districts were "narrowly tailored" to satisfy strict scrutiny, while the North Carolina three-judge panel's conclusion here that the twenty-six challenged VRA districts survive strict scrutiny was consistent with the U.S. Supreme Court's clarification of the section 5 narrow tailoring analysis. **Dickson v. Rucho, 481.**

Redistricting—federal requirements—primary concern—federal law rather than race—When making redistricting decisions, federal and state law must be read in harmony, although a redistricting plan that does not satisfy federal requirements fails even if it is consistent with the law of North Carolina. The Fourteenth Amendment, by guaranteeing equal protection for all citizens regardless of race, essentially prohibits consideration of race during redistricting; however, at the same time, the General Assembly must ensure that, to the greatest extent allowed under federal law, the state legislature's redistricting plans comply with the Whole County Provision of the North Carolina Constitution. Despite a cat's cradle of factors facing the General Assembly, the three-judge trial court panel in this case found that no factual inquiry was required regarding the General Assembly's predominant motivation in forming twenty-six Voting Rights Act districts beyond the General Assembly's concession that the districts were drafted to be VRA-compliant. In light of the many other considerations potentially in play, the Court did not believe that this concession established that race ipso facto was the predominant motive driving the General Assembly. It appeared from the three-judge panel's findings that the General Assembly was concerned with compliance with federal law more than addressing race per se. **Dickson v. Rucho, 481.**

Redistricting—gerrymandering—In a redistricting case which challenged four districts as being the result of racial gerrymandering, the General Assembly's actions in creating these districts were rationally related to all its expressed goals. The U.S. Supreme Court has recognized that compliance with federal law, incumbency protection, and partisan advantage are all legitimate governmental interests. **Dickson v. Rucho, 481.**

Redistricting—process—Considering redistricting issues under the Whole County Provision of the North Carolina Constitution, the General Assembly first must create all necessary Voting Rights Act districts, single-county districts, and single counties containing multiple districts. Thereafter, the General Assembly should make every effort to ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on. **Dickson v. Rucho, 481.**

Redistricting—splitting districts—lack of compactness—A purported lack of compactness of legislative districts created by the General Assembly and the harm resulting from splitting precincts may be valid considerations, but neither constitutes an independent legal basis for finding a constitutional violation, and there is no justiciable standard by which to measure these local factors. **Dickson v. Rucho, 481**.

ELECTIONS—Continued

Redistricting—state constitution—Good of the Whole Clause—Enacted redistricting plans did not violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. Plaintiffs proffered maps representing their good faith understanding of a plan they believed to be best for the State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," plaintiffs' claims failed. **Dickson v. Rucho, 481.**

EMINENT DOMAIN

Contiguous properties—development plan—unity of ownership—vested right to complete subdivision—In a condemnation action, the owners of the undeveloped portions of a subdivision had a vested right to complete the subdivision in accordance with the pre-approved development plan. The owners—the named defendant and the limited liability company—owned contiguous properties subject to the vested, unified development plan, and Darryl Wayne had at least a modicum of interest in both properties. Therefore, the unity of ownership requirement was satisfied for the purpose of determining compensation. **Town of Midland v. Wayne, 55.**

Inverse condemnation—Map Act—recordation of highway corridor map—taking without just compensation—The Court of Appeals did not err by reversing the dismissal of plaintiffs' inverse condemnation claim. The use of the Map Act by defendant Department of Transportation to record the pertinent highway corridor map resulted in a taking of plaintiffs' property rights without just compensation. On remand, the trier of fact must determine the value of the loss of these fundamental rights by calculating the value of the land before and after the corridor map was recorded, taking into account all pertinent factors including the restriction on each plaintiff's fundamental rights as well as any effect of the reduced ad valorem taxes. **Kirby v. N.C. Dep't of Transp., 847.**

Vested right to complete subdivision—not separate property interest—enhanced value—In a condemnation action, the property owners' vested right to complete the subdivision was not a separate property interest from the real estate. Instead, it was a quality that enhanced the value of the property before the taking. **Town of Midland v. Wayne, 55.**

EMPLOYER AND EMPLOYEE

Patent bonuses—liquidated damages—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not abuse its discretion by concluding that plaintiff was not entitled to liquidated damages on the jury's award of issuance bonuses associated with unissued patents. The employer had reason to believe that it did not owe plaintiff the bonuses. **Morris v. Scenera Research, LLC, 857.**

