369 N.C.—No. 2 Pages 202-450

JUDICIAL STANDARDS; ORGANIZATION OF STATE BAR; DISCIPLINE AND DISABILITY OF ATTORNEYS; BOARD OF LAW EXAMINERS; ADMINISTRATIVE COMMITTEE; CONTINUING LEGAL EDUCATION; LEGAL SPECIALIZATION; PROFESSIONAL CONDUCT

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 21, 2017

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 21 DECEMBER 2016

HEADNOTE INDEX

APPEAL AND ERROR

Appealability—Business Court designation—opposition overruled—interlocutory—In an action involving stock grant agreements and a designation of the case as a mandatory complex business case, an interlocutory order of the North Carolina Business Court overruling defendant's opposition to the designation of the case was not immediately appealable. Defendant argued that she was denied the substantial right to have the matter heard in the same manner as ordinary disputes involving ordinary citizens, but she did not explain how she was prejudiced. Although defendant contended that the Business Court's decision was akin to the denial of a motion for a change of venue, merely asserting a preference for a forum other than the Business Court absent a specific, legal entitlement to an exclusion from designation was insufficient. **Hanesbrands Inc. v. Fowler, 216.**

Appealability—class action certification granted—interlocutory—public interest—appeal heard—Although defendant's appeal in a class action from the certification of the class was interlocutory (denying certification affects a substantial right), the subject matter of the this class action (assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation) implicated the public interest to such a degree that the Supreme Court invoked its supervisory authority. **Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp., 202.**

Two jury arguments—one objection—arguments not separate—In a murder prosecution in which defendant raised the insanity defense, two statements by the prosecutor about defendant's likelihood of release, viewed in context, were not separate and distinct. The second was a summary of the first, so that defendant's objection to the first was sufficient. **State v. Dalton, 311.**

Writ of certiorari—issues not accepted—The Court of Appeals' decision to issue a writ of certiorari is discretionary and that Court may choose to grant such a writ to

numerous common issues of law and fact. The same basic questions of fact and law would determine whether defendant was liable for its actions in retaining surplus money as reserve funds and attempting to remove all the members who would not agree to enter into a current exclusive marketing agreement. **Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp., 202.**

Certification—recovery—capable of fair determination—The trial court did not abuse its discretion when certifying a class action involving assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation by concluding that each class member's share of any recovery could be determined fairly based upon that member's patronage interests in defendant and that a class action would preserve the rights of numerous absent, unnamed class members. **Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp., 202.**

CONSTITUTIONAL LAW

Cruel and unusual punishment—juvenile sentence—life without parole— A trial court order denying defendant's motion for appropriate relief was reversed where defendant had received a sentence of life without parole as a seventeen-year-old. The State's sole argument in defense of the denial of the motion was that *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was not to be applied retroactively, but *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), held that Miller was entitled to retroactive application. **State v. Perry, 390.**

Effective assistance of counsel—disagreement over tactics—A prosecution was remanded to the Court of Appeals with entry of an order dismissing an ineffective assistance of counsel claim without prejudice to assert in a motion for appropriate relief where defendant told the trial court that his attorney was not asking the questions defendant wanted him to ask of a detective, the record did not shed light on the nature and substance of the questions, defendant was generally disruptive throughout trial, and it could not be ascertained whether defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. **State v. Floyd, 329.**

CRIMINAL LAW

Guilty pleas—voluntariness—The Court of Appeals erred by vacating defendant's guilty plea to possession of a firearm by a felon where defendant pleaded guilty knowingly and voluntarily. Considered in its entirety, the transcript of the plea hearing did not demonstrate that defendant believed his plea was conditioned on the right to seek review of any pretrial motion (defendant contended that the State violated N.C.G.S. § 15A-711). **State v. Ross, 393.**

Insanity defense—closing argument—defendant's likelihood of release— The evidence in a first-degree murder prosecution in which defendant claimed insanity did not support the assertions made by the prosecutor during closing arguments about defendant's likelihood of release. The prosecutor's argument was that it was very possible that defendant would be released in fifty days if she was found not guilty by reason of insanity. The level of possibility or probability of release was not the salient issue; rather, it was the evidence and all reasonable inferences that could be drawn from that evidence which should have governed counsel's arguments in closing. The only reasonable inference to be drawn from the evidence presented at trial was that it was highly unlikely that

defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she was no longer dangerous to others. **State v. Dalton, 311.**

Insanity defense—closing argument—prejudicial—In a first-degree murder prosecution in which defendant claimed insanity, there was prejudicial error where the prosecutor argued to the jury that it was "very possible" that defendant would be released in fifty days when the overwhelming evidence was that defendant had committed the violent acts and that she had a longstanding history of substance abuse and mental illness. It was unlikely that defendant could demonstrate within fifty days that she was no longer dangerous to others. A reasonable possibility existed that the jury would have found defendant not guilty by reason of insanity if the prosecutor had not made the improper remarks during closing arguments. **State v. Dalton, 311.**

EMOTIONAL DISTRESS

Allegations of severe distress—sufficiency of allegations—The plaintiff in an intentional infliction of emotional distress action sufficiently alleged severe emotional distress where the complaint stated that plaintiff's severe emotional distress manifested itself in diagnosable form, including depression, anxiety, loss of sleep, loss of appetite, lack of concentration, difficulty remembering things, feelings of alienation from loved ones, shame, and loss of respect with the community and coworkers, and damages "in excess of $10,000.00." **Turner v. Thomas, 419.**

First-degree murder prosecution—extreme and outrageous conduct—Plaintiff sufficiently alleged extreme and outrageous conduct in an intentional infliction of emotional distress action against an SBI blood analyst following plaintiff's first-degree murder acquittal where his allegations painted a picture of law enforcement officials deliberately abusing their authority as public officials to manipulate evidence and distort a case for the purpose of reaching a foreordained conclusion of guilt. **Turner v. Thomas, 419.**

Intent—first-degree murder prosecution—In an intentional infliction of emotional distress action, plaintiff sufficiently alleged intent to inflict emotional distress. While standing trial for first-degree murder is unquestionably stressful for anyone, plaintiff's complaint did not allege that defendants were merely negligent or that their investigation was inadequate; instead, the complaint alleged sinister motives and conduct by defendants specifically aimed toward the improper purpose of wrongfully convicting plaintiff of murder. **Turner v. Thomas, 419.**

HOMICIDE

Felony murder—instructions—aggressor doctrine—no plain error—There was no plain error where the trial instructed the jury on the aggressor doctrine of self-defense in a felony murder prosecution. The State did not solely rely on the theory that defendant was the aggressor but also offered evidence that tended to contradict defendant's evidence as to each of the other elements of self-defense. Defendant failed to establish that, absent an instruction on the aggressor doctrine, the jury would have credited his account of the night's events over other contrary testimony. **State v. Juarez, 351.**

Instructions—felony murder—instructions—lesser included offenses—The trial court correctly denied defendant's request for instructions on second-degree murder and voluntary manslaughter in a felony murder prosecution where there was

SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

February 13, 14, 15
March 20, 21, 22
April 10, 11, 12
May 9
June 13
August 28, 29, 30, 31
October 9, 10, 11, 12
November 6, 7, 8
December 11, 12, 13

KAYE W. FISHER, DAN LEWIS AND DANIEL H. LEWIS FARMS, INC., GEORGE ABBOT, ROBERT C. BOYETTE AND BOYETTE FARMS, INC., KYLE A. COX, C. MONROE ENZOR, JR., EXECUTOR OF THE ESTATE OF CRAWFORD MONROE ENZOR, SR., ARCHIE HILL, KENDALL HILL, WHITNEY E. KING, CRAY MILLIGAN, RICHARD RENEGAR, LINWOOD SCOTT, JR. AND SCOTT FARMS, INC., ORVILLE WIGGINS, ALFORD JAMES WORLEY, EXECUTOR OF THE ESTATE OF DENNIS ANDERSON, CHANDLER WORLEY, HAROLD WRIGHT, AND OTHERS SIMILARLY SITUATED

v.

FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION

No. 374A14

Filed 21 December 2016

1. Appeal and Error—appealability—class action certification granted—interlocutory—public interest—appeal heard

Although defendant's appeal in a class action from the certification of the class was interlocutory (denying certification affects a substantial right by not allowing certification), the subject matter of the this class action (assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation) implicated the public interest to such a degree that the Supreme Court invoked its supervisory authority.

2. Class Actions—certification—alleged derivative action

The trial court did not abuse its discretion in a class action suit against the Flue-Cured Tobacco Cooperative Stabilization Corporation by allowing a motion for class certification notwithstanding defendant's contention that plaintiffs' action was derivative in nature. Whether or not plaintiffs' claims are derivative in nature, nothing in N.C.G.S. § 55-7-42 precludes class certification in this case.

3. Class Actions—certification—class representatives—no conflict of interest

The trial court did not abuse its discretion by certifying the class where defendant argued that there was a conflict of interest between one of the class representatives and other members of the plaintiff class, a director of the organization. Because plaintiffs' claims were against defendant and not against individual directors, there was no sense in which the director was "inculpating, if not suing, himself" by participating in this case as a class representative.

4. Class Actions—certification—recovery—capable of fair determination

The trial court did not abuse its discretion when certifying a class action involving assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation by concluding that each class member's share of any recovery could be determined fairly based upon that member's patronage interests in defendant and that a class action would preserve the rights of numerous absent, unnamed class members.

5. Class Actions—certification—class members—common issues of law and fact

The trial court did not err when certifying a class in an action against the Flue-Cured Tobacco Cooperative Stabilization Corporation by finding that the class members shared numerous common issues of law and fact. The same basic questions of fact and law would determine whether defendant was liable for its actions in retaining surplus money as reserve funds and attempting to remove all the members who would not agree to enter into a current exclusive marketing agreement.

6. Class Actions—certification—class action—preferable to individual litigation

The trial court did not abuse its discretion by ruling that a class action was superior to individual litigation in a case involving assets held by the Flue-Cured Tobacco Cooperative Stabilization Corporation. Although defendant argued that the class was unmanageable simply because of its size, the trial court stated that the only pragmatically effective way to provide relief under the circumstances was through certification of a class and, given the extremely large number of similarly situated class members and the impracticality of requiring them to protect their rights through filing hundreds of thousands of individual lawsuits, it could not be concluded that the trial court abused its discretion.

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

Appeal pursuant to N.C.G.S. § 7A-27(b) from an amended order on motion for class certification entered on 24 February 2014 by Judge John R. Jolly, Jr. 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 20 April 2015.

Blanchard, Miller, Lewis & Isley, P.A., by Philip R. Isley; Speights & Runyan, by C. Alan Runyan, pro hac vice; and Richardson, Patrick, Westbrook & Brickman, LLC, by James L. Ward, Jr., for plaintiff-appellees.

Quinn Emanuel Urquhart & Sullivan, LLP, by John B. Quinn, pro hac vice, and Derek L. Shaffer, pro hac vice; and Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant n/k/a U.S. Tobacco Cooperative, Inc.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, for NC Chamber, amicus curiae.

JACKSON, Justice.

In this case we consider whether the trial court erred by allowing plaintiffs' motion to certify a class of current and former flue-cured tobacco producers who were members of defendant Flue-Cured Tobacco Cooperative Stabilization Corporation between 1946 and 2004. Because we cannot conclude that the trial court abused its discretion, we affirm and remand.

This appeal arises from two cases that were consolidated for pretrial purposes. These two cases began with the filing of complaints on 6 January 2005 and 11 February 2005. Plaintiffs are current and former tobacco producers and members of defendant, a nonprofit cooperative that administered the federal tobacco price support program (the Price Support Program) for flue-cured tobacco from 1946 through 2004.

According to the allegations in plaintiffs' third amended and consolidated complaint, flue-cured tobacco producers participating in the Price Support Program were required to be members of defendant. To become a member, a producer paid five dollars to defendant in exchange for one share of defendant's stock. The complaint asserted that each member entered into a contract with defendant that stated:

> The undersigned grower of flue-cured tobacco (hereinafter "grower") applies for membership in the Flue-Cured Tobacco Co-operative Stabilization Corporation, a nonprofit co-operative . . . and herewith makes payment of

> $5.00 to the undersigned agent for one (1) share of common stock.
>
> The grower hereby appoints the Association as his agent to receive, handle and market all or such portion of the flue-cured tobacco . . . as the grower may elect or choose to deliver to the Association for disposition in accordance with the terms of this contract and the Association accepts such appointment . . . .
>
> The Stabilization Corporation agrees (1) to receive, handle and sell . . . such tobacco as the grower may elect to deliver to the Stabilization Corporation, and (2) that in addition to the amount of [sic] paid to the grower upon delivery of tobacco, it will distribute to him his pro rata share of any net gains remaining after payment of operating and maintenance costs and expenses and a reasonable deduction for reserves as determined by the Board of Directors.

The complaint asserts that each member "was guaranteed a lifetime membership in [defendant] that could not be cancelled without a hearing."

According to the complaint, the process of participating in the Price Support Program involved tobacco producers delivering their product to a warehouse, where defendant then graded the tobacco and attempted to sell it at auction. The auction was subject to a minimum price established annually by the United States Department of Agriculture, and the tobacco would not be sold for less than that price. If the tobacco could not be sold, then defendant would process and store it, while advancing the minimum price less an administrative fee to the tobacco producer. Defendant paid the tobacco producers using loans from the Commodity Credit Corporation (CCC), a corporation owned and operated by the federal government that helped administer the Price Support Program. The unsold tobacco served as collateral for the loans issued by the CCC.

Plaintiffs' complaint alleged that until 1982, these loans "were completely non-recourse, meaning that all losses or defaults incurred under the program were borne by the CCC and the taxpayers of the United States." At the same time, if tobacco from a given crop year eventually was sold at a price higher than necessary to pay that year's loans, then "these gains were to be allocated pro-rata among [ ] the [tobacco producers] who participated in the program that year." This system of allocating losses and gains remained in effect until 1982, when Congress enacted the No Net Cost Tobacco Program Act (the NNC Act). Pursuant

to the NNC Act, defendant began collecting an additional payment (the NNC Assessment) from tobacco producers when they delivered their tobacco to defendant. These funds served as additional collateral for the loans issued to defendant by the CCC, limiting losses borne by the federal government. If any funds remained after the loans were repaid, the surplus funds belonged to the tobacco producers who had participated in the Price Support Program. Ultimately, the Price Support Program came to an end in 2004.

Plaintiffs asserted claims related to funds accumulated by defendant throughout the lifetime of the Price Support Program and held by defendant as reserve funds. According to the allegations in the complaint, the money in defendant's reserve funds came primarily from a few specific sources. First, defendant received and stored tobacco from 1967 to 1973 and eventually sold the tobacco at a price higher than necessary to repay the loans from the CCC for those crop years. Some of this surplus money was distributed to the tobacco producers, and some was retained by defendant as reserve funds. Defendant issued certificates of interest to the tobacco producers whose tobacco had created the surplus during this time period. The certificates of interest showing that the tobacco producers had an interest in the reserve funds were issued on a pro rata basis. Second, after 1982 defendant used surplus funds collected from NNC Assessments to redeem unsold tobacco that had been held as collateral for loans from the CCC. Defendant sold that tobacco for a substantial amount and retained the money as reserve funds. Third, when the Price Support Program came to an end in 2004, defendant satisfied its remaining loans, and the CCC returned to defendant approximately eighty-three million pounds of processed tobacco that had been held as collateral. Defendant sold this tobacco and again retained the revenue.

Plaintiffs' complaint alleged that in 2004, defendant notified all its members that unless they entered into new contracts to sell tobacco exclusively to defendant in 2005, they would lose their memberships—thus "forc[ing] Plaintiffs to either enter into that contract, at reduced prices and quantities, or lose their substantial investment in [defendant], including their share of the reserves, retained earnings, and margins." Plaintiffs contended that defendant "expelled hundreds of thousands" of members and took control of the reserve funds in an "attempt[ ] to create a 'last man standing' scenario in which a few hundred remaining member[s] potentially have the benefit of hundreds of millions of dollars in assets which have been created through the efforts of all member[s], including Plaintiffs." Plaintiffs sought, *inter alia*, money damages, partial distribution of defendant's assets, and a declaratory judgment that

plaintiffs are members of defendant and are "entitled to all rights, privileges, and benefits resulting" from their membership.

Plaintiffs also filed a motion for class certification. The trial court allowed the motion, stating that the certified class shall include:

> All individuals, proprietorships, partnerships, corporations, or their heirs, representatives, executors or assigns, and other proper entities that have been members/shareholders of the Flue-Cured Tobacco Cooperative Stabilization Corporation . . . at any time from its inception through the end of crop year 2004, and any heirs, representatives, executors, successors or assigns, and;
>
> (a) had not requested cancellation of their membership and whose membership was cancelled by Stabilization without a hearing, and/or
>
> (b) were issued a certificate of interest in capital reserve by Stabilization for any of the tobacco crop years between and including 1967-1973, and/or
>
> (c) delivered, consigned for sale, or sold flue-cured tobacco and paid an assessment for deposit into the No Net Cost Tobacco Fund or No Net Cost Tobacco Account during any tobacco crop years between and including 1982-2004.

Defendant appealed to the North Carolina Court of Appeals. This Court on its own initiative certified the case for discretionary review prior to a determination by the Court of Appeals.

[1] As an initial matter, we note that defendant's appeal is interlocutory. "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to [the] appellant if not corrected before appeal from final judgment." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 125, 225 S.E.2d 797, 802 (1976) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)). "A substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (quoting *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805). "We consider whether a right is substantial on a case-by-case basis." *Id.* at 75, 678 S.E.2d at 605.

"The *denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs." *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000) (citing, *inter alia*, *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984)). "[H]owever, no order *allowing* class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted." *Id.* at 193, 540 S.E.2d at 328. In *Frost* we stated that a trial court's order allowing class certification does not affect a substantial right and is not immediately appealable. *Id.* at 194, 540 S.E.2d at 328. Nevertheless, we concluded that the underlying subject matter of *Frost* was important enough to justify invocation of our supervisory authority over the courts of this state to consider the merits of the appeal. *Id.* at 195, 540 S.E.2d at 329 (citing N.C.G.S. § 7A-32(b) (1999)).

The case *sub judice* involves "a class of producers of flue-cured tobacco who were members/shareholders of Defendant at times material and signed marketing agreements with Defendant pursuant to which the putative class members delivered tobacco to Defendant that was either sold or otherwise used in the [Price Support] program." The class includes the tobacco producers, "proprietorships, partnerships, [and] corporations," and their "heirs, representatives, executors, successors or assigns." The trial court stated that, according to defendant's records, "for each year between 1967 and 1973 certificates were issued to between 40,768 and 149,483 members," and "[t]here were 209,186 members who paid [NNC] assessments between 1982 and 2004." The parties agree that the total number of past and present members of defendant exceeds eight hundred thousand. Consequently, after careful consideration, we conclude that the subject matter of this case implicates the public interest to such a degree that invocation of our supervisory authority is appropriate. N.C.G.S. § 7A-32(b) (2015). Accordingly, we consider the merits of defendant's appeal notwithstanding that the appeal is interlocutory and ordinarily would not be immediately appealable.

[2] Rule 23 of the North Carolina Rules of Civil Procedure authorizes class action lawsuits, stating: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.G.S. § 1A-1, Rule 23(a) (2015). "The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987) (footnote and citation omitted).

As an initial matter, the class representatives must demonstrate the existence of a class. *Id.* at 277, 280-81, 354 S.E.2d at 462, 464. "Whether a proper 'class' under Rule 23(a) has been alleged is a question of law." *Id.* at 280, 354 S.E.2d at 464. A proper class exists "when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 280, 354 S.E.2d at 464. In addition to establishing the existence of a proper class, the class representatives must show: (1) that "they will fairly and adequately represent the interests of all members of the class;" (2) that they have "no conflict of interest" with the class members; (3) that they "have a genuine personal interest, not a mere technical interest, in the outcome of the case;" (4) that they "will adequately represent members outside the state;" (5) that "class members are so numerous that it is impractical to bring them all before the court;" and (6) that "adequate notice" is given to all class members. *Faulkenbury v. Teachers & State Emps.' Ret. Sys.*, 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997) (citing *Crow*, 319 N.C. at 282-84, 354 S.E.2d at 465-66).

"When all the prerequisites are met, it is left to the trial court's discretion 'whether a class action is superior to other available methods for the adjudication of th[e] controversy.' " *Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 337, 757 S.E.2d 466, 470 (2014) (alteration in original) (quoting *Crow*, 319 N.C. at 284, 354 S.E.2d at 466). The trial court has "broad discretion" to allow or deny class certification. *Frost*, 353 N.C. at 198, 540 S.E.2d at 331. Accordingly, we review the trial court's order allowing class certification for abuse of discretion. *See Beroth Oil*, 367 N.C. at 337, 757 S.E.2d at 470 (citing *Faulkenbury*, 345 N.C. at 699, 483 S.E.2d at 432). In *Beroth Oil* we further refined the standard of review applicable to the findings of fact and conclusions of law in the class certification order, concluding that although "the general standard of review is abuse of discretion," the trial court's conclusions of law are reviewed de novo. *Id.* at 338, 757 S.E.2d at 471 (quoting *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009), *disc. rev. denied and cert. denied*, 363 N.C. 800, 690 S.E.2d 530 (2010)). The trial court's findings of fact are binding on the appellate court if supported by competent evidence. *Id.* at 338, 757 S.E.2d at 471.

In this appeal defendant argues that class certification is improper. Defendant contends that the trial court found that the "central issue common to all Plaintiffs is whether they are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as a reasonable reserve." Defendant asserts that this issue involves a challenge to its business judgment and therefore "constitutes a prototypical

derivative claim." Defendant states that plaintiffs are barred from bringing a derivative proceeding because they failed to make a written demand upon defendant in compliance with section 55-7-42, which states:

> No shareholder may commence a derivative proceeding until:
>
> (1) A written demand has been made upon the corporation to take suitable action; and
>
> (2) 90 days have expired from the date the demand was made unless, prior to the expiration of the 90 days, the shareholder was notified that the corporation rejected the demand, or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

N.C.G.S. § 55-7-42 (2015). We disagree with defendant's assertion.

A derivative proceeding is defined in pertinent part as "a civil suit in the right of a domestic corporation." *Id.* § 55-7-40.1(1) (2015). Derivative claims belong to the corporation itself, rather than to the plaintiffs, meaning that the rights to be vindicated are those of the corporation, not those of plaintiffs suing derivatively on the corporation's behalf. *See*, *e.g.*, *Gall v. Exxon Corp.*, 418 F. Supp. 508, 514-15 (S.D.N.Y. 1976). "[A]ny damages flow back to the corporation, not to the individual shareholders bringing the [derivative] action." *Green v. Freeman*, 367 N.C. 136, 142, 749 S.E.2d 262, 268 (2013) (citing, *inter alia*, *Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-15 (4th Cir. 2011)).

Defendant's appeal arises from the class certification order and seeks reversal of that order. Defendant does not argue that section 55-7-42 requires dismissal of any specific claims for relief alleged in the complaint, but contends that section 55-7-42 precludes class certification. Yet, section 55-7-42 establishes when a shareholder "may commence a derivative proceeding," but does not set forth any requirements for class certification. In addition, neither Rule 23 nor this Court's precedents require a court evaluating a motion for class certification to consider whether any claims raised by a putative class action are derivative in nature. N.C.G.S. § 1A-1, Rule 23 (2015); *see also*, *e.g.*, *Crow*, 319 N.C. at 282-84, 354 S.E.2d at 465-66 (describing the prerequisites for class certification). We conclude that whether or not plaintiffs' claims are derivative in nature, nothing in section 55-7-42 precludes class certification in the case *sub judice*. We express no opinion whether any of these claims are derivative claims and note that defendant may argue that specific

claims are barred by section 55-7-42 in a properly raised motion to dismiss. *See, e.g.*, *Allen ex rel. Allen & Brock Constr. Co. v. Ferrera*, 141 N.C. App. 284, 289, 540 S.E.2d 761, 766 (2000) (concluding that the trial court did not err by dismissing the plaintiff's derivative claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6)). We hold only that defendant has not shown that the trial court abused its discretion by allowing the motion for class certification notwithstanding defendant's contention that plaintiffs' action is derivative in nature.

[3] Next, defendant argues that the trial court abused its discretion by certifying the class because there is a conflict of interest between one of the class representatives and other members of the plaintiff class. Specifically, defendant contends that one named plaintiff and class representative, Richard Renegar, is on defendant's Board of Directors. Defendant asserts that allowing Renegar to represent the class essentially amounts to Renegar "inculpating, if not suing, himself" because, by arguing that the Board's recent and current actions are unreasonable or improper, Renegar "effectively" contradicts Board decisions for which he "consistently voted in favor." We disagree.

We explained in *Crow* that one of the prerequisites for class certification is that the class representatives not have a conflict of interest with the other class members. "The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465 (citing *Thompson v. Humphrey*, 179 N.C. 44, 58, 101 S.E. 738, 746 (1919)).

The trial court found that Renegar, like other class representatives, was a producer of flue-cured tobacco, was a member of defendant, had signed a marketing agreement with defendant, and had delivered tobacco to defendant. In evaluating whether there were any conflicts between the class representatives and the class members, the trial court noted that plaintiffs had not raised any claims alleging that any individual member of defendant's Board of Directors had engaged in misconduct. In addition, the trial court stated that all "claims against individual directors were voluntarily dismissed" by plaintiffs. The trial court also observed that "the named Plaintiffs have continually exhibited an interest in the outcome of this civil action and have been diligent in their involvement, such that the court is satisfied that the Class representatives will protect the interests of all Class members." The trial court concluded that plaintiffs are adequate class representatives.

Because plaintiffs' claims are against defendant and not against individual directors, there is no sense in which Renegar is "inculpating, if not suing, himself" by participating in this case as a class representative. Although a trial court might review a class representative's other activities and find that these activities create a conflict of interest with class members, here the trial court exercised its discretion and determined that Renegar is capable of representing the interests of class members. We are unable to conclude that the trial court abused its discretion by certifying the class notwithstanding this alleged conflict.

[4] Next, defendant argues that "[t]he trial court erred as a matter of law by disregarding fundamental conflicts that divide the class." Specifically, defendant identifies the following alleged conflicts of interest between the class members: (1) some class members still sell tobacco to defendant, while other class members no longer sell tobacco; (2) some class members have filed a separate action in federal district court stating that their interests are not represented by the current action; and (3) some class members who sold tobacco during years when tobacco was sold at a profit may have claims that other class members lack. Defendant asserts that the class certification order must be reversed because of these conflicts.

We did not state in *Crow* that there can be no conflicts of interest between class members. *See id.* at 282, 354 S.E.2d at 465. Nevertheless, we "caution[ed]" that the list of prerequisites identified in *Crow* should not "be viewed as all-inclusive." *Id.* at 282 n.2, 354 S.E.2d at 465 n.2. The trial court has "broad discretion" in "all matters pertaining to class certification." *Frost*, 353 N.C. at 198, 540 S.E.2d at 331. The court "is not limited to consideration of matters expressly set forth in Rule 23 or in [*Crow*]." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. Accordingly, nothing prevents the trial court from evaluating potential conflicts of interest between class members and weighing any potential conflicts when exercising its discretion to allow or deny class certification. *See*, *e.g.*, *Harrison v. Wal-Mart Stores*, *Inc.*, 170 N.C. App. 545, 554, 613 S.E.2d 322, 329 (2005) (concluding that the trial court did not abuse its discretion when it concluded in pertinent part that it could not "certify a class in which some putative class members assert that other putative class members caused or contributed to the wrongs asserted and the latter deny the assertion"). The trial court may be in the best position to determine whether any conflicts among class members warrant denial of class certification.

In the case *sub judice* the trial court considered defendant's arguments and rejected them. The trial court concluded that "[a]ll Class

members and representatives have a common unified interest in the determination of whether Defendant is retaining more than a reasonable reserve to the detriment of the current and former members." The court noted that plaintiffs are not seeking dissolution of defendant and explained that "[v]arying interests among Class members arising from when and how much tobacco a Class member delivered do not create a conflict concerning Defendant's liability." Instead, the court stated that class members' relative interests could be determined based upon each member's patronage interests.

The court noted that class members who received certificates of interest for participation in the profitable crop years from 1967 to 1973 "would receive only that portion of the net gains for each year that is attributable to the tobacco they delivered for that year." The court stated that "[t]hese amounts have been separately accounted for and maintained in Defendant's records." The court therefore concluded that these members' interests do not conflict with those of other members.

For class members "in the 1982-2004 group," who paid the NNC Assessments that in some years helped to create the surplus money that defendant retained as reserve funds, the trial court noted that "there are no material conflicts . . . because their tobacco and [NNC] assessments are proportionally taken into consideration during the entire period that they are common contributors." Although the court acknowledged that some class members may be entitled to a larger or lesser amount of damages than others depending upon the amount of tobacco delivered and NNC Assessments paid by each individual class member, the court, quoting *Pitts v. American Security Insurance Co.*, 144 N.C. App. 1, 15, 550 S.E.2d 179, 190 (2002), stated that "[a] difference in the amount of damages does not create a material conflict of interest between [a plaintiff] and the other proposed class members."

The trial court did not find that conflicts of interest divide the members of the class. Instead, the court concluded that each class member's share of recovery could be determined fairly based upon that member's patronage interests in defendant. Moreover, the court stated that a class action "will preserve the rights of numerous absent, unnamed Class members." We are unable to conclude that the trial court abused its discretion.

[5] Next, defendant argues that the trial court erred by finding that the class members share numerous common issues of law and fact. Defendant contends that each class member's recovery will depend upon different factors, such as whether the class member still actively sells tobacco to

defendant, the communications the class member received from defendant, the crop years during which the class member produced and sold tobacco, and whether the class member has already redeemed a certificate of interest or received other payments from defendant. Defendant asserts that in *Beroth Oil*, 367 N.C. at 346, 757 S.E.2d at 476, this Court stated that certifying a class of eight hundred property owners would require a trial with "far too many individualized, fact-intensive determinations for class certification to be proper." Defendant argues that here the class is larger and requires determination of a greater number of diverse issues than those referenced in *Beroth Oil*. We disagree.

Beroth Oil involved a class of property owners raising inverse condemnation claims against the North Carolina Department of Transportation. 367 N.C. at 333, 757 S.E.2d at 468. The inverse condemnation claims arose from the deleterious effect on their properties of the Transportation Corridor Official Map Act, which imposed certain limits on obtaining a building permit or approving a subdivision plat. *Id.* at 334, 757 S.E.2d at 468. The trial court denied class certification. *Id.* at 336, 757 S.E.2d at 470. In concluding that the trial court did not abuse its discretion, we explained that different parcels of land necessarily were affected differently by the restrictions imposed by the Act. *Id.* at 343, 757 S.E.2d at 474. We observed that "[n]ot all of these 800 property owners have the same property interests and expectations. As the trial court correctly noted, the properties . . . are diverse: 'Some . . . are improved and some are not. Some are residential and others are commercial.' " *Id.* at 343, 757 S.E.2d at 474 (second ellipsis in original). Our decision was based upon the "discrete fact-specific inquiry" necessary to decide inverse condemnation claims related to the particular restrictions of the Act on numerous different properties with different uses and purposes. *Id.* at 343, 757 S.E.2d at 474.

By contrast, in the case *sub judice* the trial court identified many issues of law and fact that are common to the class. The trial court stated that "all members paid $5 for their stock," that "the material language of the stock certificates is uniform," and that "all members signed a marketing agreement," with the text of the agreements used from 1946 to 1984 being "substantially identical" and the text of the agreements used from 1985 to 2004 also being "substantially identical." The trial court explained that "Defendant's relationship with all members was governed by uniform agreements with the [CCC] and uniform agreements with the auction warehouses." The court noted that the terms of all the certificates of interest were identical. For members who participated in the 1967 to 1973 crop years, each member's "gains . . . were allocated

pro rata by year based upon each member's percentage of the consigned pounds of tobacco." For members who paid NNC Assessments, the payments were assessed, kept, transferred, and used in the same way for each member. The court stated that defendant had maintained records showing the proceeds from crop years that created a surplus, including the surplus money retained by defendant from 1967 to 1973, from 1982 to 1984, and from tobacco redeemed after the Price Support Program ended in 2004.

The trial court also identified common legal issues shared by the class, including whether defendant "was required to allocate and identify its total equity to the members on a yearly basis," "breached a fiduciary duty to Plaintiffs," or "breached Plaintiffs' contractual rights." The court stated that all plaintiffs share a common interest in determining whether defendant's reserve funds were and are reasonable. The court concluded that plaintiffs had shown sufficient commonality of interests among the class members. The trial court found that no individual inquiry is necessary to determine whether defendant may terminate the membership of members who do not agree to enter into a current marketing agreement with defendant.

Unlike *Beroth Oil*, in which even the question of whether a specific property owner could raise an inverse condemnation claim required a "discrete fact-specific inquiry," *id.* at 343, 757 S.E.2d at 474, here the same basic questions of fact and law will determine whether defendant is liable to plaintiffs for its actions in retaining surplus money as reserve funds and attempting to remove all the members who would not agree to enter into a current exclusive marketing agreement with defendant. In addition, here the trial court exercised its broad discretion to allow, rather than deny, class certification. We are unable to conclude that the trial court abused its discretion in determining that plaintiffs have demonstrated the existence of a class with a shared interest in common questions of fact and law.

[6] Finally, defendant argues that this class is unmanageable simply because of the large number of tobacco producers who were members of defendant and will be members of the class. But the large number of individuals whose interests are affected by defendant's actions is a key reason cited by the trial court in ruling that a class action is superior to individual litigation. The trial court stated that "the only pragmatically effective way to provide relief under the circumstances of this matter is through certification of a class because each individual class member's damages suffered may be relatively small while the burden and expense

of individual litigation would be very high." The trial court noted that a class action "will avoid a multiplicity of lawsuits," prevent inconsistent results, reduce plaintiffs' transaction costs in bringing the action, and "preserve the rights of numerous absent, unnamed Class members." "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. Given the extremely large number of similarly situated class members and the impracticality of requiring them to protect their rights through filing hundreds of thousands of individual lawsuits, we cannot conclude that the trial court abused its discretion by ruling that a class action is superior to individual litigation in this case. Accordingly, we affirm the trial court's order allowing the motion for class certification and remand this case to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED AND REMANDED.

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

HANESBRANDS INC.
v.
KATHLEEN FOWLER

No. 438A15

Filed 21 December 2016

Appeal and Error—appealability—Business Court designation—opposition overruled—interlocutory

In an action involving stock grant agreements and a designation of the case as a mandatory complex business case, an interlocutory order of the North Carolina Business Court overruling defendant's opposition to the designation of the case was not immediately appealable. Defendant argued that she was denied the substantial right to have the matter heard in the same manner as ordinary disputes involving ordinary citizens, but she did not explain how she was prejudiced. Although defendant contended that the Business Court's decision was akin to the denial of a motion for a change of venue, merely asserting a preference for a forum other than the Business Court absent a specific, legal entitlement to an exclusion from designation was insufficient.

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

Appeal pursuant to N.C.G.S. §§ 7A-27(a) and 7A-45.4(e) from an order entered on 5 November 2015 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Forsyth County. Heard in the Supreme Court on 31 August 2016.

Constangy, Brooks, Smith, & Prophete, LLP, by Robin E. Shea and Jill S. Stricklin, for plaintiff-appellee.

Law Office of David Pishko, P.A., by David Pishko, for defendant-appellant.

JACKSON, Justice.

In this case we consider whether defendant Kathleen Fowler may appeal an interlocutory order of the North Carolina Business Court overruling her opposition to designation of this case as a mandatory complex business case. We conclude that defendant has failed to show that this order affects a substantial right as required for appeal of an interlocutory order pursuant to N.C.G.S. § 7A-27(a). Accordingly, we dismiss defendant's appeal.

On 20 August 2015, plaintiff Hanesbrands Inc. filed a complaint in Superior Court, Forsyth County alleging that defendant breached five different stock grant agreements that she entered into during her employment with plaintiff. Plaintiff seeks to recover monetary damages of $462,366—the alleged value of certain of its stock units and options granted to defendant pursuant to those agreements. That same day, plaintiff filed a Notice of Designation of its case as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a) on the basis that the case involved both "the law governing corporations" and a dispute "involving securities." The designation received preliminary approval from the Chief Justice of the Supreme Court of North Carolina on 21 August 2015. See N.C.G.S. § 7A-45.4(f) (2015).

Defendant filed an opposition to the designation on 23 September 2015, which was overruled by order of Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, who was assigned to the case. On 12 November 2015, after filing an answer to plaintiff's original complaint, defendant appealed the Business Court's order to this Court pursuant to N.C.G.S. §§ 7A-45.4(e) and 7A-27(a). Plaintiff argues

that this Court should dismiss defendant's appeal because the Business Court's order is interlocutory and defendant failed to show that the order affects a substantial right. We agree.

When a party disagrees with a Business Court Judge's ruling on an opposition to the designation of a case as a mandatory complex business case, "the party may appeal in accordance with G.S. 7A-27(a)." N.C.G.S. § 7A-45.4(e) (2015). According to section 7A-27(a):

> Appeal lies of right directly to the Supreme Court in any of the following cases: . . .
>
> (3) From any interlocutory order of a Business Court Judge that does any of the following:
>
> a. Affects a substantial right.
>
> b. In effect determines the action and prevents a judgment from which an appeal might be taken.
>
> c. Discontinues the action.
>
> d. Grants or refuses a new trial.

Id. § 7A-27(a) (2015).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231 (1916)). To appeal from an interlocutory order, the appellant must show that the order affects a "substantial right which he might lose if the order is not reviewed before final judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 530, 67 S.E.2d 669, 671 (1951) (citations omitted). "[A]n appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

> "It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed.

Johnson v. Lucas, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (citation omitted) (quoting *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (second and third alterations in original)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). Similarly, in appeals from interlocutory orders, the North Carolina Rules of Appellate Procedure require that the appellant's brief contain a "statement of the grounds for appellate review," which must allege "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (discussing N.C. R. App. P. 28(b)).[1]

We have determined that a "substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)). Recognizing that "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied," we have determined that it is "usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

In her appeal from the Business Court's interlocutory order in this case, defendant alleges that the designation of her case as a mandatory complex business case affects a substantial right. Specifically, defendant argues that requiring her "to defend a case filed against her by a large, public corporation in a special court established primarily for disputes between businesses" denies her the substantial right to "have this matter heard in the same manner as ordinary disputes involving ordinary citizens." Defendant also argues that the "Business Court Judge's decision in this action is akin to the denial of a motion for change of venue." Although defendant appears to suggest that she may suffer some unspecified prejudice from this case being tried in Business Court, she

1. Although opinions of the Court of Appeals are not binding on this Court, the wider scope of the Court of Appeals' jurisdiction has allowed it to develop a more robust body of case law regarding interlocutory appeals.

has not explained how she would be prejudiced. She has not identified a specific "material right" that she would lose if the order is not reviewed before final judgment nor explained how the order in question would "work injury" to her if not immediately reviewed. *See Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605; *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. Furthermore, the General Statutes provide that if a case is not "designated a mandatory complex business case" it may still be designated as "a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts." N.C.G.S. § 7A-45.4(f). Rule 2.1 affords the Chief Justice wide latitude to designate a case as a complex business case. Specifically,

> [t]he Chief Justice may designate any case or group of cases as (a) "exceptional" or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.

Gen. R. Pract. Super. & Dist. Cts. 2.1(a), 2016 Ann. R. N.C. 3 (emphasis added). We note that in Delaware, another state having a specialized business court, the Administrative Directive establishing that state's Complex Commercial Litigation Division specifically excludes certain types of cases from designation, including "any case involving an exclusive choice of court agreement . . . where the agreement relates to an individual or collective contract of employment." James T. Vaughn, Jr., President J., Del. Super. Ct., *Administrative Directive of the President Judge of the Superior Court of the State of Delaware No. 2010-3: Complex Commercial Litigation Division* 1-2 (2010). In contrast, neither our statute nor Rule 2.1 create any such exclusions for cases involving individuals or for specific classes of cases. Merely asserting a preference for a forum other than the Business Court absent a specific, legal entitlement to an exclusion from designation is insufficient to support defendant's contention that this matter was analogous to a venue change and is therefore immediately appealable. Consequently, we conclude that defendant has not demonstrated that the Business Court's interlocutory order is immediately appealable. Accordingly, we dismiss defendant's appeal.

DISMISSED.

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

IN RE FORECLOSURE OF BEASLEY

[369 N.C. 221 (2016)]

IN THE MATTER OF 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 1211, PAGE 169 OF THE CARTERET COUNTY REGISTRY, NORTH CAROLINA

No. 276PA15

Filed 21 December 2016

Mortgages—non-judicial foreclosure hearing—trustee's withdrawal of notice

The order of the superior court clerk of court, the order of the superior court, and the opinion of the Court of Appeals in a foreclosure case all were vacated where the trustee effectively withdrew its notice of non-judicial foreclosure hearing, thus terminating the hearing.

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 101 (2015), reversing an order entered on 25 September 2013 by Judge Phyllis M. Gorham in Superior Court, Carteret County. Heard in the Supreme Court on 11 October 2016.

Nelson Mullins Riley & Scarborough, L.L.P., by Donald R. Pocock and D. Martin Warf, for petitioner-appellee FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings, LLC.

Shipman & Wright, LLP, by Gregory M. Katzman, W. Cory Reiss, and Gary K. Shipman, for respondent-appellant.

PER CURIAM.

Because the trustee effectively withdrew its notice of non-judicial foreclosure hearing, thus terminating the proceeding, there was no pending case on which the clerk of court could act. *See In re Foreclosure of Lucks*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Dec. 21, 2016) (No. 162A16). As a result, we hereby vacate the clerk of court's order and that of the superior court, as well as the opinion of the Court of Appeals.

VACATED.

IN RE LUCKS

[369 N.C. 222 (2016)]

IN THE MATTER OF FORECLOSURE OF A DEED OF TRUST EXECUTED BY GORDON F. LUCKS DATED JULY 14, 2006 AND RECORDED IN BOOK 4254, PAGE 96 IN THE BUNCOMBE COUNTY PUBLIC REGISTRY

No. 162A16

Filed 21 December 2016

Mortgages and Deeds of Trust—foreclosure—substitute trustee—authority

The trial court properly refused to authorize a creditor to proceed with a foreclosure where the creditor failed to establish the substitute trustee's authority to foreclose under the deed of trust. However, the trial court erred by entering a "dismissal with prejudice." The refusal to authorize the creditor to proceed was not a "dismissal" and did not implicate res judicata or collateral estoppel in the traditional sense. The trial court did not abuse its discretion by refusing to admit a limited power of attorney appointing a service company, which, in turn, was relied upon to appoint a substitute trustee. The excluded limited power of attorney was not internally consistent.

Justice HUDSON concurring in result.

Justices BEASLEY and ERVIN join in this concurring opinion.

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. ___, 785 S.E.2d 185 (2016), reversing an order entered on 30 December 2014 by Judge Bradley B. Letts in Superior Court, Buncombe County. Heard in the Supreme Court on 10 October 2016.

Troutman Sanders LLP, by D. Kyle Deak, for petitioner-appellee Deutsche Bank National Trust Company, Trustee.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for respondent-appellant.

NEWBY, Justice.

The contractual right of foreclosure by power of sale under a deed of trust is a non-judicial proceeding. In the comprehensive statutory framework governing non-judicial foreclosure by power of sale set forth in Chapter 45 of our General Statutes, the General Assembly

has prescribed certain minimal judicial procedures, including requiring notice and a hearing designed to protect the debtor's interest. The hearing official then authorizes the foreclosure to proceed or refuses to do so. In this informal setting, a creditor must establish, among other things, the existence of a debt, default, and its right to foreclose, and a debtor may raise evidentiary challenges. The Rules of Civil Procedure applicable to formal judicial actions do not apply. The debtor has the option to file a separate judicial action to enjoin the foreclosure.

Here, because the creditor failed to establish the substitute trustee's authority to foreclose under the deed of trust, the trial court properly refused to authorize the creditor to proceed with the foreclosure. Nonetheless, the trial court erroneously entered a "dismissal with prejudice." The refusal to authorize the creditor to proceed is not a "dismissal"; it does not implicate res judicata or collateral estoppel in the traditional sense. While the creditor may not proceed with non-judicial foreclosure on the same default, it may proceed on the same default through foreclosure by judicial action. The creditor may also proceed non-judicially under power of sale based upon a different default. Because the Court of Appeals erred by finding that the creditor established the successor trustee's authority to proceed under the deed of trust, we reverse the decision of that court, which reversed the trial court's evidentiary ruling.

In July 2006, Gordon F. Lucks (borrower) executed a promissory note with IndyMac Bank, F.S.B. (the Note) in the principal amount of $225,000 to purchase real property situated in Buncombe County. The debt is repayable through monthly installments, with each payment due on the first of the month, and matures on 1 August 2036. The Note includes default and acceleration provisions.

At the same time, borrower executed a deed of trust on the property, naming Robert P. Tucker II as trustee, which was recorded with the Buncombe County Register of Deeds. The deed of trust provides for non-judicial foreclosure by power of sale. Deutsche Bank National Trust Company (Deutsche Bank)[1] currently holds the Note and asserts that borrower "has not paid any amount due and owing under the Note since October 1, 2010."

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1. Deutsche Bank National Trust Company acts as Trustee of the Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2006-D, Home Equity Mortgage Loan Asset-Backed Certificates, Series INABS 2006-D, under the Pooling and Servicing Agreement dated September 1, 2006, the purported beneficiary under the deed of trust.

In September 2013, the Ford Firm, acting as substitute trustee under the deed of trust, initiated a hearing for non-judicial foreclosure under N.C.G.S. § 45-21.16 for borrower's failure to make payments. The Assistant Clerk of Superior Court, Buncombe County "dismissed" the case for failure to present documentation appointing the Ford Firm as substitute trustee.

In June 2014, Cornish Law, PLLC, now acting as substitute trustee, initiated a new hearing for non-judicial foreclosure based on borrower's failure to make payments.[2] The Assistant Clerk found proper documentation established that "The Ford Firm was the Trustee at the time of the [prior] dismissal," and since "Cornish Law, PLLC is in privity with The Ford Firm," the "action is barred by Res Judicata" and again "dismissed" the case. Deutsche Bank appealed the matter to superior court. *See* N.C.G.S. § 45-21.16(d1) (2015).

At the de novo hearing in superior court, Deutsche Bank tendered a series of documents to establish the substitute trustee's right to proceed with non-judicial foreclosure, which included various copies of powers of attorney. One such document, marked "Exhibit 4," is the crucial document at issue in this appeal, without which the substitute trustee lacks authority to act under the deed of trust. The document is purported to be a limited power of attorney appointing a service company to act on Deutsche Bank's behalf, which, in turn, was relied upon to appoint the substitute trustee.[3]

Deutsche Bank called a witness who testified that she was "employed by" the service company, but Deutsche Bank did not establish her position, role, or duties in the handling of records. Regarding the document marked Exhibit 4, the employee stated that a different firm "prepared the power of attorney," that "normally we record the power of attorneys," and that, "[i]n this case we try to record it to the state . . . where the headquarters would be," which she "believe[d] . . . would be Charlotte." The City of Charlotte is located in Mecklenburg County.

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2. It is unclear from the record if the new substitute trustee was proceeding under a different default.

3. Deutsche Bank tendered, *inter alia*, an exhibit appointing Cornish Law, PLLC, as substitute trustee, which was executed by a representative of the service company, acting on the Bank's behalf. *See* N.C.G.S. § 45-10(a) (2015) (allowing the noteholder to appoint a successor trustee). Because a break in any one link in the chain leading to the appointment of the substitute trustee deprives the creditor of the authority to foreclose under the deed of trust, we need not analyze the other alleged deficiencies. *See Smith v. Allen*, 112 N.C. 223, 225-26, 16 S.E. 932, 932 (1893) (citing *Hill v. Wilton*, 6 N.C. (2 Mur.) 14, 18 (1811)).

Deutsche Bank tendered Exhibit 4, which is a photocopy, fourteen pages in length, signed by a Bank officer on 21 November 2013 and notarized. The last page revealed a recording stamp from the Register of Deeds in Montgomery County, not Mecklenburg County, which states the document was recorded in 2010, three years before the purported execution, and that the document is eleven pages in length, not fourteen. Borrower objected to the Exhibit's admission into evidence, noting the "recording information appears to precede the date of signatory on that instrument." Counsel for Deutsche Bank stated that she "believe[d] that was an error in stapling the exhibit." Nonetheless, no witness testified about the discrepancy. Deutsche Bank did not request the trial court take judicial notice of any recorded version of Exhibit 4 or make other arguments for the admission of Exhibit 4.

The trial court sustained borrower's objection to the admission of Exhibit 4 for "failure to provide a proper foundation and hearsay," noting that "the document is internally inconsistent" and "has inconsistent dates." Because Exhibit 4 is essential in establishing the substitute trustee's authority to proceed with the foreclosure, the trial court "dismissed with prejudice" the case for insufficient evidence. Deutsche Bank timely appealed the matter to the Court of Appeals.

In a divided opinion, the Court of Appeals reversed the trial court's dismissal. *In re Foreclosure of Lucks*, ___ N.C. App. ___, 785 S.E.2d 185, 2016 WL 1321155 (2016) (unpublished). The majority noted that "the evidentiary rules are slightly more relaxed in the context of a foreclosure hearing than in normal litigation," *id.*, 2016 WL 1321155, at *2, and concluded that the trial court erred by sustaining borrower's objection to Exhibit 4 "on the basis of lack of 'proper foundation and hearsay,' " *id.* at *3. The dissent opined that any relaxation of the evidentiary rules "is not supported by citation or case law," *id.* at *4 (Hunter, J., dissenting), and, noting borrower failed to establish alternative means to admit Exhibit 4, concluded the trial court properly excluded the Exhibit, *id.* at *7. Borrower appeals as a matter of right.

Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding. S*ee In re Foreclosure of Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (A power of sale is contractual and allows the creditor to sell the mortgaged property "without any order of court in the event of a default." (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 281, at 331 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed.

1988))). Though states have adopted differing views,[4] by at least 1830, North Carolina had allowed power of sale foreclosures under deed of trust. *See Harrison v. Battle*, 16 N.C. (1 Dev. Eq.) 537, 542 (1830).

The General Assembly has crafted Chapter 45 to be the comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale. *E.g.*, N.C.G.S. §§ 45-21.16 (2015) (notice and hearing requirements), 21.26 (2015) (reporting of sale), 21.27 (2015) (upset bid), -21.29 (2015) (orders for possession); *see also* Durant M. Glover, Comment, *Real Property—Changes in North Carolina's Foreclosure Law*, 54 N.C. L. Rev. 903, 913-15 (1976) (discussing the evolution of non-judicial foreclosure statutes). The Rules of Civil Procedure do not apply unless explicitly engrafted into the statute. *E.g.*, N.C.G.S. § 45-21.16(a) (requiring service as "provided by the Rules"); *see also In re Ernst & Young, LLP*, 363 N.C. 612, 620, 694 S.E.2d 151, 156 (2009) (holding that N.C.G.S. § 105-258(a) (2007) prescribed "its own specialized procedure that supplants the Rules"). By establishing an exclusive procedure, non-judicial foreclosure does not require the filing of an action.[5] Nonetheless, Chapter 45 does require a minimal degree of judicial oversight for the sole purpose of requiring a creditor to establish its right to proceed with the foreclosure. *See* N.C.G.S. § 45-21.16(d). The creditor must give notice of a hearing. *Id.* § 45-21.16(a). Given the fluid nature of the debtor-creditor relationship and the state and federal oversight of foreclosure proceedings,[6] there are multiple reasons why a creditor might choose not to proceed with the hearing. For example, a debtor may seek to remit late mortgage payments, or changes in law may alter foreclosure requirements, thus affecting the creditor's ability to

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4. *See* 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7:20, at 944 & nn.1, 2 (6th ed. 2014) (noting that thirty-five jurisdictions allow non-judicial foreclosure by power of sale, of which North Carolina and Colorado are the only states requiring an "opportunity for a hearing before the foreclosure sale"); *compare, e.g.*, *Ex parte GMAC Mortg., LLC*, 176 So. 3d 845, 848-49 (Ala. 2013) (no judicial oversight), *with Handler Constr., Inc. v. CoreStates Bank, N.A.*, 633 A.2d 356, 362-63 (Del. 1993) (foreclosure only available by judicial action).