Patent bonuses—rescission—money damages sufficient remedy—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Court of Appeals erred by holding that plaintiff was entitled to rescission. A party may pursue rescission

EMPLOYER AND EMPLOYEE—Continued

only when a material breach occurs *and* all legal remedies fall short of compensating the injured party for its loss. Plaintiff claimed that his employer owed him $5,000 to $10,000 for each patent at issue, and money damages provided him with a complete remedy. **Morris v. Scenera Research, LLC, 857.**

Patent bonuses—Retaliatory Employment Discrimination Act damages—not trebeled—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err when it declined to treble the jury's award of Retaliatory Employment Discrimination Act (REDA) damages. Proving a willful violation of N.C.G.S. § 95-241 requires a showing of the accused party's knowledge or reckless disregard of whether an action violated the statute. Competent evidence supported the trial court's decision to not treble plaintiff's REDA award. **Morris v. Scenera Research, LLC, 857.**

Wage and Hours Act—patent bonuses—calculability—question for jury—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the Supreme Court affirmed the holding of the Court of Appeals that the question of whether a wage is "calculable" under the Wage and Hours Act is one of fact, not law, and that the trial court properly submitted the question to the jury. Plaintiff argued at trial that value of the patent issuance bonuses for patent applications still pending with the U.S. Patent and Trademark Office could be calculated using the following formula: 150 outstanding patents x $5,000 for each successfully issued patent x 90% patent issuance success rate = $675,000. The employer failed to offer any other formula at trial, and the meaning of "calculable" includes "capable of being estimated." **Morris v. Scenera Research, LLC, 857.**

Wage and Hours Act—patent bonuses—patents pending when employment ended—In a compensation and intellectual property dispute between plaintiff and his former employer arising from the employer's patent bonus program, the trial court did not err by denying the employer's motions for direct verdict and judgment notwithstanding the verdict on the issue of whether plaintiff was entitled to patent issuance bonuses for patents still pending when his employment ended. Plaintiff presented more than a scintilla of evidence supporting his Wage and Hours Act claim: Plaintiff testified that his bonuses were earned at the time the patents were filed, and another witness confirmed that bonuses were earned at the time patents were filed. **Morris v. Scenera Research, LLC, 857.**

EVIDENCE

Authentication—video surveillance—The Court of Appeals erred by reversing defendant's conviction for felony larceny based on a video showing defendant stealing shirts from a Belk Department Store. By presenting evidence that the video surveillance system was reliable and that the video presented at trial had not been altered, the State properly authenticated the video. **State v. Snead, 811.**

Expert opinion testimony—general characteristics of child sexual assault victims—possible reasons for delayed reporting of allegations—subject to disclosure in discovery in sexual offense prosecution—In defendant's prosecution for sexual offenses perpetrated against two minors, the State failed to satisfy its statutory obligations when it did not produce summaries of its expert witnesses' opinions and the basis for those opinions in response to defendant's discovery

EVIDENCE—Continued

requests. Expert testimony about the general characteristics of child sexual assault victims and the possible reasons for delayed reporting of sexual assault allegations constitutes expert opinion testimony, subject to disclosure in discovery under N.C.G.S. § 15A-903(a)(2). The Supreme Court modified and affirmed the decision of the Court of Appeals upholding defendant's conviction because defendant failed to show that there was a reasonable possibility that the jury would have reached a different result absent the erroneously admitted expert opinion testimony. **State v. Davis, 794.**

Expert witness testimony—excluded—no abuse of discretion—The trial court did not abuse its discretion in a first-degree murder prosecution in which defendant claimed self-defense by excluding evidence from a defense expert, Mr. Cloutier, on the use of force. The trial court concluded that Mr. Cloutier's testimony about pre-attack cues and use of force variables would not assist the jury because those matters were within the jurors' common knowledge; that Mr. Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system; and that Mr. Cloutier's reaction time testimony was based on speculation and not reliable. **State v. McGrady, 880.**

Expert witness testimony—standards—adoption of federal standard—A 2011 amendment to Rule 702(a) of the North Carolina Rules of Evidence adopted the federal standard for the admission of expert witness testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its line of cases. The proper interpretation of Rule 702(a) remains an issue of state law, and previous N.C. cases are still good law if they do not conflict with the *Daubert* standard. **State v. McGrady, 880.**

Expert witness testimony—standards—application of new rule—Rule 702(a) of the North Carolina Rules of Evidence has three main parts, and expert testimony must satisfy each to be admissible. Expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience and must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case" for its own. Expertise can come from practical experience as much as from academic training, but the question remains whether the witness has enough expertise to be in a better position than the trier of fact to have an opinion on the subject. And, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data; (2) the testimony must be the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case. **State v. McGrady, 880.**

Findings—material conflict in the evidence—insufficient explanation of rationale—Disagreement between two expert witnesses created a material conflict in the evidence at a suppression hearing where the experts differed on defendant's apparent degree of impairment, a fact essential to the probable cause determination. A finding of fact, whether written or oral, was required to resolve this conflict, but the judge made no such finding. Although he did attempt to explain his rationale for granting the motion, none of his statements could be construed as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there could be no meaningful appellate review of the trial judge's decision. **State v. Bartlett, 309.**

Findings—required only for material conflict—Case law requires findings of fact at a suppression hearing only when there is a material conflict in the evidence

EVIDENCE—Continued

and allows the trial court to make these findings either orally or in writing. Cases that suggested otherwise were disavowed. **State v. Bartlett, 309.**

Material conflict—finding by second judge—suppression hearing required— A new evidence suppression hearing was required where one judge made an inadequate oral finding resolving a material conflict in the evidence, left office, and another judge resolved the evidentiary conflict without holding another suppression hearing. **State v. Bartlett, 309.**

Other crimes or bad acts—murder—photographs of burnt body—victim's good character—perjury—The trial court erred in a first-degree murder case by allowing admission of an excessive amount of the Saldana murder evidence under Rule 404(b), including more than a dozen photographs of her burnt body; by allowing a witness to testify about Saldana's good character; and by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury. The cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial. Defendant's conviction and sentence were vacated and remanded for a new trial. **State v. Hembree, 2.**

Potential bias of witness—relevant—weak probative value—potential to confuse jury—In defendant's trial resulting in his convictions for robbery with a dangerous weapon, second-degree burglary, and first-degree murder under the felony murder rule, the trial court did not abuse its discretion by excluding evidence of a voice message that showed a potential bias against defendant by defendant's sister who testified for the State. The trial court properly concluded that the voice message met the low bar of relevancy and then conducted a Rule 403 analysis. The sister was not a key witness for the State, and the trial court properly balanced the weak probative value of the voice message against the possibility of confusing the jury with information about a feud within defendant's family. **State v. Triplett, 172.**

Preservation of issues—risk of prejudice outweighing probative value—use of civil pleadings in criminal case—The Court of Appeals erred by awarding a first-degree murder defendant a new trial based upon the admission of evidence concerning defendant's response to a wrongful death and declaratory judgment action and a child custody action where defendant objected under N.C.G.S. § 8C-1, Rule 403. As a general proposition, appellate decisions holding that a trial court erroneously failed to sustain an objection lodged pursuant to N.C.G.S. § 8C-1, Rule 403, tend to rest on determinations that the admission of the evidence in question served little or no purpose other than to inflame the passions of the jury. A careful review of the record demonstrated that the evidence relating to the wrongful death and declaratory judgment action had at least some material probative value for the purpose of challenging the validity of defendant's alibi defense. Moreover, the trial court made a serious attempt to address the risk of unfair prejudice. **State v. Young, 188.**

GUARANTY

Guarantors—anti-deficiency legislation—waiver—Guarantors were among the class of obligors eligible to claim the benefit of N.C.G.S. § 45-21.36. A guarantor is protected by the provision of statute that provides for a judicial method of determining the indebtedness. It is not the type of "defense or offset" which is subject to waiver. Further, because anti-deficiency legislation is so narrowly tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this

GUARANTY—Continued

statutory protection as a prerequisite to receipt of a mortgage or as a condition of a guaranty agreement would violate public policy. **High Point Bank and Trust Co. v. Highmark Properties, LLC, 301.**