5. "Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding." N.C.G.S. § 45-21.16(g).

6. *See, e.g.*, Single Family Mortgage Foreclosure Act, 12 U.S.C. §§ 3751-3768 (2012) (governing non-judicial power of sale foreclosure of mortgages held by the Department of Housing and Urban Development on single-family homes, thereby preempting state law); *see also* 12 C.F.R. § 1024.41(g) (2016) (prohibiting foreclosure sale under certain circumstances "[i]f a borrower submits a complete loss mitigation application").

proceed. Such a decision to refrain from proceeding is not a "dismissal" but simply a withdrawal of the notice and has no collateral consequence.

Section 45-21.16 requires a creditor to give the debtor adequate notice of a hearing, which initially occurs before the clerk of court. *See id.* § 45-21.16(a), (d); *see also In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993) (Section 45-21.16 does not "alter the essentially contractual nature of the remedy, but rather [ ] satisf[ies] the minimum due process requirements." (quoting *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918, *appeal dismissed*, 301 N.C. 90 (1980))). The statute provides for a relaxation in the formal rules of evidence at the hearing. *See* N.C.G.S. § 45-21.16(d) ("The clerk . . . may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents."). The creditor must show the existence of (i) a valid debt, (ii) default, (iii) the right to foreclose, (iv) notice, and (v) "home loan" classification and applicable pre-foreclosure notice, and (vi) that the sale is not barred by the debtor's military service. *Id.* The evidentiary rules are the same when the trial court conducts a de novo hearing on an appeal from the clerk's decision. *See id.* § 45-21.16(d1).[7]

At the hearing the debtor is free to raise evidentiary objections "tending to negate any of the [ ] findings required under N.C.G.S. § 45-21.16," *In re Goforth Props.*, 334 N.C. at 374-75, 432 S.E.2d at 859, or the debtor may seek to enjoin the foreclosure in a separate judicial action, N.C.G.S. § 45-21.34 (2015); *see also id.* § 45-21.17A(f), (g) (2015) (setting requirements for bringing actions to set aside the sale for failure to provide notice). Once the creditor has established the various elements of N.C.G.S. § 45-21.16(d), "the clerk shall authorize the [creditor] to proceed under the instrument." *Id.* § 45-21.16(d).

If the clerk or trial court does not find the evidence presented to be adequate to "authorize" the foreclosure sale, this finding does not implicate res judicata or collateral estoppel in the traditional sense. *See* Note, *The Model Power of Sale Mortgage Foreclosure Act—An Appraisal*, 27 Va. L. Rev. 926, 929 (1941) ("[T]he principle of *res adjudicata* is therefore not applicable to" the "extra-judicial method of foreclosure."). While the creditor is prohibited from proceeding again with a non-judicial foreclosure on the *same* default, the creditor can proceed with a judicial foreclosure. *See* N.C.G.S. § 45-21.2 (2015) ("This Article does

7. "The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to" the appropriate trial court. N.C.G.S. § 45-21.16(d1).

not affect any right to foreclosure by action in court . . . ."). Likewise, the creditor may proceed non-judicially on another default.

"The competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine." *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940). We review the trial court's exclusion of documentary evidence under the hearsay rule for abuse of discretion. *See State v. Blake*, 317 N.C. 632, 637-38, 346 S.E.2d 399, 402 (1986); *accord Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 283-84 (4th Cir. 1993). "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) (citing, *inter alia*, *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

The precise question before this Court is whether the trial court abused its discretion by finding Deutsche Bank failed to establish the appointment of the substitute trustee, a prerequisite to its right to proceed with non-judicial foreclosure, and if so, what is the effect of that decision. Exhibit 4 is essential to the substitute trustee's appointment. Though the Court of Appeals majority was correct in noting that the evidentiary rules are more relaxed in the non-judicial foreclosure setting, given the significant internal inconsistencies in the power of attorney at issue and Deutsche Bank's failure to present alternative grounds for admissibility, we conclude that the trial court did not abuse its discretion in refusing to admit Exhibit 4 into evidence.

Exhibit 4 is plainly internally inconsistent. *See* 5 John Henry Wigmore, *Evidence in Trials at Common Law* §§ 1421, 1422, at 253-54 (James H. Chabourn ed., 1974) (Trustworthiness and necessity are the hallmarks of admissibility.) Deutsche Bank tendered the Exhibit as a photocopy, fourteen pages in length, executed in 2013. The last page, which contains a recording stamp from the "Montgomery County, NC" Register of Deeds, indicates the Exhibit is only eleven pages in length and was recorded in 2010. *Cf. id.* § 1557, at 481 (explaining that "specific errors" undermine a record's trustworthiness (emphasis omitted)). While there were ways to overcome the inconsistency, none were effectuated here. *See*, *e.g.*, N.C.G.S. § 45-10(a) (2015) (allowing noteholder to appoint substitute trustee directly); *id.* § 45-21.16(d) (allowing "affidavits and certified copies"); *see also id.* § 8C-1, Rule 201(d) (2015) (judicial notice); *id.*, Rule 803(6) (2015) (business records). Deutsche Bank could have provided a photocopy of the recorded document from the proper county register of deeds, but did not do so. *See id.* § 47-28(a)

(2015) ("[P]owers of attorney affecting real property . . . shall be registered in the office of the register of deeds of the county in which the principal is domiciled or where the real property lies.").

Though the superior court correctly refused to authorize the substitute trustee to proceed, the court erroneously entered a "dismissal with prejudice." Non-judicial foreclosure is not a judicial action; the Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel applicable to judicial actions do not apply. To the extent that prior case law implies otherwise, such cases are hereby overruled. While it is true that Deutsche Bank is barred from proceeding again with non-judicial foreclosure based on the *same default*, the Bank may nonetheless proceed with foreclosure by judicial action.[8] The Bank may also proceed with non-judicial foreclosure based upon a *different default*. The trial court's order is to be interpreted consistent with this analysis.

Though the evidentiary requirements under non-judicial foreclosure proceedings are relaxed and there were ways to overcome the Exhibit's inconsistencies, we cannot conclude the trial court had no reasonable basis to exclude Exhibit 4. Accordingly, we reverse the decision of the Court of Appeals, which reversed the evidentiary ruling of the trial court.

REVERSED.

HUDSON, J. concurring in result.

I agree that this Court should reverse the decision of the Court of Appeals and affirm the trial court's dismissal of this attempt to foreclose by power of sale. I would focus, however, on the primary argument of the parties, which addresses whether the trial court properly excluded exhibits that were necessary to establish the right to foreclose. I agree with the majority that Exhibit 4 "is the crucial document at issue in this appeal." Thus, we should review the trial court's decision to exclude Exhibit 4 "based upon a failure to provide a proper foundation and hearsay." I conclude that the trial court acted appropriately in excluding Exhibit 4.

In addition, I would explain more fully and precisely the statutory basis for the proper scope of the applicability of the Rules of Evidence and Rules of Civil Procedure in power-of-sale foreclosures. First, the

8. The Note indicates payments are due in monthly installments on the first day of the month, maturing on 1 August 2036.

majority agrees with the Court of Appeals majority's broad statement that the evidentiary rules are more relaxed in the non-judicial foreclosure setting. I would clarify that the Rules of Evidence are relaxed only in the hearing before the clerk and only to the extent specifically provided for in N.C.G.S. § 45-21.16(d). In the de novo hearing in the trial court, however, the statute does not specifically provide for any relaxation of the rules, so the Rules of Evidence apply fully, as in any court proceeding, per Rules of Evidence 101 and 1101. N.C. R. Evid. 101 (These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101."); *id.* R. 1101 ("Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.").

Second, the majority announces that the "Rules of Civil Procedure do not apply unless explicitly engrafted into the statute." I do not agree. The very first sentence of the Rules of Civil Procedure, which are themselves a statutory enactment, provides: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in *all* actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C. R. Civ. P. 1 (emphasis added) (titled "Scope of Rules"). I do not agree with the majority's assertion that the Rules of Civil Procedure do not apply "unless they are engrafted into the statute"; the Rules themselves presume they apply in all proceedings in the courts unless a different procedure is prescribed. I conclude this creates a presumption that these rules apply; the majority has turned this presumption around, citing no authority.

Additionally, the statute distinguishes between the proceeding before the clerk and the de novo hearing in the trial court, although the majority does not. I would clarify that since N.C.G.S. § 45-21.16 prescribes a different procedure for the hearing before the clerk, *see* N.C.G.S. § 45-21.16(c)-(d1) (2015), the Rules of Civil Procedure do not apply; however, because the statute does not prescribe any such alternate procedure for the de novo hearing in the trial court, *see id.* § 45-21.16(e) (2015), I would conclude that the Rules of Civil Procedure apply there, as in any court proceeding, per Rule 1. As such, I concur in the result.

"When an appellate court reviews the decision of a trial court sitting without a jury, 'findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them . . . .' " *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citations omitted)). Conclusions of law are reviewable by the

appellate court de novo. *Id.* at 467, 738 S.E.2d at 175 (citing *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

It does not appear that this Court has addressed the standard of review of a trial court's evidentiary determination in this particular context. The cases from the Court of Appeals are in conflict regarding whether an abuse of discretion or de novo standard of review is appropriate in the context of authentication of documentary evidence. *Compare State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (reviewing a trial court's determination as to authentication of text messages de novo), *disc. rev. denied*, 367 N.C. 791, 766 S.E.2d 644 (2014), *and State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (reviewing a trial court's determination as to authentication of cell phone records de novo), *disc. rev. denied*, 365 N.C. 553, 722 S.E.2d 607 (2012), *with In re Foreclosure by Goddard & Peterson, PLLC*, ___ N.C. App. ___, ___, 789 S.E.2d 835, 842 (2016) (reviewing evidentiary determinations by a trial court in a power-of-sale foreclosure proceeding for abuse of discretion), *and Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (using an abuse of discretion standard to review a trial court's determination as to authentication of spreadsheets with data under Rule 901), *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006). In this concurring opinion, I need not make a determination about which standard of review should apply because the result would be the same under either standard.[1]

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1. The majority opinion announces an abuse of discretion standard for reviewing "the trial court's exclusion of documentary evidence under the hearsay rule" and cites this Court's decision in *State v. Blake*, 317 N.C. 632, 637-38, 346 S.E.2d 399, 402 (1986). First, *Blake* does not support this statement. *Blake* states that "[r]ulings on questions arguably leading rest in the trial court's discretion and will not be disturbed in the absence of an abuse of discretion." *Blake*, 317 N.C. at 637, 346 S.E.2d at 402. In support of this statement, *Blake* cites *State v. Young*, 312, N.C. 669, 325 S.E.2d 181 (1985), which states that "[r]ulings by the trial court on leading questions are discretionary and reversible only for abuse of discretion." *Young*, 312 N.C. at 678, 325 S.E.2d at 187. Both cases specifically address the standard of review relating to leading questions. Neither case articulates a standard of review for evidentiary determinations under the hearsay rule. In fact, when *Blake* does discuss the hearsay issue, it seems to employ, although without specifically saying, a de novo review. *See Blake*, 317 N.C. at 638, 346 S.E.2d at 402.

Additionally, there are several cases from the Court of Appeals that explicitly utilize a de novo standard for reviewing trial court determinations regarding hearsay. *See, e.g.*, *State v. Hicks*, ___ N.C. App. ___, ___, 777 S.E.2d 341, 348 (2015) ("This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection de novo." (citing *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009))), *disc. rev. denied*, 368 N.C. 686, 781 S.E.2d 606 (2016); *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 ("The trial court's determination

Here the trial court concluded that Deutsche Bank (the Bank) "failed to offer sufficient evidence . . . to proceed with the foreclosure." The trial court found that the Bank "failed to prove [it] possessed the Right to Foreclose" after excluding several exhibits including Exhibit 4, which was essential to establishing the substitute trustee's appointment. The trial court excluded Exhibit 4 "based upon a failure to provide a proper foundation and hearsay." During the de novo hearing before the trial court, the trial court specifically noted, as to Exhibit 4, that "[t]he Court would determine this is not only a – taken no exception to hearsay rule, but also the document is internally inconsistent. I would further note this document is presented to the Court from counsel which has inconsistent dates." Thus, the precise issue before this Court is whether the trial court acted appropriately in excluding Exhibit 4.

Subsection 45-21.16(d) specifically explains that in the hearing before the clerk, "the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, *affidavits and certified copies of documents*." N.C.G.S. § 45-21.16(d) (emphasis added). This provision allows affidavits to be used in place of live testimony when "the 'necessity for expeditious procedure' substantially outweighs any concerns about the efficacy of allowing [the witness] to testify by affidavit." *In re Foreclosure of Brown*, 156 N.C. App. 477, 486, 577 S.E.2d 398, 404-05 (2003) (quoting *In re Custody of Griffin*, 6 N.C. App. 375, 378, 170 S.E.2d 84, 86 (1969)). The statute also allows clerks to consider "certified copies of documents," presumably in place of originals. N.C.G.S. § 45-21.16(d). The statute allows for these particular forms of evidence "in addition to other forms of evidence *required or permitted by law*." *Id.* (emphasis added). This means that aside from this narrow exception for affidavits and certified copies of documents, the other evidence that the "clerk shall consider," *id.*, must generally conform to the Rules of Evidence. Accordingly, I conclude that the Rules of Evidence are relaxed in power-of-sale foreclosure hearings before the clerk only to the extent specifically provided for in N.C.G.S. § 45-21.16(d).

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as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." (quoting *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009)), *appeal dismissed and disc. rev. denied*, 365 N.C. 354, 718 S.E.2d 148 (2011).

Second, it is not clear why the majority announces a specific, possibly new standard of review relating to hearsay when it does not analyze whether Exhibit 4 is hearsay or fits within a hearsay exception here. The majority simply concludes that because Exhibit 4 is "plainly internally inconsistent," the majority "cannot conclude the trial court had no reasonable basis to exclude" it.

I further conclude that in a de novo hearing before the trial court, the Rules of Evidence apply fully, as in any court proceeding, per Rules of Evidence 101 and 1101. N.C. R. Evid. 101 (These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101."); *id.* R. 1101 ("Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State."). Subsection 45-21.16(e) does not specifically provide for any relaxation of the rules of evidence for the court proceeding, as it does in subsection 45-21.16(d), for the hearing before the clerk.

The Bank sought to introduce Exhibit 4, which is a photocopy "of a document purporting to be a Limited Power of Attorney granting certain powers to Ocwen Loan Servicing, LLC." There is no stamp on Exhibit 4 certifying the exhibit as a true and accurate copy; thus, it is an uncertified copy.

The trial court specifically noted that the document has internal inconsistencies, particularly with dates and numbers of pages. The trial court also noted the lack of a "proper foundation." I conclude that the trial court acted appropriately in excluding the document on this basis,[2] regardless of the applicable standard of review.

As noted above, I conclude that once this matter reached the superior court, the Rules of Evidence applied. Under the North Carolina Rules of Evidence, "[e]very writing sought to be admitted must be properly authenticated" in order to establish the foundation for the document's admissibility. *Inv'rs Title Ins. Co. v. Herzig*, 330 N.C. 681, 693, 413 S.E.2d 268, 274 (1992) (citations omitted). Rule 901 states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. R. Evid. 901(a). Rule 901 provides a nonexclusive list of ways evidence may be authenticated, including "Testimony of Witness with Knowledge" and "Public Records or Reports." *Id.* R. 901(b)(1), (7).[3]

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2. Because this matter can be resolved based upon the trial court's exclusion of Exhibit 4 for failure to provide a proper foundation, in my view this Court need not reach the alternate ground for inadmissibility noted by the trial court, i.e., hearsay.

3. Rule 901 reads in pertinent part:

> (b) Illustrations.– By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

Rule 902 provides for methods of self-authentication of evidence. Specifically, "[e]xtrinsic evidence of authenticity . . . is not required with respect to the following: . . . (4) Certified Copies of Public Records . . . [and] (8) Acknowledged Documents." *Id.* R. 902.[4]

The Bank's attorney here did question a live witness (Ms. Lyew) but in so doing, failed to lay enough of a foundation to establish the authenticity of Exhibit 4. Counsel did not elicit testimony regarding the witness's job responsibilities, work experience, time of employment with Ocwen, or any other details showing her personal knowledge of the documents and loan in question. This testimony failed to satisfy minimal authentication requirements. Additionally, while evidence that a public

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> (1) Testimony of Witness with Knowledge.-- Testimony that a matter is what it is claimed to be.
>
> . . . .
>
> (7) Public Records or Reports.-- Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

N.C. R. Evid. 901(b)(1), (7).

4. Rule 902 reads in pertinent part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> . . . .
>
> (4) Certified Copies of Public Records.-- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.
>
> . . . .
>
> (8) Acknowledged Documents.-- Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Id. R. 902.

record or report "is from the public office where items of this nature are kept" could serve to authenticate this document to the extent this document may qualify as a public record or report, *id.* R. 901(b)(7), the recording stamp included with Exhibit 4 contradicts the document itself and indicates that it was recorded in "Montgomery County, NC," and not "Charlotte" (Mecklenburg County), as the witness testified should be the case here. As such, there is no indication that this document was in fact recorded or, if so, where. Thus, Exhibit 4 does not satisfy the requirements of Rule 901. Finally, any argument under Rule 902 fails because the parties did not present that argument before the trial court.

In addition to not being authenticated, Exhibit 4 is internally inconsistent. As the majority notes, the recording stamp on Exhibit 4 indicates that the document is eleven pages in length and was recorded in 2010 in Montgomery County, North Carolina. In fact, the actual Exhibit 4 document is fourteen pages in length, was executed in 2013, and should have been recorded in Mecklenburg County, according to the witness.

Because Exhibit 4 is not a certified copy and it contained internal inconsistencies, and because no witness testified to personal knowledge about it, the trial court acted appropriately in excluding Exhibit 4, regardless of the applicable standard of review. Without Exhibit 4, the Bank failed to offer sufficient evidence of the right to proceed with a power-of-sale foreclosure. The trial court's conclusion is supported by the findings of fact and by the evidence. Accordingly, the trial court's dismissal on this basis was entirely appropriate.

In addition, I agree with the majority that the Bank "is barred from proceeding again with non-judicial foreclosure based on the same default, [and that] the Bank may nonetheless proceed with foreclosure by judicial action." To reach that conclusion, however, I do not think it necessary or consistent with applicable statutory authority to deem the Rules of Civil Procedure inapplicable.

Turning to the foreclosure procedure at issue here, it is clear to me that in N.C.G.S. § 45-21.16 (codified in "Part 2. Procedure for Sale [Under Power of Sale]"), the General Assembly has prescribed by statute a different procedure for the hearing before the clerk. The details of that procedure are explained in subsections (c) through (d1) of N.C.G.S. § 45-21.16. If and when the matter is "appealed to the judge of the district or superior court," it is to be reviewed in a de novo hearing. N.C.G.S. § 45-21.16(d1). Once the case has moved into the district or superior court for the de novo hearing before a judge "who shall be authorized to hear the appeal," no further procedure is prescribed for that stage of the

litigation. *Id.* § 45-21.16(e). Subsection (e) requires only that "[a] certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed." *Id.* Because no differing procedure is prescribed in N.C.G.S. § 45-21.16(e) for the proceeding in the district or superior court, I conclude that the Rules of Civil procedure apply there, in accordance with Rule 1. *See* N.C. R. Civ. P. 1.

Upon appeal from the clerk's determination, the trial court excluded Exhibit 4 and properly concluded that the Bank failed to establish its right to foreclose by power of sale. Dismissal of the matter, under the Rules of Civil Procedure, was the proper ruling at that point. Nonetheless, as to the claim based on this default, the Bank may still proceed with foreclosure by judicial action. *See* N.C.G.S. § 45-21.2 (2015) ("This Article ["Article 2A. Sales Under Power of Sale"] does not affect any right to foreclosure by action in court, and is not applicable to any such action.").

For the reasons set forth herein, I concur in the result.

Justices BEASLEY and ERVIN join in this concurring opinion.

IN RE INQUIRY CONCERNING A JUDGE, NO. 14-126B
PETER MACK, JR., RESPONDENT

No. 250A16

Filed 21 December 2016

Judges—gross rental income not reported—hearing criminal matter involving tenant—restitution

A district court judge was publically reprimanded for not reporting gross rental income and for accepting restitution from a tenant while presiding over a criminal matter involving the tenant that the judge had initiated as the complaining witness. The Judicial Standard Commission's findings of fact, including the dispositional determinations, were supported by clear, cogent, and convincing evidence in the record. Additionally, the Commission's findings of fact supported its conclusions of law. The Commission's findings and conclusions were adopted by the Supreme Court.

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 16 June 2016 that Respondent Peter Mack, Jr., a Judge of the

General Court of Justice, District Court Division 3B, State of North Carolina, be publicly reprimanded for conduct in violation of Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct and constituting 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 10 October 2016, 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

The issue before the Court in this case is whether Judge Peter Mack, Jr. (Respondent) should be publicly reprimanded for violations of Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission or opposed the Commission's recommendation that he be publicly reprimanded before this Court.

On 20 July 2015, the Commission counsel filed a Statement of Charges against Respondent alleging that he had failed to report certain income from extra-judicial sources as required by Canon 6 and the State Government Ethics Act. In addition, the Commission counsel alleged that Respondent had

> engaged in conduct inappropriate to his judicial office by presiding over a session of district court in which a criminal defendant appeared on the [judge's] calendar for criminal charges which the [judge] ha[d] initiated as the complaining witness, and which the [judge] agreed should be dismissed after [he] was paid restitution by the criminal defendant in the amount of $3,000 cash in the [judge's] chambers.

According to the allegations contained in the statement of charges, Respondent's failure to report his annual outside income as required by law during specified years is "in violation of Canons 1, 2A, and 6C of the North Carolina Code of Judicial Conduct," and Respondent's actions in presiding over a criminal case that he had initiated and agreeing to the dismissal of the case after receiving restitution in chambers constituted

violations of "Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct." As a result, the Commission counsel asserted that Respondent's actions "constitute[d] 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 §[ ]7A-377."

On 1 September 2015, Respondent filed an answer in which he alleged that his failure to report outside rental income during the years in question constituted an unintentional oversight and that the handling of the case in which he received restitution was not "against normal protocol," with all the transactions in the case having been "handled through [his] de facto attorney in the proceeding and the District Attorney's Office." On 16 November 2015, Respondent and the Commission counsel filed a number of joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to publicly reprimand Respondent. On 11 May 2016, a hearing concerning this matter was held before the Commission.

On 16 June 2016, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. Respondent has resided in Craven County, North Carolina for more than thirty years.
>
> 2. Respondent owns two residential properties in Craven County, North Carolina which he has rented to various tenants over the last ten (10) years. Specifically, from approximately May 2013 until February 2014, Respondent rented a home in New Bern, North Carolina to a tenant for approximately $800 per month (the New Bern home). Respondent began renting the New Bern home to a new tenant in 2014 for approximately $700 per month. From approximately 2007 until August of 2011, Respondent also rented a home in Havelock, North Carolina to an individual for approximately $600 per month (the Havelock home). From approximately October 2011 until the present date, Respondent rented the Havelock home to another individual for approximately $550-600 per month.
>
> 3. With respect to the Havelock home, in 2011 Respondent's former tenant vacated the home without notice, was several months behind on rent and left significant damage to the property including knocked out drywalls, missing light fixtures, soiled carpets, and more.

4. Respondent incurred significant costs as a result of the damage done to the Havelock home. Respondent contacted the former tenant seeking compensation for the damages, which the former tenant did not pay.

[5]. On 3 May 2013, Respondent sought criminal charges against the former tenant and a criminal summons was issued for injury to real property. On the criminal summons, Respondent is listed as the complainant and his address is listed as 300 Broad St., New Bern, NC 28560, the address of the Craven County Courthouse.

[6]. The former tenant's criminal charge, Craven County File No. 13CR51808, was first set for 30 May 2013. The criminal case was continued a number of times and remained pending for over a year for various reasons. The former tenant had difficulty finding a defense attorney to represent him when Respondent was the prosecuting witness. Eventually, the former tenant applied for a court-appointed attorney and an Assistant Public Defender from outside Respondent's judicial district was assigned by the Office of Indigent Defense Services.

[7]. In an effort to bring all the parties together to settle the criminal matter, the Assistant District Attorney (ADA) assigned to prosecute the former tenant's charge calendared the matter in Respondent's courtroom. Respondent did not set the case on his own calendar or exercise undue judicial authority to have the former tenant's charge heard in his court.

[8]. On 25 April 2014, Respondent presided over Criminal District Court in Craven County, and Craven County File No. 13CR51808 appeared on line number 28 of that court calendar, with Respondent's name listed as the complainant.

[9]. During the 25 April 2014 court session, Respondent provided the ADA with photographs of the damaged rental property, which were also shared with the Assistant Public Defender, who then consulted with the former tenant. The parties reached an agreement that Respondent and the ADA would not pursue the criminal charge against the former tenant if he paid Respondent restitution for the property damages. This is a common means of resolution

in similar criminal cases in Craven County. All parties agreed on the amount of restitution and the case was continued to allow the former tenant time to raise the necessary funds to pay Respondent.

[10]. On 18 July 2014, the ADA again scheduled Craven County File No. 13CR51808 on Respondent's docket, and the case appeared on line number 18 of the court calendar, with Respondent's name listed as the complainant. During this court session, Respondent recessed court and was joined in an office behind the courtroom by the ADA and the former tenant. The Assistant Public Defender representing the former tenant was not present as per an agreement with the ADA. During this meeting, Respondent left the office temporarily, and when he returned, the ADA had received $3000 in cash as restitution from the former tenant, and the ADA handed it to Respondent. After restitution was made to Respondent, the ADA filled out a form dismissing the criminal charge against the former tenant. There is no dispute that Respondent was entitled to the restitution from the former tenant.

[11]. With respect to the rental properties as a whole, while Respondent stipulates he has had little to no annual net income from the rental properties, he admits he has grossed in excess of $5,000 annually in rent as reportable extra-judicial income.

[12]. Notwithstanding Respondent's income from his rental properties, Respondent admits that he did not report this income on his annual income reports required under Canon 6 of the Code of Judicial Conduct. Specifically, Respondent did not file a Canon 6 report with the Craven County Clerk of Superior Court for 2011, 2012, or 2013. The only Canon 6 report on file for Respondent in Craven County was from the 2010 calendar year and under the column for "name of source/activity," he stated "(NONE)."

[13]. After receiving notification of the Commission's investigation into this matter, Respondent filed an "Amended" Canon 6 report on 3 November 2014, listing his two (2) rental properties (described herein), but for the calendar year for which the "Amended" report was filed, he indicated "2010 – 2014."

[14]. Respondent's failure to file the required Canon 6 reports was the result of his own negligence, but it was not an attempt to willfully conceal his extra-judicial income and neither the Respondent nor any party appearing before him benefitted from his failure to file the required reports.

[15]. In addition to the obligation to file an annual gift and income report under Canon 6, District Court judges are "covered persons" under the State Government Ethics Act, which requires all covered persons to annually file a Statement of Economic Interest (SEI form). SEI forms must be filed with the State Ethics Commission each year.

[16]. Respondent reported his rental income from the New Bern home and the Havelock home as required on his SEI forms from 2007 until 2010. However, Respondent failed to report the rental income on his 2011 SEI form. On his 2011 SEI form, Respondent affirmed "the information provided in this Statement of Economic Interest and any attachments hereto are true, complete, and accurate to the best of my knowledge and belief."

[17]. Respondent's failure to report his rental income on his SEI forms continued in 2012, 2013, and 2014, when Respondent filed No-Change SEI forms with the State Ethics Commission. These SEI forms declared that he had no changes from his 2011 SEI form to report, and thus he failed to report the income for these successive years. On each of his 2012, 2013, and 2014 SEI No-Change Forms, Respondent confirmed he had reviewed the previous year's SEI form and affirmed "my responses continue to be true, correct, and complete to the best of my knowledge and belief."

[18]. All SEI forms signed and filed by Respondent specifically instructed covered persons to list all sources of income of more than $5,000, including "rental income."

[19]. Respondent's failure to properly report his rental income to the State Ethics Commission was not a willful or intentional attempt to conceal sources of income, nor did Respondent or any party appearing before him benefit in any way from his failure to report the income. However, Respondent's affirmation, acknowledgment, and previous reporting of extra-judicial income on SEI reports from

2007-2010, show Respondent should have known to report this income.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as matters of law that:

A. Failure to Report Rental Income on Canon 6 Reports, 2010-2013

1. Canon 6 of the North Carolina Code of Judicial Conduct requires judges to "report the name and nature of any source or activity from which the judge received more than $2,000 income during the calendar year for which the report is filed." N.C. Code of Judicial Conduct, Canon 6C.

2. Canon 6 further requires District Court judges to file such reports with the Clerk of Superior Court in the county in which the District Court judge resides by 15 May of the year following the year in which the income was received. N.C. Code of Judicial Conduct, Canon 6C.

3. Canon 6 serves the important purpose of ensuring transparency in a judge's financial and remunerative activities outside of the judicial office to ascertain potential conflicts of interest, avoid corruption and maintain public confidence in the impartiality, integrity and independence of the state's judiciary.

4. Where a judge acts as a landlord and personally rents real property and directly receives gross rental income exceeding $2000 in a calendar year, such activity must be reported on the annual Canon 6 report.

5. By repeatedly failing to report the rental income on his Canon 6 reports filed from 2010-2013, Respondent violated Canon 6 of the Code of Judicial Conduct.

6. By repeatedly failing to report the rental income on his Canon 6 reports filed from 2010-2013, Respondent failed to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct and failed to comply with the law and to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the

judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

7. Respondent's failure to properly file annual Canon 6 financial disclosures was the result of his own negligence, and was not an attempt to willfully conceal his extra-judicial income. Although Respondent's failure to report did not benefit him in any way, the continuing and recurring nature of this negligence year after year, distinguishable from an isolated incident or single occurrence, aggravates this misconduct to a level warranting more than a private letter of caution.

8. Respondent's violations of Canons 1, 2A and 6 of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. [§ 7A-] 376(b).

B. Failure to Disclose Rental Income on Statement of Economic Interest, 2011-2014

9. The State Government Ethics Act requires all covered persons to annually file a Statement of Economic Interest (SEI form). As a judicial officer and judge of the General Court of Justice, Respondent is a "covered person" under the State Government Ethics Act. N.C. Gen. Stat. § 138A-3(10) & (19).

10. Among other things, covered persons are required to report the source of income of more than $5000 received by the covered person, his/her spouse, or members of his/her immediate family during the filing year. The State Ethics Commission has interpreted "income" to mean the covered person's gross income, not net income.

11. Pursuant to the State Government Ethics Act, income includes "salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income." (citing N.C. Gen. Stat. § 138A-24(a)(3)). The SEI form provided by the State Ethics Commission also includes similar language.

12. By his failure to file SEI forms that accurately disclosed his extra-judicial income for the years of 2011-2014, Respondent failed to observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved, in violation of Canon 1 of the Code of Judicial Conduct.

13. By his failure to file SEI forms that accurately disclosed his extra-judicial income for the years of 2011-2014, Respondent failed to respect and comply with the law and conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the Code of Judicial Conduct.

14. Respondent's failure to properly file SEI forms that accurately disclosed his extra-judicial income for the years of 2011[ ]to 2014 was the result of his own negligence, and was not an attempt to willfully conceal his extra-judicial income or benefit any party appearing before him. Though not the result of ill motive, Respondent knew or should have known to accurately include his extra-judicial income in these reports and that his failure to do so could be considered a violation of the State Government Ethics Act, which Respondent acknowledged by his signature on the SEI forms signed each year. The potential statutory violations associated with this action aggravates this misconduct to a level warranting more than a private letter of caution. The Commission further concludes, as with Respondent's failure to properly file Canon 6 financial disclosures, that the continuing and recurring nature of Respondent's admitted negligence year after year with respect to his SEI forms, as distinguished from an isolated incident or single occurrence, aggravates this misconduct to a level warranting more than a private letter of caution.

15. Based on the foregoing, Respondent's violations of Canons 1 and 2A of the Code of Judicial Conduct with respect to his failure to file accurate SEI forms from 2011 to 2014 amounts to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C.G.S. [§ 7A-]376(b).

C. Acceptance of Restitution in a Criminal Matter While Presiding Over Court Session

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

17. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These principles embody the requirement that a judge should not use the prestige and benefits of the office to advance his own private and personal interests.

18. The Commission accepts Respondent's contention, as set forth in the Stipulations, that for both the April and July 2014 criminal court sessions, the ADA assigned to prosecute the former tenant calendared the matter in Respondent's courtroom for the purpose of achieving restitution or other settlement of the matter. The Commission further accepts that Respondent did not exercise undue judicial authority to have his criminal case against his former tenant heard in his court. The Commission also accepts Respondent's contention, as set forth in the Stipulations, that the State's dismissal of the charge in exchange for payment of restitution was routine practice in Craven County.

19. The touchstone of an inquiry under the Code of Judicial Conduct is not whether the conduct was motivated by malice or ill-intent, although that can be a relevant consideration, but whether the conduct in issue threatens to undermine public confidence in the independence, impartiality and integrity of the judiciary. As such, regardless of whether the restitution and dismissal practice in Craven County is routine in criminal cases, and without taking

a position on the propriety of such practice, and regardless of who calendared the matter on Respondent's criminal docket, sitting judges are not similarly situated with respect to resolving their personal legal matters as other criminal complainants or civil litigants.

20. In these circumstances, public confidence in the independence, impartiality and integrity of the judiciary depends on conduct, especially in the courtroom, that objectively and reasonably conveys a clear separation of the judge's private interests from his judicial duties. As the presiding judge in criminal district court on 25 April 2014 and 18 July 2014, it was incumbent upon Respondent to independently evaluate the propriety of his personal criminal matter being calendared before him as presiding judge, and further, to recognize the obvious conflict of interest and the potential for public concern as to his influence over the outcome of a matter in which he had a personal financial interest. As a criminal complainant, it was also incumbent upon Respondent to maintain a clear separation of his personal life from his judicial duties, including ensuring that his personal address rather than the Craven County Courthouse address was indicated as his address on the criminal summons, and settling and accepting cash restitution at a time when he was not also exercising his judicial duties as presiding judge.

21. The Commission notes that at the disciplinary recommendation hearing held on 11 May 2016, Respondent requested that the Commission reject and dismiss his stipulation that his conduct relating to the acceptance of restitution warranted discipline as set forth in the Stipulations. The Commission denies Respondent's request. In addition, as noted previously, Respondent indicated on the record that he has no objections to the facts contained in the Stipulations as they relate to this issue[, stating,] "I know I stipulated to all the facts, and I still stipulate that those are the facts[]." The facts relating to the restitution issue were also admitted in Respondent's Verified Answer.

22. The Commission concludes, therefore, that based upon the clear, cogent and convincing evidence supporting its findings of fact on this issue, Respondent (1) failed

> to personally observe standards of conduct to ensure the integrity and independence of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct; and (2) failed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct.
>
> 23. The Commission further concludes that the facts and circumstances relating to the restitution issue aggravate this misconduct to a level warranting more than a private letter of caution. Accordingly, Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct also amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § N.C.G.S. § 7A-31[-]376(b).

(Citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court "issue a public reprimand to Respondent" for "failing to report rental income on Canon 6 gift and income reports from 2010 to 2013," "failing to report rental income as required on annual Statements of Economic Interest filed with the State Ethics Commission from 2011 to 2014," and "settling and accepting cash restitution in a criminal matter initiated by Respondent while presiding over the court session in which the criminal matter was docketed," with this recommendation resting upon the Commission's earlier findings and conclusions and the following additional dispositional determinations:

> 1. Respondent has been fully cooperative with the Commission's investigation, voluntarily providing information about the underlying matter.
>
> 2. Respondent agreed to enter into the Stipulations to bring closure to this matter and because of his concern for protecting the integrity of the court system.
>
> 3. With respect to filing accurate Canon 6 and SEI reports, Respondent agreed to accept a recommendation of public reprimand from the Commission and acknowledges that the conduct set out in the Stipulations 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 G.S. § 7A-376([b]).

4. Respondent has an exemplary record of public service having served honorably with the United States Army where he was awarded the Army Commendation Medal for service above and beyond the call of duty. Respondent also worked for the United States Navy as a civilian and served as a law enforcement office for over 5 years in North Carolina before beginning a career in law.

5. Respondent is also strongly dedicated to his community, volunteering his time with numerous organizations. Respondent has served as a volunteer fire fighter and EMT, President of the Judicial District 3B Bar Association, and trustee on the Board of Trustees for Craven Community College. Respondent was a Havelock Rotary Club member, has been a Master Mason in the Cherry Point Masonic Lodge for over 30 years and is a member of the Ancient and Accepted Scottish Rite.

6. Respondent has already taken remedial measures by filing an amended Canon 6 disclosure form and is taking similar steps to supplement his SEI forms from 2011-2014. Respondent now understands the necessity of reporting his extra-judicial income and will comply each year as set forth in Canon 6 of the Code of Judicial Conduct and the State Government Ethics Act.

7. Respondent also acknowledges the potential for conflicts of interest to arise in his role as a landlord. If he were to encounter another incident which would require taking out criminal charges against a current or former tenant, Respondent understands and agrees that the matter must be kept separate from any of his judicial duties and he must make reasonable efforts to ensure his role and schedule as a judge will not conflict with any criminal action where he is the prosecuting witness. Respondent has already shown initiative to comply with the Code by recusing himself when the former tenant obtained a new unrelated criminal charge which was scheduled before Respondent. When Respondent realized the matter was on his calendar, he properly recused himself.

(Citations omitted.)

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, including the dispositional determinations set out above, 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. As a result, we accept the Commission's findings and conclusions 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 Peter Mack, Jr. 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, and 6C of the North Carolina Code of Judicial Conduct.

By order of the Court in Conference, this the 20th day of December, 2016.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of December, 2016.

Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

MIDREX TECHNOLOGIES, INC.
v.
N.C. DEPARTMENT OF REVENUE

No. 5A16

Filed 21 December 2016

Taxation—franchise and income tax—excluded corporation—building or construction contractor

The trial court did not err by concluding that Midrex Technologies, Inc. was not entitled to a franchise and income tax refund where the issue in the case was whether the corporation was entitled to utilize the single-factor tax allocation formula authorized by N.C.G.S. § 105-130.4(r) and made available to exempt corporations engaged in business as a building or construction contractor. Although the record did contain evidence tending to show that Midrex employees engaged in construction management activities and performed a limited amount of hands-on construction activity, that evidence was not enough to support a decision to classify Midrex as an "excluded corporation" on the grounds that it is a "building or construction contractor."

Appeal pursuant to N.C.G.S. §§ 7A-27(a) and 7A-45.4 from an Opinion and Order on Petition for Judicial Review entered on 21 October 2015 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Wake County, upholding a Final Decision and Order Granting Respondent's Motion for Summary Judgment entered by Administrative Law Judge Craig Croom on 13 October 2014. Heard in the Supreme Court on 30 August 2016.

Robinson, Bradshaw & Hinson, P.A., by Thomas Holderness, for petitioner-appellant.

Roy Cooper, Attorney General, by Tenisha S. Jacobs, Special Deputy Attorney General, for respondent-appellee North Carolina Department of Revenue.

ERVIN, Justice.

The issue in this case is whether petitioner Midrex Technologies, Inc. (Midrex) is entitled to utilize the single-factor tax allocation formula

authorized by N.C.G.S. § 105-130.4(r) and made available to exempt corporations "engaged in business as a building or construction contractor" by N.C.G.S. § 105-130.4(a)(4). For the reasons set forth below, we affirm the trial court's decision to uphold the administrative law judge's determination that Midrex was not an "excluded corporation" for purposes of N.C.G.S. § 105-130.4(a)(4) during the relevant time period.

Midrex, a Delaware corporation headquartered in Charlotte, was formed to develop and market the Midrex Direct Reduction Process. The Midrex Process, which has been patented by Midrex and is forty years old, is used in a facility known as a Midrex Plant to convert iron ore into direct reduced iron (DRI), a premium iron ore that is, in turn, used as an alternative feed in connection with the production of steel. Although Midrex engages in three primary business activities, Engineering Services and Procurement Services, Midrex Plant Sales, and After Market Sales, the ultimate focus of its business is the sale of Midrex Plants.

Engineering and Procurement Services employees design Midrex Plants, with their work including, but not limited to:

> 1. Designing refractory linings for gas based equipment, furnaces, ductwork, and heating exchange equipment;
>
> 2. Designing gas based equipment, furnaces, ductwork, and heating exchange equipment; and
>
> 3. Designing systems and equipment associated with the design and construction of DRI plants and new technology.

Engineering and Procurement Services houses employees who work in various engineering disciplines, such as mechanical, civil, process, and electrical engineering. Engineering and Procurement Services also houses employees responsible for obtaining proprietary and non-proprietary equipment needed for a Midrex Plant. Finally, Engineering and Procurement Services houses a site manager and a construction manager,[1] with the site manager being responsible for handling the relationship between Midrex and the purchaser of a Midrex Plant, including keeping the client apprised of any ongoing plant-related issues, helping coordinate activities at the plant site, recommending any necessary corrective measures, communicating with persons involved in the

1. At the time that this case was heard before the administrative law judge, Construction Manager was also its Site Manager.

construction process, and providing advice and assistance relating to any issues that might arise during the construction of a Midrex Plant and with the construction manager being responsible for all activities involved in the construction of both foreign and domestic plants.

The terms and conditions under which Midrex designs and sells a Midrex Plant are set out in certain contracts that are entered into between Midrex and the client. The plant sale contracts that Midrex enters into with its clients outline the relevant technical specifications, the terms under which the client makes payment to Midrex, and the nature and extent of the work to be performed by the client and by Midrex. The work that Midrex is required to perform under these plant sale contracts does not include the construction, erection, and installation of the systems and components utilized in a Midrex plant, with the client or some other entity being required to hire construction contractors and laborers in order to ensure the performance of those tasks. Consistent with this understanding of the contractual relationship between Midrex and its client, Midrex is required to provide engineering, equipment procurement, and advisory and field services needed in connection with the construction of a Midrex Plant, with these contractually required field services including:

> 1. Interpreting and explaining of plans, materials, and other technical data;
>
> 2. Advising the Client in developing and updating a construction schedule;
>
> 3. Inspecting material, equipment, and workmanship;
>
> 4. Providing advice related to the commissioning of a Midrex Plant.

Although Midrex field service employees do, on occasion, provide hands-on assistance to clients, the performance of this work does not change the fact that, under Midrex's plant sales contracts, the client retains ultimate responsibility for directly supervising and obtaining the performance of all on-site construction work in accordance with the relevant plans and specifications.

Finally, After Market Sales is responsible for addressing issues that arise following the construction of a Midrex Plant. For example, After Market Sales employees are involved in providing additional equipment and parts needed to permit the continued operation of an existing Midrex plant after construction has been completed.

In the years between 2005 and 2008, Midrex entered into contracts with various clients at different locations around the world for the sale of Midrex Plants. As a result, Midrex filed North Carolina C Corporation Tax Returns with the Department of Revenue that apportioned its income using the standard three-factor formula provided for in N.C.G.S. § 105-130.4(i).[2] Subsequently, Midrex filed a set of amended returns for the relevant period in which it calculated its tax liability using the single-factor formula applicable to "excluded corporations" authorized by N.C.G.S. § 150-130.4(r), with Midrex's claim to be an "excluded corporation" resting on a contention that it was "engaged in business as a building or construction contractor." N.C.G.S. §105-130.4(a)(4) (2016). In these amended returns, Midrex sought a $3,303,703 refund.

Midrex admitted that, during the relevant period, its "primary business [wa]s selling . . . plants." In all of the tax returns that it filed relating to this period, Midrex assigned itself a North American Industry Classification System (NAICS) code of 541330 based upon a review of the business services that it provides, including the field services upon which its present refund request depends. NAICS code 541330 falls within the engineering, rather than the construction, sector.

After the filing of Midrex's amended returns, respondent North Carolina Department of Revenue determined that Midrex should not be classified as an "excluded corporation" on the grounds that it "was not engaged in business as a building or construction contractor." Referencing the *Franchise Tax*, *Corporate Income Tax*, *Privilege Tax*, *Insurance Premium Tax [and] Excise Tax Rules and Bulletins for Taxable Years 2005 and 2006 and 2007 and 2008*, the Department of Revenue determined that an entity should be treated as an "excluded corporation" depending upon whether it was classified as a "building or construction contractor" on the basis of the NAICS system, which focuses upon whether an entity's primary business activity involves erecting buildings and other structures. As a result of the fact that Midrex was not primarily engaged in the business of constructing buildings or other engineering projects and was, instead, "primarily a technology company

2. Initially, Midrex filed tax returns for the 2005, 2006, and 2007 tax years that did not attempt to apportion revenue between North Carolina and other jurisdictions. In 2009 Midrex filed a return for the 2008 tax year utilizing the three-factor apportionment formula and filed amended returns seeking refunds for the 2005, 2006, and 2007 tax years. Subsequently, Midrex filed a second set of amended returns relating to the 2005, 2006, and 2007 tax years in which it sought a further refund based upon use of the single-factor formula. The present case arises from the Department's decision to reject the second set of refund requests relating to the 2005, 2006, and 2007 tax years.

that supplies technology relating to the production of DRI" that "is not responsible for the actual construction or installation of the purchased technology," the Department of Revenue determined that Midrex "was not engaged in business as a building or construction contractor" and rejected Midrex's refund request.

On 25 October 2013, Midrex filed a Petition for a Contested Tax Case Hearing with the Office of Administrative Hearings in which it sought to have the denial of its refund request by the Department of Revenue overturned. On 12 June 2014 and 27 June 2014, respectively, Midrex and the Department of Revenue filed motions seeking entry of summary judgment in their favor. On 10 October 2014, the administrative law judge entered a Final Decision and Order Granting Respondent's Motion for Summary Judgment in which he determined that there was no genuine issue of material fact, that judgment should be entered in favor of the Department of Revenue, and that Midrex's refund request should be denied.

On 23 October 2014, Midrex filed a Petition for Judicial Review in the Superior Court, Wake County. After this case was designated a mandatory complex business case as defined by N.C.G.S. § 7A-45.4 and assigned to a trial judge for decision, the Department of Revenue filed a response to Midrex's petition. On 21 October 2015, the trial court entered an Opinion and Order on Petition for Judicial Review determining that "Midrex was not an excluded corporation during the tax years at issue" and affirming "the Final Decision entered in this matter on October 10, 2014," denying Midrex's summary judgment motion, and granting the Department of Revenue's summary judgment motion.

Although Midrex acknowledged that no disputed issues of material fact existed in this case, it argued before the trial court that the administrative law judge had failed to properly apply the statutory provisions set out in N.C.G.S. § 105-130.4(a)(4) to the facts established by the present record. More specifically, Midrex asserted that the administrative law judge had erred by concluding that Midrex was not a "building or construction contractor" or "engaged in [the construction] business" and by construing the relevant statutory language to require a showing that construction-related activities constituted Midrex's "primary" business activity as a prerequisite for a finding that Midrex was an "excluded corporation." In reaching a contrary conclusion, the trial court began by attempting to determine the plain meaning of "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4) and reasoning that "only if Midrex's work qualifies as building or construction contracting will [this] Court need to address the meaning of the statutory term

'engaged in business.' " *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, No. 14 CVS 13996, slip op. at 13 (N.C. Super. Ct. Wake County Oct. 21, 2015) (unpublished). Although Midrex asserted that the field service work that it performed under its Plant sale contracts constituted construction management and that it was involved in "construction contracting" for that reason, the Department of Revenue asserted that Midrex was "not a building or construction contractor" because "Midrex's contracts do not place responsibility on Midrex to build or erect the plant" and because "Midrex is not significantly involved in the physical labor of building the plant." *Id.*

After concluding that a determination of the extent to which Midrex was properly classified as an "excluded corporation" involved an issue of statutory construction requiring an analysis of the plain meaning of the relevant statutory language and, potentially, the utilization of various principles of statutory construction, *Midrex*, slip op. at 10-13 (citing *inter alia*, *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d, 513, 517 (2001)), the trial court noted that "Merriam-Webster defines 'building' as 'the art or business of assembling materials into a structure,' " defines " 'construction' as 'the process, art, or manner or constructing something,' " and defines "contractor as 'one that contracts or is a party to a contract: as (a) one that contracts to perform work or provide supplies[; or] (b) one that contracts to erect buildings.' " *Id.* at 15 (brackets in original). In addition, the trial court sought guidance from language appearing in other relevant statutory provisions, noting that the "statutory definition [of "construction contractor" contained in N.C.G.S. § 105-273(5a)] is consistent with the dictionary definitions and emphasizes the physical work of 'building' and 'installing' as the critical elements of construction contracting, and does not suggest that it excludes subcontractors or other contractors." *Id.* According to the trial court, the dictionary and statutory definitions of the relevant terms "accurately reflect the common understanding [of the terms], as they include a broader range of activity." *Id.* at 16.

Although Midrex argued that NAICS treats construction managers providing scheduling and oversight services as contractors, the trial court pointed out that "NAICS recognizes that where an establishment's primary business is providing oversight and scheduling for construction projects it may properly be classified for purposes of the NAICS system as a 'general contractor-type establishment' " and indicated that the quoted language "does not suggest that any establishment which performs any amount of construction oversight and scheduling as some part of its services is a 'building or construction contractor.' " *Id.* As a

result, the trial court concluded that the term "building or construction contractor" as used in N.C.G.S. § 105-130.4(a)(4) did not apply to the provision of "construction management that involves only oversight or scheduling, but does not include responsibility for performance or direction of the actual building, erection, or assembly of a structure;" therefore, Midrex construction management activities "do[ ] not fit within the plain meaning of the term 'building or construction contractor' as used in [N.C.] G.S. § 105-130.4(a)(4). " *Id.* at 18.

Although the agreements between Midrex and its clients obligated Midrex to provide technical advice, including "interpreting and explaining drawings and specifications," "advising the client in development of the construction sequence," and "inspecting the material, equipment, and workmanship of the plant," and to "direct and supervise the commissioning (start-up) of the Midrex Plant once it was constructed," these contracts clearly made the client responsible for procuring the performance of the actual erection of the plant. *Id.* at 18-19. In light of these contractual provisions, the trial court determined that the fact that Midrex performed field advisory services for its clients did not render Midrex a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4). *Id.* at 19. Having made that determination, the trial court deemed it "unnecessary . . . to address the parties' arguments regarding the meaning of the term 'engaged in business,' " and affirmed the administrative law judge's order. *Id.* at 19-20. Midrex noted an appeal to this Court from the trial court's order.

As we have already noted, the issue before the trial court in this case was whether the administrative law judge properly granted summary judgment in favor of the Department of Revenue and against Midrex. Subsection 150B-51(d) of our General Statutes provides that "[i]n reviewing a final decision allowing judgment on the pleadings or summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56," with the reviewing court having the authority to "remand the case to the administrative law judge for such further proceedings as are just" in the event that "the order of the court does not fully adjudicate the case." N.C.G.S. § 150B-51(d) (2015). Similarly, in reviewing an order from a superior court acting in an appellate capacity, an appellate court must "determine whether the trial court exercised the appropriate scope of review and, if appropriate[,] . . . decide whether the court did so properly." *In re Denial of NC IDEA's Refund*, 196 N.C. App. 426, 434, 675 S.E.2d 88, 95 (2009) (quoting *County of Wake v. N.C. Dep't of Env't & Nat. Res.*, 155 N.C. App. 225, 233-34, 573 S.E. 2d 572, 579 (2002), *disc. rev. denied*, 357 N.C. 62, 579 S.E.2d 386-87 (2003)).

According to well-established North Carolina law, summary judgment "shall be rendered forthwith 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) (2015). Appeals arising from summary judgment orders are decided using a de novo standard of review. *Dallaire v. Bank of Am.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (citation omitted). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely substitute[es] its own judgment for' [that of the lower court]." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (second, third, and fourth alterations in original)). As a result, our task on appeal from the trial court's order is to make a de novo determination of whether the administrative law judge correctly granted summary judgment in favor of the Department of Revenue and against Midrex.