INDICTMENT AND INFORMATION

Damage to real property—identity of property vital—owner's name not essential—An indictment charging injury to real property was valid on its face where the indictment alleged damage to "Katy's Great Eats" rather than the proper legal name of the corporate entity, "Katy's Great Eats, Inc." Unlike personal property, real property is inherently unique; it cannot be duplicated, as no two parcels of real estate are the same. In an indictment alleging injury to real property, identification of the property itself rather than the owner or ownership interest is vital. The owner or lawful possessor's name may be used to identify the specific parcel of real estate but it is not an essential element of the offense that must be alleged in the indictment. The indictment gave defendant reasonable notice of the charge against him. **State v. Spivey, 739.**

Injury to personal property—owned by multiple entities—The Court of Appeals erred by holding that the indictment charging defendant with injury to personal property was fatally flawed for failure to allege that each owner of the property was an entity capable of owning property. When an indictment alleges that injury to personal property was committed against multiple entities, at least one of which was capable of owning property, the indictment is not facially invalid. **State v. Ellis, 342.**

Registered sex offender change of address—"three business days" statutory language—The indictment charging defendant, a registered sex offender, with failure to provide timely written notice of his change of address in violation of N.C.G.S. § 14-208.11 was valid and conferred jurisdiction upon the trial court. Omission of the word "business" from the phrase "third business day" as set forth in § 14-208.9(a) did not deprive defendant of notice of the charge against him. The indictment included the critical language of § 14-208.11, alleging that defendant failed to report "as a person required by Article 27A of Chapter 14." **State v. Williams, 620.**

JUDGES

Discipline—improper courtroom conduct—In a judicial discipline case involving inappropriate conduct by a district court judge in the courtroom, the North Carolina Supreme Court concluded that the Judicial Standards Commission's findings of fact were supported by clear, cogent, and convincing evidence in the record and that its findings of fact supported its conclusions of law. The Supreme Court concluded and adjudged that the judge should be publicly reprimanded. **In re Hill, 410.**

JUDGMENTS

Entry of order—absence of written order—The Court of Appeals erred by dismissing the State's appeal from the trial court's order in an intoxicated driving case on the theory that the order had never been properly entered. The Court of Appeals had noted that the record on appeal did not include a written copy of the order and held that it lacked jurisdiction in the absence of a written order. However, a trial court has entered a judgment or order in a criminal case in the event that it announces its ruling in open court and the courtroom clerk makes a notation of its

JUDGMENTS—Continued

ruling in the minutes being kept for that session. The order from which the State noted its appeal was, in fact, entered in accordance with *State v. Oates*, 366 N.C. 264 (2012). **State v. Miller, 729.**

JURISDICTION

Subject matter jurisdiction—appeal of order granting motion for appropriate relief—Court of Appeals had jurisdiction to review—Where the trial court granted defendant's motion for appropriate relief (MAR), the Court of Appeals had subject matter jurisdiction to hear the State's appeal. The General Statutes give the Court of Appeals jurisdiction to issue writs to supervise the state's trial courts, N.C.G.S. § 7A-32(c), and they also specify that appeals relating to MARs may be taken by writ of certiorari, N.C.G.S. § 15A-1422(c). The language in the Rules of Appellate Procedure that a writ of certiorari may be issued to review an order of a trial court "denying" a MAR does not limit the jurisdiction of the Court of Appeals as established by the General Statutes. **State v. Stubbs, 40.**

JUVENILES

Petition—illegible signature—Respondent failed to show that a juvenile petition was not properly verified where a space on the petition for "Signature of Person Authorized to Administer Oaths" had an illegible signature and the space for the person's title was not filled in. By signing in a space with such a conspicuous designation, the person who did so necessarily represented that he or she possessed such authority, and there was nothing in the record indicating that this person lacked the authority he or she claimed to possess. **In re N.T., 705.**

KIDNAPPING

Disjunctive verdict—no error—The trial court's disjunctive jury instruction in a first-degree kidnapping prosecution did not violate defendant's constitutional right to be convicted only by the unanimous verdict of a jury in open court. The Court of Appeals concluded that the challenged instruction would have allowed one or more jurors to convict defendant based on a theory not supported by the evidence, but our case law has long embraced a distinction between unconstitutionally vague instructions that render unclear the offense for which the defendant is being convicted and instructions which instead permissibly state that more than one specific act can establish an element of a criminal offense. **State v. Walters, 749.**