C corporations like Midrex doing business within North Carolina are subject to various forms of taxation "to raise and provide revenue" for the State. *See* N.C.G.S. § 105-1 (2015). A corporation's franchise tax obligation is computed based upon the "total amount of [the corporation's] issued and outstanding capital stock, surplus, and undivided profits," *id.* § 105-122(b) (2016), while a C corporation's income tax liability is imposed upon the corporation's "net income." *Id.* § 105-130.3 (2015). As a result of the fact that a corporation may earn income both inside and outside of North Carolina and the fact that there are limitations on the extent to which North Carolina has the constitutional authority to tax income earned outside North Carolina, a corporation that does business both inside and outside North Carolina must use the allocation and apportionment process delineated in N.C.G.S. §§ 105-122(c1)(1) and 105-130.4 in order to determine its liability for the payment of North Carolina franchise and income taxes.

According to the statutory provisions governing the allocation and apportionment process during the relevant time period, corporations other than those defined as "excluded corporations" in N.C.G.S. § 105-130.4(a)(4) are required to utilize a three-factor apportionment formula that focuses upon property, payroll, and sales in order to determine their North Carolina franchise and income tax liability, *id.* §§ 105-122(c1)(1), 130-4(i) (2015),while "excluded corporations" are entitled to utilize a single-factor formula that focuses exclusively upon sales. *Id.* § 105-130.4(r) (2015). Thus, the extent to which Midrex is

entitled to utilize the single-factor formula in lieu of the three-factor formula depends entirely upon whether it is properly categorized as an "excluded corporation."

An "excluded corporation" is defined as "any corporation *engaged in business as a building or construction contractor*, a securities dealer, or a loan company or a corporation that receives more than fifty percent (50%) of its ordinary gross income from intangible property." *Id.* § 105-130.4(a)(4) (emphasis added). In view of the fact that there is no definition of "building or construction contractor" in the relevant statutory provisions, we are required, as a first step, to determine the meaning of that statutory phrase in order to ascertain whether Midrex should be deemed an "excluded corporation" entitled to utilize the single-factor formula for the purpose of determining its franchise and income tax liability.

"Legislative intent controls the meaning of a statute." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)).

> The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, 'the spirit of the act and what the act seeks to accomplish.' If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Lenox, Inc. v. Tolson, 353 N.C. at 664, 548 S.E.2d at 517 (citations omitted). Courts should "give effect to the words actually used in a statute" and should neither "delete words used" nor "insert words not used" in the relevant statutory language during the statutory construction process. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations omitted). "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098 (1999), *disavowed in part by Lenox*, 353 N.C. at 663, 548 S.E.2d at 517. In determining the plain meaning of undefined terms, "this Court has used 'standard, nonlegal dictionaries' as a guide." *C.D. Spangler Constr. Co. v. Indus. Crankshift & Eng'g Co.*, 326 N.C. 133, 152, 388 S.E.2d 557, 568 (1990) (quoting *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966)). Finally, statutes should be construed so that the resulting construction "harmonizes with the underlying reason and purpose of the statute." *Elec. Supply Co. of*

Durham v. Swain Elec. Co., 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations omitted).

According to the *New Oxford American Dictionary*, "building" means "the process or business of constructing something," such as "the building of highways"; "construction" means "the building of something, typically a large structure"; and "contractor" means "a person or company that undertakes a contract to provide materials or labor to perform a service or do a job." *New Oxford American Dictionary* 228, 373, 377 (Angus Stevenson & Christine A. Lindberg eds. 3d ed. 2010). As the administrative law judge and the trial court reasoned, these definitions tend to focus upon the act of physically constructing or erecting a structure or improvement to real property. Thus, the validity of Midrex's claim to be a "building or construction contractor" depends upon the extent to which the work performed by Midrex employees involves the act of building or constructing a physical asset, such as a Midrex Plant.

An examination of the relevant statutory language in wider context reinforces this conclusion. As the relevant statutory provisions clearly indicate, the single-factor formula and three-factor formula are utilized to determine the affected entity's entire North Carolina tax liability. In other words, an "excluded" corporation is treated for tax allocation and apportionment purposes as if it was involved in nothing other than the activity that caused it to be classified as "excluded." In light of that fact, we have difficulty in seeing why the General Assembly would have intended for N.C.G.S. § 105-130.4(a)(4) to have been construed in such a manner as to classify an entity engaged in only a relatively small amount of construction-related activity as if it was a "building or construction contractor." Instead, it is far more likely, given that a taxpayer is treated as "excluded" or not "excluded" on a whole entity basis, that N.C.G.S. § 105-130.4(a)(4) should be understood as describing the entire entity rather than a small portion of the entity's overall business.

The interpretation of the relevant statutory language that we believe to be appropriate is further buttressed by the fact that the Department of Revenue has traditionally read N.C.G.S. § 105-130.4(a)(4) in just this way. In an attempt to provide guidance to taxpayers and others attempting to ensure compliance with North Carolina's revenue laws, the Secretary of Revenue publishes Bulletins that set out his or her interpretation of various statutory provisions.

> It is the duty of the Secretary [of Revenue] to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the

> applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation.

N.C.G.S. § 105-264(a) (2016). "The construction adopted by the administrators who execute and administer a law in question is one consideration where an issue of statutory construction arises," *Polaroid*, 349 N.C. at 301-02, 507 S.E.2d at 293 (quoting *John R. Sexton & Co. v. Justus*, 342 N.C. 374, 380, 464 S.E.2d 268, 271 (1995)), because such interpretation is " 'strongly persuasive' " and "entitled to due consideration," *id.* at 302, 507 S.E.2d at 293 (quoting and citing *Shealy v. Associated Transp., Inc.*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960)). *Contra Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 156, 712 S.E.2d 868, 871 (2011) (stating "courts consider, but are not bound by, the interpretations of administrative agencies and boards"). Thus, the manner in which the Secretary of Revenue has interpreted the relevant statutory language is important and must be given "due consideration."

The relevant Bulletin language clearly states that a "building or construction contractor," as that term is used in N.C.G.S. 105-130.4(a)(4), "is a business so classified in the [NAICS] published by the Federal Office of Management and Budget." Corp., Excise & Insur. Tax Div., N.C. Dep't of Revenue, *Franchise Tax[,] Corporate Income Tax[,] Privilege Tax[,] Insurance Premium Tax[,] Excise Tax: Rules and Bulletins: Taxable Years 2005 & 2006*, at 46; *id.*, *Years 2007 & 2008*, at 54-55. NAICS classifies establishments as belonging to particular industries based on the nature of the entity's primary business activity. According to NAICS, the construction sector is comprised of establishments that are *primarily* engaged in the construction of buildings or engineering projects, including erecting buildings and other structures, heavy construction, alterations, reconstruction, and installation. Thus, under the interpretation of N.C.G.S. § 105-130.4(a)(4) deemed appropriate by the Secretary of Revenue, an entity is not a "building or construction contractor" unless that entity is primarily engaged in the actual construction or erection of physical assets.

A careful review of the undisputed evidence contained the evidentiary record presented for the administrative law judge's consideration indicates that Midrex has only limited involvement in the actual, physical construction of a Midrex Plant. Instead, the undisputed record

evidence tends to show that the client, rather than Midrex, has ultimate responsibility for obtaining the physical construction of a Midrex Plant, with Midrex being responsible for providing scheduling, oversight, and other sorts of technical assistance and advice. For that reason, we agree with the trial court and the administrative law judge that Midrex is not a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4). Our determination to this effect is buttressed by the fact that the undisputed record evidence reflects that Midrex has classified itself as an engineering company rather than a building or construction company for purposes of the NAICS system. In view of the fact that an entity is not entitled to classify itself as a construction company utilizing NAICS unless it is primarily engaged in activities involved the building or erection of structures, the fact that Midrex concedes that it is not primarily engaged in such activities, and the fact that Midrex has assigned an engineering-related NAICS code rather than a construction-related NAICS code, it is clear that Midrex is not entitled to claim "building or construction contractor" status for purposes of N.C.G.S. § 105-130.4(a)(4) utilizing the test for identifying "excluded corporations" that the Department of Revenue has deemed appropriate either. As a result, when considering the record evidence concerning Midrex's role in the construction of a Midrex Plant on the basis of either the literal language of N.C.G.S. § 105-130.4(a)(4) or the method for identifying "excluded corporations" deemed appropriate by the Secretary, we agree that the Department of Revenue correctly rejected Midrex's refund request.

In seeking to persuade us that it should be treated as a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4), Midrex emphasizes that it provides construction management services and performs hands-on construction activities. Although the record does contain evidence tending to show that Midrex employees engage in construction management activities and perform a limited amount of hands-on construction activity, this evidence is not enough to support a decision to classify Midrex as an "excluded corporation" on the grounds that it is a "building or construction contractor."

As Midrex notes, construction management activities are included within the NAICS construction classification. In light of that fact, Midrex argues that it should be deemed a construction company for NAICS-related purposes given that it performs what amounts to construction management services for its clients and that it should be deemed to be a "building or construction contractor" for that reason. Midrex's argument to this effect fails, however, because an NAICS classification

determination is supposed to be premised upon the identification of an entity's primary business activity. Although the record does contain evidence tending to show that Midrex performs a certain amount of construction management work, the record does not provide any support for an assertion that the provision of such services constitutes Midrex's primary business activity. For that reason, Midrex could not properly be classified as a construction manager for purposes of the NAICS classification system given that construction management was not its primary line of business during the relevant time period. As a result, the fact that Midrex performs a certain amount of construction management work does not justify a decision in Midrex's favor in this case.

Similarly, while Midrex employees do, apparently, perform a very limited amount of hands-on construction, such work is not provided for in the Plant construction contracts, appears to involve an attempt on the part of Midrex's employees to demonstrate to the employees of other entities employed by the client for the purpose of physically constructing a Midrex Plant how certain jobs should be performed, and seems to represent a very small fraction of the work that Midrex performs for its clients in connection with the design, construction, and commissioning of a Midrex Plant. In other words, the hands-on construction work that is performed by Midrex's employees appears to be incidental to the obligations imposed upon it under the contracts that are intended to result in the construction of a Midrex Plant. Thus, Midrex cannot be treated as a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4) based on its hands-on construction activities either.

In an attempt to persuade us of the correctness of its position, Midrex argues that, because N.C.G.S. § 105-130.4 is a tax statute, it should be construed in favor of Midrex as the taxpayer. *See Lenox*, 353 N.C. at 664, 548 S.E.2d at 517 (2001). However, as the Department of Revenue notes, this Court has held that tax statutes providing for exceptions to otherwise-applicable general rules, such as N.C.G.S. §§ 105-130.4(a)(4) and 105-130.4(r), should be treated as statutes providing for an exemption from taxation that should be construed against the taxpayer. *See Hatteras Yacht Co. v. High*, 265 N.C. 653, 656, 144 S.E.2d 821, 824 (1965) (finding that exemptions from taxation are "to be strictly construed against the claim of such special or preferred treatment"). As the record clearly reflects, the vast majority of C Corporations subject to North Carolina taxation apportioned their income utilizing the three-factor formula specified in N.C.G.S. § 105-130.4(i) during the tax years at issue in this case. For that reason, any claim that a taxpayer has the right to utilize the single-factor formula set out in N.C.G.S. § 105-130.4(r)

should be strictly construed against, rather than in favor of, the taxpayer's contention, a proposition that further reinforces our determination that Midrex is not entitled to be treated as an "excluded corporation" as defined in N.C.G.S. § 105-130.4(a)(4).

Reduced to its essence, the argument that Midrex has advanced in support of its refund request rests on an assertion that entities seeking to be classified as "excluded corporations" based on their status as a "building or construction contractor" are entitled to be categorized in that manner as long so as they are engaged in any non-incidental amount of "building or construction" work. In other words, acceptance of Midrex's argument hinges on the proposition that the company is not required to be *primarily* "engaged in business as a building or construction contractor." Admittedly, as Midrex notes, the word "primarily" does not appear in the relevant statutory language. *See* N.C.G.S. § 105-130.4(a)(4). The absence of the word "primarily" from N.C.G.S. § 105-130.4(a)(4), while relevant, is not, however, dispositive in light of the rule of statutory construction to the effect that the fact "[t]hat a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) (citation omitted). Thus, the ultimate issue for our consideration remains what the relevant statutory language, when read in context and in its entirety, should be understood to mean.

As we have already demonstrated, the position espoused by the Department of Revenue and upheld by the administrative law judge and the trial court is fully consistent with both the literal language in which the relevant statutory provision is couched and long-standing administrative practice. Acceptance of the construction of the relevant statutory language contended for by Midrex would have the effect of allowing *any* corporation that performed *some* building or construction work to take advantage of the single-factor formula made available by N.C.G.S. § 105-130.4(r), despite the fact that the General Assembly clearly intended that the single-factor formula was only to be made available to a limited class of corporate taxpayers, with the remaining corporate taxpayers being required to use the three-factor formula.[3] Any decision

3. Admittedly, the General Assembly has amended N.C.G.S. § 105-130.4 so as to allow all corporations to utilize the single-factor formula effective for tax years beginning with 1 January 2018. However, Midrex's liability for franchise and income taxation associated with the 2005, 2006, and 2007 tax years must, of course, be determined in light of the statutory provisions in effect as of that time.

that would have the effect of vastly expanding the number of entities entitled to use the single-factor test would appear to conflict with the apparent legislative intent. *See Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent is accomplished"). As a result, adoption of the construction of the relevant statutory language contended for by Midrex would appear to be inappropriate for this reason as well.

Thus, for the reasons set forth above, we conclude that the administrative law judge and the trial court properly determined that Midrex was not a "building or construction contractor" for purposes of N.C.G.S. § 105-130.4(a)(4). In light of that fact, we need not determine whether Midrex satisfied the "engaged in business" criterion contained in N.C.G.S. § 105-130.4(a)(4) in order to properly resolve this case. Accordingly, we hold that the trial court did not err by concluding that Midrex is not entitled to a franchise and income tax refund based upon the argument that it has advanced before this Court and we thus affirm the trial court's decision.

AFFIRMED.

THE NORTH CAROLINA STATE BAR
v.
JERRY R. TILLETT

No. 208PA15

Filed 21 December 2016

Judges—discipline—sitting judges—misconduct while in office—jurisdiction

Where a sitting judge engaged in misconduct while in office, the North Carolina State Bar Disciplinary Hearing Commission lacked the authority to investigate and discipline him. Pursuant to the state constitution and the General Statutes, jurisdiction to discipline sitting judges for their conduct while in office rests solely with the Judicial Standards Commission and the Supreme Court of North Carolina.

Chief Justice MARTIN concurring.

Justice EDMUNDS joins in this concurring opinion.

Justice ERVIN concurring in the result.

Justices HUDSON and BEASLEY join in this concurring opinion.

On writ of certiorari to review the question presented in defendant's petition for discretionary review. Heard in the Supreme Court on 30 August 2016.

Katherine Jean, Counsel, and David R. Johnson, Jennifer A. Porter, and G. Patrick Murphy, Deputy Counsels, North Carolina State Bar, for plaintiff-appellee.

Vandeventer Black LLP, by Norman W. Shearin, David P. Ferrell, and Kevin A. Rust, for defendant-appellant.

Roy Cooper, Attorney General, by Melissa L. Trippe, Special Deputy Attorney General, for North Carolina Judicial Standards Commission, amicus curiae.

JACKSON, Justice.

In this case we consider whether the North Carolina State Bar Disciplinary Hearing Commission (DHC) has the authority to investigate and discipline sitting Judge Jerry R. Tillett (defendant) for his conduct while in office. Because we conclude that the DHC lacks this authority, we reverse the DHC's denial of defendant's motion to dismiss and remand this case to the DHC to dismiss with prejudice the complaint of the North Carolina State Bar (State Bar) against defendant.

Defendant has served continuously as a judge in Judicial District One of the General Court of Justice, Superior Court Division, from the time of the circumstances giving rise to this case until the present. On 16 February 2012, the Judicial Standards Commission (JSC) commenced a formal investigation into defendant's "interactions with employees and officials of the Town of Kill Devil Hills, including his involvement in orders entered against the town, and regarding his interactions with the District Attorney's office of the 1st Prosecutorial District including pressuring that office to pursue certain legal actions." Based on its findings and conclusions, the JSC imposed a public reprimand on defendant.

According to the public reprimand, on 4 April 2010, Kill Devil Hills Police detained defendant's adult son for an unspecified reason. Eleven days later, on 15 April, defendant arranged a meeting with officials from the Town of Kill Devil Hills and its police department in defendant's chambers. Defendant complained about his son's detention "as part of a series of other complaints about incidents of misconduct involving" the police department. According to those who participated in the meeting, defendant then became agitated and confrontational in his warnings to town officials to address the complaints and engaged in "discussion of a superior court judge's ability to remove officials from office," causing some individuals to feel "threatened."

The public reprimand also states that throughout 2011 defendant received "communications from Kill Devil Hills police officers with grievances against Chief of Police Gary Britt and Assistant Town Manager Shawn Murphy related to personnel issues." During this period, defendant also received "complaints about the performance of the District Attorney of the 1st Prosecutorial District." Concluding from the complaints "that Chief Britt was guilty of professional malfeasance," defendant attempted to convince the District Attorney and members of his staff "that it was their duty to file a petition for the removal of Chief Britt." The District Attorney and his staff "ultimately concluded that there was insufficient evidence to support such a petition." On 24 June 2011, defendant then sent a letter to Chief Britt notifying him about complaints of his professional misconduct and further warning Chief Britt that "to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority." This letter was printed on defendant's judicial stationery and defendant signed it "in his capacity as Senior Resident Superior Court Judge."

In addition, the public reprimand notes that on 19 September 2011 defendant drafted and executed an order for production of copies of the private personnel records of several town employees, including Chief Britt and Murphy, to be delivered to him "for an in camera review, for the protection of integrity of information, to prevent alteration, spoliation, for evidentiary purposes and or [sic] for disclosure to other appropriate persons as directed by the Court." Defendant issued this order on his own initiative without a request from any employee of the town, anyone in the District Attorney's office, or any of the complainants who previously had contacted defendant.

The public reprimand further notes that on 5 January 2012, defendant sent a letter to Murphy, also on judicial stationery "and signed in his capacity as Senior Resident Superior Court Judge," alleging receipt of "complaints of professional misconduct" against Murphy and warning Murphy that "to the extent that allegations involve conduct prejudicial to the administration of justice, conduct violative of public policy, and/or violations of criminal law including obstruction of justice, oppression by official, misconduct in public office and/or substantial offense, this office will act appropriately in accord with statutory and/or inherent authority." That same day defendant met with the District Attorney and a member of the District Attorney's staff "in reference to complaints lodged against the District Attorney's office and the office's failure to file a petition against Chief Britt." A sheriff's deputy was present at this meeting in defendant's chambers, which, in conjunction with defendant's "critical and aggressive comments, had the effect of intimidating the officials from the District Attorney's office."

Finally, the reprimand states that even though defendant later recused himself from matters involving complaints against the Kill Devil Hills Police Department and the District Attorney's office, he continued to involve himself in the adjudication of the complaints by communicating with judges who were involved in the matter "through suggested orders, and his appellate filings in defense of such suggested orders."

Based on these findings of fact, the JSC determined that both defendant's initial confrontation with town officials in his chambers and later in his capacity as Chief Resident Superior Court Judge "created a reasonable and objective perception of conflict that tainted his subsequent use of the powers of his judicial office in matters adversarial to these officials." The JSC also determined that defendant's attempts to address complaints against Chief Britt, Murphy, and the District Attorney were "overly aggressive," drove him to become "embroiled in a public feud with these individuals," and caused him to engage in "actions that fell outside of the legitimate exercise of the powers of his office." Furthermore, the JSC found that defendant's "communication with other judges through suggested orders, and his appellate filings in defense of such suggested orders" after he had recused himself, "created a public perception of a conflict of interest which threatens the public's faith and confidence in the integrity and impartiality of [defendant's] actions in these matters." The public reprimand of defendant concluded:

> The above-referenced actions by [defendant] constitute a significant violation of the principles of personal conduct embodied in the North Carolina Code of Judicial

> Conduct . . . . [Defendant's] overly aggressive conduct displayed toward the District Attorney's office and certain employees of the Town of Kill Devil Hills, and his misuse of the powers of his judicial office in connection thereto, resulted in the public perception of a conflict of interest between [defendant] and the District Attorney's office and the town of Kill Devil Hills, which brought the judiciary into disrepute and threatened public faith and confidence in the integrity and impartiality of the judiciary.

Defendant accepted the reprimand as indicated by his 6 March 2013 signature, and its official filing on 8 March 2013 constituted the JSC's final action on the matter.

On 6 March 2015, exactly two years after defendant accepted the JSC's public reprimand, the State Bar commenced a disciplinary action against defendant by filing a complaint with the DHC. The State Bar alleged that defendant's conduct constituted seventeen separate violations of North Carolina Rule of Professional Conduct 8.4(d)[1] and requested that the DHC take disciplinary action against defendant in accordance with N.C.G.S. § 84-28(a) and section B.0114 of the Discipline and Disability Rules of the North Carolina State Bar. Defendant filed a motion to dismiss the State Bar's complaint dated 16 March 2015 and an answer to the complaint on 30 March 2015. The DHC denied defendant's motion to dismiss on 30 April 2015, and defendant filed a petition for discretionary review with this Court, which was denied and certified to the North Carolina Court of Appeals by order entered on 28 January 2016. Upon reconsideration, this Court issued an order *ex mero motu* on 27 May 2016 deeming "the question presented by this case to be of such importance that the invocation of our supervisory jurisdiction is warranted." We issued a writ of certiorari to review the following question:

> 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?

This Court stayed all proceedings before the DHC "pending full briefing by the parties in this Court and our determination of this question."

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1. Rule 8.4 states, "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice." N.C. St. B. Rev. R. Prof'l Conduct 8.4(d), 2016 Ann. R. N.C. 1261, 1261-62.

Defendant argues that Article IV, Section 17(2) of the North Carolina Constitution and Chapter 7A, Article 30 of the General Statutes convey to this Court exclusive, original jurisdiction over the discipline of members of the General Court of Justice. Consequently, defendant contends that the DHC infringes upon this Court's jurisdiction by initiating attorney disciplinary proceedings against a sitting member of the General Court of Justice for conduct while in office. Defendant therefore asserts that the DHC erred in failing to grant his motion to dismiss the State Bar's complaint against him. We agree.

The North Carolina State Bar was created by the General Assembly in 1933 "as an agency of the State of North Carolina." Act of Apr. 3, 1933, ch. 210, sec. 1, 1933 N.C. Pub. [Sess.] Laws 313, 313 (codified at N.C.G.S. § 84-15 (2015)). "Subject to the superior authority of the General Assembly to legislate thereon by general laws," the State Bar Council was "vested, as an agency of the State, with control of the discipline and disbarment of attorneys practicing law in this State." *Id.*, sec. 9, at 319 (codified at N.C.G.S. § 215(9) (Supp. 1933)). We have recognized that the "purpose of the statute creating the North Carolina State Bar was to enable the bar to render more effective service in improving the administration of justice, particularly in dealing with the problem . . . of discipling [sic] and disbarring attorneys at law." *Baker v. Varser*, 240 N.C. 260, 267, 82 S.E.2d 90, 95-96 (1954). The General Assembly enhanced the disciplinary function of the State Bar in 1975 by creating the DHC and authorizing it to "hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council." Act of June 13, 1975, ch. 582, sec. 6, 1975 N.C. Sess. Laws 656, 658-59 (codified at N.C.G.S. § 84-28.1 (Supp. 1975)). The DHC, as a committee of the Council, *see* N.C.G.S. § 84-23(b) (2015), maintains broad jurisdiction to exercise these powers because "[a]ny attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council," *id.* § 84-28(a) (2015).

Notwithstanding the well-established statutory authority of the State Bar to discipline attorneys, in 1971 the North Carolina Courts Commission (the Commission) submitted a report to the General Assembly outlining, *inter alia*, the need for a new, formal method to address misconduct by members of the state judiciary. *See* State of N.C. Courts Comm'n, *Report of the Courts Commission to the North Carolina General Assembly* 19-30 (1971) [hereinafter *Courts Commission Report*]. The Commission noted that at that time, there was "no formal means for disciplining any judge, short of removal, and impeachment [was] the sole means for

removing an appellate or superior court judge for misconduct." *Id.* at 19. The Commission concluded that these measures were entirely inadequate to regulate the judiciary, noting the inefficiency, expense, and partisan nature of impeachment proceedings, as well as the fact that no judge had been removed by impeachment in North Carolina since 1868. *Id.* at 19-20. In addition, the Commission determined that the type of behavior potentially requiring impeachment and removal of a judge is extremely rare, thereby justifying the need for discipline proportionate to "a kind of judicial misbehavior for which removal is too severe, a kind that can usually be corrected by action within the judicial system without sacrificing the judge." *Id.* at 21. The Commission concluded that a "flexible machinery that can handle minor cases as well as major ones is an urgent and widely felt need." *Id.*

In determining the form and procedure of a potential system for judicial discipline, the Commission recognized "[t]he need for a truly effective mechanism for disciplining or removing judges" that would account for both "the tradition of [judicial] independence" and the "larger public interest in the efficient and untainted administration of justice." *Id.* at 20. The Commission noted that several other states had attempted to satisfy these interests by establishing independent judicial qualifications commissions. *Id.* at 22-25. The Commission concluded that through such disciplinary bodies:

> [t]he public is assured of an honest, able, efficient bench, while at the same time the independence of the judiciary is fully protected. And since the system permits the judiciary to police its own ranks, with any decision to censure, remove or retire coming from the supreme court, temptation of the executive or legislative branches to involve themselves in these matters is minimized.

Id. at 26. Therefore, the Commission recommended an amendment to the North Carolina Constitution "authorizing an additional procedure for discipline and removal of judges for misconduct or disability" and the creation of the JSC.[2] *Id.* at 27. Although the Commission ultimately left the procedures and composition of the JSC "to the wisdom of the General Assembly," *id.*, it recommended, *inter alia*, that JSC proceedings should be "confidential until such time as [the JSC] ma[kes] its final recommendations to the Supreme Court" so as to protect judges from

2. The Commission noted its preference for the name "Judicial Standards Commission" over "Judicial Qualifications Commission"—the moniker used in several other states. *Courts Commission Report* at 26.

groundless accusations, ensure "[p]ublic confidence in the integrity of the courts," and "protect complainants and witnesses, many of whom would be reluctant to complain or testify for fear of publicity or reprisal." *Id.* at 29-30. The Commission also recommended that the "majority of all members of the Supreme Court must concur in any censure or removal order, or in an order to take no action (dismiss) the proceedings," highlighting its intention that the Supreme Court have exclusive jurisdiction over judicial discipline. *Id.* at 30. Notably, the Commission stated that the JSC "would be analogous to the censure and disbarment machinery of the organized bar -- machinery long ago recognized as essential to protect the image of the legal profession." *Id.* at 21. This statement illustrates the Commission's view that the State Bar's disciplinary proceedings did not extend to the judiciary and that amending the Constitution and creating the JSC was intended to fill that void.

In June 1971 the General Assembly enacted the Judicial Standards Commission Act and proposed an amendment to the North Carolina Constitution authorizing the statute.[3] *In re Peoples*, 296 N.C. 109, 163, 250 S.E.2d 890, 921 (1978), *cert. denied*, 442 U.S. 929 (1979). The amendment was adopted by the voters in 1972 and became Article IV, Section 17(2), which provides:

> The General Assembly shall prescribe a procedure . . . for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C. Const. art. IV, § 17(2); Thad Eure, Sec'y of State, *North Carolina Manual* 1973, at 432 (John L. Cheney, Jr. ed.) (noting date of amendment adoption).

The General Assembly fulfilled this constitutional mandate when the corresponding legislation became effective on 1 January 1973 as Article 30 of Chapter 7A of the General Statutes. Act of June 17, 1971, ch. 590, 1971 N.C. Sess. Laws 517 (codified at N.C.G.S. §§ 7A-375 to -377 (Supp.

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3. Although the statute was passed before adoption of the constitutional amendment, "[t]he General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such constitutional amendment." *In re Nowell*, 293 N.C. 235, 242, 237 S.E.2d 246, 251 (1977) (quoting *Fullam v. Brock*, 271 N.C. 145, 149, 155 S.E.2d 737, 739-40 (1967)).

1971)). The stated purpose of Article 30 "is to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article." N.C.G.S. § 7A-374.1 (2015). Accordingly, section 7A-375 of Article 30 provides for the formation of the thirteen-member JSC, with five of those members, including the Court of Appeals judge who serves as chair of the JSC, being appointed by the Chief Justice of the Supreme Court. *Id.* § 7A-375(a) (2015). The statute then conveys authority to the JSC to adopt and amend its own procedural rules "subject to the approval of the Supreme Court." *Id.* § 7A-375(g) (2015).

Disciplinary proceedings against a judge[4] begin when a citizen of the State files "a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice," or when the JSC initiates an investigation on its own motion. *Id.* § 7A-377(a) (2015). If the JSC concludes from its investigation that disciplinary proceedings are warranted, it will issue a "notice and statement of charges." *Id.* § 7A-377(a5) (2015). An answer, additional filings, and a hearing generally will follow. *See id.* Viewing the entire framework of Article 30, we have concluded that the role of the JSC is to "serve[ ] 'as an arm of the Court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.' " *In re Hayes*, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002) (quoting *In re Tucker*, 348 N.C. 677, 679, 501 S.E.2d 67, 69 (1998)).

As for the actual administration of judicial discipline, presently the JSC has the exclusive authority only to issue an offending judge "a private letter of caution" for violations of the North Carolina Code of Judicial Conduct that are "not of such a nature as would warrant a recommendation of public reprimand, censure, suspension, or removal." N.C.G.S. § 7A-376(a) (2015). Imposition of those more serious forms of discipline now falls within the exclusive jurisdiction of the Supreme Court "[u]pon recommendation of the Commission." *Id.* § 7A-376(b) (2015).[5] In

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4. Article 30 states that " 'Judge' means any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice." N.C.G.S. § 7A-374.2(5) (2015).

5. Prior to the 2013 revisions to Article 30, section 7A-376 permitted the JSC to independently issue public reprimands. *See* Act of July 26, 2013, ch. 404, sec. 2, 2013 N.C. Sess. Laws 1681, 1682 (codified at N.C.G.S. § 7A-376(a) (2013)). Defendant was disciplined by the JSC pursuant to this earlier version of the statute.

those "proceedings authorized by G.S. 7A-376" we have determined that "this Court sits not as an appellate court but rather as a court of original jurisdiction," *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912 (citation omitted), and that "original jurisdiction to discipline judges lies solely within the Supreme Court by virtue of statutory authority," *In re Renfer*, 345 N.C. 632, 635, 482 S.E.2d 540, 542 (1997) (citing *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912). Therefore, we have concluded that the "final authority to discipline judges lies solely with the Supreme Court." *In re Hayes*, 356 N.C. at 398, 584 S.E.2d at 266 (citing *In re Peoples*, 296 N.C. at 146-47, 250 S.E.2d at 911-12).

"In obedience to" Article IV, Section 17(2), the legislature enacted Article 30, thus fulfilling "the intent of the General Assembly to provide the machinery and prescribe the procedure for the censure and removal of justices and judges for wilful misconduct in office, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978). We have upheld the General Assembly's plan, noting that "[i]t seems both appropriate and in accordance with the constitutional plan that the Supreme Court . . . should [ ] have final jurisdiction over the censure and removal of the judges and justices." *In re Martin*, 295 N.C. 291, 299-300, 245 S.E.2d 766, 771 (1978).

Aside from the section 7A-375 requirement that four members of the JSC be "members of the State Bar who have actively practiced in the courts of the State for at least 10 years," N.C.G.S. § 7A-375(a), Article 30 makes no other provision for the involvement of the State Bar in the discipline of judges. Furthermore, although the JSC has existed for more than forty years, the State Bar can cite to no previous instances of the DHC's claiming concurrent jurisdiction to discipline a sitting judge for conduct while in office. Instead, the DHC has pursued disciplinary action against a judge for his conduct as an attorney before becoming a judge, *see N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 657 S.E.2d 378 (2008), and against an attorney who was no longer a member of the General Court of Justice, *see N.C. State Bar v. Badgett*, 212 N.C. App. 420, 713 S.E.2d 791, 2011 WL 2226426 (2011) (unpublished) (*Badgett III*).

Ethridge involved an appeal to the Court of Appeals from the decision of the DHC to disbar Judge James B. Ethridge. 188 N.C. App. at 655, 657 S.E.2d at 380. Judge Ethridge was elected to the district court in 2004. *Id.* at 655, 657 S.E.2d at 380. Several years before taking the bench, Judge Ethridge had represented a sixty-nine-year-old woman named Rosalind Sweet, who suffered from dementia. *Id.* at 655, 657 S.E.2d at 380. Judge Ethridge was investigated and ultimately disbarred by the

DHC for depositing funds entrusted to him by Sweet into his own personal checking account, disbursing those funds for the benefit of himself and third parties, preparing and recording a deed conveying Sweet's real estate to himself without her approval, and "falsely representing on the public record that he had given Ms. Sweet $48,000 in consideration for the property she deeded to him." *Id.* at 657-58, 657 S.E.2d at 381-82. Finding "adequate and substantial evidence supporting the DHC's findings and [that] those findings support[ed] its conclusions," the Court of Appeals upheld the DHC's decision to disbar Judge Ethridge. *Id.* at 670, 657 S.E.2d at 388-89.

In *Badgett III* the Court of Appeals considered the decision of the DHC to disbar former judge Mark H. Badgett after his removal from office. 2011 WL 2226426, at *1. Judge Badgett had been censured and suspended from office for sixty days by this Court in March 2008 based upon the JSC's findings that he had failed, *inter alia*, to disclose to interested parties his business relationship with an attorney who appeared before him in several matters and had failed to disqualify himself from those matters. *In re Badgett*, 362 N.C. 202, 203-04, 210, 657 S.E.2d 346, 347-48, 351 (2008) (*Badgett I*). In addition, the JSC had determined that Judge Badgett coerced a guilty plea from a criminal defendant and attempted to do so with another criminal defendant. *Id.* at 203, 657 S.E.2d at 347. In a proceeding arising from a separate incident, Judge Badgett was found to have engaged in additional misconduct and subsequently was censured, removed from office, and barred from ever holding another judicial office by this Court. *In re Badgett*, 362 N.C. 482, 483-87, 491, 666 S.E.2d 743, 744-46, 749 (2008) (*Badgett II*). After Judge Badgett's removal from office, the DHC exercised its authority to discipline him as a private attorney, utilizing the misconduct that served as the basis for his judicial discipline. *Badgett III*, 2011 WL 2226426, at *1. The Court of Appeals subsequently affirmed the DHC's decision to disbar Judge Badgett. *Id.* at *13.

As an initial matter, we note that *Ethridge* and *Badgett III* are decisions of the Court of Appeals that are not binding on this Court. Furthermore, both cases are distinguishable from the present case. Neither *Ethridge* nor *Badgett III* conflicts with the General Assembly's statutory scheme for the discipline of judges in Article 30. In *Ethridge*, although Judge Ethridge was a member of the General Court of Justice when disbarred, the conduct at issue occurred while he was still an attorney engaged in the private practice of law. *See Ethridge*, 188 N.C. App. at 655, 657 S.E.2d at 380. By contrast, the conduct in question here occurred while defendant was a member of the General Court of

Justice. Similarly, *Badgett III* is distinguishable because the DHC disbarred Judge Badgett for his conduct while a judge once he was no longer a member of the General Court of Justice. *See Badgett III*, 2011 WL 2226426, at *3 ("On 10 June 2009, the Bar filed an amended complaint seeking disciplinary action for the misconduct that led to *Badgett I* and *Badgett II*."). The DHC did not attempt to discipline Judge Badgett for his judicial conduct while he was still in office, as the DHC is attempting to do in the present case. *Ethridge* and *Badgett III* illustrate only that the DHC has disciplined a sitting judge for conduct as an attorney before becoming a judge, and has disciplined an attorney who was no longer a judge for conduct that occurred while on the bench.

In the instant case the State Bar contends that N.C.G.S. § 7A-410 implies the statutory authority of the DHC to discipline defendant. Section 7A-410 states in pertinent part:

> When a judge of the district court, judge of the superior court, judge of the Court of Appeals, justice of the Supreme Court, or a district attorney is no longer authorized to practice law in the courts of this State, the Governor shall declare the office vacant. . . . For purposes of this Article, the term 'no longer authorized to practice law' means that the person has been disbarred or suspended and all appeals under G.S. 84-28 have been exhausted.

N.C.G.S. § 7A-410 (2015). The State Bar argues that this statute "would simply have no meaning if the General Assembly intended that the Council and the DHC should have no jurisdiction to discipline a lawyer who was also sitting as a judge." We disagree. Contrary to the State Bar's analysis, section 7A-410 simply explains what should occur when, as in *Ethridge*, a judge is disbarred for conduct that occurred before he became a judge.

The State Bar asserts that a judge is still a lawyer after taking office and therefore, must comply with both the Code of Judicial Conduct and the Rules of Professional Conduct as required by section 84-28.[6] Therefore, the State Bar contends that the DHC may discipline a sitting judge because "[j]udicial discipline concerns the fitness of a judge to serve as a judge. Attorney discipline concerns the fitness of a lawyer

6. "Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt . . . ." N.C.G.S. § 84-28(a).

to be a lawyer. The same conduct may implicate both fitness to be a judge and fitness to be a lawyer." We agree that a judge's conduct may affect his or her fitness to be a lawyer. In *Badgett III* the DHC disbarred the defendant once he was removed from judicial office; however, while a judge remains in office, only this Court or the JSC may impose discipline for his or her conduct as a judge.

In the present case defendant was a member of the General Court of Justice when he engaged in the misconduct set forth above. As a result, he was investigated and disciplined by the JSC pursuant to sections 7A-376 and 7A-377. Having accepted the JSC's public reprimand, defendant remains a sitting member of the General Court of Justice. Based upon the history and language of Article 30 of Chapter 7A of the General Statutes, we conclude that jurisdiction to discipline sitting judges for their conduct while in office rests solely with the JSC and this Court, and not with the DHC.[7] Consequently, we hold that the DHC does not have jurisdiction to discipline defendant as a sitting member of the General Court of Justice for his conduct while a member of the General Court of Justice. Accordingly, we reverse the DHC's denial of defendant's motion to dismiss the State Bar's complaint against him and remand this case to the DHC with instructions to dismiss with prejudice the State Bar's complaint.

REVERSED AND REMANDED.

Chief Justice MARTIN concurring.

I fully join the majority opinion. The Constitution of North Carolina requires that the General Assembly "prescribe a procedure, in addition to impeachment and address set forth in this section . . . for the censure and removal of a Justice or Judge of the General Court of Justice." N.C. Const. art. IV, § 17(2). The constitution thus provides for only three methods to discipline sitting judges: impeachment, address, and "a procedure" prescribed by the General Assembly.

The procedure that the General Assembly has, in fact, prescribed establishes the Judicial Standards Commission (JSC) as the sole mechanism by which sitting judges may be disciplined or removed. *See* N.C.G.S. §§ 7A-374.1 to -377 (2015). Indeed, the statutory text specifically

7. Because defendant's appeal is resolved on these grounds, we do not decide whether the State Bar is estopped from prosecuting conduct for which defendant has already been subject to a binding and final order of discipline by the JSC. We also do not decide whether the DHC violated defendant's procedural and substantive due process rights.

mandates that "[t]he procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article." *Id.* § 7A-374.1. Judges therefore cannot be disciplined or removed in any way other than impeachment, address, or the statutory procedure that the General Assembly has devised.

By initiating disciplinary proceedings against a sitting judge for conduct that the judge engaged in while on the bench, the State Bar is trying to circumvent both the constitution and the prescribed statutory procedure. I write separately to note the wisdom of the overall scheme that the General Assembly has prescribed, and to elucidate why the law should not expose sitting judges to discipline by the State Bar for actions that they take while they are members of the General Court of Justice.

The General Assembly's procedure places recommendations for judicial discipline and removal in the hands of the JSC and final decisions on discipline and removal in the hands of this Court. Other than the JSC's power to issue private letters of caution, *see id.* § 7A-377(a3), the JSC functions solely "as an arm of the Court" that "conduct[s] hearings for the purpose of aiding the Supreme Court in determining whether a judge" should be disciplined or removed from the bench. *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978).[1] This procedure is sound because it preserves judicial independence. In the words of United States Supreme Court Justice Stephen Breyer, judicial independence is important because the justice that stems from proper adjudication "is only attainable . . . if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors." Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 996 (1996). For society to be governed by the rule of law, judges must be able to apply the law dispassionately, "without fear of retribution or the need to curry favor." *See* Charles Gardner Geyh et al., *Judicial Conduct and Ethics* § 1.04, at 1-10 (5th ed. 2013). If a judge is fearful that a lawyer or group of lawyers who appear before her will attempt to expose her to discipline, then she

1. Before 2013, the JSC could issue public letters of reprimand without this Court's permission. *See, e.g.*, N.C.G.S. § 7A-377(a4) (2011); *cf. id.* § 7A-377(a4) (2013). But it has always been within this Court's sole discretion whether to accept the JSC's recommendation to censure or remove a judge. *See In re Hardy*, 294 N.C. at 97, 240 S.E.2d at 372 (noting as of 1978 that the JSC's "recommendations are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove[,] or decline to do either" (quoting *In re Nowell*, 293 N.C. 235, 244, 237 S.E. 2d 246, 252 (1977) (per curiam))).

may not be able to act according to her best legal judgment in the cases that come before her. This is just one example of why judges must, to the greatest extent possible, be free from all outside pressures—political, financial, and personal—that could affect their ability to act with fairness and impartiality.

Judges, of course, need to be held accountable when they act in ways that do not befit a judge. Otherwise, public trust and confidence in the courts would erode. Judges cannot be above the law, and that is why the JSC exists. The JSC arose out of the Courts Commission of 1971's recommendation that a disciplinary process be created that would, as the majority notes, balance the need for judicial independence with the need for judicial accountability. *See* State of N.C. Courts Comm'n, *Report of the Courts Commission to the North Carolina General Assembly* 19-30 (1971) [hereinafter *Courts Commission Report*]. The JSC's sole mission is to ensure that judges conduct themselves in accordance with the Code of Judicial Conduct. *See* N.C.G.S. § 7A-376. Because this mission is the one goal that unites all of the members of the JSC—which has a diverse set of members culled from the bench, the bar, and citizens who are laypeople in the law, *see id.* § 7A 375(a)—the JSC is far less prone to being influenced by outside motives than other bodies may be. The JSC, with the help of this Court's oversight, is therefore uniquely positioned to balance judicial independence and judicial accountability.

Furthermore, because the JSC is duty-bound to enforce North Carolina's Code of Judicial Conduct, it is duty-bound to uphold judicial independence by the very terms of the Code. The very first words of the Code's Preamble state that "[a]n independent and honorable judiciary is indispensable to justice in our society," and the Code's first canon states that "[a] judge should uphold the integrity and independence of the judiciary." Code Jud. Conduct pmbl., Canon 1, 2016 N.C. R. Ct. (State) 509, 509. The Code that the JSC enforces thus places judicial independence at the very center of the values that the JSC must uphold.

Other state supreme courts have long since concluded that a system in which attorneys discipline judges is inconsistent with the goal of judicial independence and is contrary to good public policy. For instance, at the mid-point of the twentieth century, the Oklahoma Supreme Court held that lawyer disciplinary bodies cannot discipline members of the judiciary because it "would result in nothing more than discord, and could result in confusion, pernicious partisan political activity concerning the judiciary, and other results not beneficial to the administration of justice." *Chambers v. Cent. Comm. of Okla. Bar Ass'n*, 1950 OK 287, ¶16, 203 Okla. 583, 586, 224 P.2d 583, 586-87 (1950). Some years later,

the Alabama Supreme Court concluded that, "regardless of how honorable the motives of the would-be prosecutors may be," it is proper to shield judges from discipline by lawyers acting through the State Bar so that judges "may remain free to function without fear or favor." *Ala. State Bar ex rel. Steiner v. Moore*, 282 Ala. 562, 566, 213 So.2d 404, 408 (1968). Indeed, mindful of the need to "maintain and restore public confidence in the integrity, independence, and impartiality of [its] judiciary," every state "has established a judicial conduct organization charged with investigating and prosecuting complaints against judicial officers." Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 Just. Sys. J. 405, 405 (2007). And in all but two states, "the state supreme court has the final word" on the appropriate disciplinary measure to impose on a sitting judge. Cynthia Gray, *State Supreme Courts Play Key Role in Judicial Discipline*, 86 Judicature 267, 267 (2003). The JSC as it exists in North Carolina thus mirrors the national trend.

For all of these reasons, the best way to ensure judicial independence is to place the JSC and this Court—and no other individual or entity—at the helm of non-impeachment proceedings to discipline or remove judges.

Additionally, there would be practical problems if both the JSC and the State Bar had the power to discipline sitting judges for acts that they perform while they are on the bench. For example, a judge may be loath to enter into a stipulated disposition with the JSC—even though those dispositions are an effective way to resolve disciplinary disputes in a manner that both does justice in individual proceedings and preserves the public's trust and confidence in the judicial system as a whole—because doing so could adversely affect the judge's ability to defend against a disciplinary proceeding by the State Bar.

Placing the State Bar at the helm of proceedings to discipline judges would also undermine the judiciary's inherent authority to discipline the attorneys that appear in the General Court of Justice. Part of a judge's role is to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Code Jud. Conduct Canon 3B(3), 2016 N.C. R. Ct. (State) at 510; *see also* N.C.G.S. § 84-36 (2015) (clarifying that the creation of the State Bar does not "disabl[e] or abridg[e] the inherent powers of the court to deal with its attorneys"); *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 182, 695 S.E.2d 429, 436 (2010) ("[A] court possesses inherent authority to discipline attorneys."). This Court has characterized this power as one of "two methods for enforcing attorney discipline." *Sisk*, 364 N.C. at 182, 695 S.E.2d at 436

(citing *In re Delk*, 336 N.C. 543, 550, 444 S.E.2d 198, 201 (1994)). If the State Bar also had the power to discipline judges, judges might be hesitant to exercise their power to discipline attorneys because of the fear of a disciplinary counterattack.

A system in which the State Bar assumes the authority to discipline judges would therefore inevitably impair a judge's ability to perform an important judicial function. It could also place the members of the bench in a no-win scenario because, if a judge were afraid to exercise her inherent powers over attorneys who had engaged in unprofessional conduct, she would be guilty of violating Canon 3B—and then she herself would need to be disciplined. The disciplinary process envisioned by the State Bar would be like having the batter critique the umpire's ball and strike calls, rather than letting the umpire call pitches as he sees them. Under the State Bar's process, a judge would not be free to follow the law as she sees it when considering matters of attorney discipline. The result would be that the justice system would lose a key component of the very public trust that both the State Bar and the JSC are designed to protect and promote.

Furthermore, the State Bar's investigative process could dramatically interfere with the performance of a judge's duties. Under the JSC's process, the matter remains confidential until this Court issues an order of "public reprimand, censure, suspension, or removal." N.C.G.S. § 7A-377(a6). This ensures that a judge wrongly accused of misconduct is protected against "unjustified public attack." *Courts Commission Report* at 25. But the State Bar's process does not preserve confidentiality once the State Bar's Grievance Committee has found "probable cause to believe that the attorney is guilty of misconduct justifying disciplinary action" and has directed counsel "to prepare and file a complaint against the respondent." 27 NCAC 1B .0113(a), (h) (Oct. 8, 2009); 27 NCAC 1B .0133(a)(1) (Sept. 22, 2016). If a judge were subjected to this process, and an unjustified public attack became public knowledge before the judge was actually found to have committed misconduct, a judge might want to steer clear of even the possibility that someone would bring a grievance against her. That, in turn, could affect how she decided the cases before her and compromise her ability to faithfully follow the law. This practical difference in the State Bar's process would, once again, be inconsistent with the very notion of judicial independence.

In sum, the comprehensive and well-designed scheme prescribed by the General Assembly preserves judicial independence and avoids practical concerns that could result from a process involving a greater number of disciplinary bodies. The scheme envisioned by the State Bar,

by contrast, would undermine judicial independence and would present a number of practical problems. Judges must decide according to the law, not based on outside pressures. When judges are free to do so, this in turn increases public confidence in the courts. The current constitutional and statutory scheme, which establishes the JSC process as the sole means to discipline sitting judges for conduct committed while an incumbent judge, thus maximizes the public's trust in the courts and enables judges to do justice in every case that comes before them. These are goals of both the judiciary specifically and the legal profession as a whole. And the General Assembly has wisely borne these goals in mind in its statutory procedure for disciplining sitting judges. I therefore concur fully in the majority opinion.

Justice EDMUNDS joins in this concurring opinion.

Justice ERVIN concurring in the result.

Although I agree with my colleagues' decision that the State Bar lacks the authority to seek the imposition of attorney discipline against defendant in this case, I am unable to agree with the Court's apparent determination that the State Bar has no authority to sanction a sitting judge for any reason during the time that the judge remains in office. I would be the first to concede that the constitutional and statutory provisions that we are called upon to construe in this case are in tension, if not in actual conflict.[1] However, when the relevant constitutional and statutory provisions are carefully examined in light of the differing purposes served by the disciplinary systems administered by the Judicial Standards Commission[2] and the State Bar, I believe that there is a way to preserve the core jurisdiction of each agency without any undue friction between or interference with the essential function of each disciplinary

1. The lack of obvious interaction between the various provisions of the General Statutes applicable to attorney and judicial discipline suggests the appropriateness of action by the General Assembly for the purpose of clarifying the roles that it wishes for the agencies in question to play.

2. As the majority explains, this Court is the ultimate disciplinary authority under the statutory scheme for judicial discipline set out in Article 30 of Chapter 7A of the General Statutes. Although I will refer to the disciplinary system administered by the Judicial Standards Commission throughout the remainder of this separate opinion, I do so only for purposes of convenience and do not wish to be understood by using that phraseology as overlooking or minimizing the fact that this Court has ultimate responsibility for the more serious disciplinary decisions made in the process administered by the Judicial Standards Commission.

system. After construing the relevant constitutional and statutory provisions in the manner that I believe to be appropriate, I agree with the Court that the State Bar lacks the authority to proceed against defendant on the basis of the theory outlined in its complaint, albeit for different reasons than those advanced in the Court's opinion.

According to Article IV, Section 22 of the North Carolina Constitution, "[o]nly persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of [the] District Court." N.C. Const. art. IV, § 22. "Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina," to practice law in this state. N.C.G.S. § 84-4 (2015). In order to regulate the practice of law in North Carolina, the General Assembly has "created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar," *id.* § 84-15 (2015), with the State Bar Council having "the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals," *id.* § 84-23(a) (2015). The active membership of the State Bar "shall be all persons who have obtained a license or certificate, entitling them to practice law in the State of North Carolina, who have paid the membership dues specified, and who have satisfied all other obligations of membership." *Id.* § 84-16 (2015). "Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt," *id.* § 84-28(a) (2015), with attorneys being subject to discipline in the event that they are "[c]onvict[ed] of, or . . . [have] tender[ed] and accept[ed] . . . a plea of guilty or no contest to, a criminal offense showing professional unfitness," *id.* § 84-28(b)(1) (2015); found to have committed a "violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act," *id.* § 84-28(b)(2) (2015); or made a "[k]nowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; fail[ed] to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or [engaged in] contempt of the Council or any committee of the North Carolina State Bar," *id.* § 84-28(b)(3) (2015). According to Rule 8.4 of the Revised Rules of Professional Conduct, which have been adopted pursuant to the State Bar's rulemaking authority, *id.* § 84-21 (2015), "[i]t is professional misconduct for a lawyer to:"

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official;
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
>
> (g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

N.C. St. B. Rev. R. Prof'l Conduct 8.4, 2016 Ann. R. N.C. 1137, 1260. "When a judge of the district court, judge of the superior court, judge of the Court of Appeals, justice of the Supreme Court, or a district attorney is no longer authorized to practice law in the courts of this State, the Governor shall declare the office vacant," with "no longer authorized to practice law" being defined as a situation in which "the person has been disbarred or suspended and all appeals under G.S. 84-28 have been exhausted." N.C.G.S. § 7A-410 (2015).

Similarly, Article IV, Section 17(2) of the North Carolina Constitution provides that

> [t]he General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction

> of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C. Const. art. IV, § 17(2).

> Upon recommendation of the [Judicial Standards] Commission, the Supreme Court may issue a public reprimand, censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

N.C.G.S. § 7A-376(b) (2015). A violation of the "Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings." Code Jud. Conduct pmbl., 2016 Ann. R. N.C. 863, 863.

The relevant constitutional and statutory provisions do not, when read literally, directly address the problem that we face in this case, which stems from the fact that both the Judicial Standards Commission and the State Bar have attempted to sanction defendant based upon the same conduct and a very similar, if not identical, legal theory. As I read the relevant constitutional and statutory provisions, there does not appear to be any obvious bar to the exercise of concurrent jurisdiction by both agencies given that the Judicial Standards Commission has clear responsibility for the discipline of judges and that the State Bar has clear responsibility for the discipline of attorneys, a group of which judicial officials are, of necessity, a subset. The relevant constitutional provisions provide that judges must be lawyers and that the General Assembly must establish a process for addressing judicial incapacity and misconduct without in any way explicitly stating that the rules governing the professional discipline of attorneys do not apply to judges or explicitly providing that the constitutionally required process for disciplining judges overrides the legal obligations otherwise imposed upon members of the State Bar. Similarly, the relevant statutory provisions, including the rules adopted in accordance with the State Bar's rulemaking authority, simply identify the circumstances under which each agency has the authority to seek to discipline individuals subject to its jurisdiction without acknowledging any limitations on either body's authority arising from the existence of the other. As a result, the language of the relevant constitutional

and statutory provisions provides little direct guidance as to how the issue that confronts us in this case should be resolved and certainly does not suggest that authority granted to either body is exclusive.

Upon stepping back, examining the issue that we have before us on a more global level, and giving thought to the relevant rules of constitutional and statutory construction in context, the proper resolution of this case becomes clearer. Although I may be belaboring the obvious, the fact that Article IV, Section 22 requires members of the judiciary to be authorized to practice law in North Carolina necessarily suggests that the State Bar has, and retains, jurisdiction over members of the judiciary even after they assume judicial office.[3] Allowing judges to remain licensed attorneys for any length of time after they have committed serious acts of professional misconduct undermines public confidence in both the judiciary and the legal profession. The strength of this inference is further reinforced by the fact that the General Assembly provided in N.C.G.S. § 7A-410 for the removal from office of judicial officials who have been disbarred without in any way limiting the grounds upon which the judge in question was subject to disbarment. As a result, these constitutional and statutory provisions suggest that the State Bar did not, in fact, lose all authority to discipline lawyers following their elevation to the bench.

On the other hand, there can be little question that the Judicial Standards Commission has primary responsibility for addressing allegations of judicial misconduct. Any other conclusion would constitute a failure to recognize that the process of judicial discipline administered by the Judicial Standards Commission postdates the creation of the process of attorney discipline administered by the State Bar. As the Court notes, had the process for disciplining attorneys been deemed adequate to address issues arising from allegations of judicial misconduct, there would have been little reason for the adoption of Article IV, Section 17(2) of the North Carolina Constitution and the enactment of Article 30

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3. Admittedly, the language of Article IV, Section 22 directly addresses the need for individuals elected or appointed to judicial office to be licensed attorneys. However, this Court has long held that "[c]onstitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption," *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953). In view of the fact that the clear purpose of Article IV, Section 22 was to ensure that members of the judiciary were licensed attorneys, it makes little sense to read that constitutional provision as allowing individuals who were licensed at the time of their election and appointment, but who have been disbarred or otherwise lost their licenses to practice law, to remain in judicial office. In fact, N.C.G.S. § 7A-410 might be subject to constitutional challenge in the event that Article IV, Section 22 was to be read in this manner.

of Chapter 7A of the General Statutes. In addition, the justification for the creation of a system of judicial discipline separate and apart from impeachment by the General Assembly and the imposition of sanctions by the State Bar discussed in the Court's opinion, and the other policy-based justifications advanced in the Chief Justice's concurring opinion, including the necessity for preserving the independence of the judiciary, provide further support for the proposition that the disciplinary system administered by the Judicial Standards Commission, rather than the disciplinary system administered by the State Bar, should be the primary means for addressing issues of judicial misconduct.

A decision to construe the relevant constitutional and statutory provisions so as to treat the State Bar and the Judicial Standards Commission as having fully concurrent jurisdiction over every conceivable instance of judicial misconduct poses both legal and practical difficulties. As the facts contained in the present record reveal, there will undoubtedly be instances in which the State Bar and the Judicial Standards Commission have differing views as to the manner in which particular allegations of judicial misconduct should be addressed. The State Bar's assertion that it has unlimited authority, regardless of the position taken by the Judicial Standards Commission, to address allegations of judicial misconduct could well put a sitting judge in the position of questioning whether he is entitled to rely on advice provided by the Judicial Standards Commission in resolving particular ethics-related issues, despite the fact that the relevant constitutional and statutory provisions give the Judicial Standards Commission primary responsibility for addressing allegations of judicial misconduct. Similarly, a decision by the State Bar to seek the imposition of professional discipline upon a judicial official who has already been sanctioned by the judicial disciplinary process raises possible collateral estoppel or res judicata issues, not to mention basic questions of fundamental fairness. As a result, given the risk of conflict stemming from the fact that the Judicial Standards Commission and the State Bar appear to have concurrent jurisdiction over sitting judges and the fact that requiring sitting judges to satisfy multiple regulatory agencies that could take differing views of the manner in which the same issue should be resolved poses obvious legal and practical problems, I believe that it would be appropriate to attempt to determine whether there is any way to read the relevant constitutional and statutory provisions so as to reconcile the State Bar's concurrent jurisdiction over judicial officials in their capacity as lawyers with the Judicial Standards Commission's primary responsibility for addressing issues relating to judicial misconduct.

As an initial matter, I note that the purpose of the process for addressing allegations of judicial misconduct administered by the Judicial Standards Commission is to protect the public against improper judicial actions, while the purpose of the attorney discipline process administered by the State Bar is to protect the public against misconduct by practicing attorneys. For that reason, it is not surprising that the disciplinary authority exercised by each agency focuses on its core function. For example, as has already been noted, the State Bar has the authority to discipline members of the Bar for violating a Rule of Professional Conduct, engaging in criminal conduct or acts of dishonesty, engaging in conduct prejudicial to the administration of justice, claiming the ability to improperly influence a judicial official, assisting a judicial officer in unlawful conduct, or damaging his or her client. For the most part, members of the judiciary are unlikely to violate a Rule of Professional Conduct while acting in a judicial capacity or by claiming the ability to improperly influence a judicial official, assisting a judicial official in improper conduct, or damaging a client. However, a judicial official could, in some instances, be guilty of criminal conduct, acts of dishonesty, or conduct prejudicial to the administration of justice. Similarly, the disciplinary authority of the Judicial Standards Commission is available when the judicial official engages in willful misconduct in office, persistently fails to perform his or her duties, is habitually intemperate, is convicted of a crime involving moral turpitude, or engages in conduct prejudicial to the administration of justice that brings the judicial office into disrepute. As should be obvious, a judicial official could be guilty of any of these types of misconduct. Thus, given the primary responsibility for judicial discipline assigned to the process administered by the Judicial Standards Commission, the ultimate question before us in this case is the extent, if any, to which the State Bar is entitled to exercise concurrent jurisdiction over judicial officials who engage in the limited range of conduct that could make them liable to attorney discipline.

As a general proposition, I have no difficulty in concluding that the State Bar ought to be able to sanction a judicial official for violating any Rule of Professional Conduct that would have been applicable to the judge at the time that the alleged violation occurred, for committing a criminal act, or for engaging in dishonest or fraudulent conduct. In my opinion, the members of the public should not be subjected to the unfettered risk that individuals who have engaged in such conduct would be allowed to provide them with legal services regardless of their current eligibility to do so. On the other hand, given the risk of conflicting decisions and the other legal and practical problems that I have outlined

above, I have trouble understanding why a judicial official should be subject to discipline by both the Judicial Standards Commission and the State Bar for conduct prejudicial to the administration of justice, particularly when the conduct in question involved actions taken by the judge in the course of carrying out his or her perceived judicial responsibilities. Allowing such a result seems to me to be inconsistent with the principle of statutory construction that, when possible, statutes should be construed in such a manner as to avoid producing an absurd outcome. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (stating that, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded" (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979))). In addition, it would be consistent with the canon of statutory construction that, "[w]here 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." *Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) (second and third alterations in original) (quoting *McIntyre v. McIntyre*, 341 N.C. 629, 631, 461 S.E.2d 745, 747 (1995)). As a result, in order to avoid inconsistent outcomes, the risk of conflicting advice, the potential for claim or issue preclusion questions to arise, undue confusion, and other difficulties, I believe that the Court should construe the relevant constitutional and statutory provisions in such a way as to preclude the State Bar from proceeding against an attorney on the basis of alleged conduct prejudicial to the administration of justice arising from activities undertaken by a judicial official in the conduct of his or her judicial duties that do not involve a violation of the Rules of Professional Conduct, a criminal act, dishonest or fraudulent conduct, claiming the ability to improperly influence another public official, or assisting another judicial official in committing an act of judicial misconduct[4] and to hold that the

4. Admittedly, conduct that violates these specific rule provisions would be "prejudicial to the administration of justice." However, because the relevant phrase is so broad that it could encompass judicial misconduct committed by a sitting judge arising only from his or her judicial duties, which is outside the purview of the State Bar's jurisdiction, the State Bar may not proceed on that legal theory alone and must, instead, specify how the conduct of a sitting judge violated his or her obligations and responsibilities *as an attorney.*

Judicial Standards Commission has exclusive responsibility for addressing such allegations.[5]

The Judicial Standards Commission disciplined defendant based upon determinations that his actions involved violations of Canon 1 (requiring a judge to "participate in establishing, maintaining, and enforcing" and to "personally observe[ ] appropriate standards of conduct to ensure that the integrity and independence of the judiciary [are] preserved"), Code Jud. Conduct Canon 1, 2016 Ann. R. N.C. 863, 863; Canon 2A (requiring a judge to "respect and comply with the law" and to "conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), *id.* Canon 2A, 2016 Ann. R. N.C. at 865; and Canon 3A(3) (requiring a judge to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity" and obligating a judge to "require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control"), *id.* Canon 3A(3), 2016 Ann. R. N.C. at 869, of the Code of Judicial Conduct, with these violations having (1) "created a public perception of a conflict of interest which threatens the public's faith and confidence in [his] integrity and impartiality," (2) been "reasonably perceived as coercive and retaliatory," and (3) constituted "conduct prejudicial to the administration of justice." Similarly, the State Bar alleged in the complaint that it filed in this case that defendant had "engaged in conduct that was prejudicial to the administration of justice in violation of Rule 8.4(d) [of the Rules of Professional Conduct]," as evidenced by a number of specific actions that he took in what he believed to be the performance of his judicial duties during his controversy with the Kill Devil Hills Police Department and the District Attorney's Office. In other words, both the Judicial Standards Commission and the State Bar sought to sanction defendant based upon their authority to discipline covered individuals for conduct prejudicial to the administration of justice based upon conduct arising from defendant's performance of his judicial duties. In view of my belief that the State Bar does not have the authority to seek the imposition of discipline based upon an

5. The validity of this approach is bolstered, at least in my opinion, by the fact that the State Bar's jurisdiction to sanction individuals for conduct prejudicial to the administration of justice is rule-based, while the Judicial Standards Commission's ability to do so stems from the language of the relevant constitutional and statutory provisions, which should not be negated if at all possible. *Sessions v. Columbus County*, 214 N.C. 634, 638, 200 S.E. 418, 420 (1939) (stating that "[r]econciliation is a postulate of constitutional as well as of statutory construction" (citing *Parvin v. Bd. of Comm'rs*, 177 N.C. 508, 99 S.E. 432 (1919))).

allegation that the attorney in question engaged in conduct prejudicial to the administration of justice stemming from acts committed while he or she was a member of the judiciary and those acts did not also violate specific obligations and responsibilities imposed upon attorneys, I do not believe that the State Bar has the authority to seek the imposition of attorney discipline upon defendant on the basis of the allegations set out in its complaint. As a result, because I believe that the State Bar's complaint against defendant should be dismissed for this reason, I concur in the result reached by the Court without joining its opinion.

Justices HUDSON and BEASLEY join in this concurring opinion.

RICHARD O'NEAL, EMPLOYEE
v.
INLINE FLUID POWER, INC. & AUTOMOTIVE PARTS CO., INC., EMPLOYER,
AUTO OWNERS INSURANCE COMPANY, CARRIER

No. 261PA15

Filed 21 December 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. ___, 773 S.E.2d 574 (2015), affirming an opinion and award filed on 4 June 2014 by the North Carolina Industrial Commission. Heard in the Supreme Court on 10 October 2016.

Jernigan Law Firm, by Leonard T. Jernigan, Jr., Anthony L. Lucas, and Kristina B. Thompson, for plaintiff-appellant.

McAngus Goudelock & Courie, by Viral V. Mehta and Carl M. Short III, for defendant-appellees.

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

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

PIRO v. McKEEVER

[369 N.C. 291 (2016)]

MICHAEL C. PIRO
v.
REBECCA HADDEN McKEEVER, L.C.S.W.; CYNTHIA L. SAPP, PH.D.; KAREN BARRY, M.F.T., LMFT; AND DAVIDSON COUNSELING ASSOCIATES

No. 93A16

Filed 21 December 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. ___, 782 S.E.2d 367 (2016), affirming an order entered on 3 November 2014 by Judge Robert C. Ervin in Superior Court, Mecklenburg County. Heard in the Supreme Court on 11 October 2016.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and Michelle D. Connell, for plaintiff-appellant.

Epstein Law Firm, PLLC, by Andrew J. Epstein, for defendant-appellee Rebecca Hadden McKeever, L.C.S.W.

McGuireWoods LLP, by Mark E. Anderson and Monica E. Webb, for National Association of Social Workers, amicus curiae.

PER CURIAM.

In this case we consider whether plaintiff's complaint sufficiently alleged claims for negligent infliction of emotional distress and intentional infliction of emotional distress. Because the members of the Court are equally divided as to both issues, the holding of the Court of Appeals is left undisturbed and stands affirmed 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.

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

STATE OF NORTH CAROLINA
v.
BRITTANY TAYLOR ALLMAN

No. 25A16

Filed 21 December 2016

Search and Seizure—warrant to search house—probable cause

In a prosecution for drug offenses, the facts alleged in a detective's affidavit were sufficient to support probable cause to issue a warrant to search defendant's house where two half-brothers were stopped in a car, drugs were found in the car, an investigation revealed that they lived in defendant's house, the warrant was issued, and more drugs and paraphernalia were found in the house. Under the totality of the circumstances, the magistrate had a substantial basis to conclude that probable cause existed to search defendant's home.

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. ___, 781 S.E.2d 311 (2016), affirming an order entered on 2 October 2014 by Judge Jack Jenkins in Superior Court, New Hanover County. Heard in the Supreme Court on 30 August 2016.

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

Glenn Gerding, *Appellate Defender*, *by Paul M. Green*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Justice.

The sole issue before us is whether the trial court properly granted defendant's motion to suppress evidence. The Court of Appeals affirmed the trial court's ruling. We hold that the magistrate in this case had a substantial basis to find that probable cause existed to issue the challenged search warrant, and we therefore reverse the decision of the Court of Appeals.

Defendant lived with Sean Whitehead and Jeremy Black, who were half-brothers, at 4844 Acres Drive in Wilmington, North Carolina. The police stopped a car that Black was driving. Whitehead was a passenger.

Inside the car, the police found 8.1 ounces of marijuana and over $1600 in cash. This stop ultimately led to the issuance of a warrant to search defendant's home. Based on evidence found there, defendant was charged with six offenses pertaining to the manufacture, possession, and sale or delivery of illegal drugs.

Defendant moved to suppress evidence seized during the search of her home, arguing that the warrant to conduct the search was not supported by probable cause. After a hearing, the trial court granted defendant's motion, and the State appealed. The Court of Appeals affirmed the trial court's ruling, with one judge dissenting. *State v. Allman*, ___ N.C. App. ___, ___, 781 S.E.2d 311, 318 (2016); *id.* at ___, 781 S.E.2d at 318-20 (Dillon, J., dissenting). The State then filed a notice of appeal with this Court.

The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. Absent exigent circumstances, the police need a warrant to conduct a search of or seizure in a home, *see Payton v. New York*, 445 U.S. 573, 586 (1980), and a warrant may be issued only on a showing of probable cause, U.S. Const. amend. IV. Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause. *See State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984).

The Supreme Court of the United States has adopted the totality of the circumstances test to determine whether probable cause exists under the Fourth Amendment. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). This Court has adopted the same totality of the circumstances test to determine whether probable cause exists under Article I, Section 20 of the state constitution. *See Arrington*, 311 N.C. at 643, 319 S.E.2d at 260-61. And because the text of Article I, Section 20 does not "call[ ] for broader protection than that of the Fourth Amendment," *State v. Miller*, 367 N.C. 702, 706, 766 S.E.2d 289, 292 (2014), the probable cause analysis under the federal and state constitutions is identical.[1]

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1. In *State v. Carter*, this Court declined to adopt a good faith exception to the state constitution's exclusionary rule. *Compare State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988), *with United States v. Leon*, 468 U.S. 897, 913 (1984) (adopting a good faith exception to the Fourth Amendment exclusionary rule). But the holding in *Carter*, which concerns the proper remedy for an unreasonable search or seizure, does not affect the scope of our probable cause analysis, which concerns whether an unreasonable search or seizure happened in the first place.

In general, "a neutral and detached magistrate," not an "officer engaged in the often competitive enterprise of ferreting out crime," must determine whether probable cause exists. *Gates*, 462 U.S. at 240 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw "[r]easonable inferences from the available observations." *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991). A single piece of evidence may not necessarily be conclusive; as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant. *See Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (per curiam); *see also Gates*, 462 U.S. at 238.

Reviewing "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35 (alterations in original) (quoting *Gates*, 462 U.S. at 236). Because " '[a] grudging or negative attitude by reviewing courts toward warrants' is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant," a reviewing court should not subject the issuing magistrate's probable cause determination to de novo review. *Gates*, 462 U.S. at 236 (citation omitted) (quoting United *States v. Ventresca*, 380 U.S. 102, 108 (1965)). The magistrate's probable cause determination should instead be given "great deference." *Id.* (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). In practice, the reviewing court gives deference to the magistrate's determination by "ensur[ing] that the magistrate had a *substantial basis for . . . conclud[ing]* that probable cause existed." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (emphasis added) (second and third alterations in original) (quoting *Gates*, 462 U.S. at 238-239).

Under North Carolina law, an application for a search warrant "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items [subject to seizure] are in the place[ ] . . . to be searched." N.C.G.S. § 15A-244(3) (2015). A supporting affidavit is sufficient when it gives the magistrate "reasonable cause to believe that the search will reveal the presence of the [items] sought on the premises described in the [warrant] application," and that those items "will aid in the apprehension or conviction of the offender." *State v. Bright*, 301 N.C. 243, 249, 271 S.E.2d 368, 372 (1980). But a magistrate cannot lawfully issue a search warrant based on an affidavit that is "purely conclusory" and that does not state the underlying circumstances allegedly giving rise to probable cause. *Id.*

The affidavit in this case, which was submitted by Detective Anthony E. Bacon Jr. of the New Hanover County Sheriff's Office, contained all of the following allegations:

Agent Joe Cherry of the Brunswick County Sheriff's Office stopped a car that Jeremy Black was driving. Black's half-brother Sean Whitehead was a passenger in the car. Agent Cherry used a K-9 unit to conduct an exterior sniff of the car, and the dog "alerted on the vehicle for illegal controlled substances." Agent Cherry then searched the car and found 8.1 ounces of marijuana packaged in a Ziploc bag, which was inside of a vacuum sealed bag, which in turn was inside of a manila envelope. He also found over $1600 in cash.

Detective Bacon checked both Black's and Whitehead's criminal histories. He discovered that Whitehead had previously been charged on several occasions with "crimes relating to the illegal sale and distribution of marijuana" and had been convicted of possession with the intent to sell and deliver marijuana. Detective Bacon also discovered that Black had pleaded guilty to first-degree burglary and had been charged with cocaine distribution and possession of marijuana. During the vehicle stop, Whitehead maintained that he and Black lived at 30 Twin Oaks Drive in Castle Hayne, North Carolina. Whitehead said that he and Black had been on their way back there before they were stopped.

On the same day as the vehicle stop, Detective Bacon went to 30 Twin Oaks Drive. When he got there, he discovered that neither half-brother lived at that address but that Whitehead's and Black's mother, Elsie Black, did. Ms. Black told Detective Bacon that the two men lived at 4844 Acres Drive in Wilmington and had not lived at 30 Twin Oaks Drive for about three years.[2] She described the Acres Drive property as a small one-story residence that had "a big, tall privacy fence in the backyard" and said that "there should be an old red truck and an old white truck at the house." At that point, another detective went to 4844 Acres Drive. The property matched the description given by Ms. Black, and one of the two trucks outside of the house was registered to Jeremy Black.

In addition to stating all of these allegations, the affidavit recited Detective Bacon's extensive training in law enforcement and extensive experience with drug investigations and trials. The affidavit also stated, based on Detective Bacon's training and experience, that drug dealers

2. Here and elsewhere, the affidavit mistakenly listed the Acres Drive address as 4814, not 4844.

typically keep evidence of drug dealing at their homes, including but not limited to the drugs themselves, records of drug dealing activities, tools and materials used to weigh and package drugs, large amounts of cash, and expensive things purchased with drug money.

Supported by his affidavit, Detective Bacon applied for a warrant to search the property at 4844 Acres Drive, and the magistrate issued it.[3] When detectives searched the Acres Drive house (several hours after Detective Bacon went to 30 Twin Oaks Drive), they found varying amounts of marijuana throughout the living room and a shotgun in defendant's bedroom. According to a police inventory sheet, the detectives also found, among other things, digital scales, plastic packaging material, sandwich bags, smoking pipes, and rolling papers in the house. In addition, the detectives discovered a wall safe that contained syringes filled with a liquid later identified as psilocybin mushrooms, a controlled substance.

When reviewing a trial court's ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The trial court found virtually all of the facts that we have just recounted, and its findings were supported by competent evidence—namely, by the affidavit itself.

But the trial court erred in its conclusion of law that the facts alleged in Detective Bacon's affidavit were insufficient to support a finding of probable cause to issue the search warrant. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the half-brothers were drug dealers. Based on the mother's statement that Whitehead and Black really lived at 4844 Acres Drive, the fact that her description of 4844 Acres Drive matched the appearance of the actual premises, and the fact that one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that Whitehead and Black lived there. And based on the insight from Detective Bacon's training and experience that evidence of drug dealing is likely to be found at a drug dealer's home, and the fact that Whitehead lied about where he and Black lived, it was reasonable for the magistrate to infer

3. Because the warrant replicated the error in the affidavit, it listed the property's address as 4814 Acres Drive. Defendant does not argue that this error makes the warrant invalid.

that there could be evidence of drug dealing at 4844 Acres Drive. These are just the sort of common-sense inferences that a magistrate is permitted to make when determining whether probable cause exists.

We acknowledge that nothing in Detective Bacon's affidavit directly linked defendant's home with evidence of drug dealing. But federal circuit courts have addressed this precise situation and held that a suspected drug dealer's lie about his address, in combination with other evidence of drug dealing, can give rise to probable cause to search his home. In *United States v. Whitner*, for example, the Third Circuit noted that "direct evidence linking the crime to the location to be searched is not required to support a search warrant," 219 F.3d 289, 297 (3d Cir. 2000), and that a suspected drug dealer's lie to federal agents about where he lived was an "important piece of evidence linking the crime to" the suspect's apartment, *id.* at 298. "[W]hen combined with . . . other information" from the attesting officer's affidavit, the Third Circuit ruled, the suspect's lie "logically suggests that [he] was storing some evidence of illegal activity at [his] apartment which he did not want the agents to discover." *Id.* at 299. And in *United States v. Caicedo*, the Sixth Circuit held that probable cause existed to search a suspected drug dealer's home because, among other reasons, the suspect "had lied about his address in statements" that he made after his arrest. 85 F.3d 1184, 1193 (6th Cir. 1996).

The Court of Appeals maintained that the facts here were "materially indistinguishable" from those in *State v. Campbell*. *See Allman*, __ N.C. App. at ___, 781 S.E.2d at 316. In *Campbell*, we held that the facts alleged in the affidavit in that case were too conclusory to support a finding of probable cause to search the home of suspected drug dealers. *State v. Campbell*, 282 N.C. 125, 129-32, 191 S.E.2d 752, 756-57 (1972). But the facts of *Campbell* can be distinguished from the facts here in two ways. First, in contrast to the affidavit supporting the warrant in this case, there is no indication that the affidavit in *Campbell* mentioned any insights from the affiant's training and experience, or used them to link evidence of drug dealing with the home of the suspected dealers. *See id.* at 130-31, 191 S.E.2d at 756; *see also State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 825 (2015) (stating that evidence supporting a warrant application is "viewed from the perspective of a police officer with the affiant's training and experience"). Second, while a suspect in this case lied to Agent Cherry about his true address, nothing in the *Campbell* opinion indicates that any of the subjects of that search lied to the authorities about their home address. So *Campbell* does not alter our conclusion.

Defendant has argued that N.C.G.S. § 15A-244(3) provides an independent basis for granting her motion to suppress. As we have noted above, subsection 15A-244(3) specifies that a warrant application must be supported by at least one affidavit that states with particularity the facts and circumstances that establish probable cause. Although defendant suggests that this provision limits the scope of what qualifies as probable cause, she is mistaken. The provision does not change the probable cause standard at all; it just specifies the type of evidence that the police have to produce to *meet* the standard.

In sum, under the totality of the circumstances, the magistrate in this case had a substantial basis to conclude that probable cause existed to search defendant's home. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
JAMES ANTHONY BARNETT, JR.

No. 36PA16

Filed 21 December 2016

Sexual Offenders—no contact order—third parties—victim's minor children

In a case arising from convictions for attempted second-degree rape and other offenses, the trial court had the authority under the catch-all provision of N.C.G.S. § 15A-1340.50 to enter a no contact order specifically including the victim and her minor children. N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, not third parties, and the catch-all provision cannot be read to expand the reach of the statute. However, the victim can be protected from indirect contact by the defendant through the victim's family or friends when appropriate findings are made by the trial court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 188

(2016), finding no error at trial after appeal from judgments entered on 16 July 2014 by Judge Edwin G. Wilson, Jr. in Superior Court, Rockingham County, but reversing, reversing and remanding, and vacating in part and remanding three related orders entered the same day. Heard in the Supreme Court on 10 October 2016.

Roy Cooper, Attorney General, by Anne M. Middleton, Special Deputy Attorney General, for the State-appellant.

Jennifer Harjo, Public Defender, New Hanover County, by Brendan O'Donnell, Assistant Public Defender, for defendant-appellee.

HUDSON, Justice.

Defendant James Anthony Barnett, Jr. was convicted by a jury on 16 July 2014 of a number of offenses, including attempted second-degree rape. At sentencing, the trial court entered a "Convicted Sex Offender Permanent No Contact Order" under N.C.G.S. § 15A-1340.50, prohibiting defendant from any interaction with the victim. Here we must decide whether the trial court has authority to include in such an order the names of individuals other than the original victim, and if so, under what circumstances. We conclude that the court does have that authority, if supported by appropriate findings as required by the statute.

The order entered here contains the following language under the final section, entitled "Restrictions": "This order includes the following individuals: [three named individuals who are minor children of the victim]." On appeal the Court of Appeals vacated the no contact order and remanded for the trial court to "remove mention of any individuals other than the victim," concluding that "the trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not 'victims' of the 'sex offense' committed by Defendant." *State v. Barnett*, ___ N.C. App. ___, ___, 784 S.E.2d 188, 200 (2016); *see also* N.C.G.S. § 15A-1340.50(f)(7) (2015). We allowed the State's petition for discretionary review.

We agree with the Court of Appeals that N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, and not third parties, and that the catch-all provision in N.C.G.S. § 15A-1340.50(f)(7) cannot be read to expand the reach of the statute. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 199-200. But, because we hold that N.C.G.S. § 15A-1340.50 can authorize protection for the victim from indirect contact by the defendant through the victim's family or friends when appropriate findings are

made by the trial court, we reverse in part the decision of the Court of Appeals and remand this case for entry of a new permanent no contact order not inconsistent with this opinion.

The evidence presented at trial revealed that from late January until late April 2013, defendant dated the victim. During the last two months of the relationship, defendant stayed in the victim's apartment with her and her three daughters, ages thirteen years, eleven years, and eleven months.

On or about 22 April 2013, defendant left the apartment to meet with his probation officer. That same day, while defendant was away, the victim communicated with him over the telephone to terminate their relationship. On 22 May 2013, defendant showed up at the victim's apartment to retrieve his clothes while the victim was at home with her youngest child. The victim asked defendant to wait in the living room while she gathered his belongings. Defendant asked the victim for a hug, and the victim obliged. Then defendant asked the victim to engage in sexual intercourse with him. The victim repeatedly refused, asking defendant to leave her apartment.

When defendant refused to leave, the victim entered the bathroom "to sort of kill time." Defendant followed her and stood outside the bathroom door, blocking her way when she attempted to exit the room. Defendant pulled the victim into her children's bedroom, threw her onto the floor and then onto a bed, and began attempting to engage in sexual intercourse with her. During this process, defendant repeatedly struck the victim in the head and face.

The victim stated that before defendant left the apartment, he told her he would kill her if she called the police. Nonetheless, she asked a neighbor to call for emergency assistance. The responding officer found the victim crying, in a disheveled condition, and with "severe bruises" on her face and body and "a lot of swollen . . . lumps on her head."

After being released from the hospital, the victim began receiving text messages from defendant, stating that he would come back and "finish the job," and that he was "coming back to the neighborhood" to kill her. From 31 May to 4 August 2013, while defendant was incarcerated, he wrote at least eight threatening letters to the victim or one of her daughters. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 192. On 31 May 2013, defendant wrote:

> What did I tell you, would happen if you took charges; out on me? You remember, what I told you. And I'ma stand by

> my word. Because you knew not to press charges or go to the hospital. You knew better then that. . . . I miss you deeply and love you like crazy. You are not just going to walk, away from me this easily. Because before you do so, I will kill you or have you killed.

In a later letter to the victim, defendant reminded the victim of his earlier threats and referred to "order[ing] a hit." Defendant also wrote:

> So I'ma put you below, before you can put me away for X amout of yrs. . . . I'll send my lil CЯIP homies at you and your family. . . . I will orcastrate some shit, from in here behind these walls and make it happen ASAP. If I'ma go back to prison it's going to be for some real serious shit. Not some bullshit or some bullshit lies, that you done told on me. It is going to be for, accessory to 1st degree murder and mastermind 1st degree murder. Not just one body, but 3 more precious bodies. (4 counts 1st Degree murder and 4 counts mastermind 1st Degree Murder) You understand me and feel what I'm getting at?

Additionally, defendant sent a letter to one of the victim's daughters in which he stated that, if the victim failed to "drop[ ]" the charges against him, he would "order some things to happen which means [he] will never, get out of prison again," that he "will never see, the courtroom," and that the same would be true of the victim, who would "be dead, because of [his] orders." Finally, on 4 August 2013, defendant wrote to the victim, "I done told you before, I have people watching your apartment. . . . But just know, if God spares my life and I'm able to get out and walk the streets again one day. I'm coming to get you and my family back."

On 8 July 2013, defendant was indicted in Rockingham County for: (1) attempted second-degree rape, second-degree kidnapping, and assault on a female on 22 May 2013; (2) two counts of deterring an appearance by a witness on 4 and 20 June 2013 in that defendant attempted to prevent the alleged victim from attending court to testify regarding the 22 May events "by threatening to kill her and have her killed if she appeared"; and (3) habitual misdemeanor assault under N.C.G.S. § 14-33.2. A separate undated indictment charged defendant as an habitual felon, listing convictions dated between September 1999 and June 2009, and showed offense dates of 22 May, 4 June, and 20 June 2013. All offenses were later joined for trial, plus a charge of assault inflicting serious injury, also alleged to have occurred on 22 May 2013.

Defendant was tried during the criminal session of Superior Court, Rockingham County that began on 14 July 2014 before Judge Edwin G. Wilson, Jr. Defendant entered into a plea arrangement in which he pleaded guilty to habitual misdemeanor assault based on the prior convictions set out in the indictment. Two days later a jury found defendant guilty of attempted second-degree rape, assault on a female, and both counts of deterring appearance by a witness. Defendant then pleaded guilty to having attained habitual felon status.

On 16 July 2014, the trial court sentenced defendant to a term of 110 to 144 months for attempted second-degree rape, and ordered that he register as a sex offender and enroll in satellite-based monitoring for life upon his release from prison. The trial court also entered a "Convicted Sex Offender Permanent No Contact Order" (using Form AOC-CR-620, Rev. 12/11), which includes the following:

> FINDINGS OF FACT
>
> . . . .
>
> 4. The following grounds exist for the victim to fear any future contact with the defendant:
>
> DUE TO THE AGGRAVATED NATURE OF THE OFFENSE AND THE DEFENDANT'S HISOTRY [sic] OF VIOLENCE AS WELL AS THE DEFENDANT'S PERONAL KNOWLEGED [sic] OF THE VICTIM AND HER FAMILY.
>
> CONCLUSIONS OF LAW
>
> Based on the foregoing findings, the Court concludes that (*select one*):
>
> [Checked Box] 1. reasonable grounds exist for the victim to fear any future contact with the defendant.
>
> . . . .
>
> ORDER
>
> [Checked Box] . . . It is hereby Ordered that the defendant is prohibited from having any contact with ____[ ]____ (*name of victim*) during the remainder of the defendant's natural life as specified in the Restrictions below. This no contact order is incorporated into the judgment imposing sentence in this case.
>
> . . . .

RESTRICTIONS

The following restrictions apply under the no contact order entered on above (*check all that apply*):

[Checked Box] 1. The defendant shall not threaten, visit, assault, molest, or otherwise interfere with the victim.

[Checked Box] 2. The defendant shall not follow the victim, including at the victim's workplace.

[Checked Box] 3. The defendant shall not harass the victim.

[Checked Box] 4. The defendant shall not abuse or injure the victim.

[Checked Box] 5. The defendant shall not contact the victim by telephone, written communication, or electronic means.

[Checked Box] 6. The defendant shall refrain from entering or remaining present at the victim's residence, school, place of employment, and (*specify other place(s)*) ____ [empty blank]____ at times when the victim is present.

[Checked Box] 7. Additional necessary and appropriate restriction(s):

THIS ORDER INCLUDES THE FOLLOWING INDIVIDUALS:

[three named individuals who are minor children of the victim]

The trial court entered a separate judgment on the consolidated convictions for deterring appearance by a witness, assault on a female, and habitual misdemeanor assault in which the court sentenced defendant to a second term of 110 to 144 months, to be served consecutively.

Defendant appealed to the Court of Appeals, where he argued, *inter alia*, that the trial court erred in extending the permanent no contact order to the victim's children. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 198. In a unanimous opinion filed on 19 January 2016, the Court of Appeals agreed with defendant's argument on that issue, vacated the order because of the language relating to the children, and remanded for entry of a new order. *Id.* at ___, 784 S.E.2d at 200. Specifically, the Court of Appeals concluded that the trial court's authority to enter an

order under N.C.G.S. § 15A-1340.50 "is limited to prohibiting actions by the defendant against 'the victim' based on the plain language of the statute." *Id.* at ___, 784 S.E.2d at 200. As a result, the trial court lacked "authority under the catch-all provision to enter a no contact order specifically including persons who were not 'victims' of the 'sex offense' committed by Defendant." *Id.* at ___, 784 S.E.2d at 200. The State filed a petition for discretionary review, which we allowed on 13 April 2016.

The State argues that the Court of Appeals erred in holding that the trial court was without statutory authority to include prohibitions on contact with the victim's minor children as a term of the permanent no contact order. We conclude that the trial court had authority to enter such prohibitions if supported by appropriate findings, and thus reverse that portion of the Court of Appeals' opinion holding otherwise. We agree with the Court of Appeals that N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, and not third parties, and that the catch-all provision in N.C.G.S. § 15A-1340.50(f)(7) cannot be read to expand the reach of the statute to protect individuals other than the victim. *Id.* at ___, 784 S.E.2d at 199-200. But we also conclude that a trial court may enter a no contact order prohibiting indirect contact with the victim through her children or others who may be specified in the section entitled "Restrictions" under subdivisions (f)(1) through (f)(6), as well as (f)(7) of N.C.G.S. § 15A-1340.50, if supported by appropriate findings. N.C.G.S. § 15A-1340.50 (2015). By "appropriate findings," we mean findings indicating that the defendant's contact with specific individuals would constitute indirect engagement in any of the actions prohibited in subdivisions (f)(1) through (f)(7).

This Court reviews the decision of the Court of Appeals to determine whether the decision contains an error of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). This case presents a question of statutory interpretation, which is an issue of law. "The intent of the Legislature controls the interpretation of a statute." *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 657 (1991) (quoting *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled by Mumford*, 364 N.C. at 402, 699 S.E.2d at 916). "In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983) (citation omitted). "When a statute is unambiguous, this Court 'will give effect to the plain meaning of the words without resorting to judicial construction.' " *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (quoting *State v. Byrd*, 363 N.C. 214, 219, 675 S.E.2d 323, 325

(2009)). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Byrd*, 363 N.C. at 219, 675 S.E.2d at 325 (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

The statute at issue here, N.C.G.S. § 15A-1340.50, reads in pertinent part:

> (a) The following definitions apply in this Article:
>
> (1 Permanent no contact order.— A permanent injunction that prohibits any contact by a defendant with the victim of the sex offense for which the defendant is convicted. The duration of the injunction is the lifetime of the defendant.
>
> (2) Sex offense.— Any criminal offense that requires registration under Article 27A of Chapter 14 of the General Statutes.
>
> (3) Victim.— The person against whom the sex offense was committed.
>
> . . . .
>
> (e) At the conclusion of the show cause hearing the judge shall enter a finding for or against the defendant. If the judge determines that reasonable grounds exist for the victim to fear any future contact with the defendant, the judge shall issue the permanent no contact order. The judge shall enter written findings of fact and the grounds on which the permanent no contact order is issued. The no contact order shall be incorporated into the judgment imposing the sentence on the defendant for the conviction of the sex offense.
>
> (f) The court may grant one or more of the following forms of relief in a permanent no contact order under this Article:
>
> (1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere with the victim.
>
> (2) Order the defendant not to follow the victim, including at the victim's workplace.

(3) Order the defendant not to harass the victim.

(4) Order the defendant not to abuse or injure the victim.

(5) Order the defendant not to contact the victim by telephone, written communication, or electronic means.

(6) Order the defendant to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.

(7) Order other relief deemed necessary and appropriate by the court.

N.C.G.S. § 15A-1340.50(a), (e), (f).

The paramount purpose of N.C.G.S. § 15A-1340.50 is to protect a victim of a sex offense from further contact, harm, or molestation by his or her assailant. *See id.* § 15A-1340.50 (titled "Permanent no contact order prohibiting future contact by convicted sex offender with crime victim."); Act of July 21, 2009, ch. 380, 2009 N.C. Sess. Laws 721 (captioned in part: "An act to provide that when sentencing a defendant convicted of a sex offense and upon request of the district attorney, the court may enter a permanent no contact order prohibiting any future contact of a convicted sex offender with the crime victim . . . ."); *see also State v. Hunt*, 221 N.C. App. 48, 55, 727 S.E.2d 584, 590 ("[T]he legislative purpose . . . [is] to protect an individual who fears contact with the defendant from being contacted or harmed, either mentally or physically, by the convicted sex offender who purportedly victimized him or her."), *appeal dismissed and disc. rev. denied*, 366 N.C. 390, 732 S.E.2d 581 (2012).

The statute provides that when "reasonable grounds exist for the victim [of a sex offense] to fear any future contact with the defendant, the judge shall issue [a] permanent no contact order." N.C.G.S. § 15A-1340.50(e). A permanent no contact order is defined as "[a] permanent injunction that prohibits any contact by a defendant with the victim of the sex offense for which the defendant is convicted." *Id.* § 15A-1340.50(a)(1). The "victim" is "[t]he person against whom the sex offense was committed." *Id.* § 15A-1340.50(a)(3). The trial court must "enter written findings of fact and the grounds on which the permanent no contact order is issued," and "[t]he no contact order shall be incorporated into the judgment." *Id.* § 15A-1340.50(e).

In the no contact order the trial court may impose various forms of relief specifically enumerated in the statute, as well as "other relief deemed necessary and appropriate by the court." *Id.* § 15A-1340.50(f). Each of the specifically enumerated forms of relief involves an order to the defendant not to engage in certain conduct towards the victim. *See id.* § 15A-1340.50(f)(1)-(6). The catch-all provision in subdivision (f)(7), however, does not specify whom the "other relief" may protect, and thus, can be viewed as ambiguous. *Id.* § 15A-1340.50(f)(7).

The title of the statute, the definition of "permanent no contact order" in subdivision (a)(1), and the specifically enumerated forms of relief in subdivisions (f)(1) through (f)(6) all unambiguously contemplate protection of the particular victim. Accordingly, because the purpose of the statute and the intent of the legislature appear to be to protect the particular victim of the sex offense, the catch-all provision in subdivision (f)(7) should similarly be limited to "other relief" for the protection of the victim of the sex offense only. *Cf. State v. Elder*, 368 N.C. 70, 72-73, 773 S.E.2d 51, 53 (2015) (concluding that the catch-all provision in N.C.G.S. § 50B-3(a)(13), which reads "any additional prohibitions or requirements the court deems necessary" and follows a list of twelve other prohibitions or requirements that the judge may impose on a party to a DVPO, "limits the court to ordering a *party* to act or refrain from acting" and "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," as the trial court sought to do (emphasis added)).

Thus, we agree with the Court of Appeals that N.C.G.S. § 15A-1340.50 protects the victim of the sex offense, and not third parties, and that the catch-all provision in N.C.G.S. § 15A-1340.50(f)(7) cannot be read to expand the reach of the statute to protect individuals other than the victim of the sex offense. *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 199-200.

Nonetheless, we also hold that under the statute, the trial court may prohibit a convicted sex offender from engaging in any of these forms of contact *indirectly* with the victim through the victim's family, friends, or acquaintances. Nearly all the enumerated options for relief are prohibitions against actions that can be taken indirectly as well as directly against the victim; the catch-all provision in (f)(7) permits additional restrictions if "necessary and appropriate." *See* N.C.G.S. § 15A-1340.50(f). Accordingly, to the extent that a defendant's contact with other individuals constitutes indirect engagement in any of the actions prohibited in subdivisions (f)(1) through (f)(7), such indirect contact is inherently

within the scope of the conduct that the trial court is authorized to prohibit under the statute. To specifically prohibit such conduct, however, the trial court must make appropriate findings.

Additionally, because the catch-all provision in subdivision (f)(7) allows the trial court to "[o]rder other relief deemed necessary and appropriate," it is within the scope of the trial court's authority to specifically list people whom the defendant may not contact when the trial court has concluded that such contact would constitute a violation of the specific restrictions imposed upon the defendant under subdivisions (f)(1) through (f)(6). Thus, the Court of Appeals erred in concluding that "the trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not 'victims' of the 'sex offense' committed by Defendant." *Barnett*, ___ N.C. App. at ___, 784 S.E.2d at 200.

Here both parties agree that N.C.G.S. § 15A-1340.50 authorizes a permanent no contact order for the protection of the victim only, and not for third parties. The parties differ, however, with respect to how to interpret the trial court's no contact order. The State argues that to be consistent with the statute, we must interpret the order to mean that the children were listed by the trial court to protect the victim, rather than the children themselves. Defendant, on the other hand, interprets the no contact order as protecting the children directly from any and all contact by him to the same extent as the victim, regardless of whether the contact is related to the victim. Defendant argues that his interpretation conflicts with the statute because the statute does not authorize protection for third parties. This disparity arises here because the trial court failed to make appropriate findings in support of the restrictions on defendant's indirect contact with the victim through third parties.

In essentially adopting defendant's interpretation of the order, the Court of Appeals erred. We do not agree that inclusion of the children's names under the (f)(7) catch-all provision comprehensively extends the protections of the entire order to the children too, as if they were the victims of the original assault. As discussed earlier, the trial court is not authorized to prohibit contact with third parties for the protection of those individuals; however, the trial court can prohibit indirect contact with the victim through specifically identified third parties if such a prohibition is supported by appropriate findings in the no contact order.

Accordingly, we reverse the decision by the Court of Appeals on the issue upon which we allowed review, and remand this case to that court for further remand to the trial court for entry of a permanent no contact

order containing appropriate findings to support any "Restrictions" on indirect contact with the victim through third parties. The other issues addressed by the Court of Appeals are not before this Court, and the Court of Appeals' decision on those matters remains undisturbed.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA
v.
JOHN JOSEPH CARVALHO, II

No. 369A15

Filed 21 December 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 78 (2015), finding no error after appeal from a judgment entered on 7 April 2014 by Judge Christopher W. Bragg in Superior Court, Union County. On 17 March 2016, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 12 October 2016.

Roy Cooper, Attorney General, by Mary Carla Babb, Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

As to the issue before this Court under N.C.G.S. § 7A-30(2), the decision of the Court of Appeals is affirmed. Further, we conclude that the petition for discretionary review as to the additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
DONALD LEE CURTIS

No. 122A16

Filed 21 December 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. ___, 782 S.E.2d 522 (2016), finding no error after appeal from judgments entered on 12 March 2014 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Supreme Court on 11 October 2016.

Roy Cooper, *Attorney General*, *by Sherri Horner Lawrence*, *Assistant Attorney General*, *for the State.*

Narendra K. Ghosh for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. DALTON

[369 N.C. 311 (2016)]

STATE OF NORTH CAROLINA
v.
MELISSA AMBER DALTON

No. 336PA15

Filed 21 December 2016

1. Appeal and Error—two jury arguments—one objection—arguments not separate

In a murder prosecution in which defendant raised the insanity defense, two statements by the prosecutor about defendant's likelihood of release, viewed in context, were not separate and distinct. The second was a summary of the first, so that defendant's objection to the first was sufficient.

2. Criminal Law—insanity defense—closing argument—defendant's likelihood of release

The evidence in a first-degree murder prosecution in which defendant claimed insanity did not support the assertions made by the prosecutor during closing arguments about defendant's likelihood of release. The prosecutor's argument was that it was very possible that defendant would be released in fifty days if she was found not guilty by reason of insanity. The level of possibility or probability of release was not the salient issue; rather, it was the evidence and all reasonable inferences that could be drawn from that evidence which should have governed counsel's arguments in closing. The only reasonable inference to be drawn from the evidence presented at trial was that it was highly unlikely that defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she was no longer dangerous to others.

3. Criminal Law—insanity defense—closing argument—prejudicial

In a first-degree murder prosecution in which defendant claimed insanity, there was prejudicial error where the prosecutor argued to the jury that it was "very possible" that defendant would be released in fifty days when the overwhelming evidence was that defendant had committed the violent acts and that she had a longstanding history of substance abuse and mental illness. It was unlikely that defendant could demonstrate within fifty days that she was no longer dangerous to others. A reasonable possibility existed that the jury would have found defendant not guilty by reason of

insanity if the prosecutor had not made the improper remarks during closing arguments.

Justice JACKSON concurring.

Justices EDMUNDS and ERVIN join in this concurring opinion.

Chief Justice MARTIN dissenting.

Justice NEWBY 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. ___, 776 S.E.2d 545 (2015), finding prejudicial error after appeal from judgments entered on 14 April 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Transylvania County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 11 October 2016.

Roy Cooper, *Attorney General*, *by Jess D. Mekeel*, *Assistant Attorney General*, *for the State-appellant.*

Ann B. Petersen for defendant-appellee.

BEASLEY, Justice.

We consider whether the Court of Appeals erred in holding that the prosecutor's closing arguments exaggerating a defendant's likelihood of being released from civil commitment upon a finding of not guilty by reason of insanity constituted prejudicial error. We hold that the statements at issue were improper and prejudicial. Accordingly, we affirm the decision of the Court of Appeals granting defendant a new trial.

Melissa Amber Dalton (defendant) has a long history of substance abuse and mental illness, including bipolar disorder and borderline personality disorder. On or about 29 July 2009, defendant received inpatient treatment for mental health and addiction issues at the Neil Dobbins Center, a crisis treatment facility. At that time Daniel Johnson, M.D. diagnosed defendant with cocaine dependence, cannabis abuse and substance induced mood disorder, borderline personality disorder, and intrauterine pregnancy. Dr. Johnson prescribed Lexapro, a selective serotonin reuptake inhibitor (SSRI). Unbeknownst to Dr. Johnson, defendant had previously reacted negatively to another

SSRI, Prozac. Defendant was discharged from the facility approximately three days later.

After defendant returned home from Neil Dobbins, she continued taking Lexapro. Defendant's boyfriend noticed that defendant was acting unpredictably, and he removed their infant daughter from defendant's apartment. On the night of 20 August 2009, defendant's boyfriend called defendant's mother and asked her to check on defendant because he noticed that defendant seemed depressed. After observing defendant's strange behavior, defendant's mother went to the magistrate's office and "tried to have [defendant] committed." The magistrate told her to speak with a social worker and return the next day. That evening defendant exchanged some electronics for a gram of crack cocaine.

Defendant lived in an apartment in Brevard, North Carolina, where Naomi Jean Barker (Barker) and Richard Holden (Holden) were her neighbors. Early in the morning of 21 August 2009, defendant knocked on Barker and Holden's front door claiming to have money she previously borrowed from them. When Holden opened the door, defendant pushed him against the wall and stabbed him repeatedly. Defendant then approached Barker, calling her by the wrong name, and stabbed her six times. Defendant removed five dollars from Holden's wallet and left the apartment. Barker called 911. The police arrived to find Holden dead at the scene and Barker suffering from serious injuries.

Shortly after the incident, a rescue squad member saw defendant, who was still wearing bloody clothes, trying to catch a ride at a nearby church. An officer located defendant at the church and brought her to the police station, where she was interviewed by an S.B.I. agent. When the agent recited defendant's *Miranda* rights, she refused to speak further and requested an attorney.

On 5 October 2009, defendant was indicted for first-degree murder, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant indicated her intent to plead the defense of insanity and was subsequently evaluated by David Bartholomew, M.D. regarding her capacity to proceed and her mental condition at the time of the offense.

At trial the defense offered two expert witnesses to testify as to defendant's mental state. Wilkie Wilson, Ph.D., an expert in neuropharmacology, testified about the effects of drugs on defendant's behavior at the time of the crime. He opined that SSRIs, such as Lexapro, should not be prescribed to people with bipolar disorder because this class of drugs

"can greatly disturb their mental function and push them over from a controlled state into mania." Dr. Wilson also opined that at the time of the homicide defendant was in a manic state.

George Corvin, M.D., a psychiatrist, testified about defendant's past history of mental illness and her state of mind at the time of the homicide. He opined that defendant's mental illness, her negative reactions to SSRIs, and her drug use affected her mental state at the time of the homicide. Ultimately, Dr. Corvin testified that defendant was manic at the time of the homicide. He also opined that, although treatable, defendant's mental illness cannot be cured and she will always be an addict, and added that if "[defendant] were not in treatment at all and were in a highly unstable, chaotic, abusive environment again and were to resume use of illicit substances, [then] her danger and her risk of recidivism . . . would go up substantially." The State did not present any expert witnesses to testify regarding defendant's mental condition.

At the charge conference, the prosecutor asked if he could comment on the civil commitment procedures that would apply if defendant was found not guilty by reason of insanity. The trial court agreed to permit the comment, but cautioned the prosecutor not to exaggerate defendant's chance of being released after fifty days. During closing arguments, the prosecutor made the following statements:

> [Prosecutor]: . . . . [Defendant] doesn't remember, so she says you can't hold me accountable, so find me not guilty by reason of insanity.
>
> And that way, as one of the lawyers mentioned, then she can be committed to a hospital if you find that verdict. *And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home.*
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> [Prosecutor]: *She very well could be back home in less than two months.*

(Emphasis added.) The prosecutor also argued, without objection, that defendant's request for a lawyer during the police interview was evidence of her sanity at the time of the homicide.