LARCENY

Indictment—legal entity capable of owning property—church or other place of religious worship—The Court of Appeals erred by concluding that a larceny indictment was fatally flawed because it failed to allege that Manna Baptist Church was a legal entity capable of owning property. Alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that have held otherwise was overruled. **State v. Campbell, 83.**

LOANS

Appraisal—alleged wrongful omissions—failure to plead justifiable reliance—The trial court did not err by dismissing plaintiff's claim based on its conclusion that all claims against BB&T were premised upon wrongful omissions by BB&T regarding the loan and appraisal process. Because no legal duty exists at law between a debtor and creditor, or between a bank's appraisers and a purchaser, plaintiffs' claims, as pled, failed. Moreover, because plaintiffs failed to sufficiently allege justifiable reliance upon the faulty appraisal information, or lack thereof, or that plaintiffs' injuries were proximately caused by either the bank or the appraisers, dismissal was proper. **Arnesen v. Rivers Edge Golf Club & Plantation, Inc., 440.**

Refinancing—no misrepresentation by lender—small business loan not available—BB&T was entitled to summary judgment in its favor as to all of plaintiff's claims and as to all but the interest claim stated in BB&T's counterclaim in a contract and tort action arising from a commercial loan from BB&T to plaintiff. The small business, government-backed loan that plaintiff expected was not available and BB&T made a new commercial loan to plaintiff, with subsequent modifications, thereby consolidating plaintiff's debts and giving him additional cash. It was undisputed that this occurred several months after plaintiff became aware that the desired government-backed loan was not available. The record reveals no misrepresentation inducing plaintiff to obtain this second loan, and plaintiff then executed a series of six modifications, all of which unambiguously reaffirmed the obligation and expressly waived any offsets and defenses against the indebtedness or the bank. **Ussery v. Branch Banking and Trust Co., 325.**

NEGLIGENCE

Traffic accident at intersection—conflicting evidence—There was sufficient evidence from which a jury could impute negligence to both drivers in a car wreck in which one made a left turn. There was conflicting evidence as to when the driver making the left turn entered the intersection, whether he should have seen the other driver, and the color of the traffic light when the other driver entered the intersection. The jury was in the best position to weigh the evidence. **Ward v. Carmona, 35.**

Traffic accident at intersection—left turn—prior case distinguished—The Court of Appeals did not create a new theory of motor vehicle negligence inconsistent with existing law when it stated, in a traffic accident case involving a left turn at a traffic light, that drivers must maintain a reasonable lookout even with a green light. This case involved a left turn; N.C.G.S. § 20-158(b)(2)(a) permits right turns on red, and *Cicogna v. Holder*, 345 N.C. 488, involved a driver proceeding straight into an intersection on a green light. **Ward v. Carmona, 35.**

PARENT AND CHILD

Parent-child doctrine—unemancipated minors—not a bar to gross negligence, intentional infliction of emotional distress, or punitive damages—bars ordinary negligence—The Court of Appeals erred in a negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress, gross negligence, and punitive damages case by reversing in part the trial court's order granting summary judgment in favor of defendant. The parent-child immunity doctrine neither bars unemancipated minors' claims based on gross negligence and intentional infliction of emotional distress nor defeats their claims

PARENT AND CHILD—Continued

for punitive damages. The parent-child immunity doctrine 'bars actions between unemancipated children and their parents based on ordinary negligence. **Needham v. Price, 563.**

PARTIES

Guarantors—permissive joinder—Plaintiff argued that joinder of Highmark was improper because N.C.G.S. § 26-12 did not apply to guarantors in this case. However, the law allows permissive or discretionary joinder and that statute allows joinder for the explicit purpose of giving the surety access to all defenses available to the primary borrower. Guarantors were permitted to move for joinder and the trial court committed no abuse of discretion by joining Highmark to this action. **High Point Bank and Trust Co. v. Highmark Properties, LLC, 301.**

POLICE OFFICERS

Dismissal of highway trooper—failure to exercise discretion—misapprehension of law—The commanding officer of the North Carolina State Highway Patrol acted under a misapprehension of law when he dismissed a State Trooper (petitioner) from employment for an alleged violation of the Patrol's truthfulness policy. The commanding officer erroneously believed that he was required to dismiss petitioner and thus failed to exercise his discretion based on the circumstances of the case. The Supreme Court remanded the matter to the employing agency for determination of whether petitioner's conduct constituted just cause for dismissal. **Wetherington v. N.C. Dep't of Pub. Safety, 583.**