On 14 April 2014, the jury found defendant guilty of first-degree murder under a theory of felony murder, first-degree burglary, and assault

with a deadly weapon inflicting serious injury. The jury declined to find defendant not guilty by reason of insanity for all offenses. The trial court sentenced defendant to life imprisonment without parole and a consecutive term of twenty-six to forty-one months' of imprisonment. The trial court arrested judgment on the first-degree burglary conviction.

Defendant appealed her convictions to the Court of Appeals, arguing: (1) The trial court erred in overruling her objection to the State's argument that if she was found not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days; and (2) The trial court erred in failing to intervene *ex mero motu* when the State argued that her request for counsel during a police interview showed that she was sane. In a unanimous opinion filed on 15 September 2015, the Court of Appeals found prejudicial error in the prosecutor's closing arguments regarding defendant's likelihood of release if found not guilty by reason of insanity and held that defendant was entitled to a new trial. The Court of Appeals did not address defendant's argument regarding invocation of her *Miranda* rights as evidence of sanity.

On 17 March 2016, this Court allowed the State's petition for discretionary review on the issue of "[w]hether the Court of Appeals erred in distorting the transcript, applying an incorrect standard of review, and finding prejudicial error based upon the prosecutor's statements in closing argument regarding the potential for defendant's release from civil commitment if found not guilty by reason of insanity."

[1] First, the State contends that the Court of Appeals applied the incorrect standard of review because the court improperly read the prosecutor's two separate statements as one. Specifically, the State argues that the second statement should be reviewed for gross impropriety, not abuse of discretion, because defendant did not object to that statement at trial. We disagree.

When a defendant objects at trial, this Court reviews closing arguments to determine "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). In reviewing closing arguments for an abuse of discretion, this Court must "first determine[ ] if the remarks were improper." *Id.* at 131, 558 S.E.2d at 106. If so, this Court must then "determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* at 131, 558 S.E.2d at 106 (citing *Coble v. Coble*, 79 N.C. 589 (1878); and *State v. Tyson*, 133 N.C. 692, 698, 45 S.E. 838, 840 (1903)).

Conversely, when a defendant fails to object at closing, this Court must determine if the argument was "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002) (quoting *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

Here the issue is whether the prosecutor's closing arguments mentioning defendant's likelihood of release upon a finding of not guilty by reason of insanity were prejudicial. The State asserts that the prosecutor's arguments should be reviewed as two separate and distinct statements, the first to which defense counsel objected[1] and the second to which counsel did not.[2] "[S]tatements made during closing arguments," however, "will not be examined in isolation. 'Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.' " *State v. Ward*, 354 N.C. 231, 265, 555 S.E.2d 251, 273 (2001) (citing and quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999)). When viewed in context, especially considering the conversation that took place during the charge conference,[3] the second statement is not separate and distinct from the first. It was made immediately after the trial court overruled the defense's objection and is a summary of the first statement.

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1. "And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home."

2. "She very well could be back home in less than two months."

3. The following discussion took place during the charge conference:

> [Prosecutor]: Judge, I would just ask the Court to allow me in closing argument to comment on [the civil commitment instruction].
>
> . . . .
>
> THE COURT: . . . I would have to limit – I mean, if you would make a statement like, well, she'll be out on the street in 50 days, that's not correct according to the law, so I would have to give them an instruction to disregard that statement, to correct that statement.
>
> [Prosecutor]: But she could be. Or she could be in five days.
>
> THE COURT: She could –
>
> [Prosecutor]: I think these people need to know that.
>
> THE COURT: Okay. Just be careful what you say is all I'm saying. Be cautious about it.

[2] Next, the State contends that the Court of Appeals' analysis regarding the propriety of the prosecutor's closing arguments was flawed. Specifically, the State argues that the Court of Appeals erred in relying on *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437 (2005), and distinguishing *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988). We disagree.

Closing arguments must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108; *see State v. Covington*, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976) (stating that counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case" (citations omitted)). "Improper remarks are those calculated to lead the jury astray," such as "references to matters outside the record." *Jones*, 355 N.C. at 133, 558 S.E.2d at 108. Additionally, "[i]ncorrect statements of law in closing arguments are improper." *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995).

Pursuant to section 15A-1321, if a jury finds a defendant not guilty by reason of insanity, the trial court must order that the defendant be civilly committed. N.C.G.S. § 15A-1321 (2015). Within fifty days of commitment, the trial court must provide the defendant with a hearing, *id.* § 122C-268.1(a) (2015), and if, at that time, the defendant shows "by a preponderance of the evidence" that she "(i) no longer has a mental illness" or "(ii) is no longer dangerous to others," the court will release the defendant, *id.* § 122C-268.1(i) (2015). A defendant is "dangerous to others" when

> within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. *Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.*

Id. § 122C-3(11)(b) (2015) (emphasis added).

"During closing arguments, attorneys are given wide latitude to pursue their case." *State v. Prevatte*, 356 N.C. 178, 237, 570 S.E.2d 440, 472 (2002) (citing *State v. Scott*, 343 N.C. 313, 343, 471 S.E.2d 605, 623 (1996)), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). These arguments, however, "must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Locklear*, 363 N.C. 438, 477, 681 S.E.2d 293, 320 (2009) (Brady, J., dissenting) (quoting *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008)). If a prosecutor's argument regarding a defendant's release after a finding of not guilty by reason of insanity is not supported by a reasonable inference drawn from the evidence presented at trial, then such an argument is improper. *See Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437.

In *Millsaps* the defendant raised an insanity defense to first-degree murder and other related charges. *Id.* at 341, 610 S.E.2d at 438. Evidence presented at trial indicated that the defendant's mental illness could be treated, but not cured, and that the defendant would probably always need to be hospitalized. *Id.* at 348, 610 S.E.2d at 442. During closing arguments, the prosecutor said, "We submit it's 99 percent certain that [a judge] someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him." *Id.* at 345, 610 S.E.2d at 441. Using an abuse of discretion standard, the court in *Millsaps* determined that the prosecutor's statements constituted error because they were outside the evidence presented at trial and held that they were "impermissibly prejudicial." *Id.* at 348, 610 S.E.2d at 442-43.

Here, as in *Millsaps*, the evidence presented at trial does not support the assertions made by the prosecutor during closing arguments. Specifically, the evidence does not support the conclusion that if defendant was found not guilty by reason of insanity, it is "very possible" that she would be released in fifty days. Instead, the evidence demonstrated that defendant will suffer from mental illness and addiction "for the rest of her life," and that "defendant's risk of recidivism would significantly increase if she were untreated and resumed her highly unstable lifestyle." *State v. Dalton*, ___ N.C. App. ___, ___, 776 S.E.2d 545, 551 (2015) (discussing Dr. Corvin's testimony). The State did not present any expert evidence at trial to rebut these conclusions. Additionally, the homicide for which defendant was convicted is prima facie evidence of dangerousness to others. N.C.G.S. § 122C-3(11)(b). Therefore, the only reasonable inference to be drawn from the evidence presented at trial is that it is *highly unlikely* that defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she is no longer dangerous to others.

We reject the State's contention that *Millsaps* is distinguishable from the facts of this case. In essence, *Millsaps* stands for the proposition that counsel's argument regarding the likelihood of a defendant's release after being found not guilty by reason of insanity must be supported by the evidence. The level of possibility or probability of release is not the salient issue; rather, it is the evidence and all reasonable inferences that can be drawn from that evidence which govern counsel's arguments in closing. This Court's prior decisions do not support the State's possibility versus probability dichotomy, and we decline to recognize such a dichotomy at this time.

This Court also disagrees with the State's argument that *Allen* governs the disposition of this case. In *Allen* the defendant raised the defense of insanity to charges of first-degree murder and first-degree arson. 322 N.C. at 180-82, 367 S.E.2d at 628-29. During closing arguments, the prosecutor contended that if the jury found the defendant not guilty by reason of insanity, then the defendant "might be released within ninety days." *Id.* at 194, 367 S.E.2d at 636. This Court found that the prosecutor erred by "misstat[ing] the maximum recommitment period," but concluded that such "misstatement did not rise to the level of prejudicial error."[4] *Id.* at 195, 367 S.E.2d at 637. This Court did not, however, address whether the evidence presented at trial supported the argument. Despite the State's contention, this Court's silence on the issue of likelihood of release does not support a conclusion that this Court condoned the statement. Because *Allen* only addressed a misstatement of law made during closing arguments and not a misapplication of the facts, it is distinguishable from the instant case.

[3] Finally, the State contends that the Court of Appeals' analysis regarding prejudice was flawed because defendant cannot show "a reasonable possibility" that a different result would have been reached at trial had the error not been committed. *See* N.C.G.S. § 15A-1443(a) (2015). We disagree.

"Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole." *Jones*, 355 N.C. at 133, 558 S.E.2d at 108. Here the overwhelming evidence demonstrated that defendant committed the violent acts for which she was convicted and that she had a long-standing history of

4. The closing arguments at issue in *Allen* were reviewed for gross impropriety. *Allen*, 322 N.C. at 195, 367 S.E.2d at 636-37.

substance abuse and mental illness. By improperly presenting to the jury that it was "very possible" that defendant would be released in fifty days, the prosecutor prejudiced defendant by persuading the jury against a finding of not guilty by reason of insanity. Therefore, a reasonable possibility exists that the jury would have found defendant not guilty by reason of insanity if the prosecutor had not made the improper remarks during closing arguments.

We hold, therefore, that the Court of Appeals correctly applied the abuse of discretion standard when reviewing the prosecutor's closing arguments. The prosecutor's arguments exaggerating the likelihood of defendant's release if found not guilty by reason of insanity constituted prejudicial error because they were not supported by the evidence. For the reasons stated, we affirm the opinion of the Court of Appeals.

AFFIRMED.

Justice JACKSON concurring.

Although I concur in the majority opinion, I write separately to emphasize the impropriety of the prosecutor's jury argument discouraging a potential verdict of not guilty by reason of insanity.

In any case in which a criminal defendant pleads not guilty by reason of insanity, evidence necessarily will be presented that the defendant has mental illness and that the mental illness had a causal role in the defendant's criminal behavior. *See, e.g.*, *State v. Jones*, 293 N.C. 413, 425, 238 S.E.2d. 482, 490 (1977) ("[T]he test of insanity as a defense to a criminal charge is whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act." (citing, *inter alia*, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, *cert. denied*, 414 U.S. 1042 (1973))). Because the defendant has the burden of proving the affirmative defense of insanity, *State v. Wetmore*, 298 N.C. 743, 746-47, 259 S.E.2d 870, 873 (1979), even the defendant's own attorney may provide evidence that the defendant's mental illness caused him or her to engage in conduct that a jury might find shocking or reprehensible. Consequently, this Court has acknowledged that juries may feel "fear for the safety of the community" in cases involving the insanity defense. *See State v. Hammonds*, 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976).

In *Hammonds*, a case decided before contemporary procedures dealing with a plea of not guilty by reason of insanity were put in place, this Court explained that "fear for the safety of the community" could motivate a jury to "insure that [a] defendant will be incarcerated for his own safety and the safety of the community at large." *Id.* at 15, 224 S.E.2d at 603-04. We noted that "[t]here was considerable evidence that [the] defendant was incapable of knowing right from wrong at the time [of the crime], and also evidence that his mental condition would worsen with age." *Id.* at 15, 224 S.E.2d at 603. We explained:

> [A]lthough the jury understands that a verdict of guilty means the defendant will be punished by a prison sentence or fine, and that a verdict of not guilty means the defendant will go free, the average jury does not know what a verdict of not guilty by reason of insanity will mean to the defendant. This uncertainty may lead the jury to convict the accused in a mistaken belief that he will be set free if an insanity verdict is returned.

Id. at 14, 224 S.E.2d at 603. In *Hammonds* the district attorney had stated during closing arguments that a finding of not guilty by reason of insanity would result in the defendant's "walk[ing] out of this courtroom not guilty, returned to this community." *Id.* at 11, 224 S.E.2d at 601. Although the trial court sustained the defendant's objection to the State's argument, the court refused the defendant's request for an instruction explaining the statutory procedure for commitment following a verdict of not guilty by reason of insanity. *Id.* at 11, 224 S.E.2d at 601. We concluded that "the fate of [the] defendant, should he be acquitted by reason of insanity, became a central and confusing issue in the arguments of counsel." *Id.* at 13, 224 S.E.2d at 602. Emphasizing "[t]he atmosphere . . . of confusion and of uncertainty" that pervaded the trial, we granted the defendant a new trial and held "that, upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in substance the commitment procedures . . . applicable to acquittal by reason of mental illness." *Id.* at 15, 224 S.E.2d at 604.

Here, in accordance with *Hammonds*, the trial court instructed the jury on the relevant commitment procedures. The trial court stated:

> The defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50

> days. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness or is no longer dangerous to others. If the court is so satisfied, it shall order the defendant discharged and released. If the court finds that the defendant has not met the defendant's burden of proof, then it shall order that inpatient commitment continue for a period not to exceed 90 days. This involuntary commitment will continue subject to periodic review until the court finds that the defendant no longer has a mental illness or is no longer dangerous to others.

Neverthless, even with the additional instructions required by *Hammonds*, uncertainty remains as to how long a defendant will be committed if acquitted by reason of insanity. A juror has no way to estimate the likelihood that the defendant could be released at the hearing that must be provided "before the expiration of 50 days from the date of his commitment." N.C.G.S. § 122C-268.1(a) (2015). As in *Hammonds*, a juror who believes the evidence of insanity might nevertheless be motivated to find the defendant guilty based on fear for the safety of the community. In light of the unique uncertainty involved in a plea of not guilty by reason of insanity, it is inappropriately inflammatory for a prosecutor to speculate about the possibility that a defendant who was found not guilty by reason of insanity could be released after a short period of time.

Other courts have considered this issue and have shed light on its unique nature. *See*, *e.g.*, *Dunn v. State*, 277 Ala. 39, 43, 166 So. 2d 878, 882 (1964) (reversing the defendant's murder conviction after the solicitor argued that "if [the jury] sent this defendant as an insane man up to Tuscaloosa, the State mental institution, he wouldn't stay up there more than ten days"); *People v. Castro*, 5 Cal. Rptr. 906, 908-09, 182 Cal. App. 2d 255, 259-60 (1960) (evaluating the district attorney's remarks that "[i]f your verdict comes back legally [in]sane . . . just as soon as he regains his sanity, he is released" and that "he will be snubbing his nose at the Court, the jury and the Police Department," and concluding that these remarks "were patently misconduct" and constituted "a direct appeal to passion and prejudice"); *see also Durham v. United States*, 237 F.2d 760, 762 (D.C. Cir. 1956) ("The judge's statement that the defendant would 'be released very shortly' was highly prejudicial, for it implied a warning that dire consequences might result from a finding that the defendant was not guilty by reason of insanity."). In *State v. Johnson*, 267 S.W.2d 642 (Mo. 1954), *cert. denied*, 351 U.S. 957 (1956), *and cert. denied*, 357 U.S. 922 (1958), the prosecutor argued in pertinent part that if the jury

found the defendant not guilty by reason of insanity, "he would be out in two months." *Id.* at 645. The Missouri Supreme Court concluded that the prosecutor "was attempting to engender in the minds of the jurors the fear that if [the] defendant were acquitted on his defense of insanity, [he] would be soon discharged to rape again." *Id.* The court stated that the effect of the argument was "to incite the jury" and to urge the jury to make a decision "without reference to . . . the evidence tending to prove or disprove that [the] defendant was insane." *Id.* The court reversed the defendant's convictions. *Id.* at 646.

In *People v. Stack*, 244 Ill. App. 3d 166, 613 N.E.2d 1175, *appeal denie*d, 151 Ill. 2d 574, 616 N.E.2d 345 (1993), the prosecutor stated that a finding of not guilty by reason of insanity would allow the defendant to "beat this case" and "get[ ] out the door." *Id.* at 170, 613 N.E.2d at 1178. The Illinois appellate court stated that "[t]hese types of comments could only play on an insanity jury's inherent fear that its verdict might set a dangerous man free." *Id.* at 171-72, 613 N.E.2d at 1179. The court explained that regardless of whether a prosecutor's comments suggest "an automatic release, an immediate release in the near future, or one sometime down the road," "[a]ll such comments have the same prejudicial effect in insanity cases, and all are not to be tolerated." *Id.* at 177, 613 N.E.2d at 1182.

In the case *sub judice* the prosecutor told the jury it was "very possible" that defendant could be released within fifty days if the jury returned such a verdict. While the prosecutor accurately also mentioned the finding that would have to be made before such a release became possible, the argument implied that such a finding was routine.

Instead, history shows that few who are acquitted of murder or another serious crime on the grounds of insanity are released shortly after their acquittal. One need look no further than the case of John Hinkley, Jr., who was acquitted in 1982 on the basis of insanity of shooting President Ronald Reagan and three others, but was not released from institutional psychiatric care until 2016. Gardiner Harris, *John Hinckley, Who Tried to Kill Reagan, Will Be Released*, N.Y. Times (July 27, 2016), http://www.nytimes.com/2016/07/28/us/hinckley-who-tried-to-kill-reagan-to-be-released.html. Closer to home, Michael Hayes was not released completely until 2012 following his 1989 acquittal on the basis of insanity of four murders in Forsyth County. Michael Hewlett, *For first time in 20 years, Michael Hayes is free of court supervision*, Winston-Salem J. (Mar. 1, 2012) http://www.journalnow.com/news/local/for-first-time-in-years-michael-hayes-is-free-of/article_d5514c21-a980-5bf3-934e-53b3e76e8c05.html.

A prosecutor may aptly oppose a verdict of not guilty by reason of insanity, but the argument should neither distort the process that follows such a verdict nor pander to the emotions of the jurors. The suggestion here that defendant could "very well" soon walk scot-free was inaccurate, misleading, and prejudicial. Accordingly, I join in the majority's conclusion that the prosecutor's argument in this case was improper.

Justices EDMUNDS and ERVIN join in this concurring opinion.

Chief Justice MARTIN dissenting.

Defendant entered her neighbors' home early one morning and repeatedly stabbed one person, who lived, and another person, who died. At trial, a jury rejected defendant's insanity defense and convicted her of first-degree murder and other offenses. The majority grants defendant a new trial because it misreads a statement by the prosecutor that actually had no prejudicial effect. And the concurring opinion adds to the confusion by injecting a legal concept (preventing prosecutors from leading the jury away from the evidence and appealing to its passions) that has little or no bearing on this case.

When the prosecutor made the statement at issue here during his closing argument, he was discussing what could happen if the jury found defendant not guilty by reason of insanity. The prosecutor said: "And it is very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home. . . . She very well could be back home in less than two months."[1] This statement was nearly correct, but it did slightly misstate the law. When a defendant who has allegedly inflicted or attempted to inflict serious physical injury or death is found not guilty by reason of insanity, state law requires that she be committed to civil confinement, *see* N.C.G.S. § 15A-1321(b) (2015), and that, once committed, the now-respondent will have a hearing within fifty days, *id.* § 122C-268.1(a) (2015). At this hearing, if the respondent proves by a preponderance of the evidence that (1) she "no longer has a mental illness" or (2) she "is no longer dangerous to others," the court "shall order the respondent

1. As can be seen in the majority's quotation from the record, in the language omitted by the ellipsis, defense counsel made an objection that the trial court overruled. Defendant did not object to the portion of the statement that the prosecutor made after the ellipsis. Both defendant and the majority maintain that the objection should carry over to that portion for the purposes of the standard of review. I am inclined to agree, but it follows that the statement needs to be reviewed as a whole.

discharged and released." *Id.* § 122C-268.1(i) (2015). So one way for a respondent to be released from civil confinement is to show that she is no longer dangerous to others. Had the prosecutor merely said that, it would have been a correct statement of law. But the addition of the words "or herself" made his statement incorrect. A respondent in a civil commitment hearing does not have to prove that she is not dangerous to herself—only that she is not dangerous to others. Because "[i]ncorrect statements of law in closing arguments are improper," *State v. Ratliff*, 341 N.C. 610, 616, 461 S.E.2d 325, 328 (1995), the prosecutor's statement was improper.

The trial court's decision not to sustain defendant's objection to this statement, however, is reversible only if the statement was prejudicial. *See id.* at 616-18, 461 S.E.2d at 328-29. Prejudice exists when a statement creates "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . . The burden of showing such prejudice . . . is upon the defendant." *Id.* at 617, 461 S.E.2d at 329 (alterations in original) (quoting N.C.G.S. § 15A-1443(a) (1988), which has not been amended since then). The statement that the prosecutor made here was not prejudicial at all, for two reasons.

First, the prosecutor's statement was nearly accurate, and to the extent that it was inaccurate, the inaccuracy cut against the very argument that the prosecutor was making. The prosecutor was trying to argue that defendant could be free within fifty days after being acquitted by reason of insanity, if she proved by a preponderance of the evidence that she was no longer dangerous to others (which, by law, is true). The prosecutor's only error was to add an extra hurdle for defendant to prove, which made it sound to the jury like she had to prove more than she really did. Because this error could only have hurt the prosecutor's argument, there is not a reasonable possibility that, in the error's absence, the trial would have resulted in something other than a guilty verdict.

Second, we have repeatedly held, "as a general rule, [that] a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction" about that area of the law "to the jury." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citing *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998), *cert. denied*, 528 U.S. 835 (1999)), *cert. denied*, 555 U.S. 835 (2008); *see also*, *e.g.*, *State v. Buckner*, 342 N.C. 198, 238, 464 S.E.2d 414, 437 (1995); *State v. Harris*, 290 N.C. 681, 695-96, 228 S.E.2d 437, 445 (1976). In this case, the trial court followed the pattern jury instruction and instructed the jury as follows:

> The defendant found not guilty by reason of insanity shall immediately be committed to a State mental facility. After the defendant has been automatically committed, the defendant shall be provided a hearing within 50 days. At this hearing the defendant shall have the burden of proving by a preponderance of the evidence that the defendant no longer has a mental illness or is no longer dangerous to others. If the [hearing] court is so satisfied, it shall order the defendant discharged and released.

Thus, the trial court correctly instructed the jury about what defendant would have to prove at her civil commitment hearing if the jury found her not guilty by reason of insanity. So even if the prosecutor's minor misstatement of law about what defendant would have had to show at her hearing had been at all harmful to her (which, as I have shown, it was not), it would have been cured by the trial court's proper jury instruction.

Based on these two reasons, this Court should reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further proceedings. But by misreading the prosecutor's statement, the majority is effectively analyzing the facts of a case that does not exist.

First of all, when framing the issue in this case, the majority refers to "the prosecutor's closing arguments exaggerating a defendant's likelihood of being released from civil confinement" after being acquitted by reason of insanity. Later in its opinion, it refers to "[t]he prosecutor's arguments exaggerating the likelihood of defendant's release if found not guilty by reason of insanity." The majority thus seems to interpret the phrase "very possible" to mean something like "probable" or "likely." But this misunderstands what the phrase means. Black's Law Dictionary defines "possibility" as "[t]he quality, state, or condition of being conceivable in theory or in practice." *Possibility*, *Black's Law Dictionary* (10th ed. 2014). And the word "very" is simply a word of emphasis; when combined with "possible," it is essentially a synonym of "actually," as in "actually possible" or "very well could be."[2] Nowhere does the prosecutor say that anything is "probable" or "likely."[3]

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2. Indeed, the prosecutor followed up his "very possible" statement with the statement that defendant "very well could be back home in less than two months" if she could prove her case.

3. The concurring opinion claims that the prosecutor's statement "implied that . . . a finding [resulting in release from civil confinement in 50 days] was routine." But I see no basis for this inference, and the concurrence does not provide any.

That gets to an even more basic problem with the majority's reading of the prosecutor's statement: it incorrectly identifies what the prosecutor said was "very possible." The majority paraphrases the prosecutor as saying that, "if defendant was found not guilty by reason of insanity, it is 'very possible' that defendant *would be* released in fifty days," and that "it is 'very possible' that defendant *will be able* to show by a preponderance of the evidence in fifty days that she is no longer dangerous to others." (Emphases added.) But as it is plain to see, the prosecutor actually said nothing about the likelihood that defendant would win her hearing. He merely said that she would win her hearing *if she proved her case*. And except in the one particular that I have already discussed, the statement of law that followed the words "very possible that" was not only possible, but certain.[4] To the extent that this statement was improper, it was because the prosecutor got the law wrong, not because he said anything at all about the likelihood of defendant's release.

Given the certainty of the statute ("shall order the respondent . . . released," N.C.G.S. § 122C-268.1(i)), one might wonder why the prosecutor would have limited his statement of law with the words "very possible." On the record before us, the most likely reason for his use of those words is that he was responding to the trial judge's instruction at the charge conference. During that conference, when the prosecutor asked whether he could comment on the commitment procedures that follow a verdict of not guilty by reason of insanity,[5] the trial judge said, "Okay." But he then instructed the prosecutor, "Just be careful what you say is all I'm saying. Be cautious about it." By hedging his statement with the words "very possible," the prosecutor appears to have been trying to heed what the trial judge said.

Once one recognizes where the majority has gone wrong, it becomes clear why the majority mistakenly asks whether the prosecution's

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4. The concurring opinion says that "it is inappropriately inflammatory for a prosecutor to speculate about the possibility that a defendant who was found not guilty by reason of insanity could be released after a short period of time." Of course, if what the prosecutor said was an inflammatory "appeal[ ] to [the] jury's passions," *State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002), then the pattern jury instruction about insanity verdicts, and indeed the law itself in this area, is inflammatory as well.

5. Under this Court's holding in *State v. Hammonds*, when a defendant requests an instruction on the commitment procedure and proceedings that follow a verdict of not guilty by reason of insanity, and has presented evidence to support that verdict, the trial court must provide the appropriate instruction. 290 N.C. 1, 15, 224 S.E.2d 595, 604 (1976). Defendant did so here, and the trial court complied with *Hammonds* by agreeing to issue and then properly issuing the instruction.

(slightly inaccurate) statement of law is a reasonable inference from the evidence presented at trial—namely, because the majority has misunderstood what the prosecutor said. The prosecutor's statement did not draw *any* inference from the evidence; setting aside the words "or herself," the prosecutor made a statement of law that could be made about any defendant found not guilty by reason of insanity.

Proceeding from the premise that the prosecutor said something he did not say, the majority comments that "the only reasonable inference to be drawn from the evidence presented at trial is that it is *highly unlikely* that defendant would be able to demonstrate by a preponderance of the evidence within fifty days that she is no longer dangerous to others." Even this conclusion is likely mistaken. There are arguably no reasonable inferences that could be drawn from the evidence produced at trial about the results of defendant's future civil commitment hearing. The body of evidence produced at the two proceedings may not be—indeed, likely will not be—very similar. For instance, the majority discusses the testimony of Dr. Corvin, one of defendant's experts. But defendant would not have to tender Dr. Corvin as an expert in a future hearing. She could retain a new expert to evaluate her condition, who might reach different conclusions from Dr. Corvin. In fact, because defendant's goal at her civil commitment hearing would be to show that she was *not* insane, or at least that she was no longer dangerous to others in spite of her insanity, she would likely seek to offer different evidence at her hearing than she did at her trial. To be sure, it is concerning when either a defendant or the State engages in speculation as to the outcome of a future hearing, as the majority (incorrectly) accuses the State of doing in this case—and I fear that *Hammonds* instructions may invite this behavior.

The concurring opinion, meanwhile, does not accuse the prosecutor of speculation. Under its logic, though, a defendant can request and receive a *Hammonds* instruction, but the prosecutor cannot discuss that instruction in his closing statement. That ruling would prohibit the prosecutor from arguing the whole case—the law as well as the facts—even though he is legally entitled to do so. *See* N.C.G.S. § 7A-97 (2015) ("In jury trials the whole case as well of law as of fact may be argued to the jury."). Ironically, the concurrence does not seem to be concerned when the *defense* counsel argues the whole case, including the *Hammonds* instruction, which defense counsel did here. What is good for the goose should be good for the gander.

Finally, the majority wrongly invokes the Court of Appeals' decision in *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437 (2005), to support

its argument. The prosecutor's statement during his closing argument in *Millsaps* could hardly be more different from the prosecutor's statement here. In *Millsaps*, the prosecutor said that "it's 99 percent certain that [a] [j]udge someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him." *Id.* at 345, 610 S.E.2d at 441. That statement forecast a very high likelihood of release as the result of a hearing many years in the future. Here, by contrast, the prosecutor did not predict defendant's likelihood of release at all. Saying that it is very *possible* a defendant will be released *if she proves her case* is not comparable to saying that it is nearly *certain* a defendant will be released in six to ten years without any conditions attached. One statement is a comment on what the law purportedly requires; the other is a prediction about the outcome of a future proceeding.

Both the majority opinion and the concurring opinion have inadvertently distorted this case. The majority has created imaginary facts, while the concurrence has reimagined the law. In reality, the statement that defendant challenges was not prejudicial. I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
COREY DEON FLOYD

No. 474PA14

Filed 21 December 2016

1. Assault—attempted—recognized in N.C.

Reversing a portion of the opinion of the Court of Appeals, the Supreme Court held that the offense of attempted assault with a deadly weapon inflicting serious injury is recognized in North Carolina. Although there was precedent that an attempted assault was an attempt of an attempt for which one may not be indicted, there were two common law rules under which a person could be prosecuted for assault. The second, the show-of-violence rule, did not involve an attempt to cause injury to another person. Because the attempted assault offense is recognized offense, defendant's 2005 conviction was valid, and the trial court did not err by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and attaining habitual felon status.

2. Constitutional Law—effective assistance of counsel—disagreement over tactics

A prosecution was remanded to the Court of Appeals with entry of an order dismissing an ineffective assistance of counsel claim without prejudice to assert in a motion for appropriate relief where defendant told the trial court that his attorney was not asking the questions defendant wanted him to ask of a detective, the record did not shed light on the nature and substance of the questions, defendant was generally disruptive throughout trial, and it could not be ascertained whether defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings.

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

Justice NEWBY concurring.

Justice BEASLEY concurring in part and dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 238 N.C. App. 110, 766 S.E.2d 361 (2014), vacating in part judgments entered on 30 October 2013 by Judge Jack W. Jenkins in Superior Court, Lenoir County, finding error in defendant's conviction for possession of a weapon of mass destruction, and remanding for a new trial on that charge. Heard in the Supreme Court on 31 August 2015.

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

Marilyn G. Ozer for defendant-appellee.

JACKSON, Justice.

In this case we consider whether a prior conviction for "attempted assault with a deadly weapon inflicting serious injury" can support later charges for possession of a firearm by a convicted felon and attaining habitual felon status. We also consider whether defendant is entitled to a new trial on the basis that the trial court failed to act appropriately to address an impasse between defendant and his attorney concerning the questioning of a prosecution witness on cross-examination. We answer

the first inquiry in the affirmative. As to the second, we vacate the Court of Appeals' opinion and remand for entry of an order dismissing defendant's appeal without prejudice to his right to file a motion for appropriate relief.

On 16 October 2008, Kinston police received information that a man was "hanging" in a specific area of town while "carrying around" a "sawed-off shotgun . . . in his pants." Upon reaching the scene and seeing the man—whom one of the officers recognized as defendant—officers began chasing him. Detective Robbie Braswell, who was directly behind defendant, observed defendant pull a shotgun from the waistband of his pants and throw it over a fence into a yard. Detective Braswell stopped chasing defendant and secured the weapon.

Defendant was arrested approximately two years later. On 31 January 2011, defendant was indicted for possession of a firearm by a convicted felon, possession of a weapon of mass destruction, and attaining habitual felon status. The indictment for possession of a firearm by a convicted felon listed the underlying felony as "N.C.G.S. 14[-]32(a) Attempted Assault With a Deadly Weapon Inflicting Serious Injury," with defendant having "pled guilty on December 5, 2005," for which he was "sentenced to 25-30 months in the North Carolina Department of Corrections."[1] This conviction also was listed in the habitual felon indictment as one of the three prior felony offenses required to support a finding of habitual felon status. Defendant pleaded not guilty to all charges.

The case proceeded to trial in October 2013. The State submitted a copy of the 5 December 2005 judgment showing the prior conviction

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1. Section 14-32 describes three different types of felonious assault with a deadly weapon and assigns varying punishment levels to each as follows:

> (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
>
> (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
>
> (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

N.C.G.S. § 14-32 (2015). Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury pursuant to section 14-32(a), but ultimately pleaded no contest to "attempted assault with a deadly weapon inflicting serious injury." He was punished as a Class F felon.

for attempted assault with a deadly weapon inflicting serious injury. At the close of the State's evidence, defendant moved to dismiss the possession of a firearm by a convicted felon charge for insufficiency of the evidence on grounds that the underlying felony conviction listed in the indictment as the basis for this charge, attempted assault with a deadly weapon, is not a recognized crime in North Carolina. In addition to the 5 December 2005 judgment, the State submitted copies of two other prior felony conviction judgments in support of the habitual felon charge. Defendant moved to dismiss the habitual felon charge on the same grounds, asserting that the 5 December 2005 felony conviction is invalid. The trial court denied both motions. The jury found defendant guilty of possession of a weapon of mass destruction, possession of a firearm by a convicted felon, and attaining habitual felon status. The trial court sentenced defendant to two concurrent terms of 151 to 191 months of imprisonment.

Defendant appealed. In a unanimous decision, the Court of Appeals concluded that "attempted assault is not a recognized criminal offense in North Carolina" and therefore that defendant's 2005 conviction for attempted assault with a deadly weapon inflicting serious injury could not support the convictions for possession of a firearm by a convicted felon and attaining habitual felon status. *Floyd*, 238 N.C. App. at 115, 766 S.E.2d at 366. In pertinent part, the court reasoned:

> In *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99, we . . . not[ed] that an assault consists of "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another." *Id.* at 265, 188 S.E.2d at 12 (quoting *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). As a result, since the effect of an attempted assault verdict was to find the defendant guilty of an "attempt to attempt" and since "[o]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.*, we held that an attempted assault is simply not a recognized criminal offense in this jurisdiction.

Floyd, 238 N.C. App. at 114, 766 S.E.2d at 366 (second alteration in original). Accordingly, the court held that the trial court erred by denying defendant's motions to dismiss the charges of possession of a firearm by a convicted felon and attaining habitual felon status. *Id.* at 127, 766 S.E.2d at 374.

Turning to the remaining charge of possession of a weapon of mass destruction, the Court of Appeals concluded that the trial court failed to identify and properly address an impasse that arose between defendant and his trial counsel. The Court of Appeals determined that this failure violated defendant's constitutional right to control the nature of his defense and therefore granted defendant a new trial on this charge. *Id.* at 127-28, 766 S.E.2d at 374. The State filed a petition for discretionary review, which we allowed on 9 April 2015.

[1] In its appeal the State argues that the Court of Appeals' conclusion that attempted assault is not a recognized criminal offense in North Carolina was based upon an overly narrow definition of assault. As a result, the State contends that the Court of Appeals incorrectly held that defendant's 2005 conviction for attempted assault with a deadly weapon inflicting serious injury could not support the convictions for possession of a firearm by a convicted felon and attaining habitual felon status. We agree.

The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm. N.C.G.S. § 14-415.1(a) (2015). A person may be charged with attaining habitual felon status when he or she "has been convicted or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof." *Id.* § 14-7.1 (2015). In this case the State relied upon defendant's 2005 conviction for attempted assault with a deadly weapon inflicting serious injury to support charges against him pursuant to these statutes. Accordingly, the validity of defendant's convictions depends upon whether attempted assault with a deadly weapon inflicting serious injury is recognized as a criminal offense pursuant to our current law.

"The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (citations omitted). An attempt crime "is punishable under the next lower classification as the offense which the offender attempted to commit." N.C.G.S. § 14-2.5 (2015). As a logical matter, these principles may be applied to the offense of assault with a deadly weapon inflicting serious injury in a straightforward fashion. A person who intends to "assault[ ] another person with a deadly weapon and inflict[ ] serious injury," and who does an overt act for that purpose going beyond mere preparation, but who

ultimately fails to complete all the elements of this offense—for example, by failing to inflict a serious injury—would be guilty of the attempt rather than the completed offense. N.C.G.S. § 14-32(b).

In *Currence* our Court of Appeals highlighted a different consideration: this Court has indicated that a person "cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt." 14 N.C. App. at 265, 188 S.E.2d at 12 (quoting *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912)). The court stated that

> assault is generally defined as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm."

Id. at 265, 188 S.E.2d at 12 (quoting *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305). The court then reasoned that attempted assault amounted to "an attempt to attempt." *Id.* at 265, 188 S.E.2d at 12 (quotation marks omitted).

Initially, we note that reliance upon *Hewett* may be questionable in this context because *Hewett* involved a substantially different legal issue. The defendant in *Hewett* was charged in an indictment that failed to allege his criminal intent. 158 N.C. at 628, 74 S.E. at 357. Nevertheless, this Court concluded that by alleging that the defendant attempted to commit rape, the indictment necessarily included the intent element. *Id.* at 629, 74 S.E. at 357. As support for this conclusion, the Court stated:

> practically all definitions of an attempt to commit a crime, when applied to the particular crime of rape, necessarily imply and include "an intent" to commit it.
>
> There may be offenses when in their application to them there is a distinction between "attempt" and "intent," but that cannot be true as applied to the crime of rape. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape," and punished as such.
>
> As held by the Supreme Court of California, one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt.

Id. at 629, 74 S.E. at 357 (citing, *inter alia*, *People v. Thomas*, 63 Cal. 482, 482 (1883) (per curiam)).[2] Since *Hewett* did not involve a defendant who was "indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt," *id.* at 629, 74 S.E. at 357, this statement is apparently dictum. In any event, because we conclude that attempted assault is not an attempt of an attempt, and thus does not implicate the dicta in *Hewett*, we do not address the extent to which *Hewett* may apply to other criminal offenses not at issue in the case *sub judice*.

Specifically, we observe that by stating that attempted assault amounts to "an attempt to attempt," 14 N.C. App. at 265, 188 S.E.2d at 12, the court in *Currence* overlooked an important aspect of the law of assault in North Carolina. Although our statutes criminalize the act of assault, *see*, *e.g.*, N.C.G.S. § 14-32.4(a) (2015), "[t]here is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules," *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. In *Roberts* we explained that our common law encompasses "two rules under which a person may be prosecuted for assault in North Carolina." *Id.* at 658, 155 S.E.2d at 305 (citation omitted).

First, as *Currence* recognized, we noted that assault may be defined as "an overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Roberts*, *id.* at 658, 155 S.E.2d at 305 (citations omitted) (quoting 1 Strong's North Carolina Index: *Assault and Battery* § 4 (1957)). We stated that this definition of assault "places emphasis on the intent or state of mind of the person accused." *Id.* at 658, 155 S.E.2d at 305.

Second, we described another definition of assault, which the Court of Appeals did not acknowledge in *Currence*. *Compare id.* at 658, 155 S.E.2d at 305, *with Currence*, 14 N.C. App. at 265, 188 S.E.2d at 12. We explained:

> The decisions of the Court have, in effect, brought forth another rule known as the "show of violence rule," which

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2. Although the 1912 decision in *Hewett* stated that "[t]here is no such criminal offense as an 'attempt to commit rape,' " the offense of attempted rape is recognized in our law today. *See*, *e.g.*, *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987) ("[T]he elements of attempted rape are (1) 'the *intent* to commit the rape and [2] an *overt act* done for that purpose. . . .' ") (alterations in original) (quoting *State v. Freeman*, 307 N.C. 445, 449, 298 S.E.2d 376, 379 (1983))).

> places the emphasis on the reasonable apprehension of the person assailed. The "show of violence rule" consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed.

Roberts, 270 N.C. at 658, 155 S.E.2d at 305. Our jurisprudence regarding the show-of-violence rule appears to have evolved from early cases in which a person caused another to flee, leave a place sooner than desired, or otherwise alter course through the threatened use of a weapon. *See State v. Rawles*, 65 N.C. 334 (1871); *State v. Church*, 63 N.C. 15 (1868); *State v. Hampton*, 63 N.C. 13 (1868). In *State v. Shipman*, 81 N.C. 513 (1879), one of the earliest cases in which this Court articulated the show-of-violence rule, the evidence showed that the defendant had used threatening language against another man and walked with a knife in his hand to within six feet of where the other man was standing. *Id.* at 514. Upon seeing this threatening display, the other man became "alarmed" and "left immediately." *Id.* at 516. In concluding that the defendant's behavior constituted assault, this Court explained that the definition of assault encompasses a situation in which "persons having in their possession dangerous weapons, by following and threatening [the victim], put him in fear and induce him to go home sooner than he would have done, or by a different road from that he was wont to go." *Id.* at 515 (citing *Rawles*, 65 N.C. 334).

As defined in *Roberts*, and as illustrated by *Shipman*, the show-of-violence rule does not involve an attempt to cause injury to another person, but is based upon a violent act or threat that causes fear in another person. Accordingly, although North Carolina law provides one definition of assault that describes the offense in terms of "an overt act or an attempt, or the unequivocal appearance of an attempt," our common law also provides a second definition that does not include any reference to attempt. *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. Attempted assault is not an attempt of an attempt because assault may be defined by the show-of-violence rule. *Cf. State v. May*, 137 Ariz. 183, 186, 669 P.2d 616, 619 (Ct. App. 1983) (explaining that because the defendant was charged pursuant to an Arizona statute that defines assault in terms of "an act complete in itself and not an attempt to commit a different crime," "the academic arguments of whether criminal sanctions should attach to an attempt to commit an attempt are inapplicable"); *State v. Music*, 40 Wash. App. 423, 432, 698 P.2d 1087, 1093 (1985) (" 'Attempt

to attempt' problems may arise with respect to the first type of assault because the *attempt* to commit a battery is an element of that type of assault. . . . However, since there is no attempt element in the second type of assault, a charge of attempted assault within that definition is not an 'attempt to attempt.' " (internal citation omitted)). We note that there is substantial overlap between the two definitions of assault because an overt act or attempt to do immediate physical injury to another person is likely to constitute a show of violence that causes fear and a change of behavior. As a result, relying upon the show-of-violence rule to define attempted assault does not create a significant limitation on the conduct covered by this offense.

For these reasons, we hold that the offense of attempted assault with a deadly weapon inflicting serious injury is recognized in North Carolina. We therefore reverse the portion of the Court of Appeals' opinion concluding that attempted assault is not recognized in this state, that defendant's 2005 conviction is a nullity, and that as a result, the trial court erred by denying defendant's motion to dismiss the charges of possession of a firearm by a felon and attaining habitual felon status.[3]

[2] Next, the State argues that the Court of Appeals incorrectly determined that defendant was entitled to a new trial based upon the trial court's alleged failure to recognize and address an impasse between defendant and his attorney during the trial. At the conclusion of defense counsel's cross-examination of Detective Braswell, defendant became agitated because he did not believe defense counsel was asking the right questions. Defendant stated, "I need to say something to the witness," began interrupting the trial judge, and then attempted to speak again, at which point the judge directed the jury to step out of the courtroom. After the jury had left the courtroom, this exchange took place:

> [Defendant]: You won't ask him what I need to ask him.
>
> The Court: Thank you. All right, let the record reflect that the twelve members of the jury and the alternate juror have left the courtroom. Let the record reflect that while the jurors were in here, [defendant] started asking questions. I called [defense] counsel to the bench, asked

3. The State alternatively argues that even if attempted assault with a deadly weapon inflicting serious injury is not a recognized offense, defendant cannot raise that challenge at this stage in this proceeding because doing so would constitute an impermissible collateral attack. Because we conclude that this offense is recognized in this state, we do not reach the State's alternative argument.

> counsel . . . to go back and talk to [defendant], privately, to determine what [defendant's] questions were or what [defendant] wanted to present to the jury. [Defense counsel] attempted to do so. In the meantime, [defendant] began speaking out on his own volition in the presence of the jury, and so the Court immediately sent the jury out of the courtroom.
>
> And, [defendant], I can't let you disrupt this trial, and I've already warned you --
>
> [Defendant]: I mean, I can -- I can question the witness.
>
> The Court: Your lawyer questions the witness. You don't --
>
> [Defendant]: Then I'll represent myself. I'm firing my lawyer.
>
> The Court: No. No, you can't do that, I'm sorry.
>
> [Defendant]: See, I can represent myself.
>
> The Court: No, I'm sorry. In my discretion, I'm not allowing you to do that.
>
> [Defendant]: I can represent myself. I can represent myself. It ain't -- ain't no kind of mess like that, because he ain't questioned him what I'm going to question him.
>
> The Court: Well, you ask [defense counsel] what you want him to ask the --
>
> [Defendant]: I done told him, and ain't none of that stuff been done, and I'm going for the --
>
> The Court: You ask [defense counsel] what questions you want to present to the witnesses in front of the jury.

The State then requested a determination regarding whether defendant should be held in contempt and removed from the courtroom for making repeated statements in front of the jury. The trial court instructed defendant to wait his turn before speaking and admonished him to cease engaging in disruptive behavior. Defendant made additional comments regarding the questions he desired to pose to Detective Braswell:

> [Defendant]: . . . I waited till it was our turn to question this witness, and now I ain't even questioned him.

> The Court: Well, but the way the process works, you don't ask the questions, your attorney asks the questions.
>
> [Defendant]: He didn't ask -- I told him to ask him. Things wasn't stated. It was things I needed -- I needed to [sic] them to hear.
>
> The Court: He is a professional. He is --
>
> [Defendant]: The truth be told about --
>
> The Court: -- very experienced. He knows what he's doing. The manner in which he asks questions is part of the expertise provided by counsel. It's part of the assistance of counsel that's provided. And you are not an attorney, and you are relying on his assistan[ce].
>
> [Defendant]: I know the law. I know the law.
>
> The Court: -- and you can talk to him and confer with him and let him know what questions you think should be asked, but he asks the questions, not you.
>
> [Defendant]: He got -- he got to ask them, then, and put things out. That's the thing, I'll represent myself. I don't even need a counsel.

The trial court again denied defendant's request to represent himself and ordered that he be removed from the courtroom in light of his disruptive behavior throughout the trial, but stated that defense counsel would be given frequent opportunities to consult with his client. Nonetheless, before his removal, defendant continued to challenge his counsel's questioning of Detective Braswell:

> [Defendant]: Well, see, I'll tell him the question, to ask him something, and he don't do it. Come on, man.
>
> The Court: Sir, you're doing it now, and I have not held you in contempt. In my discretion, I have not done that. The State has not brought any obstruction charges --
>
> [Defendant]: Well, I'm -- I'm gonna give him -- I'm gonna have -- I'm gonna talk to him so he can say what I would say?
>
> The Court: That's how it works, sir.
>
> [Defendant]: Exactly. And he didn't do it. That's what I'm talking about.

> The Court: Well, that's between you and [your trial counsel] --
>
> [Defendant]: I'm gonna get another attorney.
>
> The Court: -- that's not for me to interject.
>
> . . . .
>
> The Court: I've given you ample opportunity to not be disruptive, to assist in your defense while in the courtroom. It's readily apparent to the Court that you're not willing to do that.

The record does not disclose the nature of the questions defendant wanted his attorney to ask Detective Braswell.

Defendant argues that the trial court's failure to adequately address the impasse between defendant and his counsel regarding the questions to be asked of Detective Braswell, and the court's failure to instruct counsel to comply with defendant's wishes at that time, amounted to a denial of his constitutional rights to control his defense and confront witnesses. Defendant argues, and the Court of Appeals held, that the trial court's actions violated this Court's opinion in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991).

In *Ali* we recognized that tactical decisions, including how to conduct cross-examination, which jurors to strike, and the motions to be made at trial are within the province of the attorney. *Id.* at 404, 407 S.E.2d at 189 (citation omitted). The defendant in *Ali* argued that "the trial court denied him his right to assistance of counsel by allowing him, rather than his lawyers, to make the final decision regarding whether [a particular individual] would be seated as a juror." *Id.* at 402, 407 S.E.2d at 189. We stated that

> when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. at 404, 407 S.E.2d at 189. Because defense counsel in *Ali* made such a record, we concluded that the defendant was not denied effective assistance of counsel. *Id.* at 404, 407 S.E.2d at 189-90.

We have stated that

> [ineffective assistance of counsel (IAC)] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. . . .
>
> . . . .
>
> Accordingly, should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief (MAR)] proceeding.

State v. Fair, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114 (2002). Here, defendant told the trial court that his attorney was not asking the questions defendant told him to ask Detective Braswell; however, the record does not shed any light on the nature or the substance of those desired questions. We note that defendant was generally disruptive throughout trial, was forced to leave the courtroom when this behavior escalated while Detective Braswell was on the witness stand, and had to consult with his attorney outside of court thereafter. In light of defendant's disruptive behavior, we cannot ascertain, without engaging in conjecture, whether defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. As a result, it cannot be determined from the cold record whether an absolute impasse existed as described in *Ali*. Accordingly, we vacate this portion of the Court of Appeals' opinion and remand this case to that court for entry of an order dismissing defendant's IAC claim without prejudice to his right to assert it in a motion for appropriate relief.

REVERSED IN PART; VACATED IN PART AND REMANDED.

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

Justice NEWBY concurring.

I fully agree with the majority opinion. I write separately simply to emphasize another way to understand the validity of the attempt

crime at issue. It seems confusion has arisen because the term "assault" sometimes refers to an attempted battery, but often in our criminal code "assault" refers to a completed battery. Here the disputed crime is attempted felonious assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32. In this context, the term "assault" does not mean an attempted battery but requires a completed battery.

Section 14-32 describes three different types of felonious assault with a deadly weapon and assigns varying punishment levels to each:

> (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
>
> (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
>
> (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

N.C.G.S. § 14-32 (2015).

In *State v. Birchfield* we recognized that the statutory definition of "assault" under N.C.G.S. § 14-32 requires a completed battery:

> To warrant the conviction of an accused of a felonious assault *and battery* under G.S. 14-32 . . . the State must produce evidence sufficient to establish beyond a reasonable doubt that he did these four things: (1) That he committed an assault *and battery* upon another; (2) that he committed the assault and battery with a deadly weapon; (3) that he committed the assault and battery with intent to kill the victim of his violence; and (4) that he thus inflicted on the person of his victim serious injury not resulting in death.

235 N.C. 410, 413, 70 S.E.2d 5, 7 (1952) (emphases added) (citations omitted) (upholding conviction for assault with a deadly weapon inflicting serious bodily injury). Thus, while the statute uses the term "assault," it means "assault and battery" or a completed battery. *See Williams v. United States*, No. 1:11CR408-1, 2014 WL 1608268, at *1 (M.D.N.C. Apr. 22, 2014) (unpublished) (noting that "while other . . . cases suggest a definition of misdemeanor assault under N.C. Gen. Stat. § 14-33 . . . the *Birchfield* definition of felony assault highlights the presence of a battery element").

Assault and battery is commonly defined as "the act of threatening to attack someone physically and then actually doing it." *Assault and Battery*, *Black's Law Dictionary* (10th ed. 2014). One who intends to commit felonious assault and battery with a deadly weapon, and who does an overt act for that purpose going beyond mere preparation, but who ultimately fails to complete all the elements of this offense, would be guilty of attempted felonious assault and battery under N.C.G.S. § 14-32 rather than the completed offense. *See State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (Proving "attempt" requires the State to show that a defendant intended to commit the underlying crime and committed "an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense.").

The record reflects that defendant, represented by counsel, pled guilty to the offense of attempted assault with a deadly weapon inflicting serious injury in violation of N.C.G.S. § 14-32. Nevertheless, defendant suggests that he should not be held accountable for a conviction based upon his own admissions and plea agreement and further asks us to speculate as to which of the elements under N.C.G.S. § 14-32 were satisfied. Since we are dealing with a theoretical issue, the question is simply whether under any scenario a defendant could be convicted of attempted assault with a deadly weapon inflicting serious injury in violation of N.C.G.S. § 14-32. Because the statutory definition of "assault" as used in N.C.G.S. § 14-32 requires a completed battery, one can be convicted of attempting to commit the offense.

Justice BEASLEY concurring in part and dissenting in part.

I concur with the judgment of the Court as to defendant's challenge to the right to control his defense in the cross-examination of Detective Braswell. But, because I would conclude that attempted assault with a deadly weapon inflicting serious injury is not a cognizable offense in North Carolina, I would affirm the judgment of the Court of Appeals on this issue, and therefore, I respectfully dissent.