POSSESSION OF STOLEN PROPERTY

Vehicle—jury instructions—lesser-included offense—The trial court did not err by denying defendant's request to instruct the jury on unauthorized use of a motor vehicle because that offense is not a lesser-included offense of possession of a stolen vehicle. The "use" offense contains an element—"taking or operating"—that is not included in the "possession" offense. **State v. Robinson, 402.**

PUBLIC OFFICERS AND EMPLOYEES

Wrongful termination—firing of sheriff's deputy—not a county employee—no public policy violation—The trial court did not err in a wrongful termination case, arising from the firing of a deputy by defendant sheriff for reasons allegedly attributable to her failure to support the sheriff's reelection, by granting summary judgment in favor of defendant sheriff. North Carolina is an employment-at-will state. Further, a deputy sheriff or employee of a sheriff's office is not a county employee. As a result, plaintiff was not covered by the public policy violation under N.C.G.S. § 153A-99 and her suit brought under that statute failed. **Young v. Bailey, 665.**

PUBLIC RECORDS

Court records—private party request for copy of Automated Criminal/Infraction System—nonexclusive contracts—sole means of remote electronic access—The Court of Appeals erred by concluding that the Public Records Act provided the legal basis for granting plaintiff private companies' request seeking a copy of the Automated Criminal/Infraction System (ACIS) from the North Carolina

PUBLIC RECORDS—Continued

Administrative Office of the Courts. While the Public Records Act applies generally to state government records, N.C.G.S. § 7A-109 is specifically limited to court records. The General Assembly intended that the nonexclusive contracts authorized in section 7A-109(d) be the sole means of remote electronic access to ACIS. This case was remanded to the Court of Appeals for consideration of plaintiffs' remaining issues on appeal. **LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts, 180.**

SCHOOLS AND EDUCATION

Career Status Law—did not in itself create vested rights—A statute governing the employment of teachers, the Career Status Law (now repealed), did not itself create any vested contractual rights. That statute contemplated the creation of individual contracts between school boards and teachers but did not itself establish any benefit provided to teachers by the State nor create any relationship between them. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Career Status Law—implied inclusion in local contracts—Although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Impairment of teachers vested rights—method not reasonable and necessary—Even if a legitimate public purpose existed justifying an impairment of vested teachers' rights by repeal of the Career Status Law, the method adopted for alleviating that harm must be necessary and reasonable. Less sweeping alternatives were possible. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Repeal of Career Status Law—impairment of vested rights—Teachers' vested rights were substantially impaired by the repeal of the Career Status Law. Retroactively revoking this status from those whose career status rights had already vested deprived career teachers of the promise of continuing employment as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

Teachers—impairment of contractual rights—no legitimate public purpose—Although a substantial impairment of teacher's contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose, there was not a legitimate public purpose for which it was necessary to impair substantially the vested contractual rights of career status teachers. Alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, but no evidence indicates that such a problem existed. **N.C. Ass'n of Educators, Inc. v. State of N.C., 777.**

SEARCH AND SEIZURE

Initial investigatory stop—neighborhood known for drugs—The unchallenged findings of fact made by the trial court sufficiently established that a Greensboro police officer had reasonable suspicion to conduct a brief investigatory stop of defendant. Being mindful of the dangers of making the simple act of walking in one's own neighborhood a possible indication of criminal activity, the Supreme Court

SEARCH AND SEIZURE—Continued

noted that defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations, and that defendant and another man twice split up and walked in opposite directions upon seeing a marked police vehicle approach. **State v. Jackson, 75.**

Search warrant—probable cause—totality of circumstances—The trial court did not err by denying defendant's motion to suppress evidence of contraband found in his home pursuant to a search warrant. Based on the totality of the circumstances, the magistrate had a substantial basis for concluding that probable cause existed to justify the warrant. The affidavit attached to the search warrant application described the citizen complaint about suspected drug activity that led to the officers' surveillance, the arrest of a man who spent six minutes in defendant's home and was found to have a substantial amount of cash and remnants of marijuana in his vehicle, and the text messages regarding a drug sale on the man's cell phone. **State v. McKinney, 161.**