The issue before this Court is whether "attempted assault with a deadly weapon inflicting serious injury" describes a cognizable felony offense that can serve as an underlying felony conviction in a charge for possession of a firearm by a convicted felon and for attaining habitual felon status. I would hold that it is not for several reasons. First, the statutory framework laid out by our General Assembly in Chapter 14, Article 8 of the North Carolina General Statutes evidences the legislature's determination that one cannot be convicted of *attempting* an

"assault with a deadly weapon inflicting serious injury." Second, I would hold that the show-of-violence definition of assault is not applicable to the term "assault" in "assault with a deadly weapon inflicting serious injury." Finally, I would conclude that the show-of-violence theory of assault cannot be logically extended to include an inchoate crime—namely, an attempt.

First, the statutory framework laid out in Chapter 14, Article 8 demonstrates a legislative decision that attempted "assault with a deadly weapon inflicting serious injury" is not a crime for which a defendant may be convicted. Chapter 14, Article 8 was enacted to provide different punishments for varying degrees of the common law crime of assault and not as an endeavor to "create separate and distinct criminal offenses." *State v. Lefler*, 202 N.C. 700, 701, 163 S.E. 873, 874 (1932) ("The Legislature did not mean to create separate and distinct criminal offenses, such as assault with [a] deadly weapon, assault with serious damage, assault upon a woman when the man is over eighteen years of age, or any other kind of assault which is aggravated in its circumstances or [of] serious and lasting damage in its consequences." (quoting *State v. Smith*, 157 N.C. 578, 584, 72 S.E. 853, 855 (1911))). "There is but one offense, the crime of assault, and the varying degrees of aggravation were mentioned only for the purpose of graduating the punishment." *Id.* at 701, 163 S.E. at 874 (quoting *Smith*, 157 N.C. at 584, 72 S.E. at 855 (1911)).

For example, subsection 14-32(b) states that "[a]ny person who assaults another person with a deadly weapon *and* inflicts serious injury shall be punished as a Class E felon," N.C.G.S. § 14-32(b) (2015) (emphasis added), and subdivision 14-33(c)(1) states that any person who commits an assault and "[i]nflicts serious injury upon another person or uses a deadly weapon" is "guilty of a Class A1 misdemeanor," *id.* § 14-33(c)(1) (2015) (emphasis added). Under either statute a defendant would be guilty of assault but, based on how the assault was carried out, would be punished differently.

Here defendant was convicted in 2005 of attempted assault with a deadly weapon inflicting serious injury.[1] *See id.* § 14-32(b) ("Any person

1. Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury pursuant to subsection 14-32(a), but ultimately pleaded no contest to "attempted assault with a deadly weapon inflicting serious injury" and was punished as a Class F felon. Though the indictment against defendant in the present action states that his previous felony conviction was under subsection 14-32(a), it appears defendant's 2005 conviction was actually under subsection 14-32(b), as indicated by the language of what

who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."). According to section 14-2.5, "[u]nless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit." *Id.* § 14-2.5 (2015). As such, defendant was punished as a Class F felon. The conduct that would constitute an "attempt" to "assault with a deadly weapon inflicting serious injury" is, however, subject to a different classification covered by another assault statute, namely subdivision 14-33(c)(1). Therefore, defendant should not have been punished under the provisions of N.C.G.S. §§ 14-32(b) and 14-2.5.

As the majority reiterates, an attempt is (1) an intent to commit an act, and (2) "an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (citations omitted). Because an attempt occurs when the defendant's actions "fall[ ] short of the completed offense," it follows that attempt necessitates that some element of the crime is not complete. As applied to the crime of "assault with a deadly weapon inflicting serious injury,"[2] the majority states:

> As a logical matter, these principles may be applied to the offense of assault with a deadly weapon inflicting serious injury in a straightforward fashion. A person who intends to "assault[ ] another person with a deadly weapon and inflict[ ] serious injury," and who does an overt act for that purpose going beyond mere preparation, but who ultimately fails to complete all the elements of this offense—for example, by failing to inflict a serious injury—would be guilty of the attempt rather than the complete offense.

Contrary to the majority's assertion, if a person "fails to complete all of the elements of the offense—for example, by failing to inflict a serious injury" or failing to use a deadly weapon—that person is guilty

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he pleaded to as well as how he was punished. Thus, I use subsection 14-32(b), as does the majority, as an illustration. However, the same rationale that follows can be applied to subsection 14-32(a), namely that any uncompleted element of that assault puts the offense under another enumerated statute, and is not properly classified as an attempt to violate that particular statute.

2. The elements of assault with a deadly weapon inflicting serious injury are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Wilson*, 203 N.C. App. 110, 114, 689 S.E.2d 917, 920 (2010) (quoting *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997)).

of the type of assault described in N.C.G.S. § 14-33(c)(1),[3] which is an assault inflicting serious injury upon another person *or* by use of a deadly weapon, and *not* an attempt to violate subsection 14-32(b).

> The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.

State v. Lowe, 150 N.C. App. 682, 685, 564 S.E.2d 313, 316 (2002) (quoting *State v. Owens*, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498 (1983)) (holding that it was plain error for the trial court not to instruct on misdemeanor assault inflicting serious injury under N.C.G.S. § 14-33 when it was questionable whether fists and a toilet seat or lid were used as deadly weapons).[4] Any "attempt" to "assault[ ] another person with a deadly weapon and inflict[ ] serious injury" that "fall[s] short of the completed offense" is, per the legislature's determination, an assault as described in another statute, such as misdemeanor assault. Thus, in such a situation, a defendant should be convicted under the appropriate assault statute and not under a theory of "attempt" of a different statute.

That a defendant should be convicted under the appropriate assault statute is especially important given the legislature's classifications of various types of assault and their corresponding punishments. As stated above, a person who violates subsection 14-32(b) is guilty of a Class E felony and a person who violates subdivision 14-33(c)(1) is guilty of a Class A1 misdemeanor. If a person commits a subdivision 14-33(c)(1) misdemeanor assault by either inflicting serious injury on another person or by use of a deadly weapon, but is convicted for an attempted assault under section 14-32(b) instead, then that person would be punished for a Class F felony instead of a misdemeanor. *See* N.C.G.S. § 14-2.5.

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3. "Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) Inflicts serious injury upon another person or uses a deadly weapon[.]" N.C.G.S. § 14-33(c)(1).

4. In *Owens* the Court of Appeals held that the trial judge should have submitted a jury instruction on misdemeanor assault with a deadly weapon under N.C.G.S. § 14-33 as well as on felonious assault under section 14-32 when there was evidence that the victim's injury was not serious. 65 N.C. App. at 111, 308 S.E.2d at 498.

The majority's holding here undermines the legislature's determination of how to differentiate and punish different types of assault by sanctioning charging and convicting defendants of a felony when these defendants would otherwise be facing a misdemeanor charge or conviction under the statutes as written.

Therefore, given the statutory scheme for assaults laid out by the General Assembly in Chapter 14, Article 8 of the North Carolina General Statutes, I would conclude that one cannot be convicted of attempting an "assault with a deadly weapon inflicting serious injury."

Second, attempted assault with a deadly weapon inflicting serious injury is not cognizable under the show-of-violence theory of assault. "There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Citing *Roberts*, the majority notes that this Court has defined two theories of assault. A person commits assault by

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

Id. at 658, 155 S.E.2d at 305 (quoting 1 Strong's North Carolina Index: *Assault and Battery* § 4 (1957)). A person also commits assault by "a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed." *Id.* at 658, 155 S.E.2d at 305.

In determining that attempted assault with a deadly weapon inflicting serious injury is a recognized offense in North Carolina, the majority holds that this attempted assault is possible under this Court's "show-of-violence" theory of assault.[5] Nonetheless, at the end of its analysis, the majority does not explain how an assault under the show-of-violence

5. The majority seems to acknowledge without explicitly stating that there is no such crime as an attempted "attempted battery" type of assault. I agree. Though the majority calls into question this Court's statement to that effect in *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912) by labeling it dicta, "[i]t is universally agreed that there is no such crime as an attempt to commit an assault of the attempted battery variety." *Dabney v. State*, 159 Md. App. 225, 246, 858 A.2d 1084, 1096 (2004) (noting other states' stances on attempt of "attempted battery" assault as discussed in Marjorie A. Shields, Annotation, *Attempt to Commit Assault as Criminal Offenses*, 93 A.L.R. 5th 683 (2004)).

theory would apply in the context of an attempted assault with a deadly weapon inflicting serious injury.

The majority states that

> [T]here is a substantial overlap between the two definitions of assault because an overt act or attempt to do immediate physical injury to another person is likely to constitute a show of violence that causes fear and change of behavior. As a result, relying upon the show-of-violence rule to define attempted assault does not create a significant limitation on the conduct covered by this offense.

I disagree. The majority's combination or "substantial overlap" of the two definitions of assault is essentially a reiteration of one definition of assault, specifically the "attempted battery" definition of assault: "[A]n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to *put a person of reasonable firmness in fear of immediate bodily harm*." *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305 (emphasis added) (citations omitted) (quoting 1 Strong's North Carolina Index: *Assault and Battery* § 4 (1957)). This definition of assault already takes into account that an overt act of violence or attempt to do immediate physical injury to another person is likely to cause fear and probably a change of behavior in another person. The show-of-violence theory then must be something different.

As noted by the majority in this case and this Court in *Roberts*, the show-of-violence rule developed from early decisions by this Court in which a person "offered to strike" another person, without yet "attempting to strike," but still the offer to strike—or show of violence—was such that it caused the other person to reasonably fear that immediate bodily harm would ensue if he or she did not take a different course of conduct. *See State v. Shipman*, 81 N.C. 513 (1879) (holding that the defendant committed assault when he used threatening language and walked within six feet of the victim with a knife in hand, which alarmed the victim and caused him to immediately leave in order to avoid imminent danger); *State v. Rawles*, 65 N.C. 334, 336-37 (1871) (holding that the defendants committed assault—an offer to strike—when they approached the victim with weapons while using threatening language, which caused the victim to fear imminent bodily injury and take a different path home, though none of the weapons were "taken from the [bearer's] shoulder" and they did not get nearer to the victim than about

seventy-five yards); *State v. Church*, 63 N.C. 15 (1868) (holding that the defendant committed assault—an offer of violence—when he drew a pistol from its sheath but did not cock or point it and walked within ten steps of the victim using threatening language causing the victim to fear bodily harm and leave); *State v. Hampton*, 63 N.C. 13 (1868) (holding that the defendant committed assault—an offer of violence—when he threatened to hit the victim and made a fist, but did not draw his arm back to hit him, causing the victim to fear bodily harm and take another course). As these early cases demonstrate, a show of violence—or an offer of violence as it was previously termed—is something less than an attempted violent act. *Hampton*, 63 N.C. 14 ("An assault is usually defined to be an offer, or attempt to strike another. An *attempt* means something more than an *offer*."). As such, one cannot attempt to "show violence" because by its nature a "show of violence" is something less than an attempt of violence.

Based on the observation that a show of violence is less than an attempt, I would conclude that the show-of-violence definition is not applicable to the statutory offense of "assault with a deadly weapon inflicting serious injury," much less an attempt of such action. As the majority notes in its opinion, "the show-of-violence rule does not involve an attempt to cause injury to another person, but is based upon a violent act or threat that causes fear in another person." And, as just described above, this show of violence is something less than or precedes an attempt to physically harm another. Thus, the show-of-violence definition of assault is inapposite to the type of assault described in subsection 14-32(b), in which infliction of a serious injury is an element. As such, only the common law definition that defines assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another" is applicable to this assault statute.[6] For this reason as well, I disagree with the majority's conclusion that one can attempt an assault with a deadly weapon inflicting serious injury under a show-of-violence theory of assault.

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6. Admittedly, it would be helpful if the legislature included a definition of assault in the felony assault statute as the statute does seem to envision a battery as the concurrence asserts. While *State v. Birchfield* describes the elements of section 14-32 to include a battery, 235 N.C. 410, 413, 70 S.E.2d 5, 7 (1952), this Court has recognized on numerous other occasions that the elements of the offense do not require a completed battery. *See*, *e.g.*, *State v. King*, 343 N.C. 29, 35-36, 468 S.E.2d 232, 237 (1996) ("The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are: '(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.' " (quoting *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994))), *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994) ("The essential elements of the crime

Lastly, I disagree with the majority that North Carolina law recognizes any type of attempted assault. As this Court noted in *Roberts*, the difference between the two theories of assault is where the emphasis is placed. The common law rule "places emphasis on the intent or state of mind of the person accused," whereas the show-of-violence rule "places the emphasis on the reasonable apprehension of the person assailed." *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. Thus, assault is either an attempt to cause injury or a show of violence that would put a reasonable person in fear imminent injury. The majority concludes that attempted assault is a cognizable offense in North Carolina under the show-of-violence theory of assault but does not explain how one may attempt to show violence, except to say that the definition of a show-of-violence assault "does not include any reference to attempt," and thus by definition, because it is not an attempt to attempt, it may be attempted. As explained above, relying upon the show-of-violence rule to describe attempted assault is not logical because a show of violence causing someone to reasonably fear an injury is something less than even attempting to injure.

Therefore, I would conclude that attempted assault with a deadly weapon inflicting serious injury is not a crime in North Carolina.[7] Because I would hold that attempted assault with a deadly weapon is not a cognizable offense in North Carolina and therefore cannot serve as an underlying conviction for possession of a firearm by a felon or for attaining habitual felon status, these judgments should be vacated. For the reasons stated above, I would affirm the Court of Appeals on this issue and conclude that attempted assault is not a crime in North Carolina under our common law definition of assault. Thus, I respectfully dissent from the majority's holding on this issue.

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are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death."), *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640 (1968) ("The crime of felonious assault, created and defined by G.S. s 14-32, consists of these essential elements: (1) An assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) Not resulting in death."); *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962) ("The statutory offense embodies (1) assault, (2) with a deadly weapon, (3) the use of the weapon must be with intent to kill, (4) the result of the use must be the infliction of serious injury, and (5) which falls short of causing death.").

7. The State argued in its brief that the defendant could not challenge his conviction of attempted assault with a deadly weapon inflicting serious injury because such a challenge would be an impermissible collateral attack. At oral arguments, however, the State conceded that an indictment that alleges an offense that does not exist would not create jurisdiction in the trial court. The trial court does not have jurisdiction to enter judgment on a nonexistent crime and thus defendant's attempted assault conviction would be a nullity.

STATE OF NORTH CAROLINA
v.
JORGE JUAREZ

No. 360PA15

Filed 21 December 2016

1. Homicide—instructions—felony murder—instructions—lesser included offenses

The trial court correctly denied defendant's request for instructions on second-degree murder and voluntary manslaughter in a felony murder prosecution where there was no conflict in the evidence regarding whether defendant committed the underlying felony of discharging a firearm into an occupied vehicle while it was in operation. The conflicting evidence must relate to whether defendant committed the crime charged, not whether defendant was legally justified in committing the crime.

2. Homicide—felony murder—instructions—aggressor doctrine—no plain error

There was no plain error where the trial instructed the jury on the aggressor doctrine of self-defense in a felony murder prosecution. The State did not solely rely on the theory that defendant was the aggressor but also offered evidence that tended to contradict defendant's evidence as to each of the other elements of self-defense. Defendant failed to establish that, absent an instruction on the aggressor doctrine, the jury would have credited his account of the night's events over other contrary testimony.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 325 (2015), finding no error in part and reversing in part and remanding a judgment entered on 6 June 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Supreme Court on 30 August 2016.

Roy Cooper, *Attorney General*, *by I. Faison Hicks*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily H. Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

BEASLEY, Justice.

We consider whether the Court of Appeals erred in reversing the trial court's judgment based upon defendant's conviction for first-degree felony murder and remanding this case to the trial court for a new trial. The Court of Appeals held that the trial court committed reversible error by failing to instruct the jury on the lesser-included offenses of second-degree murder and voluntary manslaughter, and that the trial court committed plain error when it instructed the jury on the aggressor doctrine of self-defense. For the reasons stated herein, we reverse the decision of the Court of Appeals and reinstate the jury's verdict and the trial court's judgment.

This case involves events surrounding the death of Alfonzo Canjay (Canjay) in the early morning hours of 31 October 2012. On the evening of 30 October 2012, Jorge Juarez (defendant) and four acquaintances—Marcos Chaparro (Chaparro), Karen Gonzalez (Gonzalez), Erick Martinez (Martinez), and Karina Rodriguez (Rodriguez)—were drinking beer and smoking marijuana at Chaparro's Durham residence. Around 11:30 p.m., the group left Durham in Chaparro's Acura to drive Rodriguez home to Foxhall Village in Raleigh. The group arrived at Rodriguez's residence at around 12:00 a.m. on 31 October. After dropping off Rodriguez, Chaparro and Martinez decided to steal car stereos from vehicles parked at Foxhall Village, while Gonzales and defendant waited in the Acura.

As Chaparro and Martinez searched for car stereos to steal, the noises awoke Canjay and his wife, who looked outside and saw the two men peering into the family's car and trying to steal things. Upon being discovered, Chaparro and Martinez ran away to find Gonzalez and defendant. Once the four reunited, either Chaparro or Martinez insisted Gonzales drive back toward Canjay's house to retrieve a stereo they had hidden nearby before leaving Foxhall Village.

Meanwhile, Canjay got in his car and began searching for the men, while his wife and daughter unsuccessfully tried to call the police. Canjay saw the Acura as it neared the main office at the complex, and he drove toward it from the opposite direction such that Gonzalez had to swerve to go around his vehicle. Canjay turned his vehicle around to pursue the Acura and pulled up to its passenger side, making two separate sideswipe contacts with the Acura. After the second impact, defendant fired one shot from his handgun into the driver's side of Canjay's vehicle. The shot struck Canjay in the heart, killing him. Gonzales then drove the group back to Durham.

On 8 April 2013, defendant was indicted for the first-degree murder of Alfonzo Canjay. The State proceeded against defendant on the theory of felony murder based on the underlying felony of discharging a firearm into an occupied vehicle while it was in operation. The trial court denied defendant's motion to dismiss at the close of the State's evidence and again at the close of all of the evidence. The trial court also denied defendant's request for instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter. The trial court instructed the jury on perfect self-defense including the aggressor doctrine; defendant did not object to this instruction. The jury found defendant guilty of first-degree felony murder, and the trial court sentenced him to life imprisonment without parole. Defendant appealed.

On appeal defendant argued that the trial court (i) erred in denying his motion to dismiss; (ii) erred in denying his request for instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter; and (iii) erred in instructing the jury that perfect self-defense was unavailable if defendant was the initial aggressor. The Court of Appeals held that the trial court did not err in denying defendant's motion to dismiss, *State v. Juarez*, ___ N.C. App. ___, ___, 777 S.E.2d 325, 328 (2015), but did err by not instructing the jury on the lesser-included offenses and also erred by instructing on the aggressor doctrine of self-defense, *id.* at ___, ___, 777 S.E.2d at 330, 331.

We allowed the State's petition for discretionary review of the Court of Appeals' decision regarding the trial court's two alleged errors. Before this Court the State argues that the Court of Appeals erred in concluding that the trial court should have given jury instructions on second-degree murder and voluntary manslaughter as lesser-included offenses of first-degree murder. The State also argues that the Court of Appeals erred in concluding that the trial court's instruction on the aggressor doctrine amounts to plain error. We agree on both counts.

[1] First, we consider whether the Court of Appeals correctly concluded that the trial court erred in not instructing the jury on the lesser-included offenses. The court held that it was error not to instruct on the lesser-included offenses because the evidence was conflicting as to whether defendant acted in self-defense when he shot into Canjay's vehicle, which could render him not guilty of first-degree felony murder, and there was sufficient evidence to support a lesser-included offense. *Id.* at ___, 777 S.E.2d at 331. The Court of Appeals' reasoning was incorrect.

Felony murder is a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery,

kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17 (2015). This statute expresses the legislature's deliberate policy choice to hold individuals accountable "for deaths occurring during the commission of felonies," regardless of whether the murder was intentional or unintentional. *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 115 S. Ct. 2619 (1995). Because "the purpose of the felony murder rule is to deter even accidental killings from occurring during the commission of a dangerous felony," self-defense is not a defense to felony murder. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995).

Perfect self-defense, however, may be a defense to the underlying felony, which would thereby defeat the felony murder charge, *id.* at 668-69, 462 S.E.2d at 499, as well as any other homicide charge, *see, e.g.*, *State v. Bush*, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982) ("Perfect self-defense excuses a killing altogether. . . ."). Perfect self-defense is a right that "rests upon necessity" to save one's self and is "only available to a person who is without fault," thus excusing a defendant altogether. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). If a person cannot establish perfect self-defense, but can establish imperfect self-defense,[1] that person's actions are not excused and he is still at fault, though to a lesser degree. *See State v. Crisp*, 170 N.C. 785, 792, 87 S.E. 511, 514-15 (1916) (explaining that perfect self-defense is only available "where the party . . . was wholly free from wrong or blame," whereas if a party "was in the wrong . . . then the law justly limits his right of self-defense,

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1. Perfect self-defense requires the existence of all four of the following elements:

> (1) [I]t appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) [D]efendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) [D]efendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) [D]efendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

Bush, 307 N.C. at 158-59, 297 S.E.2d at 568 (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (italics omitted)). Imperfect self-defense is available when elements (1) and (2) listed above are met, but either the defendant "was the aggressor or used excessive force." *Id.* at 159, 297 S.E.2d at 568.

and regulates it according to the magnitude of his own wrong" (quoting *Reed v. State*, 11 Tex. Ct. App. 509, 517-18 (1882))). Therefore, imperfect self-defense is not available as a defense to the underlying felony utilized to support a felony murder charge because allowing for such a defense, when the defendant is in some manner at fault, would defeat the purpose of the felony murder rule. *Richardson*, 341 N.C. at 668, 462 S.E.2d at 499.

Here, if defendant acted in perfect self-defense when he shot into Canjay's vehicle, the killing would be excused and defendant absolved of any fault. *Bush*, 307 N.C. at 158, 297 S.E.2d at 568. Only under a theory of imperfect self-defense could defendant be found guilty of a lesser degree of homicide. *See id.* at 159, 297 S.E.2d at 568 (stating that when a defendant shows "only that he exercised the imperfect right of self-defense," instead of perfect self-defense, he "remain[s] guilty of at least voluntary manslaughter"). Allowing jury instructions on the lesser-included offenses of second-degree murder and voluntary manslaughter would permit the jury to find defendant not guilty of felony murder while at the same time finding defendant was, in some manner, at fault for shooting into Canjay's vehicle—the underlying felony in question. This outcome would undermine the imperfect self-defense limitation set out in *Richardson* and the purpose of the felony murder rule. Therefore, the trial court was correct to deny defendant's request for instructions on second-degree murder and voluntary manslaughter.

The Court of Appeals' and defendant's reliance on *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002), is misguided, as is defendant's further reliance on *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), and *State v. Camacho*, 337 N.C. 224, 446 S.E.2d 8 (1994). In *State v. Millsaps* this Court explained that when the State prosecutes a defendant for first-degree murder solely on a felony murder theory, a trial court must instruct on lesser-included offenses when the evidence of the underlying felony is in conflict and the evidence would support a lesser-included offense. 356 N.C. at 565, 572 S.E.2d at 773 (citing *Thomas*, 325 N.C. 583, 386 S.E.2d 555). The trial court is not required to instruct on lesser-included offenses if the evidence of the underlying felony is not in conflict and all the evidence supports felony murder. *Id.* at 565, 572 S.E.2d at 774 (citing *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976)). Here evidence of the underlying felony is not in conflict and the evidence does not rationally support the lesser-included offenses.

In *Thomas* the State prosecuted the defendant for first-degree murder on the theory of felony murder, which rested on the theory that the

defendant acted in concert with the passenger in her car. 325 N.C. at 594-95, 386 S.E.2d at 561.

> In order to convict defendant . . . of first degree felony murder the State was required to offer evidence that, among other things, defendant did act in concert with [her passenger] when he committed the underlying felony of discharging a firearm into the [victim's] residence. If there is conflicting evidence on this aspect of the case, *i.e.*, evidence that defendant did not act in concert with [her passenger] and, therefore, did not commit the underlying felony, then defendant is entitled to an instruction on whatever degree of homicide less than first degree murder the evidence supports.

Id. at 595, 386 S.E.2d at 562 (citing *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973)). This Court determined that there was conflicting evidence regarding whether the defendant shared a common purpose or plan with her passenger. *Id.* at 596-98, 386 S.E.2d at 562-63. The State's evidence tended to show that she was acting in concert with the passenger, while other evidence indicated that the defendant did not know that her passenger had a gun or was going to shoot it. *Id.* at 597, 386 S.E.2d at 563. Thus, "the trial court's failure to instruct the jury on the lesser included offense of involuntary manslaughter" when the evidence would support such a conviction was reversible error. *Id.* at 599, 386 S.E.2d at 564.

Similarly, in *Camacho* the State prosecuted the defendant for first-degree murder on the theory that the defendant was lying in wait for the victim. 337 N.C. at 227, 446 S.E.2d at 9. This Court determined that the evidence was conflicting regarding whether the crime was committed by means of lying in wait. *Id.* at 231, 446 S.E.2d at 12. The State's evidence tended to show that the defendant was lying in wait, while the defendant's evidence tended to show that he was in the victim's room only to retrieve personal belongings. *Id.* at 232, 446 S.E.2d at 12. Thus, the trial court's failure to instruct the jury on second-degree murder and involuntary manslaughter when the evidence would support such a conviction was error. *Id.* at 234-35, 446 S.E.2d at 14.

As these cases demonstrate, the conflicting evidence must relate to whether defendant *committed* the crime charged, not whether defendant was legally *justified* in committing the crime. *See Camacho*, 337 N.C. at 231-32, 446 S.E.2d at 12; *Thomas*, 325 N.C. at 598, 386 S.E.2d at 563; *see also State v. Gause*, 227 N.C. 26, 30, 40 S.E.2d 463, 466 (1946)

(finding that the evidence conflicted as to whether the defendant was lying in wait; therefore, the trial court erred by not instructing the jury on second-degree murder).

Here there is no conflict in the evidence regarding whether defendant committed the underlying felony of discharging a firearm into an occupied vehicle while it was in operation.[2] The Court of Appeals aptly notes that "[t]here is no question that this transpired. Defendant fired a gun into Canjay's vehicle while Canjay was driving it." *Juarez*, ___ N.C. App. at ___, 777 S.E.2d at 331. Defendant does not dispute that he *committed* this crime. Rather, defendant claims that his conduct was *justified* because he was acting in self-defense. While the evidence regarding whether defendant acted in self-defense is in conflict, there is no conflict in the evidence regarding whether defendant discharged a firearm into Canjay's vehicle while Canjay was driving it. Thus, the evidence that defendant committed the underlying felony is not in conflict.

Moreover, in *Millsaps* this Court reiterated that "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." 356 N.C. at 561, 572 S.E.2d at 771 (citing *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, 516 U.S. 884, 116 S. Ct. 223 (1995)). Here the jury could not rationally find defendant guilty of the lesser-included offenses of second-degree murder or voluntary manslaughter and acquit him of the greater offense of first-degree murder. As discussed above, because defendant was prosecuted on the basis of a felony murder theory, he could only be acquitted of first-degree murder if the jury found he acted in perfect self-defense regarding the underlying felony. If defendant acted in perfect self-defense, a jury could not find him guilty of the lesser-included offenses of second-degree murder or voluntary manslaughter because "[p]erfect self-defense excuses a killing altogether." *Bush*, 307 N.C. at 158, 297 S.E.2d at 568. Therefore, the Court of Appeals erred in concluding that the trial court should have instructed on the lesser-included offenses.

[2] Next, we consider whether the Court of Appeals correctly concluded that the trial court erred when it instructed the jury on the aggressor doctrine of self-defense. Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain

2. The elements of discharging a firearm into an occupied vehicle while in operation are (1) willfully and wantonly discharging (2) a firearm (3) into an occupied vehicle (4) that is in operation. N.C.G.S. § 14-34.1(b) (2015).

error. *See* N.C. R. App. P. 10(a)(4); s*ee also State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

The plain error standard requires a defendant to "demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[P]lain error is to be 'applied cautiously and only in the exceptional case' " in which a defendant can show that the prejudicial error is "one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 518, 723 S.E.2d at 334 (alteration in original) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict. *Id.* at 518, 723 S.E.2d at 334.

Here, when the trial court instructed the jury on perfect self-defense, it included instructions on the aggressor doctrine—that a defendant is not entitled to the benefit of self-defense if he was the aggressor in the situation. *See Marsh*, 293 N.C. at 354, 237 S.E.2d at 747 (describing the aggressor element of self-defense). When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct the jury on the aggressor doctrine of self-defense. *See State v. Washington*, 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951); *see also State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105-06 (citations omitted), *disc. rev. denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). On appeal the Court of Appeals determined there was no evidence that defendant was the aggressor in the situation, and thus, it was error to instruct on the aggressor doctrine. The Court of Appeals, however, failed to analyze whether such error had the type of prejudicial impact that "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceeding." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Therefore, the court's analysis was insufficient to conclude that the alleged error rose to the level of plain error.

On review, it is not necessary for this Court to decide whether an instruction on the aggressor doctrine was improper, because defendant failed to show that the alleged error was so fundamentally prejudicial as to constitute plain error. For defendant to meet his burden under *Lawrence*, he would have to show that, absent the erroneous instruction, it is probable that the jury would have found that he acted

in perfect self-defense. To find that defendant acted in perfect self-defense, the jury would have to find that defendant honestly believed his actions of shooting into an occupied car were necessary to protect himself from the threat of death or serious bodily harm, that defendant's belief was reasonable, and that defendant did not use excessive force or more force than necessary to protect himself from death or great bodily harm.[3] *See State v. Moore*, 363 N.C. 793, 796-97, 688 S.E.2d 447, 449-50 (2010). Defendant failed to sufficiently demonstrate that, absent instructions on the aggressor doctrine, the jury would not have rejected his claim of self-defense for other reasons.

On appeal defendant mainly focused on the evidence that tended to show he was not the aggressor. The jury, however, could have rejected defendant's claim of self-defense for other reasons. The State did not solely rely on the theory that defendant was the aggressor, but offered evidence that tended to contradict defendant's evidence as to each of the other elements of self-defense as well. Defendant has failed to establish that, absent an instruction on the aggressor doctrine, the jury would have credited his account of the night's unfolding over other contrary testimony.

Defendant has not shown that "the jury probably would have returned a different verdict" if the trial court had not instructed the jury on the aggressor doctrine. *Lawrence*, 365 N.C. at 519, 732 S.E.2d at 335. Therefore, assuming, without deciding, that the trial court's instruction on the aggressor doctrine was erroneous, we hold that the error does not rise to the level of such fundamental error as to constitute plain error.

For the reasons stated herein, we find no reversible error in the trial court's instructions to the jury and thus reverse the decision of the Court of Appeals. The remaining issue determined by the Court of Appeals is not before us, and the court's decision on that matter remains undisturbed.

REVERSED.

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3. Perfect self-defense also requires that the defendant not be the aggressor in the fray, *see State v. Moore*, 363 N.C. 793, 796-97, 688 S.E.2d 447, 449-50 (2010); however, as explained above, if there is no evidence that the defendant was the aggressor, the trial court should not instruct on that element. Here, if the trial court had not instructed on the aggressor doctrine, the jury would have had to find the other three elements exist to make a finding of perfect self-defense.

STATE OF NORTH CAROLINA
v.
DAVID MATTHEW LOWE

No. 278PA15

Filed 21 December 2016

1. Search and Seizure—search warrant—house—probable cause

Where there was an anonymous tip that the resident (Michael Turner, with whom defendant was staying) was "selling, using and storing narcotics at" his house, and where a detective's affidavit in support of the search warrant listed his training and experience, Turner's history of drug-related arrests, and the detective's discovery of both marijuana residue and correspondence addressed to Turner in trash from Turner's residence, under the totality of the circumstances there was probable cause for issue of a search warrant for the house.

2. Search and Seizure—search warrant for house—rental car in curtilage—nature of items to be seized

A rental car parked in the curtilage of a residence was within the scope of a search warrant and could be searched pursuant to the warrant to search the house. It was undisputed that when officers arrived at the target residence to execute the warrant, the rental car parked in the driveway was within the curtilage of the home and the nature of the items to be seized was such that the items could be easily stored in a vehicle.

On discretionary review upon separate petitions by the State and defendant pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 774 S.E.2d 893 (2015), reversing judgments entered on 8 July 2014 by Judge Reuben F. Young in Superior Court, Wake County, and remanding for further proceedings. Heard in the Supreme Court on 31 August 2016.

Roy Cooper, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant/appellee.

M. Gordon Widenhouse, Jr. for defendant-appellant/appellee.

HUDSON, Justice.

Here we are asked to consider the validity of a search warrant authorizing a search of the premises on which defendant was arrested, and whether the search of a vehicle located on those premises was within the scope of the warrant. We conclude that the warrant was supported by probable cause and therefore affirm that part of the decision of the Court of Appeals. However, we conclude that the search of the subject rental car did not exceed the scope of the warrant and thus reverse that part of the decision below.

Defendant David Matthew Lowe was indicted on 2 December 2013 in Wake County for two counts of trafficking in MDMA under N.C.G.S. § 90-95(h)(4) and one count of possession of LSD with intent to sell or deliver under N.C.G.S. § 90-95(a)(1). The trial court denied defendant's pretrial motions to quash the search warrant for a residence where defendant was a visitor at the time the warrant was executed, and to suppress evidence seized from the residence and from a rental car used by defendant and his girlfriend that was parked in the driveway of the target residence at the time of the search. On 8 July 2014, defendant pleaded guilty to the controlled substances violations while reserving the right to appeal the trial court's denial of his motions. On appeal, the Court of Appeals unanimously affirmed the search of the residence, holding that the warrant was supported by probable cause, but reversed the search of the rental car on the basis that the vehicle search exceeded the scope of the warrant. *State v. Lowe*, ___ N.C. App. ___, 774 S.E.2d 893 (2015).

Background

On 24 September 2013, Detective K.J. Barber of the Raleigh Police Department obtained a search warrant from the local magistrate for 529 Ashebrook Drive in Raleigh. Detective Barber filed an affidavit in support of the search warrant in which he swore to the following facts:

> In September of 2013, I received information that a subject that goes by the name "Mike T" was selling, using and storing narcotics at 529 Ashbrooke [sic] Dr. Through investigative means, I was able to identify Terrence Michael Turner as a possible suspect.
>
> Terrence Michael [T]urner, AKA: Michael Cooper Turner has been charged with PWISD Methylenedioxymethamphetamine, Possess Dimethyltryptamine, PWISD Psylocybin, PWISD Cocaine, Possess Heroin, PWIMSD Schedule I, Maintain a Vehicle/Dwelling, Trafficking in

> MDMA, Conspire to sell Schedule I and other drug violations dating back to 2001.
>
> On 9/24/2013 I conducted a refuse investigation at 529 Ashebrook Dr. St [sic] Raleigh, NC 27609. The 96 gallon City of Raleigh refuse container was at the curb line in front of 529 Ashebrook Dr.
>
> Detective Ladd removed one bag of refuse from the 96 gallon container and we took it to a secured location for further inspection. Inside the bag of refuse, I located correspondence to Michael Turner of 529 Ashebrook Dr. Raleigh, NC 27600 [sic], also in this bag of refuse, I located a small amount of marijuana residue in a fast food bag, which tested positive as marijuana utilizing a Sirche # 8 field test kit.
>
> Based on the above stated facts coupled with my training and experience it is my reasonable belief that illegal narcotics are being used and/or sold from inside this location. Based on the above, I respectfully request this warrant be issued.

The warrant authorized the search of the "premises, vehicle, person and other place or item described in the application for the property and person in question." On the following day, 25 September 2013, Detective Barber and other officers executed a search of the residence.

When the officers arrived on scene, they observed a Volkswagen rental car parked in the driveway. Detective Barber was aware that Mr. Turner had an Infinity registered in his name, as well as an outdated registration for a Toyota, but neither of those vehicles was present at the scene. Detective Barber had never seen the Volkswagen rental car before. Inside the residence officers encountered defendant and his girlfriend, Margaret Doctors, who were overnight guests of Mr. Turner. A search of the residence revealed 853 grams of marijuana in the home, as well as 14 grams of crushed MDMA in the room that had been occupied by defendant and Ms. Doctors. Detective Barber testified, without further elaboration, that "once we entered the house on the search warrant, we were able to determine that the vehicle was being operated by [defendant] and Ms. Doctors." After searching the house, officers searched the rental car and discovered in the trunk defendant's book bag and identifying documents, 360 dosage units of MDMA, 10 strips of LSD, and $6000 in U.S. currency.

On 11 April 2014, defendant filed pretrial motions to quash the search warrant and to suppress the evidence seized from the residence and the rental car, as well as incriminating statements he made afterwards. After hearing the motions on 7 and 8 July 2014, the trial court denied defendant's motions on 8 July 2014. Defendant pleaded guilty to all charges but reserved the right to appeal the trial court's denial of his motion to suppress evidence. The trial court sentenced defendant to two concurrent terms of thirty-five to fifty-one months of imprisonment for trafficking in MDMA by possession, and a consecutive term of seven to eighteen months for possession of LSD with intent to sell or deliver. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant first argued that the search warrant was not supported by probable cause and that any evidence seized from the ensuing search should have been suppressed. *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 896. The court disagreed, holding that the totality of the circumstances—the marijuana discovered in the trash, in conjunction with Turner's history of drug-related arrests and the anonymous tip that Turner was "selling, using and storing" narcotics in his home—"formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence." *Id.* at ___, 774 S.E.2d at 898-99.

Defendant next argued that the search of the rental car parked in Turner's driveway exceeded the scope of the warrant issued to search Turner's residence. *Id.* at ___, 774 S.E.2d at 899. The Court of Appeals agreed. The court recognized that "[t]here is long-standing precedent in North Carolina and other jurisdictions that, '*[a]s a general rule*, "if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car." ' " *Id.* at ___, 774 S.E.2d at 899 (second alteration in original) (emphasis added) (quoting *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742, *appeal dismissed and disc. rev. denied*, 308 N.C. 192, 302 S.E.2d 245 (1983)). Nonetheless, the court stated that "[t]he crucial fact distinguishing this case . . . relates to law enforcement officers' knowledge about the ownership and control of the vehicle." *Id.* at ___, 774 S.E.2d at 899. On that basis, and in reliance on the United States Supreme Court's decision in *Ybarra v. Illinois*, the Court of Appeals concluded that the search of the rental car exceeded the scope of the warrant issued for Turner's residence and that the evidence seized

from the car should have been suppressed.[1] *Id.* at ___, 774 S.E.2d at 899-901.

Finally, the Court of Appeals noted that that the record did not make clear which portion of contraband attributable to defendant was found in the home as opposed to the rental car, and therefore which portion of contraband was subject to suppression. *Id.* at ___, 774 S.E.2d at 901. Accordingly, the court reversed the trial court's denial of defendant's motion to suppress evidence obtained from the vehicle and remanded with instructions to determine which portion of the contraband attributable to defendant was seized from the home.[2] *Id.* at ___, 774 S.E.2d at 901. Defendant and the State both filed petitions for discretionary review on 25 August and 8 September 2015, respectively. We allowed both petitions on 28 January 2016.

I. Probable Cause

[1] Here defendant again contends that the search warrant was not supported by probable cause, and therefore, any evidence seized in the ensuing search should have been suppressed. We do not agree.

The United States and North Carolina Constitutions both protect against unreasonable searches and seizures of private property. U.S. Const. amend. IV; N.C. Const. art. I, § 20. The Fourth Amendment to the United States Constitution provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. In addressing whether a search warrant is supported by probable cause, we employ the "totality of the circumstances" test, under which we must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989). "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."

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1. The Court of Appeals also rejected an argument by the State that the evidence seized from the rental car should be admissible under the "good faith exception" to the exclusionary rule. *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 901. The court held that the exception did not apply because the error lay with the police executing the warrant, not with the warrant itself. *Id.* at ___, 774 S.E.2d at 901. The State has abandoned this argument on review here.

2. Because we are reversing the suppression of items from the vehicle, this determination is no longer necessary.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)).

Defendant asserts that this case is analogous to *State v. Benters*, in which we held that a lack of sufficient independent corroboration precluded a finding of probable cause. 367 N.C. 660, 673, 766 S.E.2d 593, 603 (2014). We conclude, as did the Court of Appeals, that defendant's reliance upon *Benters* is misplaced.

In *Benters*, we addressed the probable cause determination in a case involving an anonymous tip, as opposed to a case in which a tip is received from a confidential informant, and we stated, "An anonymous tip, standing alone, is rarely sufficient, but 'the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to [pass constitutional muster].' " *Id.* at 666, 766 S.E.2d at 598-99 (brackets in original) (quoting *State v. Hughes*, 353 N.C. 200, 205, 539 S.E.2d 625, 629 (2000)). The anonymous tip in *Benters* was that the defendant was growing marijuana. *Id.* at 661-62, 669, 766 S.E.2d at 596, 600. The corroborating evidence proffered by the police consisted of: (1) utility records of power consumption for the target residence; (2) gardening equipment observed at the target residence (coupled with the apparent absence of significant gardening activity); and (3) the investigating officer's expertise and knowledge of the defendant. *Id.* at 661-62, 669, 766 S.E.2d at 596, 600-01. We held that these allegations were not "sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause." *Id.* at 673, 766 S.E.2d at 603.

The distinctions between the two cases are apparent. Here the anonymous tip was that Michael Turner was "selling, *using* and *storing* narcotics at" his house. Detective Barber's affidavit in support of the warrant listed his training and experience, as well as Michael Turner's history of drug-related arrests, and stated that Detective Barber had discovered marijuana residue in trash from Michael Turner's residence, along with correspondence addressed to Michael Turner. As the Court of Appeals stated, "Although there were many reasons the gardening equipment may have been outside the defendant's house in *Benters*, the presence of marijuana residue in defendant's trash offers far fewer innocent explanations." *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 898. Furthermore, in the description of crimes for which evidence was sought, Detective Barber listed possession of controlled substances in violation of N.C.G.S. § 90-95 in the affidavit. Thus, unlike in *Benters*, the affidavit presented the magistrate with "direct evidence of the crime for which the officers sought to collect evidence." *Id.* at ___, 774 S.E.2d at

898; *see also State v. Williams*, 149 N.C. App. 795, 798-99, 561 S.E.2d 925, 927 ("[A] residue quantity of a controlled substance, despite its not being weighed, is sufficient to convict a defendant of possession of the controlled substance . . . ."), *disc. rev. denied*, 355 N.C. 757, 566 S.E.2d 481, *cert. denied*, 537 U.S. 1035, 1235 S. Ct. 553, 154 L. Ed. 2d. 455 (2002).

Accordingly, we agree with the Court of Appeals and hold that under the totality of the circumstances there was a substantial basis for the issuing magistrate to conclude that probable cause existed.

II. Search of the Vehicle

[2] The State argues that the Court of Appeals erred in holding that the rental car parked in the curtilage of the residence could not be searched pursuant to the warrant. We conclude that the search of the vehicle here was within the permissible scope of the search conducted under the valid warrant.

The authorized scope of a valid warrant can depend upon the nature of the object of the search because "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 2170-71, 72 L. Ed. 2d 572, 591 (1982). "Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside." *Id.* at 821, 102 S. Ct. at 2171, 72 L. Ed. 2d at 591.

We previously addressed the scope of a search warrant with regard to vehicles in *State v. Reid*, in which we held:

> The authority to search described premises would include personal property located thereon. Authority to search a house gives officers the right to search cabinets, bureau drawers, trunks, and suitcases therein, though they were not described. "*It has been held that if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car.*"

286 N.C. 323, 326, 210 S.E.2d 422, 424 (1974) (emphasis added) (citations omitted). In the case of a private residence, "the premises" by necessity

encompasses the curtilage of the home. This is because "the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, 751 (1886)); *see also Courtright*, 60 N.C. App. at 250, 298 S.E.2d at 742 (explaining that the curtilage "is an area within which the owner or possessor assumes the responsibilities and pleasures of ownership or possession").

Here Detective Barber obtained a valid search warrant based on probable cause for 529 Ashebrook Drive authorizing the search of "premises, vehicle, person and other place or item described in the application for the property and person in question." It is undisputed that when Detective Barber and other officers arrived at the target residence to execute the warrant, the rental car parked in the driveway was within the curtilage of the home. The nature of the items to be seized (including, *inter alia*, controlled substances, drug paraphernalia, and any evidence relating to the use or sale of controlled substances) was such that the items could be easily stored in a vehicle. Because the rental car was within the curtilage of the residence targeted by the search warrant, and because the rental car was a proper place "in which the object of the search may be found," we conclude that the search of the rental car was authorized by the warrant. *Ross*, 456 U.S. at 820, 102 S. Ct. at 2170, 72 L. Ed. 2d at 591. Accordingly, we hold that the search of the rental car did not exceed the scope of the warrant and that the trial court properly denied defendant's motion to suppress.

In departing from the general rule of *Reid*, the Court of Appeals erred. The court determined that "law enforcement officers' knowledge about the ownership and control of the vehicle" constituted a "crucial fact distinguishing this case" from *Reid* and its progeny. *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 899. As an initial matter, it is unclear from the record precisely what knowledge about the ownership and control of the vehicle the officers acquired, as well as when and how they acquired it. The trial court entered no written findings of fact or conclusions of law, although the trial judge did make oral findings at the time of his rulings. The sole witness to testify, Detective Barber, gave sparing and possibly contradictory testimony on the subject.[3] Nonetheless, regardless of

3. Detective Barber testified that "once we entered the house on the search warrant, we were able to determine that that vehicle was being operated by [defendant] and Ms. Doctors." Yet, he later testified that the vehicle was registered to "Hertz Rental," and that

whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant.

The Court of Appeals, noting that that our appellate courts had not yet addressed the specific issue here, namely whether "a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," *id.* at ___, 774 S.E.2d at 899-900, looked to cases addressing the somewhat analogous situation of a search of an individual present at a premises described in a warrant. To that end, the court relied on the seminal case of *Ybarra v. Illinois*, in which the Supreme Court held that when officers obtained a warrant to search a tavern at which the defendant happened to be a patron, the search of the defendant, in the absence of additional facts, was unconstitutional. 444 U.S. 85, 88-92, 100 S. Ct. 338, 340-43, 62 L. Ed. 2d 238, 243-46 (1979). There the Court held that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . The Fourth and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places." *Id.* at 91, 100 S. Ct. at 342, 62 L. Ed. 2d at 245 (citations omitted). Applying the reasoning of *Ybarra* here, the Court of Appeals was persuaded "that a warrant authorizing the search of a house or business does not automatically cover the search of a vehicle owned, operated, or controlled by a stranger to the investigation." *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 900 (citations omitted). On that basis, and in light of the knowledge purportedly acquired by the officers about the vehicle, the court concluded that the search of the rental car exceeded the scope of the search warrant. *Id.* at ___, 774 S.E.2d at 899-901.

The reasoning proffered by the Court in *Ybarra*, sound as it is in the context of a search of an individual present at a tavern open to the public, is not similarly applicable to the search of a vehicle on the premises of a private residence that is the target of a warrant. The owner or possessor of a premises cannot exercise possession, control, or dominion over an individual located on the premises in the same manner that he can do so over items of personal property, such as a vehicle. The two are inherently different and carry with them separate privacy considerations. *See*

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the information he obtained from defendant and Ms. Doctors regarding the operation and rental of the vehicle was obtained during interviews "at the police station," at which point "the vehicle in the driveway had already been searched." As a result, it is unclear if the officers obtained information about the rental car prior to the search of the car, and if so, whether it was obtained verbally from the individuals in the residence.

Zurcher v. Stanford Daily, 436 U.S. 547, 555, 98 S. Ct. 1970, 1976, 56 L. Ed. 2d 525, 535 (1978) ("Search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things,' . . . ." (brackets in original) (quoting *United States v. Kahn*, 415 U.S. 143, 155 n.15, 94 S. Ct. 977, 984 n.15, 39 L. Ed. 2d 225, 237 n.15 (1974))); *Ybarra*, 444 U.S. at 91, 100 S. Ct. at 342, 62 L. Ed. 2d at 245 ("[A] search or seizure of a person must be supported by probable cause particularized with respect to that person. . . . The Fourth and Fourteenth Amendments protect the 'legitimate expectations of privacy' of persons, not places."). Moreover, a commercial patron at a tavern open to the public can, in the absence of additional facts, be fairly characterized as being in "mere propinquity" to the suspected criminal activity targeted by the warrant. *Ybarra*, 444 U.S. at 91, 100 S. Ct. at 342, 62 L. Ed. 2d at 245. But, the same cannot be said of personal property, like a vehicle located within a dwelling's curtilage, over which the "owner or possessor assumes the responsibilities and pleasures of ownership or possession," and which has presumably been permitted, if not invited, onto the premises. *Courtright*, 60 N.C. App. at 250, 298 S.E.2d at 742. Accordingly, we conclude that *Ybarra* is inapposite.

Moreover, the Court of Appeals erred in construing the officers' purported knowledge of the rental car as support for a conclusion that the car was unrelated to the target of the search warrant. To the contrary, defendant was not on the premises by accident, but rather was an overnight guest at a residence targeted for suspected drug trafficking. The officers were informed about defendant's operation of the rental car only after they entered the home, in which they discovered defendant, along with 853 grams of marijuana, as well as 14 grams of crushed MDMA in the room that defendant had been occupying. Far from establishing that defendant was "a stranger to the investigation," *Lowe*, ___ N.C. App. at ___, 774 S.E.2d at 900, the officers' knowledge of the rental car only served to further connect the car to the suspected criminal activity targeted by the warrant. Accordingly, we reverse the Court of Appeals' holding that the search of the rental car exceeded the scope of the warrant.

For the reasons stated herein, we affirm in part and reverse in part the decision of the Court of Appeals.

AFFIRMED IN PART; REVERSED IN PART.

STATE v. MOIR

[369 N.C. 370 (2016)]

STATE OF NORTH CAROLINA
v.
JAMES KEVIN MOIR

No. 49PA14

Filed 21 December 2016

Sentencing—sex offender registration—petition to terminate

In a case involving the trial court's denial of defendant's petition to terminate his sex offender registration, the North Carolina Supreme Court remanded to the trial court for application of the "modified categorical approach" to determine whether defendant was eligible for termination of the registration requirement. Federal statutory provisions governing termination of sex offender registration, which involve tier levels for different categories of sexual offenses, interact with state law. Defendant's eligibility for termination of registration depended upon the extent to which his convictions for indecent liberties were comparable to or more severe than convictions for abusive sexual conduct under the federal statute.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 231 N.C. App. 628, 753 S.E.2d 195 (2014), vacating an order entered on 18 February 2013 by Judge Richard D. Boner in Superior Court, Catawba County, and remanding this case to the Superior Court, Catawba County, for further proceedings. Heard in the Supreme Court on 16 February 2015.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State-appellant.

Crowe & Davis, P.A., by H. Kent Crowe; and LeCroy Law Firm, PLLC, by M. Alan LeCroy, for defendant-appellee.[1]

ERVIN, Justice.

In this case, we consider whether the Court of Appeals erred by vacating and remanding the trial court's order denying a petition filed by defendant James Kevin Moir seeking termination of the requirement

1. H. Kent Crowe filed an appellee's brief on defendant's behalf before unexpectedly dying prior to the holding of oral argument. On 29 January 2015, this Court allowed defendant's motion to substitute M. Alan LeCroy as defendant's counsel.

that he register as a sex offender on the grounds that the trial court had erroneously determined that defendant was not eligible to have his registration terminated in light of certain provisions of federal law. After careful consideration of the State's challenges to the Court of Appeals' decision, we conclude that the Court of Appeals' decision should be modified and affirmed and that this case should be remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

On 9 January 2001, the Catawba County grand jury returned bills of indictment charging defendant with having committed two counts of first-degree statutory sexual offense and two counts of taking indecent liberties with a child.[2] On 28 November 2001, defendant entered a plea of guilty to two counts of taking indecent liberties with a child. Based upon defendant's guilty plea, Judge James W. Morgan consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of sixteen to twenty months of imprisonment, with that sentence being suspended and with defendant being placed on supervised probation for five years on the condition that defendant serve an active sentence of one hundred ten days imprisonment, pay the costs, comply with the usual terms and conditions of probation and the special terms and conditions of probation applicable to sex offenders, and have no contact with the victim except to the extent that such contact is allowed by the victim's mother. In the course of entering judgment, Judge Morgan ordered defendant to "[i]mmediately register" as a sex offender as required by N.C.G.S. § 14-208.7, a mandate with which defendant complied on 15 March 2002. After defendant received an extension of the probationary period in October 2006 for the purpose of allowing defendant to complete the sex offender treatment program, Judge Timothy S. Kincaid entered an order on 25 June 2007 terminating defendant's probation. On 22 May 2012, defendant filed a petition pursuant to N.C.G.S. § 14-208.12A seeking to have the requirement that he register as a sex offender pursuant to Part 2 of Article 27A of Chapter 14 of the North Carolina General Statutes terminated on the grounds that he had "been subject to the North Carolina registration requirements . . . for at least ten (10) years beginning with the" date of initial registration; that he had "not been convicted of any subsequent offense

2. Although the record on appeal only contains a single indictment charging defendant with one count of first-degree statutory sexual offense and one count of taking indecent liberties with a child, the remaining documents contained in the record on appeal and the briefs that the parties submitted to both the Court of Appeals and this Court indicate that defendant was actually charged with two counts of both offenses.

requiring registration" since the date of his conviction; that he had "not been arrested for any offense that would require registration" since the completion of his sentence; and that proper notice of his request for relief from his sex offender registration requirement had been provided to the appropriate entities.

Defendant's petition came on for hearing before the trial court at the 11 February 2013 criminal session of the Superior Court, Catawba County. On 18 February 2013, the trial court entered an order denying defendant's petition. In its order, the trial court found as fact that:

> 1. On November 28, 2001, the defendant entered pleas of guilty to two counts of taking indecent liberties with a minor child as part of a plea agreement.
>
> 2. Prior to the court's sentencing of the defendant, the State gave a statement of facts in support of the plea during which it was stated that the defendant had engaged in improper touching of the defendant's daughter, a child of the age of 4 years, and that he had masturbated in the presence of the child.
>
> 3. The State's statement of facts indicated that the improper touching had occurred in the vaginal area of the child.
>
> 4. The defendant was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes as a result of his guilty pleas.
>
> 5. The defendant has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least 10 years beginning with the date of the initial North Carolina registration.
>
> 6. Since the date of conviction, the defendant has not been convicted of any subsequent offenses requiring registration under Article 27A, Chapter 14.
>
> 7. Since the completion of his sentence for the indecent liberties offenses, the defendant has not been arrested for any offense that would require registration under Article 27A, Chapter 14.
>
> 8. The defendant served his petition on the Office of the District Attorney for Catawba County at least three weeks prior to the hearing held in this matter.

9. The risk of the defendant re-offending is low.

10. The defendant is not a current or potential threat to public safety.

11. Touching of the genital area of a minor with the intent to gratify sexual desire is considered "sexual contact" under the provisions of 18 U.S.C. § 2246(3), and sexual contact is classified as "abusive sexual contact" under 18 U.S.C. § 2244.

12. Abusive sexual contact is considered to be a Tier II offense under the provisions of 42 U.S.C. § 16911(3)(A)(iv).

13. The registration for Tier II offenses under the provisions of the Jacob Wetterling Act, 42 U.S.C. § 14071, and the provisions of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911, *et seq.*, is 25 years. This registration period cannot be reduced.

14. The defendant has not been registered as a sex offender for at least 25 years.

Based upon these findings of fact, the trial court concluded as a matter of law:

1. That the termination of defendant's obligation to register as a sex offender would not comply with the current provisions of the Adam Walsh Child Protection and Safety Act of 2006, which are applicable to the termination of a registration requirement and are required to be met as for the receipt of federal funding by the State of North Carolina.

2. [That t]he defendant is not entitled to termination of the registration requirement.

As a result, the trial court determined that defendant's "request to terminate the sex offender registration is denied" and that "defendant shall continue to maintain a current registration under Part 2 of Article 27A of Chapter 14." Defendant noted an appeal to the Court of Appeals from the trial court's order.

On 7 January 2014, the Court of Appeals filed an opinion vacating the trial court's order and remanding this case to the Superior Court, Catawba County, for further proceedings on the grounds that the trial court had erred by determining that defendant was a Tier II sex offender

who was ineligible to obtain relief from the sex offender registration requirement. *State v. Moir*, 231 N.C. App. 628, 631-32, 753 S.E.2d 195, 196-97 (2014). According to the Court of Appeals, the trial court reached this erroneous conclusion based upon an incorrect understanding of the relevant provisions of federal law. *Id.* at 631, 753 S.E.2d at 197. In the Court of Appeals' view, the extent to which an individual should be classified as a Tier I, Tier II, or Tier III offender hinges upon the nature of "the offense charged" rather than upon "the facts underlying the case," as the trial court appeared to believe. *Id.* at 631, 753 S.E.2d at 197. As a result, because the crime of taking indecent liberties with a child did not inherently involve the type of conduct required to make defendant a Tier II offender, the Court of Appeals concluded that defendant should be treated as a Tier I, rather than a Tier II, offender. *Id.* at 631-32, 753 S.E.2d at 197 (citing *In re Hamilton*, 220 N.C. App. 350, 358, 725 S.E.2d 393, 399 (2012), and *In re McClain*, 226 N.C. App. 465, 469, 741 S.E.2d 893, 896, *disc. rev. denied*, 366 N.C. 600, 743 S.E.2d 188 (2013)). However, because "the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion," *id.* at 362, 753 S.E.2d at 197 (quoting *In re Hamilton*, 220 N.C. App. at 359, 725 S.E.2d at 399 (citing N.C.G.S. § 14-208.12A(a1) (2012))), the Court of Appeals vacated the trial court's order and remanded this case to the trial court for the entry of a new order containing appropriate findings of fact and conclusions of law based upon a correct understanding of the applicable law and, in the event that the trial court determined that defendant was eligible to be relieved from his existing obligation to comply with the sex offender registration program, the making of a discretionary decision concerning the extent to which defendant's petition should be allowed or denied, *id.* at 632, 753 S.E.2d at 197. We granted the State's request for discretionary review on 19 August 2014.

Section 14 208.12A of our General Statutes, which governs requests for relief from the sex offender registration requirement, provides in pertinent part that:

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30 year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.
>
> If the reportable conviction is for an offense that occurred in North Carolina, the petition shall be filed in the district where the person was convicted of the offense.

. . . .

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C.G.S. § 14-208.12A (2015). As a result, given that the trial court's findings of fact, which have not been challenged on appeal, establish that defendant "has not been arrested for any offense that would require registration" since completing his sentence and "is not a current or potential threat to public safety," the extent to which defendant is eligible to be removed from the sex offender registration program depends upon whether "[t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State." *Id.* § 14-208.12A(a1)(2).

The currently effective federal statutory provisions governing the extent to which an individual required to register as a sex offender is entitled to have his or her registration obligation terminated are found in the Sex Offender Registration and Notification Act (SORNA), which is also known as the Adam Walsh Act.[3] Adam Walsh Child Protection and

3. The federal statutory provisions governing removal from a state's sex offender registry have been amended on a number of occasions. The relevant provisions were, as N.C.G.S. § 14-208.12A(a1)(2) suggests, originally contained in the Jacob Wetterling Act, 14 U.S.C. § 14071 (1994), which was amended by the "Pam Lychner Sexual Offender Tracking and Identification Act of 1996." *See* Pub. L. No. 104-236, §§ 1-2, 110 Stat. 3093, 3093-96. In 2006, portions of both the Lychner Act and the Wetterling Act were repealed following enactment of the Adam Walsh Child Protection and Safety Act, which currently

Safety Act of 2006, Pub. L. No. 109-248, Title I, §§ 102, 113, 120 Stat. 590, 593-94.[4] According to SORNA, sex offenders subject to a registration requirement are classified on the basis of three tier levels, *see* 42 U.S.C. § 16911(2)-(4) (2012), with sex offenders being treated differently based upon the exact tier to which they are assigned, *see id.* § 16915. Among other things, 42 U.S.C. § 16915 provides that "[a] sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under" 42 U.S.C. § 16915(b), with "[t]he full registration period" being "15 years, if the offender is a tier I sex offender," "25 years, if the offender is a tier II sex offender," and "the life of the offender, if the offender is a tier III sex offender." *Id.* § 16915(a). However, a Tier I sex offender may have his or her required registration period reduced to ten years, *id.* § 16915(b)(3)(A), and a Tier III offender may have his or her required registration period reduced to twenty-five years, *id.* § 16915(b)(3)(B), in the event that he or she is not "convicted of any offense for which imprisonment for more than 1 year may be imposed," is not "convicted of any sex offense," "successfully complete[s]any periods of supervised release, probation, and parole," and "successfully complete[s] . . . an appropriate sex offender treatment program," *id.* § 16915(b). As a result, defendant would not have been eligible to have his obligation to register as a sex offender terminated at the conclusion of a ten year registration period unless he satisfied the requirements for being a Tier I offender.

The exact contours of the tier system upon which 42 U.S.C. § 16915 depends are spelled out in 42 U.S.C. § 16911. 42 U.S.C. § 16911(1) defines a "sex offender" as "an individual who was convicted of a sex offense." *Id.* § 16911(1). According to 42 U.S.C. § 16911(2), a Tier I sex offender is "a sex offender other than a [T]ier II or [T]ier III sex offender." *Id.* § 16911(2). A Tier II sex offender is

> a sex offender other than a [T]ier III sex offender whose offense is punishable by imprisonment for more than 1 year and—
>
> (A) is comparable to or more severe than the following offenses, when committed against a minor, or

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governs removal from North Carolina's sex offender registry for purposes of N.C.G.S. § 14-208.12A(a1)(2).

4. SORNA is codified, for the most part, at 42 U.S.C. §§ 16901-16962 (2012).

an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)[ ] of title 18[)];

(iv) abusive sexual contact (as described in section 2244 of title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a [T]ier I sex offender.

Id. § 16911(3). Finally, a Tier III sex offender is

a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a [T]ier II sex offender.

Id. § 16911(4). As a result of the fact that the State seeks to have defendant categorized as a Tier II offender on the grounds that his "offense" was "comparable to or more severe than" "abusive sexual contact" as defined in 18 U.S.C. § 2244, the extent to which defendant is or is not eligible to have his obligation to register as a sex offender terminated depends upon the extent, if any, to which his convictions for taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1 are comparable to or more severe than convictions for "abusive sexual contact" in violation of 18 U.S.C. § 2244.[5]

According to N.C.G.S. § 14-202.1,

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C.G.S. § 14-202.1(a) (2015). On the other hand, a defendant is guilty of abusive sexual contact in violation of 18 U.S.C. § 2244 if he or she "knowingly engages in or causes sexual contact with or by another person, if so to do would violate" 18 U.S.C. §§ 2241(a) or (b), 2242, 2243(a) or (b), or 2241(c), or if he or she "knowingly engages in sexual contact with another person without that other person's permission," 18 U.S.C. § 2244(a)-(b) (2012), with "sexual contact" for purposes of 18 U.S.C. § 2244 defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse

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5. As a result of the fact that the same analysis we have utilized to address the State's contention that defendant should be categorized as a Tier II offender would be appropriate in the event that the State were to contend that defendant should be categorized as a Tier III offender, our discussion of the merits of the contention that the State has actually made in this case suffices to permit an appropriate disposition in this case. We do not, however, wish for the discussion contained in the text of this opinion to be understood as limiting the extent to which the Superior Court, Catawba County, is entitled to classify defendant as a Tier I, a Tier II, or a Tier III offender on remand.

or gratify the sexual desire of any person," *id.* § 2246(3).[6] The extent to which the crime of taking indecent liberties with a child is comparable to or more severe than the crime of abusive sexual contact for purposes of 42 U.S.C. § 16911(3)(A)(iv) is, of course, a question of federal, rather than state, law.

The federal courts have described three approaches for making determinations like ascertaining the tier to which a defendant should be assigned for the purpose of determining whether he is eligible to have his sex offender registration obligation reduced pursuant to 42 U.S.C. § 16915(b): (1) the "categorical approach," (2) the "circumstance-specific approach," and (3) the "modified categorical approach."[7] *United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2015) (stating that "courts employ two main approaches, . . . the categorical approach and the circumstance-specific approach"); *see Descamps v. United States*, ___ U.S. ___, ___, ___, 186 L. Ed. 2d 438, 449, 451-53 (2013) (explaining that the "modified categorical approach" is solely a "variant" of the "categorical approach"); *see also United States v. Berry*, 814 F.3d 192, 195-96 (4th Cir. 2016); *United States v. Price*, 777 F.3d 700, 704-05 (4th Cir.), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 941 (2015). The applicability of each approach depends upon whether the statute under which a defendant

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6. A careful examination of 18 U.S.C. §§ 2241(a), 2241(b), 2242, 2243(a), 2243(b), and 2241(c) reveals that guilt of the offenses delineated in each of these statutory provisions requires proof that the offender "engage[d] in or cause[d] sexual contact with or by another person," 18 U.S.C. § 2244, in such a manner as to result in the commission of a "sexual act," which is defined as "contact between the penis and the vulva or the penis and the anus," with "contact involving the penis occur[ring] upon penetration, however slight;" "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;" "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person;" or "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," *id.* § 2246(2)(A)-(D). However, given that the offense set out in 18 U.S.C. § 2244(b) does not require proof that the offender committed a "sexual act" and given that conviction for an offense "comparable to or more severe" than that defined in 18 U.S.C. § 2244(b) would suffice to render the person in question a Tier II offender even if that offense was not also "comparable to or more severe than" the offenses delineated in 18 U.S.C. § 2244(a), *see* 42 U.S.C. § 16911(3)(A)(iv), we need not address the extent, if any, to which defendant's conviction for taking indecent liberties with a child would be "comparable to or more severe than" a conviction for the offenses requiring proof of the commission of a "sexual act" delineated in 18 U.S.C. § 2244(a).

7. The "circumstance-specific approach" is also known as the "non-categorical approach." *See United States v. Price*, 777 F.3d 700, 705 (4th Cir.), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 941 (2015).

was convicted refers to a "generic crime" or to a "defendant's specific conduct." *White*, 782 F.3d at 1130. In the event that Congress intended for the relevant statutory provision to refer to a generic crime rather than a defendant's specific conduct, the "categorical approach," in which courts compare the elements of the offense for which the defendant was convicted with the "elements of the generic offense identified in the federal statute," is used in making the necessary comparison. *Price*, 777 F.3d at 704; *see White*, 782 F.3d at 1130-31; *see also Taylor v. United States*, 495 U.S. 575, 602, 109 L. Ed. 2d 607, 629 (1990). A defendant's state conviction is comparable to the relevant federal offense for purposes of the "categorical approach" when the elements composing the statute of conviction "are the same as, or narrower than, those of the generic offense." *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449; *Price*, 777 F.3d at 704 (citing *Taylor*, 495 U.S. at 602, 109 L. Ed. 2d at 629). Accordingly, if a state statute "sweeps more broadly than the generic crime," there is no categorical match. *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 451 (stating that "[t]he key, we emphasize[ ], is elements, not facts.") In other words, if there is " 'a realistic probability . . . that the State would apply its statute to conduct that falls outside the generic definition of a crime,' there is no categorical match and the prior conviction cannot be for an offense under the federal statute." *Price*, 777 F.3d at 704 (quoting *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193, 166 L. Ed. 2d 683, 692-93 (2007)).

On the other hand, in the event that Congress intended to refer to a defendant's specific conduct instead of to the elements of the offense involved in the underlying criminal conviction, courts apply the "circumstance-specific approach." *Id.* at 705 (citing *Nijhawan v. Holder*, 557 U.S. 29, 34, 174 L. Ed. 2d 22, 27 (2009)). In applying the "circumstance-specific approach," the court is required to compare the actual conduct that led to the defendant's conviction for the relevant state offense with the elements of the offenses as defined in federal law. *Id.*; *see Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 456. In other words, when the facts underlying the defendant's prior conviction would support a conviction under the federal statute, the defendant's prior offense is comparable to the federal offense for categorization purposes. *Price*, 777 F.3d at 705 (citing *Nijhawan*, 557 U.S. at 34, 174 L. Ed. 2d at 27); *see Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 456. Thus, the "broader framework" made possible through the use of the "circumstance-specific approach" is available "when the federal statute refers 'to the specific way in which an offender committed the crime on a specific occasion,' rather than to the generic crime." *Price*, 777 F.3d at 705 (quoting *Nijhawan*, 557 U.S. at 34, 174 L. Ed. 2d at 27).

In the event that the court is required to address issues arising under a divisible statute, which exists when the relevant provision sets out multiple offenses rather than a single offense, a pure categorical approach cannot be utilized in any meaningful way. *See Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449 (noting that the "modified categorical approach" applies "when a prior conviction is for violating a so-called 'divisible statute' "). In order to resolve cases involving divisible statutes, courts have developed the "modified categorical approach." Under that approach, "[g]eneral divisibility, however, is not enough" to permit a finding of comparability. *United States v. Montes–Flores*, 736 F.3d 357, 365 (4th Cir. 2013) (quoting *United States v. Cabrera–Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013)). Instead, the "modified categorical approach" only permits a finding of comparability in the event that the elements of at least one of the alternative offenses set out in the statute defining the offense of which the defendant was previously convicted categorically match the generic federal offense. *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 453 (stating that "[a]ll the modified [categorical] approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes' " on the theory that, "[i]f at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of" having committed) (ellipsis in original) (quoting *Nijhawan*, 557 U.S. at 41, 174 L. Ed. 2d at 32).[8] In using the "modified categorical approach," the court is permitted to examine a limited number of contemporaneously generated documents described in *Shepard v. United States*, 544 U.S. 13, 26, 161 L. Ed. 2d 205, 214 (2005), "such as the indictment, the plea agreement, and jury instructions, to 'determine which alternative formed the basis of the defendant's prior conviction.' " *Berry*, 814 F.3d at 196 (quoting *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449). "The modified [categorical] approach does not authorize a . . . court to substitute such a facts-based inquiry for an elements-based one." *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at

8. The greater flexibility allowed through the use of the "modified categorical approach" is not available in the event that the relevant state statute specifies several alternative *means* of committing a crime, one of which would bring the statute of conviction within the definition of the generic crime, instead of setting out alternative offenses made up of differing *elements*. *Mathis v. United States*, 579 U.S. ___, ___, 195 L. Ed. 2d 604, 616-18 (2016); *see also id.* at ___, 195 L. Ed. 2d at 610 (defining "elements" as "the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction' " (quoting *Black's Law Dictionary* 634 (10th ed. 2014)) and defining "facts" as "mere real-world things—extraneous to the crime's legal requirements" that "need neither be found by a jury nor admitted by a defendant" (citing *Black's Law Dictionary* 709)).

462. Instead, the only reason that a court is allowed to consider certain extra-statutory information in the "modified categorical approach" is "to assess whether the plea was to the version of the crime" in the state statute that "correspond[s] to the generic offense." *Id.* at ___, 186 L. Ed. 2d at 452 (citing *Shepard*, 544 U.S. at 25-26, 161 L. Ed. 2d at 217 (plurality opinion)). If none of the alternative offenses set out in a "divisible" statute is determined to be comparable to the generic offense on the basis of a "categorical" analysis, no "match[ ]" exists and "[t]he modified [categorical] approach . . . has no role to play" in the analysis. *Id.* at___, 186 L. Ed. 2d at 453-54; *accord Montes–Flores*, 736 F.3d at 365 (stating that "[g]eneral divisibility, however, is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, *by its elements*, [the generic offense]" (quoting *Cabrera–Umanzor*, 728 F.3d at 352)). Thus, "[o]nce the elements of the offense of conviction have been identified, the examination of any *Shepard* documents ends, and the court proceeds with employing the categorical approach, comparing the elements of the offense of conviction with the elements of the offense identified in the federal statute." *Berry*, 814 F.3d at 196 (citing *Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 449). As a result, we must now determine whether 42 U.S.C. § 16911, when properly construed, requires use of the "categorical approach," the "circumstance-specific approach," or the "modified-categorical approach."

Although the United States Supreme Court has pointed out that the word "offense" in statutes can refer to either a generic offense or specific conduct, *Nijhawan*, 557 U.S. at 34-35, 174 L. Ed. 2d at 27-28, an analysis of the language in which 42 U.S.C. § 16911(3)(A)(iv) is couched and various equitable and practical considerations persuade us that Congress intended for the required comparability analysis to focus on a generic offense rather than the defendant's individual conduct. As an initial matter, when taken in context, the references to "offense" contained throughout 42 U.S.C. § 16911 tend, for the most part, to refer to specific criminal offenses as defined in state law rather than to the specific conduct in which the defendant engaged. For example, as the Court of Appeals noted, the fact that a "sex offender" is defined as "an individual who was convicted of a sex offense," 42 U.S.C. § 16911(1), the fact that a Tier II offender is defined as a "sex offender whose offense is punishable by imprisonment for more than 1 year," *Moir*, 231 N.C. App. at 630, 753 S.E.2d at 196 (quoting 42 U.S.C. § 16911(3) (2006)), and the fact that the statute contains "lists of elements of the offense" tend to suggest that Congress was referring to the identity of the generic offense for

which a defendant was convicted rather than to a description of each individual defendant's conduct, *id.* at 631, 753 S.E.2d at 197. In addition, we note that 42 U.S.C. § 16911(3)(A) refers to offenses described in 18 U.S.C. §§ 1591, 2422(b), 2423(a), and 2244. 42 U.S.C. § 16911(3)(A); *White*, 782 F.3d at 1133 (citing 42 U.S.C. § 16911(3)(A)). As the United States Supreme Court has stated, cross-references to other federal statutory provisions tend to suggest that Congress intended to refer to a generic offense instead of the specific conduct in which the defendant engaged. *Nijhawan*, 557 U.S. at 36-38, 174 L. Ed. 2d at 28-30 (explaining that the references in the Armed Career Criminal Act to specific federal crimes support use of the "categorical approach"); c*f. United States v. Dodge*, 597 F.3d 1347, 1353-56 (11th Cir.) (en banc) (explaining that a "circumstance-specific approach" is appropriate as applied to the phrase "against a minor" as found in 42 U.S.C. § 16911(5)(A)(ii) and (7)(I) given that these phrases do not include a cross-reference to another federal penal section), *cert. denied*, 562 U.S. 961, 178 L. Ed. 2d 287 (2010)). Thus, our reading of the relevant statutory language tends to suggest that Congress intended to refer to a generic offense rather than to the defendant's underlying conduct in the relevant portion of 42 U.S.C. § 16911.

In addition, in making this determination, we must consider

> the practical difficulties and potential unfairness of applying a circumstance-specific approach, including the burden on the trial courts of sifting through records from prior cases, the impact of unresolved evidentiary issues, and the potential inequity of imposing consequences based on unproven factual allegations where the defendant has pleaded guilty to a lesser offense.

White, 782 F.3d at 1132 (citing *Taylor*, 495 U.S. at 601-02, 109 L. Ed. 2d at 628-29). In conducting that inquiry, we note that a trial judge required to make the necessary categorization determination long after the date of a defendant's conviction may lack access to relevant factual information concerning the defendant's conduct, particularly in cases involving convictions resulting from a guilty plea rather than a jury verdict. *See Descamps*, ___ U.S. at ___, 186 L. Ed. 2d at 457 (noting that the use of the "circumstance-specific approach" would require trial courts "to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense"; that "[t]he meaning of those documents will often be uncertain"; and that "the statements of fact in

them may be downright wrong"). In addition, use of the "circumstance-specific approach" would, in some instances, force trial courts to base their decisions on "unresolved evidentiary issues" and "unproven factual allegations," *White*, 782 F.3d at 1132, 1135 (citing *Taylor*, 495 U.S. at 600-02, 109 L. Ed. 2d at 628-29), and result in what amounts to a mini-trial concerning the exact nature of a defendant's earlier conduct in which the defendant might be unable to effectively defend himself or herself due to the passage of time and other factors. Thus, the interpretation of the literal statutory language that we believe to be appropriate has the added benefit of avoiding a number of practical and equitable problems that would arise from reliance upon the "circumstance-specific approach" for the purpose of determining whether defendant is a Tier I or a Tier II offender.

The reading of the relevant portion of 42 U.S.C. § 16911 that we believe to be appropriate is also consistent with the approach adopted by various federal courts and agencies in the course of resolving this issue. For example, the Fourth Circuit stated in *Berry* that "SORNA's text . . . suggests that the categorical approach should be used to determine whether a prior conviction is comparable to or more severe than the generic crimes listed in Section 16911(4)(A)." 814 F.3d at 197. The Tenth Circuit has reached the same conclusion. *White*, 782 F.3d at 1135 (concluding that "Congress intended courts to apply a categorical approach to sex offender tier classifications designated by reference to a specific criminal statute"). In fact, no federal circuit, to our knowledge, has construed the exact statutory provision at issue here differently than we do. Finally, the National Guidelines for Sex Offender Registration and Notification promulgated by the United States Department of Justice provide that, "in assessing whether the offense satisfies the criteria for tier II or tier III classification, jurisdictions generally may premise the determination on the elements of the offense, and are not required to look to underlying conduct that is not reflected in the offense of conviction." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38053 (July 2, 2008). As a result, for all of these reasons, we conclude that, in determining whether defendant's convictions for taking indecent liberties with a child suffice to make him a Tier II offender as defined in 42 U.S.C. § 16911(3)(A)(iv), we are required to utilize the categorical approach, as supplemented by the "modified categorical approach" in the event that defendant was convicted of violating a divisible statute.[9]

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9. A number of courts that utilize the "categorical approach" for other purposes have adopted the "circumstance-specific" method for the purpose of applying the statutory

As we have already noted, N.C.G.S. § 14-202.1 prohibits "[w]illfully tak[ing] or attempt[ing] to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire," *id.* § 14-202.1(a)(1), and "[w]illfully commit[ting] or attempt[ing] to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years," *id.* § 14-202.1(a)(2). As of the present date, this Court has not had the opportunity to determine whether N.C.G.S. § 14-202.1(a) is or is not a divisible statute, particularly in the aftermath of the amendment to that statutory provision worked by Chapter 779 of the 1975 North Carolina Session Laws, which removed the requirement that the defendant act "with intent to commit an unnatural sexual act," N.C.G.S. § 14-202.1 (1969), from the crime of taking indecent liberties with children, and amended the remaining statutory language so as to create the two subdivisions, N.C.G.S. § 14-202.1(a)(1) and (a)(2), that have been contained in all versions of N.C.G.S. § 14-202.1(a) since the 1 October 1975 effective date of the amendment. Act of June 24, 1975, ch. 779, 1975 N.C. Sess. Laws 1105. Thus, given our willingness to authorize the use of the "modified categorical approach" in appropriate cases, a determination of whether N.C.G.S. § 14-202.1(a) is a divisible statute must be made in order to properly determine whether defendant is eligible to seek relief from the existing requirement that he register as a sex offender.

An analysis of the literal language of N.C.G.S. § 14-202.1(a) provides a basis for arguing that N.C.G.S. § 14-202.1 is a divisible statute, with

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reference to the commission of a crime "against a minor" contained in 42 U.S.C. § 16911(3). *See generally Berry*, 814 F.3d at 197 (stating that "the language of Section 16911(3)(A), like the language of Section 16911(4)(A), instructs courts to apply the categorical approach when comparing prior convictions with the generic offenses listed except when it comes to the specific circumstance of the victims' ages" (citations omitted)); *Gonzalez–Medina*, 757 F.3d at 429 (concluding "that Congress contemplated a non-categorical approach to the age-differential determination in the § 16911(5)(C) exception"); *Dodge*, 597 F.3d at 1356 ("hold[ing] that courts may employ a noncategorical approach to examine the underlying facts of a defendant's offense, to determine whether a defendant has committed a 'specified offense against a minor' and is thus a 'sex offender' subject to SORNA's registration requirement"); *United States v. Mi Kyung Byun*, 539 F.3d 982, 990-94 (9th Cir.) (determining that the phrase "a specified offense against a minor" contained in 42 U.S.C. § 16911(5)(A)(ii) and (7) allows for a "circumstance-specific approach"), *cert. denied*, 555 U.S. 1088, 172 L. Ed. 2d 761 (2008). We agree with the approach to age-related issues deemed appropriate in the cases and hold that North Carolina courts should use the noncategorical or "circumstance-specific approach" in addressing any age-related issues that may arise in the course of determining whether an individual seeking the termination of an existing sex offender registration requirement should be categorized as a Tier I, a Tier II, or a Tier III offender.

N.C.G.S. § 14-202.1(a)(1) and N.C.G.S. § 14-202.1(a)(2) being understood to state separate offenses. The Tenth Circuit read N.C.G.S. § 14-202.1(a) in just that manner. *White*, 782 F.3d at 1136. However, there is a reasonable and rational basis for taking the opposite position as well. For example, the Court of Appeals rejected a defendant's fatal variance claim even though the trial court instructed the jury concerning the issue of defendant's guilt of taking indecent liberties with a child by using the language "for the purpose of arousing or gratifying sexual desire" as found in N.C.G.S. § 14-202.1(a)(1) when the indictment was couched solely in terms of the "lewd and lascivious act" language contained in N.C.G.S. § 14-202.1(a)(2). *State v. Wilson*, 87 N.C. App. 399, 400-01, 361 S.E.2d 105, 106-07 (1987), *disc. rev. denied*, 321 N.C. 479, 364 S.E.2d 670 (1988). In addition, this Court and the Court of Appeals have upheld indecent liberties convictions under both subdivisions of N.C.G.S. § 14-202.1(a) based upon essentially identical conduct. *See*, *e.g.*, *State v. Banks*, 322 N.C. 753, 767, 370 S.E.2d 398, 407 (1988) (concluding that the act of inserting an adult's tongue into a child's mouth constituted an "immoral, improper, or indecent" act within the meaning of N.C.G.S. § 14-202.1(a)(1) and a "lewd or lascivious" act within the meaning of N.C.G.S. § 14-202.1(a)(2)); *State v. Hammett*, 182 N.C. App. 316, 323, 642 S.E.2d 454, 459 (concluding that masturbating in a child's presence constituted an offense punishable pursuant to N.C.G.S. 14-202.1(a)(2)), *appeal dismissed and disc. rev. denied*, 361 N.C. 572, 651 S.E.2d 227 (2007); *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981) (concluding that masturbating in a child's presence constituted an offense pursuant to N.C.G.S. § 14-202.1(a)(1)); *cf. State v. Jones*, 172 N.C. App. 308, 314-16, 616 S.E.2d 15, 19-20 (2005) (holding that a single act cannot support two convictions under both N.C.G.S. § 14-202.1(a)(1) and N.C.G.S. § 14-202.1(a)(2), respectively). In light of these decisions, at least four members of an en banc panel of the Fourth Circuit have determined that N.C.G.S. § 14-202.1(a) is not a divisible statute. *United States v. Vann*, 660 F.3d 771, 782-83 (4th Cir. 2011) (King, J., concurring, with Motz, Gregory, & Davis, JJ.). Thus, the extent to which N.C.G.S. § 14-202.1(a) is a divisible statute remains an open question about which reasonable minds can differ.

Assuming, without in any way deciding, that N.C.G.S. § 14-202.1(a) is a divisible statute, additional questions of North Carolina law must be resolved before defendant's eligibility to seek the termination of his obligation to continue to register as a sex offender can be determined. Although this Court has held that proof that a touching occurred is not necessary for a finding of guilt for purposes of N.C.G.S. § 14-202.1(a)(1), *see State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (stating that N.C.G.S. § 14-202.1(a)(1) does not require "the State [to] prove

that a touching occurred"), and while the Court of Appeals has held that proof of a touching is not necessary for a finding of guilt under N.C.G.S. § 14-202.1(a)(2), *see Hammett*, 182 N.C. App. at 323, 642 S.E.2d at 459 (holding that the defendant did not need to have physically touched the victim in order to be convicted of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(2)); *State v. Every*, 157 N.C. App. 200, 207, 578 S.E.2d 642, 648 (2003) (stating that "[i]t is not necessary that an actual touching of the victim by defendant occur in order for the defendant to be 'with' a child for purposes of taking indecent liberties under [N.C.G.S.] § 14-202.1(a)(1)" (citation omitted)), this Court has never addressed, much less decided, whether a physical touching of the victim is necessary for a defendant to be convicted of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(2). For that reason, this Court has also never determined whether any such physical touching requirement applicable to N.C.G.S. § 14-202.1(a)(2) is limited to an "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person." 18 U.S.C. § 2246(3). As a result, our existing precedent simply does not permit the making of certain preliminary determinations required for a showing that defendant's conviction for taking indecent liberties with a child is "comparable to or more severe than" "abusive sexual contact," *Berry*, 814 F.3d at 200 (quoting 42 U.S.C. 42 U.S.C. § 16911(4)(A)), or, alternatively, whether there is "a realistic probability . . . that the State would apply [N.C.G.S. § 14-202.1(a)(2)] to conduct that falls outside the generic definition of" abusive sexual contact, *Price*, 777 F.3d at 704 (quoting *Duenas–Alvarez*, 549 U.S. at 193, 166 L. Ed. 2d at 693).

Even if N.C.G.S. § 14-202.1(a)(2) is interpreted in such a manner as to make it comparable to abusive sexual contact in violation of 18 U.S.C. § 2244, the present record does not permit us to determine, using the limited range of documents delineated in *Shepard*, whether defendant was convicted of the offense spelled out in N.C.G.S. § 14-202.1(a)(2) rather than the offense spelled out in N.C.G.S. § 14-202.1(a)(1). As an initial matter, we note that the indictments returned against defendant for the purpose of charging him with taking indecent liberties with a child allege, in conjunction with a citation to N.C.G.S. § 14-202.1, that:

> the defendant named above unlawfully, willfully, and feloniously did take and attempt to take immoral, improper, and indecent liberties with the child named below for the purpose of arousing and gratifying sexual desire and did commit and attempt to commit a lewd and lascivious act upon the body of the child named below. At the time of

> this offense, the child named below was under the age of 16 years and the defendant named above was over 16 years of age and at least five years older than the child.

Similarly, the transcript of plea indicates that defendant had agreed to plead guilty to "two counts of indecent liberties"; the Felony Judgment Findings of Aggravating and Mitigating Factors describe defendant's "offense" as "indecent liberties student"; and the trial court's judgment indicates that defendant had been convicted of "indecent liberties with a child," with an accompanying statutory reference to N.C.G.S. § 14-202.4(A).[10] As a result, the materials contained in the present record that the trial court is authorized to consider pursuant to *Shepard* simply do not permit a determination that defendant was convicted of committing the offense made punishable by N.C.G.S. § 14-202.1(a)(2) to the exclusion of the offense made punishable by N.C.G.S. § 14-202.1(a)(1) or to a generic offense made punishable by N.C.G.S. § 14-202.1.[11] *See Vann*, 660 F.3d at 773-76 (per curiam) (holding that an indictment like that returned against defendant in this case did not suffice to permit a court to determine, for purposes of the "modified categorical approach," that the defendant was convicted of the offense made punishable by N.C.G.S. § 14-202.1(a)(2)).

10. Although the State filed a motion seeking to have the statutory reference contained in the judgment changed from N.C.G.S. § 14-202.4(A) to N.C.G.S. § 14-202.1, the record contains no indication that this amendment request was ever approved.

11. As we noted earlier, the trial court did find that, "[p]rior to the court's sentencing of the defendant, the State gave a statement of facts in support of the plea during which it was stated that the defendant had engaged in improper touching of the defendant's daughter, a child of the age of 4 years, and that he had masturbated in the presence of the child," with this "improper touching [having] occurred in the vaginal area of the child." Although defendant did not challenge the sufficiency of the evidence to support this finding on appeal, the exact basis for this finding and the extent to which the trial court was entitled to consider the information upon which this finding was based pursuant to *Shepard* is unclear given that we have not been provided with a transcript of the hearing held before the trial court for the purpose of considering defendant's request for the termination of his obligation to register as a sex offender. However, the State did indicate in its brief before this Court that, "[t]hough no transcript from the formal plea proceedings was introduced as an exhibit, the State's description of its stated factual basis was not disputed by [defendant]" and was "corroborated by the testimony from [defendant's] witness." As a result, the trial court's finding concerning the conduct underlying defendant's conviction for taking indecent liberties with a child appears to rest, at most, upon a subsequent reconstruction of a factual basis statement offered in support of defendant's guilty plea rather than any sort of contemporaneously generated document of the type contemplated by *Shepard*. We need not determine whether the trial court was entitled to consider this information at this point given the disposition that we have deemed appropriate in this case and leave the determination of whether the information upon which the trial court relied in its initial order could be considered in determining defendant's eligibility to have his sex offender registration obligation terminated consistent with *Shepard* for consideration on remand.

Although this Court has the authority to make a number of the determinations listed above without the necessity for further proceedings in the trial court, we believe, after careful consideration, that we should refrain from doing so at this point. As the record clearly reflects, neither the Court of Appeals nor the trial court considered the extent, if any, to which the necessary categorization decision could be made using the "modified categorical approach." For that reason, we have not had the benefit of briefing and argument concerning the numerous legal questions of first impression which must be resolved in order to determine defendant's eligibility for removal from the sex offender registry. In light of its misapprehension of the applicable law, which was entirely understandable given that many of the decisions upon which we have relied in this opinion had not been handed down by the date upon which it entered its order, the trial court failed to determine whether N.C.G.S. § 14-202.1(a) constitutes a divisible statute, whether a conviction for the offense made punishable by N.C.G.S. § 14-202.1(a)(2) requires proof that the defendant "intentional[ly] touch[ed], either directly or through the clothing, . . . the [victim's] genitalia, anus, groin, breast, inner thigh, or buttocks," 18 U.S.C. § 2246(3), and the extent, if any, to which the information that could be appropriately considered under *Shepard* that was contained in the record tended to show that defendant's indecent liberties conviction rested solely upon a violation of N.C.G.S. § 14-202.1(a)(2). Consistent with the well-established legal principle that "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light," *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973) (brackets in original) (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939), and citing *Davis v. Davis*, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967); *Owens v. Voncannon*, 251 N.C. 351, 355, 111 S.E.2d 700, 703 (1959); and *In re Gibbons*, 247 N.C. 273, 283, 101 S.E.2d 16, 23-24 (1957)), we believe that the most appropriate manner in which to resolve the issues that remain to be addressed in this case is for this Court to affirm the Court of Appeals' decision that the trial court erred by applying the "circumstance-specific approach" in determining whether defendant should be deemed eligible to have the requirement that he register as a sex offender terminated. However, we modify the Court of Appeals' decision in order to require use of the "modified categorical approach" rather than the pure "categorical approach" in cases involving divisible statutes, and remand this case to the Superior Court, Catawba County, for further proceedings not inconsistent with this opinion. On remand, the trial court should consider whether N.C.G.S. § 14-202.1 is a divisible statute. If the trial court deems N.C.G.S. § 14-202.1 to be divisible,

it must then consider whether guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof of a physical touching and whether any such physical touching requirement necessitates proof that the defendant "intentional[ly] touch[ed], either directly or through the clothing, [ ] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim. Finally, if guilt of any separate offense set out in N.C.G.S. § 14-202.1(a)(2) requires proof that defendant "intentional[ly] touch[ed], either directly or through the clothing, [ ] the genitalia, anus, groin, breast, inner thigh, or buttocks of" the victim, the trial court must determine whether any document that the trial court is authorized to consider under *Shepard* permits a determination that defendant was convicted of violating N.C.G.S. § 14-202.1(a)(2) rather than any specific offense set out in N.C.G.S. § 14-202.1(a)(1) or any generic offense made punishable pursuant to N.C.G.S. § 14-202.1(a). Finally, if necessary, the trial court should consider, in the exercise of its discretion, whether it should terminate defendant's obligation to register as a sex offender.

MODIFIED AND AFFIRMED, AND REMANDED.

STATE OF NORTH CAROLINA
v.
DOMINIQUE JEVON PERRY

No. 81A14

Filed 21 December 2016

Constitutional Law—cruel and unusual punishment—juvenile sentence—life without parole

A trial court order denying defendant's motion for appropriate relief was reversed where defendant had received a sentence of life without parole as a seventeen-year-old. The State's sole argument in defense of the denial of the motion was that *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was not to be applied retroactively, but *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), held that *Miller* was entitled to retroactive application.

On writ of certiorari to review an order denying a motion for appropriate relief entered on 3 June 2013 by Judge R. Stuart Albright in Superior Court, Guilford County. On 29 July 2013, the Court of Appeals allowed defendant's petition for the issuance of a writ of certiorari authorizing

review of the trial court's order pursuant to N.C.G.S. § 7A-32(c). On 11 March 2014, the Supreme Court, on its own initiative, certified this case for review prior to determination in the Court of Appeals. Following oral argument on 6 May 2014, the Court ordered supplemental briefing on 28 January 2016. Heard in the Supreme Court on 12 October 2016.

Roy Cooper, Attorney General, by Robert C. Montgomery, Senior Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Barbara S. Blackman and Kathryn L. VandenBerg, Assistant Appellate Defenders, for defendant-appellant.

ERVIN, Justice

On 21 May 2007, the Guilford County grand jury returned bills of indictment charging defendant with robbery with a dangerous weapon and first-degree murder, with these charges having arisen from an incident that allegedly occurred on 18 April 2007, when defendant was seventeen years old. On 27 August 2008, the jury returned verdicts convicting defendant of robbery with a dangerous weapon and first-degree murder on the basis of malice, premeditation, and deliberation and on the basis of the felony murder rule. Based upon the jury's verdict, Judge Stafford G. Bullock[1] entered judgments sentencing defendant to a term of fifty-one to seventy-one months imprisonment based upon his conviction for robbery with a dangerous weapon and to a consecutive term of life imprisonment without parole based upon his conviction for first-degree murder. The Court of Appeals filed an opinion on 8 December 2009 finding no error in the proceedings that led to the entry of Judge Bullock's judgments. *State v. Perry*, 201 N.C. App. 448, 688 S.E.2d 551, 2009 WL 4576081 (2009) (unpublished).

On 12 April 2013, defendant filed a motion for appropriate relief in which he requested that the life without parole sentence that had been imposed upon him based upon his conviction for first-degree murder be vacated and that a constitutionally permissible sentence be imposed upon him instead. In support of this request, defendant pointed out that the United States Supreme Court had held in *Miller v. Alabama*, ___ U.S. ___, ___, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407, 414-15 (2012), that the

1. Although the trial court's judgments indicate that they were entered by Judge Stanford G. Buliock, the statement of the entering judge's name appears to have been a clerical error arising from a misspelling of former Judge Bullock's name.

imposition of a mandatory sentence of life imprisonment without the possibility of parole upon a juvenile like defendant violates the Eighth Amendment prohibition against the imposition of cruel and unusual punishment and that the "rule" enunciated in *Miller* should be applied retroactively to defendant. On 28 May 2013, the State filed an answer to defendant's motion for appropriate relief in which the State asserted that the defendant was not entitled to have the life without parole sentence that had been imposed upon him based upon his conviction for first-degree murder vacated. In support of this contention, the State argued that *Miller* should not be retroactively applied in cases that had become final before the date upon which it had been decided because the prohibition against the imposition of life without parole sentences upon juveniles announced in *Miller* was a new rule that did not fall within the scope of either exception to the principle that such new rules were not entitled to retroactive application that was set out in *Teague v. Lane*, 489 U.S. 288, 311, 109 S. Ct. 1060, 1075-76, 103 L. Ed. 2d 334, 356 (1989) (plurality opinion), and made applicable in North Carolina state postconviction proceedings in *State v. Zuniga*, 336 N.C. 508, 513-14, 444 S.E.2d 443, 446-47 (1994). On 3 June 2013, the trial court entered an order denying defendant's motion for appropriate relief, with this decision having been predicated on a determination that "Miller does not apply retroactively to [d]efendant's case."

On 12 July 2013, defendant filed a petition with the Court of Appeals seeking the issuance of a writ of certiorari authorizing review of the trial court's order denying his motion for appropriate relief. On 29 July 2013, the Court of Appeals entered an order allowing defendant's certiorari petition. After the filing of the parties' briefs, this Court entered an order on its own motion on 11 March 2014 certifying this case for review prior to determination by the Court of Appeals, with the parties being entitled to rely upon the briefs that had already been filed in the Court of Appeals in seeking to persuade this Court of the merits of their respective positions. Subsequently, we heard oral argument in this case on 6 May 2014. On 28 January 2016, this Court ordered supplemental briefing for the purpose of allowing the parties to address the effect of the decision in *Montgomery v. Lousiana*, ___ U.S. ___, ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599, 622 (2016), in which the United States Supreme Court held that *Miller* announced a substantive rule of law entitled to retroactive application in state postconviction proceedings, on the proper disposition of this case. After the filing of supplemental briefs by defendant and the State, this Court entered an order on 18 August 2016 providing for the holding of a consolidated supplemental oral argument in this case and the related cases of *State v. Seam* (No. 82A14), and *State v. Young*

(No. 80A14). Supplemental oral argument was heard in this case on 12 October 2016.

The State's sole argument in defense of the trial court's decision to deny defendant's motion for appropriate relief on appeal has been a contention that defendant was not entitled to have *Miller* retroactively applied in his case. As it candidly conceded in its supplemental brief, however, the State's non-retroactivity argument does not survive *Montgomery*. In light of that fact, the State concedes, and we agree, that defendant is entitled to be resentenced in the case in which he was convicted of first-degree murder pursuant to Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes. As a result, the trial court's order denying defendant's motion for appropriate relief is reversed and this case is remanded to the Superior Court, Guilford County, for further proceedings not inconsistent with this opinion, including the imposition of a new sentence in the case in which defendant was convicted of first-degree murder pursuant to N.C.G.S. §§ 15A-1340.19A to – 1340.19D.

REVERSED AND REMANDED

STATE OF NORTH CAROLINA
v.
TERRANCE JAVARR ROSS

No. 297PA15

Filed 21 December 2016

1. Criminal Law—guilty pleas—voluntariness

The Court of Appeals erred by vacating defendant's guilty plea to possession of a firearm by a felon where defendant pleaded guilty knowingly and voluntarily. Considered in its entirety, the transcript of the plea hearing did not demonstrate that defendant believed his plea was conditioned on the right to seek review of any pretrial motion (defendant contended that the State violated N.C.G.S. § 15A-711).

2. Appeal and Error—writ of certiorari—issues not accepted

The Court of Appeals' decision to issue a writ of certiorari is discretionary and that Court may choose to grant such a writ to review some issues but not others. Two issues that defendant raised in his

petition for writ of certiorari did not survive that Court's decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 776 S.E.2d 897 (2015), vacating a judgment entered on 5 August 2014 by Judge James W. Morgan in Superior Court, Cleveland County, and remanding for further proceedings. Heard in the Supreme Court on 17 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Roy Cooper, *Attorney General*, *by Kathleen N. Bolton*, *Assistant Attorney General*, *for the State-appellant.*

Peter Wood, *for defendant-appellee.*

BEASLEY, Justice.

We consider whether the Court of Appeals erred by vacating the judgment entered by the trial court—which was entered according to the terms of the parties' plea agreement—on grounds that defendant's plea was not entered knowingly and voluntarily. For the reasons stated herein, we reverse the decision of the Court of Appeals.

On 22 September 2008, a grand jury indicted defendant on two counts of possession of a firearm by a felon. Defendant alleges that on 14 October 2010, while he was incarcerated in another county on unrelated charges, he filed a motion under N.C.G.S. § 15A-711(c)[1] in Superior Court, Cleveland County, to proceed with the possession of firearms charges. Defendant also alleges that in April 2013 he filed a pretrial motion to dismiss due to the State's failure to request that defendant be produced for trial within the six months after defendant's motion to

1. Defendant filed this alleged motion pursuant to N.C.G.S. § 15A-711(c). Section 15A-711 delineates the procedures for securing attendance at hearings and trials of criminal defendants who are incarcerated in institutions within the State. Subsection 15A-711(c) provides that "[a] defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him" may file a written request "with the clerk of the court where the other charges are pending" to "require the prosecutor prosecuting such charges to proceed pursuant to this section." A copy of defendant's request must be served upon the prosecutor, and "[i]f the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed." N.C.G.S. § 15A-711(c) (2015).

proceed.[2] On 5 August 2014, the matter came on for hearing in Superior Court, Cleveland County. Defendant entered an *Alford* plea of guilty to two counts of possession of a firearm by a convicted felon. At that time, the State and defendant agreed to the following terms of the plea arrangement:

> In exchange for pleas of guilty to two counts of possession of a firearm by a convicted felon, the State agrees to consolidate the charges into one Class G felony for sentencing with the defendant receiving an active sentence of 24 - 29 months[.]
>
> The State further agrees to dismiss all remaining charges pending against the defendant in Cleveland County.
>
> The sentence in these cases will run at the expiration of any sentence being served.

After defendant tendered his guilty plea before the trial court, the following colloquy occurred among defendant, defense counsel, and the trial court:

> [DEFENSE COUNSEL]: . . . You can see from the transcript [defendant] has a lot of irons in the fire over here in Cleveland County, Your Honor. That's why we chose to go forward today. He feels that given all he has going on, even though there may be some holes in this case that would have benefited him at trial, the big picture he feels it's in his best interest to resolve these matters in this fashion even though he's serving a lengthy sentence, and this will add time to that. He's prepared to accept that responsibility to get the benefit of clearing all these cases up. We'd ask you to accept the plea based on that, Your Honor. . . .
>
> . . . .

2. The record does not contain any file stamped copy of defendant's alleged section 15A-711 motion or motion to dismiss, and thus it is unclear whether any pretrial motions were ever filed. The record does include two documents addressed to Mr. Rick Beam regarding defendant's purported motion to dismiss, which are dated 10 September 2013 and 16 September 2013, respectively. Neither document is file stamped by the Clerk of Superior Court's office and neither appears to have been filed. An internet search shows that Rick Beam is an attorney practicing in Gaston, Cleveland, and Lincoln Counties, North Carolina. The record does not indicate the nature of Mr. Beam's relationship with defendant.

THE DEFENDANT: Your Honor, I just want to go on record saying that I had previously filed a 15-7 -- 15A-711 request, and then I followed up with a motion that was never answered with the Court, and I feel like due to that fact, *it's in my best interest to plead guilty today*.

[DEFENSE COUNSEL]: The motion was never heard, Your Honor. I think that's what he's saying. Given the uncertainty of it, he feels it's in his best interest to go forward in this fashion, Your Honor.

THE COURT: So you're abandoning whatever was –

THE DEFENDANT: No. I just want to put on record that it was made for appeal purposes. They can't say that I abandoned the whole issue with the motion. I'm saying that I filed it previously, then I brought it up with the motion that was never answered by the Court.

THE COURT: What are you talking about? A speedy trial motion?

THE DEFENDANT: No. It's just a motion to proceed.

THE COURT: Oh, I see what you're saying.

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: I had filed them previously within 180 days, and they didn't comply so I filed a motion to dismiss which was never heard. So after it's been so long -- at this time, *that's my best option to just go on and plead-guilty*. I'll pursue that later on. I just want to leave that.

THE COURT: Well, I don't know for certain, but the fact that you're proceeding now, you may not be able to proceed on that issue.

THE DEFENDANT: *If that's the choice, I just want to have it on record. If that's the choice -- if I can't later on, I just wanted to put it on there just in case later on in the process, they don't say that I didn't bring it up before I was sentenced.*

THE COURT: Okay.

> [DEFENSE COUNSEL]: I explained that to him as well, Your Honor, take whatever, if anything happens, it happens. If it doesn't, it doesn't.
>
> THE COURT: Okay. All right. *With all that, it's still your choice to go ahead?*
>
> [THE DEFENDANT]: *Yes. Yes, sir.*
>
> THE COURT: All right. I just wanted to make sure that was clear.

(Emphases added). The trial court accepted defendant's guilty plea and sentenced him to twenty-four to twenty-nine months in prison. Defendant gave notice of appeal the same day he entered his guilty plea.[3]

On 15 August 2014, defendant filed a *pro se* motion for appropriate relief in the trial court arguing that the trial court lacked jurisdiction over defendant and the subject matter of the case. Specifically, defendant argued that because the State failed to proceed as required by N.C.G.S. § 15A-711(c) after his written request to do so, the charges against him should have been dismissed. In its 18 August 2014 written order, which was entered on 20 August 2014, the trial court denied defendant's motion for appropriate relief, concluding that defendant waived all claims he may have had under section 15A-711 when he entered his guilty plea; that it had jurisdiction over defendant; and that defendant's constitutional and statutory rights were not violated by the entry and acceptance of his guilty plea. The record does not indicate that defendant noted an appeal from the denial of his motion for appropriate relief.