Warrantless search—residence—civil domestic violence protective order—The trial court erred in a manufacturing a controlled substance, maintaining a place to keep controlled substances, and possession of drug paraphernalia case by denying defendant's motion to suppress evidence discovered during the search of his residence. N.C.G.S. § 50B-3(a)(13) does not authorize the district court to order a search of defendant's residence under a civil domestic violence protective order. The search of defendant's home, conducted without a warrant or any articulable exception to the warrant requirement, violated defendant's fundamental rights protected by the Federal and State Constitutions. **State v. Elder, 70.**

SEXUAL OFFENDERS

Failure to register—after initial compliance and subsequent incarceration—The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had previously filled out his registration paperwork, and, following his release, did not provide in-person or written notice that he had changed his address to the Urban Ministry Center. **State v. Crockett, 717.**

Failure to register—after initial compliance and subsequent incarceration—out-of-state residence—The trial court did not err by denying defendant's motion to dismiss one count of failure to register as a sex offender under N.C.G.S. § 14-208.11. The State's evidence showed that defendant had been incarcerated, had signed a registration form upon his release, and had failed to provide the required notification when he later moved to South Carolina. **State v. Crockett, 717.**

Registration—after initial compliance and subsequent incarceration—On discretionary review of the Court of Appeals' decision affirming defendant's convictions for failure to register as a sex offender, the Supreme Court held that N.C.G.S. § 14-208.9, the "change of address" statute—not section 14-208.7, the "registration" statute—governs in situations in which a sex offender who has already complied with the initial registration requirements is later incarcerated and then released. **State v. Crockett, 717.**

Registration—failure to notify of new address after release from incarceration—The Court of Appeals erred in a termination of parental rights case by

SEXUAL OFFENDERS—Continued

concluding the trial court did not have subject matter jurisdiction based on the unverified petition. The signature of the person before whom it was verified was illegible and nothing in the record identified that person's name or title. In light of the presumption of regularity which places the burden of proof on the party challenging jurisdiction, respondent failed to show that the petition was not properly verified. Respondent never submitted any evidence, or even any specific allegations, tending to overcome the presumption of regularity. **State v. Barnett, 710.**

Unauthorized accessing of social networking website—Facebook—constitutionality of statute—The Court of Appeals erred by vacating defendant's conviction for accessing a social networking website as a registered sex offender based on its determination that N.C.G.S. § 14-202.5 was unconstitutional on its face and as applied to defendant. N.C.G.S. § 14-202.5 is constitutional on its face because it satisfies *O'Brien*'s four factors, *U.S. v. O'Brien*, 391 U.S. 367 (1968). N.C.G.S. § 14-202.5 is narrowly tailored to serve a substantial governmental interest, and leaves available ample alternative channels of communication. Further, the incidental burden imposed upon this defendant, who was barred from Facebook but not from many other sites, was not greater than necessary to further the governmental interest of protecting children from registered sex offenders. Finally, defendant's conduct defeated his vagueness claim. **State v. Packingham, 380.**

TERMINATION OF PARENTAL RIGHTS

Competency inquiry—parental guardian ad litem—The trial court did not abuse its discretion in a termination of parental rights case by failing to inquire into the issue of whether respondent mother was entitled to the appointment of a parental guardian ad litem. Sufficient evidence showing that respondent was not incompetent existed to obviate the necessity for the trial court to conduct a competence inquiry before proceeding with the termination hearing. **In re T.L.H., 101.**

Failure to make reasonable progress—budgeting, housing, transportation, domestic violence—The trial court did not err by terminating respondent-mother's parental rights for failure to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children. The trial court found that respondent had failed to budget her funds, resulting in continuing failure to use incoming funds to meet her children's needs; that she had not maintained consistent housing and had been evicted from several residences for failure to pay rent; that she had lost employment due to incarceration as a result of a domestic violence incident with the father; and that she continued to drive without a valid North Carolina driver's license. These findings demonstrated that respondent's failure to correct the conditions that led to the removal of her children was not simply a result of poverty, and the Court of Appeals erred by holding that the trial court did not have the authority to order respondent to comply with the corresponding requirements of her case plan. **In re D.L.W., 835.**

Neglect—domestic violence between parents—placed children at risk—The trial court did not err by terminating respondent-mother's parental rights on the basis of neglect due to domestic violence between the parents. In its order terminating respondent's parental rights, the trial court found that the domestic violence between the parents put the children at risk and that one of the children had intervened in an argument between the parents; that there were further incidents of domestic violence after the adjudication order; and that respondent could not

TERMINATION OF PARENTAL RIGHTS—Continued

articulate what she had learned in her domestic violence counseling sessions. The trial court's findings were sufficient to support its conclusion that there would be a repetition of neglect based upon the juveniles "liv[ing] in an environment injurious to [their] welfare." The Court of Appeals erred by concluding that the ongoing domestic violence was irrelevant to a determination of whether the juveniles were neglected. **In re D.L.W., 835.**

TORT CLAIMS ACT

Jurisdiction—school activity bus accident—not covered by waiver of governmental immunity—The Industrial Commission did not have jurisdiction over plaintiff's action brought under the Torts Claims Act to recover for alleged negligence by an employee of a local board of education in the operation of an activity bus transporting students and school staff to an extracurricular event. The waiver of governmental immunity provided in N.C.G.S. § 143-300.1 of the Tort Claims Act did not apply to this set of facts. Public school buses, school transportation service vehicles, and school activity buses are distinct categories of vehicles, and school activity buses were not incorporated into the waiver of immunity contemplated by the Tort Claims Act. **Irving v. Charlotte-Mecklenburg Bd. of Educ., 609.**

TORTS, OTHER

Tortious interference with contract—no express or implied-in-fact contract—Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with contract. Plaintiff failed to establish a contract—express or implied-in-fact—with its customers. There was no evidence of any legal obligation of a third-party customer to the companies sold to plaintiff, and defendants were not restrained by the overbroad non-compete covenant. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

Tortious interference with prospective economic advantage—mere expectation of continuing business relationship—no evidence of contract—no evidence of malice—Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's claim for tortious interference with prospective economic advantage. Plaintiff's mere expectation of a continuing business relationship with the customers of defendants' former business was insufficient to establish this claim. Plaintiff could not show that a contract would have resulted but for defendants' malicious intervention. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

UNFAIR TRADE PRACTICES

Contract claims failed—no basis for claim—Where a family business was sold to plaintiff and thereafter one family member's new business competed with plaintiff, plaintiff's unfair and deceptive trade practices claim failed because the Supreme Court held that plaintiff's contract claims failed. The Supreme Court also rejected plaintiff's request for injunctive relief because the non-compete covenant was unenforceable. **Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 693.**

UTILITIES

Rate adjustment mechanism—infrastructure—water and sewer service— The Utilities Commission provided sufficient findings, reasoning, and conclusions to support its ultimate finding that Aqua N.C., Inc.'s use of the rate adjustment mechanism in N.C.G.S. § 62-133.12 was in the public interest, and the Commission's determination was supported by substantial evidence in view of the whole record. The Commission initially found that the legislative intent behind section 62-133.12 was to provide a mechanism to incentivize quicker investments in water and sewer infrastructure by allowing for faster recovery of some portion of invested costs, then thoroughly explained how Aqua's use of the rate adjustment mechanism would benefit Aqua's customers. Moreover, the Commission took meaningful steps to ensure that problems with water quality were addressed and that customers were charged only after Aqua has made improvements to the quality and reliability of its service. **State ex rel. Utils. Comm'n v. Cooper, Att'y Gen., 216.**

WORKERS' COMPENSATION

Employment contract—made in another state—modified in North Carolina— The Court of Appeals erred by holding that the North Carolina Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. Section 97-36 does not apply to an employment contract initially made in another state and subsequently modified in North Carolina. **Burley v. U.S. Foods, Inc., 315.**

ZONING

Appeal from zoning officer—duty to transmit to board—The Court of Appeals correctly concluded that a zoning officer (Krulik) was bound by statute to transmit petitioner's appeal to the Board and that the legal determination of whether petitioner had standing fell within the province of the Board. N.C.G.S. § 153A-345(b) specifically states that "[t]he officer from whom the appeal is taken *shall forthwith transmit to the board* all the papers constituting the record upon which action appealed from was taken." It does not establish any exception or other circumstances in which the officer may decline to transmit the appropriate materials. **Morningstar Marinas/Eaton Ferry, LLC v. Warren County, 360.**