On 27 February 2015, defendant petitioned for writ of certiorari to the Court of Appeals. In his petition defendant argued that: (1) there was an insufficient factual basis to support a plea of guilty on one of his charges; and (2) the trial court should have dismissed the charges on the basis that the State violated N.C.G.S. § 15A-711 and erred in its denial

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3. The State filed a Motion to Dismiss defendant's appeal. The Court of Appeals dismissed the appeal because defendant had no right of appeal from the trial court's acceptance of his guilty plea. *See* N.C.G.S. § 15A-1444 (2015) (enumerating the limited circumstances in which a defendant who pleads guilty has a right to appeal).

In support of his purported appeal as of right, defendant asserted before the Court of Appeals that the trial court committed prejudicial error when it accepted his guilty plea to two counts of possession of a firearm by a felon because the evidence only supported one conviction of possession of a firearm by a felon. Additionally, he asserted that the trial court committed prejudicial error when it failed to dismiss the charges against him after the State failed to writ him to Cleveland County within six months of his section 15A-711 motion.

of his post-conviction motion for appropriate relief based on the State's violation of section 15A-711.

The Court of Appeals allowed defendant's petition for writ of certiorari to review the question of whether defendant entered his guilty plea voluntarily and knowingly. *State v. Ross*, ___ N.C. App. ___, 776 S.E.2d 897, 2015 WL 4620517 (2015) (unpublished). Although the parties did not brief the issue of whether defendant's plea was entered knowingly and voluntarily, the Court of Appeals reasoned that it is proper to issue this extraordinary writ when the voluntariness of a defendant's plea is in question and the defendant made a motion for appropriate relief in an effort to preserve matters to be heard after trial.

[1] In its opinion the Court of Appeals cited its previous holding that "a guilty plea entered pursuant to a transcript of plea which purports to reserve the right to seek appellate review" of an issue not subject to review after the entry and acceptance of the plea "does not result in the entry of a plea which 'is a product of informed choice.' " *Ross*, 2015 WL 4620517, at *1 (quoting *State v. Tinney*, 229 N.C. App. 616, 624, 748 S.E.2d 730, 736 (2013) (quoting N.C.G.S. § 15A-1022(b))). The Court of Appeals further explained that "the entry of a plea conditioned on the appealability of non-appealable matters does not result in the entry of a voluntary plea." *Id.* (citing *State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011)). After reviewing the plea hearing transcript, the Court of Appeals held that defendant conditioned his plea on the appealability of the failure to grant his section 15A-711 motion; therefore, the plea "was not entered knowingly and voluntarily." *Id.* at 2. The Court of Appeals, accordingly, vacated the trial court's judgment and remanded for further proceedings. *Id.* This Court allowed discretionary review on 28 January 2016.

In its brief to this Court, the State requested that we review whether the Court of Appeals erred when it vacated the trial court's judgment on the grounds that defendant's plea was not entered knowingly and voluntarily. This Court reviews the decision of the Court of Appeals to determine whether the decision contains any error of law. *E.g.*, *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (citations omitted).

The exchange among defendant, defense counsel, and the trial court during the plea colloquy—a portion of which is set out above—does not indicate that defendant's guilty plea was conditionally entered so as to preserve the right for pretrial motions to be heard at a later time. When considered in its entirety, the transcript of the plea hearing does not demonstrate that defendant believed his plea was conditioned on the

right to seek review of any pretrial motion. Defendant pleaded guilty understanding that the right to appeal any claims he may have raised before the trial court was not preserved and was therefore waived. The trial court warned defendant that he "may not be able to proceed on [the motions]," thereby waiving certain rights by entering his guilty plea. Defendant indicated multiple times that he understood the trial court's explanation regarding the waiver of certain rights. Defendant also signed the transcript of plea form, which indicated that there were limitations on his right to appeal. *See State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) ("Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary."); *see also State v. Reynolds*, 298 N.C. 380, 395, 259 S.E.2d 843, 852 (1979) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." (quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 243 (1973))), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 795 (1980).

Furthermore, defendant acknowledged that the plea arrangement as set forth in the transcript of plea was his "full plea arrangement." Unlike *Demaio*, on which the Court of Appeals relied, the terms and conditions of the parties' plea agreement in this case did not attempt to preserve the right to appellate review of a non-appealable matter. In *Demaio* the defendant's plea agreement expressly provided that he preserved the right to appeal the denial of certain pretrial motions. 216 N.C. App. at 560-61, 716 S.E.2d at 865. But the defendant had no appeal as of right as a result of his guilty plea and waived the right to seek review of these claims at a later time by pleading guilty. Thus, the defendant had no means to take advantage of the plea arrangement to which he agreed. *Id.* at 561-65, 716 S.E.2d at 865-68. In that case the Court of Appeals explained that because the defendant entered a guilty plea on the condition that he preserved the right to appeal a non-appealable matter, his plea was not voluntary. *Id.* at 564-65, 716 S.E.2d at 867-68. Here, however, defendant's plea agreement was not conditioned on the right to appeal a non-appealable matter. The only terms and conditions set forth in the parties' plea agreement are the following:

> In exchange for pleas of guilty to two counts of possession of a firearm by a convicted felon, the State agrees to consolidate the charges into one Class G felony for sentencing with the defendant receiving an active sentence of 24 - 29 months[.]

> The State further agrees to dismiss all remaining charges pending against the defendant in Cleveland County.
>
> The sentence in these cases will run at the expiration of any sentence being served.

Defendant's plea agreement was not conditioned on anything else. Additionally, unlike *Demaio*, in which the defendant was never advised that a provision in his plea agreement was invalid, the trial court here informed defendant that he may not be able to seek appellate review of any failure to grant certain pretrial motions, and defendant indicated to the trial court that he understood he waived his rights. *See Tinney*, 229 N.C. App. at 622, 748 S.E.2d at 735 (holding that the defendant was "not entitled to relief from the trial court's judgment on the basis of the principle enunciated in *Demaio*" because the defendant "had ample notice" that if he proceeded with the guilty plea it was not likely that he could obtain review of an order transferring his case from district court to superior court). Defendant does not allege that he conditioned his guilty plea on the right to appeal the failure to grant his section 15A-711 motion, and at the hearing defendant and defense counsel specifically told the trial court that defendant wanted to move forward with the plea agreement because it was in defendant's best interest. Accordingly, we hold that defendant entered his guilty plea knowingly and voluntarily.

[2] Further, the Court of Appeals found it appropriate to grant defendant's petition for writ of certiorari only on the issue of whether defendant's plea was knowing and voluntary, and not on the two issues raised by defendant in his petition for writ of certiorari. The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause. *See Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927) ("*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." (citations omitted)). As such, the two issues that defendant raised in his petition for writ of certiorari to the Court of Appeals have not survived that court's decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea. Specifically, defendant did not appeal the trial court's denial of his motion for appropriate relief; he is not entitled to appeal his guilty plea; if he did file a section 15A-711 motion, any challenge to the failure to grant it did not survive his guilty plea; and defendant cannot now challenge the sufficiency of the factual basis for his plea deal.

Because we conclude that defendant pleaded guilty knowingly and voluntarily, we therefore reverse the decision of the Court of Appeals vacating defendant's guilty plea and the resulting judgment.

REVERSED.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. 271PA15

Filed 21 December 2016

1. Juveniles—breaking and entering investigation—interview—request for parent—ambiguous

In a prosecution for felonious breaking and entering and other charges in which a sixteen-and-one-half-year-old defendant was interviewed by investigators, his statement, "Um, can I call my mom?" was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning. Defendant never gave any indication that he wanted to have his mother present for his interrogation, did not condition his interview on first speaking with her, and had just signed the juvenile rights form expressing his desire to proceed on this own. The purpose of the call was never established and law enforcement officers had no duty to ask clarifying questions or to cease questioning. Defendant's statutory juvenile rights, which included the equivalent of the *Miranda* warnings, were not violated.

2. Juveniles—confession—two-pronged review

A breaking and entering case involving a sixteen-and-one-half-year-old defendant was remanded where defendant asked during an interview with an investigator if he could call his mom, did so, and confessed after the conversation with the investigator resumed. The admissibility of a juvenile defendant's confession is a two-pronged inquiry. Even though defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights. The Court of Appeals did not reach this question.

Justice BEASLEY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 775 S.E.2d 326 (2015), reversing an order denying defendant's motion to suppress entered on 20 February 2014 by Judge Forrest D. Bridges, vacating a judgment entered on 4 June 2014 by Judge Jesse B. Caldwell, both in Superior Court, Mecklenburg County, and remanding the case for further proceedings. Heard in the Supreme Court on 16 February 2016.

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

Goodman Carr, *PLLC*, *by W. Rob Heroy*, *for defendant-appellee.*

EDMUNDS, Justice.

Defendant, a juvenile, asked to telephone his mother while undergoing custodial questioning by police investigators. The call was allowed, after which the interrogation continued. The trial court denied defendant's motion to suppress the statements he made following the call. We conclude that defendant's request to call his mother was not a clear invocation of his right to consult a parent or guardian before proceeding with the questioning. Accordingly, we reverse the decision of the Court of Appeals that reversed the trial court's order denying the motion to suppress.

After several homes around Charlotte were broken into on 17 and 18 December 2012, Charlotte-Mecklenburg Police arrested defendant on 9 January 2013. At the time, defendant was sixteen and one-half years old. The arresting officers took defendant to a local police station where Detective Kelly (Kelly) interrogated him. Before beginning her interrogation, Kelly provided defendant with both English and Spanish versions of the Juvenile Waiver of Rights Form routinely used by the Charlotte-Mecklenburg Police Department to explain the protections afforded juveniles under N.C.G.S. § 7B-2101. These forms advised defendant that he had the right to remain silent; that anything he said could be used against him; that he had the right to have a parent, guardian, or custodian present during the interview; that he had the right to speak to a lawyer and to have a lawyer present to help him during questioning; and that a lawyer would be provided at no cost prior to questioning if he so desired. Kelly also read these rights in English to defendant, pausing after each to ask if defendant understood. Defendant

initialed the English form beside each enumerated right and the section that noted:

> I am 14 years old or more and I understand my rights as explained by Officer/Detective Kely [sic]. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below.

The words "I DO wish to answer questions now" on the form are circled. Only after defendant signed the form did Detective Kelly begin the interrogation.

Kelly had gone no further than noting the time and date for the audio recording when defendant asked, "Um, can I call my mom?" Detective Kelly offered her cellular telephone to defendant and allowed him to step out of the booking room to make the call. Detective Kelly could hear defendant but was not sure if he placed one call or two. Defendant did not reach his mother but did speak to someone else. However, because defendant spoke Spanish while on the phone, Kelly could not provide any details concerning the nature of the conversation. Upon defendant's return to the booking area, Kelly resumed her questioning. Defendant did not object and made no further request to contact anyone. During the ensuing interview, defendant confessed that he had been involved in the break-ins.

Defendant was indicted, *inter alia*, for two counts of felony breaking and entering, conspiracy to commit breaking and entering, and conspiracy to commit common law larceny after breaking and entering. On 9 October 2013, defendant moved to suppress his confession, arguing that it was illegally obtained in violation both of his rights as a juvenile under N.C.G.S. § 7B-2101 and of his rights under the United States Constitution. After conducting an evidentiary hearing, the trial court denied the motion in an order entered on 20 February 2014, finding as facts that defendant was advised of his juvenile rights and, after receiving forms setting out these rights both in English and Spanish and having the rights read to him in English by Kelly, indicated that he understood them. In addition, the trial court found that defendant informed Kelly that he wished to waive his juvenile rights and signed the form memorializing that wish. Although defendant then unsuccessfully sought to contact his mother, the court found:

17. That Defendant did not at that time or any other time indicate that he changed his mind regarding his desire to speak to Detective Kelly. That Defendant did not at that time or any other time indicate that he revoked his waiver.

18. That Defendant only asked to speak to his mother.

19. That Defendant did not make his interview conditional on having his mother present or conditional on speaking to his mother.

20. That Defendant did not ask to have his mother present at the interview site.

21. That, upon review of the totality of the circumstances, the Court finds that Defendant's request to speak to his mother was at best an ambiguous request to speak to his mother.

22. That at no time did Defendant make an unambiguous request to have his mother present during questioning.

23. That Defendant never indicated that his mother was on the way or could be present during questioning.

24. That Defendant made no request for a delay of questioning.

Based on those findings, the trial court determined that the interview was conducted in a manner consistent with N.C.G.S. § 7B-2101 and did not violate any of defendant's state or federal rights. The court concluded as a matter of law that the State met its burden of establishing by a preponderance of the evidence that defendant "knowingly, willingly, and understandingly waived his juvenile rights."

On 4 June 2014, defendant entered pleas of guilty to two counts of felony breaking and entering and two counts of conspiracy to commit breaking and entering, while reserving his right to appeal from the denial of his motion to suppress. The court sentenced defendant to a term of six to seventeen months, suspended for thirty-six months subject to supervised probation.

The Court of Appeals reversed the trial court's order denying defendant's motion to suppress, vacated the judgments entered upon defendant's guilty pleas, and remanded the case to the trial court for further proceedings. *State v. Saldierna*, ___ N.C. App. ___, ___, 775 S.E.2d

326, 334 (2015). The Court of Appeals recognized that the trial court correctly found that defendant's statement asking to telephone his mother was ambiguous at best. *Id.* at ___, 775 S.E.2d at 331. However, it went on to conclude that, unlike the invocation of *Miranda* rights by an adult, a juvenile need not make a clear and unequivocal request in order to exercise his or her right to have a parent present during questioning. *Id.* at ___, 775 S.E.2d at 333-34. Instead, the Court of Appeals held that when a juvenile between the ages of fourteen and eighteen[1] makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning. *Id.* at ___, 775 S.E.2d at 334. The Court of Appeals based this distinction on the fact that *Miranda* rights are rooted in the United States Constitution, while the right to have a parent present during custodial interrogations is an additional statutory protection for juveniles who, by virtue of their age, lack the life experience and judgment of an adult. *Id.* at ___, 775 S.E.2d at 333.

This Court granted the State's petition for discretionary review. We review an opinion of the Court of Appeals for errors of law. N.C. R. App. P. (16)(a). "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." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). Findings of fact are binding on appeal if supported by competent evidence, *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted), while conclusions of law are reviewed de novo, *State v. Ortiz–Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013) (citing *Biber*, 365 N.C. at 168, 712 S.E.2d at 878), *cert. denied*, ___ U.S. ___, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014).

[1] In evaluating whether the trial court correctly denied defendant's motion to suppress, we first must consider the threshold question of whether defendant invoked his right to have his mother present during the custodial interview. We must also consider whether defendant knowingly and voluntarily waived his rights under section 7B-2101 of the

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1. Before 2015, the pertinent part of the statute read: "When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." N.C.G.S. § 7B-2101(b) (2013). In 2015, the General Assembly amended subsection 7B-2101(b) to raise the relevant age limit to "less than 16 years of age." Act of May 26, 2015, ch. 58, sec. 1.1, 2015 N.C. Sess. Laws 126, 126.

North Carolina General Statutes and under the constitutions of North Carolina and the United States, thus making his confession admissible. We begin with the former inquiry.

The State argues that defendant's request to call his mother was not an invocation of his right to have a parent present under N.C.G.S. § 7B-2101(a)(3). The State points out that defendant simply asked to call his mother, which the detective readily permitted. He never requested his mother's presence or indicated that he wished to suspend the interview until he could reach her. The State contends that when a juvenile's statement is ambiguous, law enforcement officers have no additional duty to ascertain whether the juvenile is invoking his statutory rights or whether they may continue questioning the minor.

In response, defendant argues that, according to the plain language of N.C.G.S. § 7B-2101, the interview should have ceased until defendant spoke with his mother or indicated his desire to proceed without her, even though the precise import of his question to the detective was unclear. Should we disagree with this statutory interpretation, defendant makes an argument under the United States Constitution that we should extend the rationale in *J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 131 S. Ct. 2394, 2398-99, 180 L. Ed. 2d 310, 318-19 (2011), which held that the age of a juvenile is a factor in determining whether he or she was in police custody for purposes of *Miranda*, and hold that reviewing courts must take into account the juvenile's age and maturity level when determining the admissibility of juvenile confessions.

As to defendant's statutory argument, N.C.G.S. § 7B-2101(a) establishes that juveniles must be advised of certain rights prior to a custodial interrogation. The statute codifies the juvenile's *Miranda* rights and adds the additional protection that the juvenile has the right to have a parent, guardian, or custodian present during questioning. N.C.G.S. § 7B-2101(a) (2015). A statement made during custodial interrogation is admissible only if the juvenile knowingly, willingly, and understandingly has waived his constitutional and statutory rights. *Id.* § 7B-2101(d) (2015).

This Court has recognized that a juvenile's statutory right to have a parent present during custodial interrogation is analogous to the constitutional right to counsel and therefore is entitled to the same protection. *State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986), *abrogated in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). In *Smith*, we noted that the Supreme Court of the United States held in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), that after a defendant expresses a desire to deal with

police only through counsel, he or she may not be questioned further until counsel is present or the defendant reinitiates communication with law enforcement. 317 N.C. at 106, 343 S.E.2d at 521. This Court in *Smith* applied that same principle in the context of juvenile law to hold that, when a juvenile unambiguously requested that his mother be brought to the police station, officers were required to cease all questioning until the mother arrived or the juvenile reinitiated discussions. *Id.* at 107, 343 S.E.2d at 522. These cases leave no doubt that a juvenile's constitutional rights under *Miranda* and statutory rights under N.C.G.S. § 7B-2101(a) are of equal weight and given equal consideration.

Nevertheless, the Supreme Court of the United States also has held that, when an individual under interrogation mentions an attorney with such vagueness that law enforcement investigators are left unsure whether the comment is an invocation of the right to counsel, police have no duty to ask clarifying questions and may continue with the interrogation. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362, 371 (1994) (holding that invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney" (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209, 115 L. Ed. 2d 158, 169 (1991))). In other words, the objective test set out in *Davis* considers whether a reasonable officer under the circumstances would have understood the defendant's statement to be an invocation of his or her right to have an attorney present. *Davis*, *id.* at 459, 114 S. Ct. at 2355, 129 L. Ed. 2d at 371.

This Court has adopted the analytical framework found in *Davis* when determining whether a defendant has invoked his or her constitutional rights. For instance, in *State v. Boggess*, 358 N.C. 676, 600 S.E.2d 453 (2004), we held that the defendant's statement to police that "[i]f y'all going to treat me this way, then I probably would want a lawyer" did not constitute an invocation of the defendant's right to an attorney. *Id.* at 687, 600 S.E.2d at 460; *see also State v. Hyatt*, 355 N.C. 642, 655-56, 566 S.E.2d 61, 70-71 (2002) (holding that the defendant did not invoke his right to counsel when a nearby officer "could have heard" the defendant whisper to his father that "I want you to get me a lawyer"), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003). Similarly, in *State v. Waring*, 364 N.C. 443, 701 S.E.2d 615 (2010), *cert. denied*, 565 U.S. 832, 132 S. Ct. 132, 181 L. Ed. 2d 53 (2011), we held that the defendant's statement that he "was not going to snitch" when questioned about his accomplice's name was not an unambiguous invocation of his right to remain silent. *Id.* at 473, 701 S.E.2d at 635.

We have also applied *Davis* when the suspect under interrogation is a juvenile. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001). In *Golphin*, the juvenile defendant was apprehended after he and his brother committed an armed robbery, stole a vehicle, and murdered two police officers. *Id.* at 380, 386-87, 533 S.E.2d at 183, 187. After he was detained, the defendant waived his juvenile rights under section 7B-2101 and gave a statement to an agent of the State Bureau of Investigation. *Id.* at 449, 533 S.E.2d at 224. When the agent specifically asked the defendant whether he was aware of an incident involving a Jeep, the defendant responded that "he didn't want to say anything about the [J]eep. He did not know who it was or he would have told us." *Id.* at 451, 533 S.E.2d at 225. Upon further questioning, however, the defendant admitted that his brother shot at a Jeep that was following them. *Id.* at 387, 449, 533 S.E.2d at 187, 224.

On appeal, the defendant argued that the agent violated his constitutional right to silence by continuing to question him after he requested not to discuss the Jeep. *Id.* at 448-49, 533 S.E.2d at 224. In rejecting the defendant's argument, we applied the *Davis* analysis and concluded that the defendant's statement was not an unambiguous request to remain silent. *Id.* at 450-51, 533 S.E.2d at 225. Instead, the statement appeared to be an acknowledgment that, had he known who was involved, the defendant would have shared that information freely. *Id.* at 451, 533 S.E.2d at 225. As a result, it was reasonable for the agent to continue the questioning because the defendant failed clearly to invoke any of his rights. *Id.* at 451-52, 533 S.E.2d at 225. In reaching this conclusion, we confirmed both that the *Davis* analysis applies when evaluating whether a juvenile defendant has invoked his or her juvenile rights during a custodial interrogation and that law enforcement officers are not required to seek clarification of ambiguous statements made by juvenile defendants under interrogation. *See id.* at 451, 533 S.E.2d at 225.

Because a juvenile's statutory right to have a parent or guardian present during questioning is entitled to the same protection as the constitutional right to counsel, we must apply *Davis* in determining whether defendant's statement—"Um, can I call my mom?"—was a clear and unambiguous invocation of his right to have his parent or guardian present during questioning. We conclude that it was not.

Although defendant asked to call his mother, he never gave any indication that he wanted to have her present for his interrogation, nor did he condition his interview on first speaking with her. Instead, defendant simply asked to call her. When the request was made, Kelly immediately

loaned defendant her personal cellular telephone so that he could make the call. Defendant's purpose for making the call was never established. Whatever his reasons, defendant did not "articulate his desire to have [a parent] present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for [a parent]," especially in light of the fact that defendant had just signed the portion of the juvenile rights form expressing his desire to proceed on his own. *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355, 129 L. Ed. 2d at 371. As the trial court pointed out, defendant's statement was at best an ambiguous invocation of his right to have his mother present. As in *Davis*, without an unambiguous, unequivocal invocation of defendant's right under N.C.G.S. § 7B-2101(a)(3), law enforcement officers had no duty to ask clarifying questions or to cease questioning. Because defendant's juvenile statutory rights were not violated, we reverse the decision of the Court of Appeals to the contrary.

[2] Nevertheless, the admissibility of defendant's confession is a two-pronged inquiry, as noted above. Even though we have determined that defendant's N.C.G.S. § 7B-2101(a)(3) right was not violated, defendant's confession is not admissible unless he knowingly, willingly, and understandingly waived his rights. N.C.G.S. § 7B-2101(d). The Court of Appeals did not reach this question and instead erroneously resolved the case upon the first prong. *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 334. Because we have concluded that defendant's right under subdivision 7B-2101(a)(3) was not violated, we remand this case to the Court of Appeals for consideration of the validity of defendant's waiver of his statutory and constitutional rights.

REVERSED AND REMANDED.

Justice BEASLEY dissenting.

I disagree with the majority and would hold that defendant's statement, "Um, Can I call my mom?" was an unambiguous invocation of his statutory right to have a parent present during custodial interrogation. Assuming *arguendo* that defendant's statement was ambiguous, I also disagree with the majority's conclusion that because defendant's request was ambiguous his statutory rights under N.C.G.S. § 7B-2101 were not violated. Because I would affirm the Court of Appeals' holding that law enforcement officers are required to ask questions to clarify the desire and intent of a juvenile who makes an ambiguous statement relating to his statutory right to have a parent present, I respectfully dissent.

Subsection 7B-2101(a) of the North Carolina General Statutes provides that juveniles must be advised of certain enumerated rights before being subjected to custodial interrogation. As explained by the majority, "The statute codifies the juvenile's *Miranda* rights and adds the additional protection that the juvenile has the right to have a parent, guardian, or custodian present during questioning." *See* N.C.G.S. § 7B-2101(a) (2015).[1] As such, the right to have a parent, guardian, or custodian present, *id.* § 7B-2101(a)(3), "is *not* the codification of a federal constitutional right, but rather our General Assembly's grant to the juveniles of North Carolina of a purely statutory protection *in addition* to those identified in *Miranda*." *State v. Saldierna*, ___ N.C. App. ___, ___, 775 S.E.2d 326, 332 (2015) (citing, *inter alia*, *State v. Fincher*, 309 N.C. 1, 12, 305 S.E.2d 685, 692 (1983) (stating, for purposes of determining the appropriate prejudice standard, that "[t]he failure to advise [a juvenile] defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude because this privilege is statutory in origin and does not emanate from the Constitution")). The statute also establishes that a juvenile's statement cannot be admitted into evidence unless the court "find[s] that the juvenile knowingly, willingly, and understandingly waived" his constitutional and statutory rights. N.C.G.S. § 7B-2101(d) (2015).

As the Court of Appeals stated, "[W]ith regard to a defendant's *Miranda* rights to remain silent and to have an attorney present during a custodial interrogation, the law is clear." *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 332. A defendant must unambiguously invoke his or her Miranda rights, and law enforcement officers have no obligation to clarify a defendant's ambiguous statements. *See Davis v. United States*, 512 U.S. 452, 459, 461-62, 114 S. Ct. 2350, 2355-56 (1994) ("[T]he suspect

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1. Subsection 7B-2101(a) states that prior to being questioned "[a]ny juvenile in custody must be advised":

> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2015).

must unambiguously request counsel," and law enforcement officers are not required to ask clarifying questions when a suspect's statement regarding counsel is ambiguous); *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885 (1981) (holding that law enforcement officers must immediately cease questioning upon a suspect's unambiguous request for counsel and cannot reinitiate interrogation until counsel arrives or the suspect "initiates further communication"). In *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379 (2001), this Court extended this rule to juveniles, holding that a juvenile defendant's right to remain silent must be unambiguously invoked.[2] *Id.* at 451-52, 533 S.E.2d at 225.

To determine whether a defendant unambiguously invoked his *Miranda* rights, this Court applies the standard set forth in *Davis:* "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' " *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209 (1991)). The Court goes on to say that the inquiry is based on what a "reasonable officer in light of the circumstances" would believe the statement to mean. *Id.* at 459, 114 S. Ct. at 2355 (citations omitted). Here defendant asked to speak to his mother prior to questioning.[3] I agree with the Court of Appeals that Detective Kelly's question, "You want to call her *now before we talk*?" is telling. *See Saldierna*, ___ N.C. App. at ___ n.6, 775 S.E.2d at 334 n.6 ("Kelly's question indicates that she believed [defendant] *might be* asking to delay the interview, at least until he had a chance to speak to his mother."). Implicit in the protections afforded by subdivision 7B-2101(a)(3) is that law enforcement officers understand whether a juvenile intends to invoke the statutory rights. The

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2. *Golphin* did not address a juvenile defendant's right to have a parent present under N.C.G.S. § 7B-2101(a)(3).

3. The following conversation occurred after Detective Kelly advised defendant of his rights:

> [Defendant]: Um, Can I call my mom?
>
> [Det. Kelly]: Call your mom *now*?
>
> [Defendant]: She's on her um. I think she is on her lunch now.
>
> [Det. Kelly]: *You want to call her now before we talk*?
>
> [Det. Kelly to other officers]: He wants to call his mom.

(Emphases added.)

majority states that defendant "never gave any indication that he wanted to have [his mom] present for his interrogation . . . . Instead, defendant simply asked to call her." Thus, according to the majority, "Defendant's purpose for making the call was never established." Despite the majority's contention, the reasonable conclusion under the circumstances is that defendant wanted his mother present.Why else would defendant want to call his mom "now before [he] talked" if not to seek her advice and protection? The majority and the Court of Appeals agree that defendant's statement was not an unambiguous invocation of his statutory right to have a parent present.[4] However, defendant's statement was "sufficiently clear[ ] that a reasonable police officer in the circumstances would understand the statement to be a request" to have his mother present before questioning. *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355. In light of this unambiguous request, all questions should have immediately ceased until defendant's mother was present or defendant reinitiated the conversation. *See Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1885.

The cases discussed above only address a defendant's constitutional *Miranda* rights, not his statutory rights. In regard to a juvenile's statutory right to have a parent present, this Court has only addressed a juvenile's *unambiguous* invocation of the right. *See State v. Smith*, 317 N.C. 100, 343 S.E.2d 518 (1986), *abrogated in part on other grounds by State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001). In *Smith* this Court stated that law enforcement officers must cease questioning when a juvenile unambiguously invokes his statutory right to have a parent present. *Id.* at 108, 343 S.E.2d at 522; *see State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002). This Court has not, however, "considered the implications of a juvenile's *ambiguous* reference" to his statutory right to have a parent present. *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 333. The legislature intended to afford juveniles greater

4. Under the law as it currently stands, I understand how the majority and the Court of Appeals reached the conclusion that defendant's statement was ambiguous. *See State v. Branham*, 153 N.C. App. 91, 98-99, 569 S.E.2d 24, 28-29 (2002) (concluding that the juvenile defendant unambiguously invoked his right when he had officers write on the juvenile rights form that he wanted his mother present before questioning); *see also State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986) (finding that the juvenile defendant unambiguously invoked his right when he requested that his mom be brought to the station), *abrogated in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). *But see State v. Oglesby*, 361 N.C. 550, 558-59, 648 S.E.2d 819, 824 (2007) (Timmons-Goodson, J., dissenting) (stating, in regards to a juvenile defendant's request to call his aunt, that "it is uncontested that . . . the juvenile's confession in this case would be inadmissible if the individual requested had fallen into the requisite category"). For the reasons stated more thoroughly below, however, juvenile defendants are provided greater protections than their adult counterparts, especially in regards to a juvenile's statutory right and protection to have a parent present.

protection in subdivision (a)(3) than those afforded by a juvenile's constitutional *Miranda* rights codified in N.C.G.S. § 7B-2101(a)(1), (2), and (4). *See The Final Report of the Juvenile Code Revision Committee* 183 (Jan. 1979) (commenting that the Committee added "[subdivision] (3) . . . to assure that the juvenile may have his parent present during questioning if he desires and [stating that subdivision (3)] is an addition to case law requirements" found in N.C.G.S. § 7B-2101(a)(1), (2), and (4)). Moreover, when viewed in its entirety, section 7B-2101 demonstrates our General Assembly's acknowledgement that juveniles are especially vulnerable when subjected to custodial interrogation. *See* N.C.G.S. § 7B-2101(b) (providing that, in essence, a juvenile under the age of sixteen cannot waive his right to have a parent or attorney present); *see also* Act of May 26, 2015, ch. 58, sec. 1.1, 2015 N.C. Sess. Laws 126, 126 (increasing the age of juveniles protected by subsection (b) from less than fourteen to less than sixteen years).

According to the majority, this Court's decision in *Smith*—applying the *Miranda* framework set forth in *Davis*, 512 U.S. at 459, 114 S. Ct. at 2355, to a juvenile's *unambiguous* invocation of his right to have a parent present—indicates that a juvenile's statutory right under subdivision (a)(3) can only be afforded as much protection as a juvenile's constitutional *Miranda* rights. As such, the majority concludes that the *Miranda* rules also apply to juveniles who make *ambiguous* statements regarding their right to have a parent present. I disagree. I agree with the Court of Appeals that by enacting N.C.G.S. § 7B-2101(a)(3), the legislature demonstrated its intent to afford a juvenile greater protection when attempting to invoke his or her right to have a parent present than when attempting to invoke his or her *Miranda* rights. *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 333 ("[R]eview of the provisions of section 7B-2101 reveals an understanding by our General Assembly that the special right guaranteed by subsection (a)(3) is different from those rights discussed in *Miranda* and, in turn, reflects the legislature's intent that law enforcement officers proceed with great caution in determining whether a juvenile is attempting to invoke this right.").

Although this Court has held that a "juvenile's right . . . to have a parent present during custodial interrogation[ ] is entitled to similar protection [as an adult's right to have an attorney present]," *Smith*, 317 N.C. at 106, 343 S.E.2d at 521, it does not follow that the protections afforded to juveniles under subdivision 7B-2101(a)(3) are capped at, and therefore cannot exceed, those provided under *Miranda*. As previously discussed, *Smith* involved a situation in which a juvenile defendant unambiguously requested that his mother be brought to the police station before he was

questioned. *Id.* at 102, 343 S.E.2d at 519. This Court held that in such circumstances, the *Miranda* framework of *Davis* applied and required law enforcement officers to immediately cease questioning. *Id.* at 106-07, 343 S.E.2d at 521-22. This Court applied principles established under the Fifth and Sixth Amendments to the "resumption of custodial interrogation" under section 7B-2101.[5] *Id.* at 106, 343 S.E.2d at 521 (noting that the *Miranda* cases "are not controlling"). The "resumption of custodial interrogation" principles apply in the context of an unambiguous invocation of rights. *See Davis*, 512 U.S. at 459-61, 114 S. Ct. at 2355-56 (holding that law enforcement officers must cease questioning after an unambiguous invocation of the right to counsel and *cannot resume questioning* until counsel is present or the defendant reinitiates communication). This Court did not address ambiguous statements, nor did it affirmatively hold that the protections afforded by subdivision (a)(3) are capped at those afforded to adults under *Miranda*. Therefore, I agree with the Court of Appeals' conclusion that the "case law regarding invocation of the *Miranda* rights guaranteed by the federal Constitution and codified in subsections 7B-2101(a)(1), (2), and (4) does not control our analysis of a juvenile's ambiguous statement possibly invoking the purely statutory right granted by our State's General Assembly in section 7B-2101(a)(3)." *Saldierna*, ___ N.C. App. at ___, 775 S.E.2d at 332.

It is well established that juveniles differ from adults in significant ways and that these differences are especially relevant in the context of custodial interrogation. *See*, *e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 2699 (1988) (plurality opinion) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."); *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 1212 (1962) (stating that juveniles are "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and . . . [are] unable to know how to protect [their] own interests or *how to get the benefits of [their] constitutional rights*" (emphasis added)); *Haley v. Ohio*, 332 U.S. 596, 599-600, 68 S. Ct. 302, 304 (1948) (plurality opinion) ("[W]e cannot believe that a lad of tender years is a match for the police in such a contest [as custodial

5. *Smith* discussed a juvenile's rights under to N.C.G.S. § 7A-595, which is the original codification of the rights afforded to juveniles in section 7B-2101. Section 7A-595 was repealed in 1999 and recodified as part of the Juvenile Code. *See* Act of Oct. 22, 1998, ch. 202, secs. 5, 6, 1997 N.C. Sess. Laws (Reg. Sess. 1998) 695, 742, 809. The two sections are substantively the same.

interrogation]. . . . He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."). As discussed by the United States Supreme Court

> [a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.
>
> Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to . . . outside pressures than adults, and so on. Addressing the specific context of police interrogation, we have observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. Describing no one child in particular, these observations restate what any parent knows—indeed, what any person knows—about children generally.
>
> Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.

J.D.B. v. North Carolina, 564 U.S. 261, 272-73, 131 S. Ct. 2394, 2403 (2011) (citations and internal quotation marks omitted).

North Carolina courts have also acknowledged that "[j]uveniles are awarded special consideration in light of their youth and limited life experience." *State v. Oglesby*, 361 N.C. 550, 557, 648 S.E.2d 819, 823 (2007) (Timmons-Goodson, J., dissenting) (citing *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting)); *see In re K.D.L.*, 207 N.C. App. 453, 459, 700 S.E.2d 766, 771 (2010) ("[W]e cannot forget that police interrogation is inherently coercive—particularly for young people." (citations omitted)), *disc. rev. denied*, 365 N.C. 90, 706 S.E.2d 478 (2011). As discussed by Justice Harry C. Martin in his dissent to this Court's decision in *In re Stallings*, "Juveniles are not, after all miniature adults. Our criminal justice system recognizes that

their immaturity and vulnerability sometimes warrant protections well beyond those afforded adults. It is primarily for that reason that a separate juvenile code with separate juvenile procedures exists." 318 N.C. at 576, 350 S.E.2d at 333 (Martin, J., dissenting). Justice H. Martin goes on to explain that the Juvenile Code demonstrates "legislative intent to provide broader protections to juveniles." *See id.* at 577, 350 S.E.2d at 333. Furthermore, "at least two empirical studies show that 'the vast majority of juveniles are simply incapable of understanding their *Miranda* rights and the meaning of waiving those rights.' " *Oglesby*, 361 N.C. at 559 n.3, 648 S.E.2d at 824 n.3 (citation omitted); *see* Cara A. Gardner, Recent Developments, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation after* State v. Oglesby, 86 N.C. L. Rev. 1685, 1698-99 (2008) [hereinafter *Failing to Serve and Protect*] ("[R]esearch has revealed that only 20.9% of juveniles understand the standard Miranda warnings . . . . [and] many d[o] not understand that [their right to an attorney means that] the attorney could actually be present during police questioning rather than at some later time. . . . This may indicate that juveniles in North Carolina also have difficulty understanding that they have the right to have a parent . . . present during an interrogation rather than at some later time." (footnotes omitted)). Therefore, it is reasonable to believe that juveniles should be afforded greater protections when seeking to have a parent present. *See Failing to Serve and Protect* at 1695 ("The reason a juvenile in a custodial interrogation has a right to the presence of a parent, guardian, or custodian is presumably so that the adult may assist in protecting the juvenile's rights.").

For these reasons, I would hold that when a juvenile makes an ambiguous statement relating to his or her statutory right to have a parent present during a custodial interrogation, law enforcement officers are required to ask clarifying questions to determine whether the juvenile desires to have his or her parent present before the juvenile answers any questions. Specifically, *Miranda* precedent is not binding on a juvenile's statutory rights under N.C.G.S. § 7B-2101(a)(3), and I believe that a juvenile can be afforded greater protection than that afforded under *Miranda* when attempting to invoke his or her statutory right. Additionally, as discussed above, juveniles are not able to fully understand the consequences of their actions and are more likely to submit to pressure. Most adults are nervous and apprehensive when stopped by a uniformed officer even in relatively trivial situations such as routine traffic stops. Imagine then the apprehension, fear, and confusion of a teenager who finds himself under the power and authority of a law enforcement officer. Faced with this pressure, it stands to

reason that many juveniles will be unable to unequivocally and unambiguously articulate their desire to have a parent present before police interrogation begins and will certainly lack the ability to appreciate the legal significance of this statutory protection. According to the majority, defendant "never gave any indication that he wanted to have [his mother] present for his interrogation, *nor did he condition his interview on first speaking with her*. Instead, defendant simply asked to call her." This standard expects far too much of the typical juvenile being held in police custody and does not comport with our legislature's intent to protect juveniles' rights.

I also disagree with the State's argument that requiring law enforcement officers to ask clarifying questions would place an unreasonable burden on them. The burden, if any, would be slight. In this case, Detective Kelly could have asked a simple question to clarify defendant's intent when he said, "Um, Can I call my mom?" or to ascertain his desire after he was unable to contact her, such as "Do you want your mother present before I ask you any questions?" Defendant's response of "no" would leave the detective free to continue the custodial interrogation, whereas the response of "yes" would be considered an unambiguous invocation of his right, and the interrogation must therefore immediately cease. Regardless, "the structure of the juvenile code" is "persuasive evidence . . . that the legislature intended to favor juvenile protections *over law enforcement expediency*." *In re Stallings*, 318 N.C. at 576, 350 S.E.2d at 333 (emphasis added). Thus, because the majority's holding fails to take into account the significant differences between juveniles and adults and improperly caps the protection of juveniles' statutory rights under section 7B-2101, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SETHY TONY SEAM

No. 82A14

Filed 21 December 2016

On writ of certiorari to review an order on a motion for appropriate relief entered on 8 August 2013 by Judge Theodore S. Royster, Jr. in Superior Court, Davidson County. On 4 September 2013, the Court of Appeals allowed the State's petition for writ of certiorari to review the order pursuant to N.C.G.S. § 7A-32(c). On 11 March 2014, the Supreme Court on its own initiative certified the case for review prior to determination in the Court of Appeals. Following oral argument on 6 May 2014, the Court on 28 January 2016 ordered supplemental briefing. Heard in the Supreme Court on 12 October 2016.

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

Glenn Gerding, *Appellate Defender*, *by Barbara S. Blackman and Kathryn L. VandenBerg*, *Assistant Appellate Defenders*, *for defendant-appellee.*

PER CURIAM.

For the reasons stated in *State v. Young*, ___ N.C. ___, ___ S.E.2d ___ (Dec. 21, 2016) (No. 80A14), the trial court's order is affirmed, and this case is remanded for resentencing.

AFFIRMED; REMANDED FOR RESENTENCING.

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

TURNER v. THOMAS

[369 N.C. 419 (2016)]

KIRK ALAN TURNER
v.
SPECIAL AGENT GERALD R. THOMAS, IN HIS INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HIS OFFICIAL CAPACITY; SPECIAL AGENT DUANE DEAVER, IN HIS INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HIS OFFICIAL CAPACITY; ROBIN PENDERGRAFT, IN HER INDIVIDUAL CAPACITY AND, IN THE ALTERNATIVE, IN HER OFFICIAL CAPACITY; AND JOHN AND JANE DOE SBI SUPERVISORS, IN THEIR INDIVIDUAL CAPACITIES AND, IN THE ALTERNATIVE, IN THEIR OFFICIAL CAPACITIES

No. 319PA14

Filed 21 December 2016

1. Malicious Prosecution—first-degree murder—SBI blood analyst—acts after indictment

The trial court properly concluded that plaintiff's malicious prosecution claim against defendants should be dismissed under Rule 12(b)(6) because plaintiff failed to state a claim upon which relief could be granted. Based on the facts known to the investigators at the time of the grand jury proceedings, a reasonable and prudent person would believe there was probable cause sufficient to prosecute plaintiff for first-degree murder. The continuation theory was not before the Supreme Court on this appeal.

2. Emotional Distress—first-degree murder prosecution—extreme and outrageous conduct

Plaintiff sufficiently alleged extreme and outrageous conduct in an intentional infliction of emotional distress action against an SBI blood analyst following plaintiff's first-degree murder acquittal where his allegations painted a picture of law enforcement officials deliberately abusing their authority as public officials to manipulate evidence and distort a case for the purpose of reaching a foreordained conclusion of guilt.

3. Emotional Distress—intent—first-degree murder prosecution

In a an intentional infliction of emotional distress action, plaintiff sufficiently alleged intent to inflict emotional distress. While standing trial for first-degree murder is unquestionably stressful for anyone, plaintiff's complaint did not allege that defendants were merely negligent or that their investigation was inadequate; instead, the complaint alleged sinister motives and conduct by defendants specifically aimed toward the improper purpose of wrongfully convicting plaintiff of murder.

4. Emotional Distress—allegations of severe distress—sufficiency of allegations

The plaintiff in an intentional infliction of emotional distress action sufficiently alleged severe emotional distress where the complaint stated that plaintiff's severe emotional distress manifested itself in diagnosable form, including depression, anxiety, loss of sleep, loss of appetite, lack of concentration, difficulty remembering things, feelings of alienation from loved ones, shame, and loss of respect with the community and co-workers, and damages "in excess of $10,000.00."

Justice ERVIN concurring, in part, and concurring in the result, in part.

Justice HUDSON concurring in part, and dissenting in part.

Justice BEASLEY joins in this opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 235 N.C. App. 520, 762 S.E.2d 252 (2014), affirming in part and reversing in part an order entered on 11 April 2013 by Judge Stuart Albright in Superior Court, Forsyth County. Heard in the Supreme Court on 18 May 2015.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John C. Vermitsky, for plaintiff-appellee.

Roy Cooper, Attorney General, by Tammera Hill and J. Joy Strickland, Assistant Attorneys General, for defendant-appellants Thomas and Deaver.

EDMUNDS, Justice.

In this case, we consider the tort liability of law enforcement agents when their criminal investigation went awry. Defendants Thomas and Deaver are or were at the time of the events in question agents of the State Bureau of Investigation (SBI) who participated in the investigation and prosecution of plaintiff for the murder of his wife. The remaining defendants are or were SBI policymakers responsible for supervising SBI agents, including Thomas and Deaver. After plaintiff was acquitted on grounds of self-defense, he filed a civil complaint against defendants alleging numerous claims, including malicious prosecution and

intentional infliction of emotional distress. The trial court granted motions to dismiss filed by all defendants pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, but the Court of Appeals reversed as to these two claims against Thomas and Deaver, reinstating the claims. We conclude that, because probable cause existed for the State to indict plaintiff for first-degree murder, plaintiff's suit for malicious prosecution necessarily would have failed. Accordingly, we reverse the holding of the Court of Appeals as to this claim. However, we agree with the Court of Appeals that, taken in the light most favorable to plaintiff, the complaint alleges elements of intentional infliction of emotional distress sufficient to withstand a motion to dismiss. Consequently, we affirm the holding of the Court of Appeals as to this claim.

On 12 September 2007, Kirk Alan Turner (plaintiff) and his friend Gregory Adam Smithson (Smithson) met at plaintiff's marital residence so Smithson could retrieve some property stored there. While at the home, plaintiff discussed personal matters with his wife Jennifer. During the conversation, Jennifer attacked plaintiff with a large spear, stabbing him multiple times in the thigh and groin area. In reaction, plaintiff pulled a pocketknife from his right front pocket and cut Jennifer twice in the neck, inflicting fatal injuries.

Smithson called 911 and performed CPR on Jennifer until emergency personnel arrived. The Davie County Sheriff's Office responded to the call and requested the assistance of the SBI. SBI Special Agent E.R. Wall arrived and notified SBI Assistant Special Agent in Charge K.A. Cline that a blood spatter expert would be needed to analyze the scene. Several hours later, Agent Wall called Agent Cline again to suggest that a blood spatter expert might not be needed after all because closer examination indicated that the blood spatter most likely was caused by arterial spurting from Jennifer's throat wound.

Two days later, Special Agent Gerald R. Thomas (defendant Thomas) arrived at plaintiff's home to conduct a blood spatter analysis of the scene. Later that day, he conducted a bloodstain analysis of various articles of clothing collected during the course of the investigation, including a gray T-shirt worn by plaintiff during the incident. Before beginning his examinations, defendant Thomas was informed by SBI Special Agent D.J. Smith that Jennifer apparently stabbed plaintiff with a spear and, in response, plaintiff cut her throat with a pocketknife. Defendant Thomas completed his examinations that same day and about two weeks later presented a written report documenting his findings. The report stated that a large bloodstain on plaintiff's gray T-shirt "was consistent with a transfer bloodstain pattern" resulting from a bloody hand being wiped

on the shirt. The report further noted several smaller bloodstains that were consistent with blood dripping onto the shirt.

On 13 December 2007, plaintiff was indicted for the first-degree murder of Jennifer. He was initially denied bond and detained for one month before being released on a bond of one million dollars. Plaintiff had to borrow money from family and friends to post his bond and retain defense counsel.

The following allegations are taken from plaintiff's complaint. After plaintiff was indicted, defendant Thomas met on 15 January 2008 with SBI Special Agent Duane Deaver (defendant Deaver); Captain Jerry Hartman, lead investigator for the Davie County Sheriff's Office; a lawyer from the district attorney's office; and another individual identified in the pleadings only as "Mr. Marks" to discuss both the feasibility of plaintiff's version of the events and their own theory of the case. During this meeting, defendants Thomas and Deaver and their colleagues theorized that plaintiff killed Jennifer for the purpose of carrying out a scheme to avoid a divorce and subsequent equitable distribution proceeding. They additionally theorized that plaintiff stabbed himself with the spear and staged the scene to make the killing look like self-defense.

Plaintiff further alleged that, to prove their theory, defendants Thomas and Deaver needed to show that the bloodstain on plaintiff's T-shirt was not a mirror image stain from plaintiff's hand but was instead a transfer pattern consistent with plaintiff having wiped a knife on the shirt. With the alleged approval of defendant Pendergraft, their supervisor, defendants Thomas and Deaver conducted tests for the purpose of "shor[ing] up" this new theory. Defendant Thomas again took samples from various evidentiary items for a second examination but failed properly to label his work in such a way that someone reviewing the evidence would be able to determine the source of each sample. Defendant Thomas also failed to make any record of the new theory. Defendants Thomas and Deaver videotaped their numerous attempts to duplicate with a knife the blood smear on the plaintiff's T-shirt. After a success, defendant Deaver can be heard on the video saying: "Oh, even better! Holy cow, that was a good one!" and "Beautiful! That's a wrap, baby!"

Plaintiff further alleged that, following the knife smear test and a second review of the evidence, defendant Thomas created a second written report that altered his initial report by replacing the words "consistent with a bloody hand being wiped on the shirt" with "consistent with a pointed object being wiped on the shirt." This second report purported to convey results of the "examination of clothing for bloodstain

patterns on Friday, September 14, 2007," even though the true date of the second examination was 15 January 2008. Defendant Thomas's second report failed to indicate either that it was based on a second review of the evidence or that it was not the original report. Plaintiff alleged that defendants Thomas and Deaver conducted these tests not only to prove their theory that plaintiff did not act in self-defense, but "to maintain the appearance of probable cause where none existed and to obtain a first-degree murder conviction of [plaintiff] despite evidence to the contrary."

In his report, defendant Thomas stated that Captain Hartman told him "he was present when emergency services cut the gray T-shirt from Mr. Turner's body and that the question [sic] blood stain was observed present in its current condition on the shirt." The report further stated that "Hartman said that he took the shirt from Emergency Medical Services and placed it in a secure area [an adjacent room], laying flat on the floor to dry."[1]

At plaintiff's trial for Jennifer's murder, defendant Thomas gave testimony about plaintiff's T-shirt that was consistent with his report. However, Captain Hartman testified that he did not arrive at the crime scene until two hours after plaintiff was taken to the hospital and that he was not present when plaintiff's T-shirt was removed, contradicting defendant Thomas's account. In addition, crime scene photographs showed plaintiff's T-shirt "crumpled on the floor, inside out." Plaintiff's defense expert Stuart James disagreed with defendants' bloodstain analysis, giving opinion testimony that the bloodstain was most likely a "mirror stain" created either when the shirt was folded as emergency medical service technicians cut off the shirt or when they tossed it onto the floor. On 21 August 2009, the jury found plaintiff not guilty of the first-degree murder of his wife, by reason of self-defense.

On 14 November 2011, plaintiff filed his original complaint in Superior Court, Forsyth County. On 4 April 2012, plaintiff voluntarily dismissed that complaint and immediately refiled a complaint making the same substantive allegations against the same defendants. In addition to defendants Thomas and Deaver, plaintiff named former SBI Director Robin Pendergraft and SBI supervisors John and Jane Doe as defendants in their individual and official capacities. Plaintiff's complaint alleged four causes of action against defendants Thomas and Deaver in their individual capacities: (1) intentional infliction of emotional distress, (2) abuse of process, (3) malicious prosecution, and

1. The complaint does not specify whether defendant Thomas included this information in his initial report or added it following his second examination of the evidence.

(4) false imprisonment. The complaint also alleged negligence claims against defendants Pendergraft and John and Jane Doe. Finally, plaintiff alleged federal constitutional claims under 42 U.S.C. § 1983 against all defendants in their individual and official capacities, and claims under the North Carolina Constitution against all defendants in their official capacities.

In response, all defendants filed motions to dismiss all charges. At a hearing on the motions, plaintiff conceded that dismissal was appropriate for the section 1983 claims against all defendants in their official capacities, for the negligence claims, and for all claims against supervisors John and Jane Doe. On 11 April 2013, the trial court granted defendants' motions to dismiss plaintiff's remaining claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.[2]

Plaintiff appealed to the Court of Appeals, which affirmed the trial court's dismissal of all claims against defendants Pendergraft and John and Jane Doe. *Turner v. Thomas*, 235 N.C. App. 520, 524, 762 S.E.2d 252, 257-58 (2014). In addition, that court affirmed the trial court's dismissal of all claims against defendants Thomas and Deaver except for the claims for malicious prosecution, *id.* at 530, 762 S.E.2d at 261, and intentional infliction of emotional distress, *id.* at 537, 762 S.E.2d at 265. The Court of Appeals held that the trial court erred in dismissing these two claims, concluding plaintiff had alleged sufficient elements of both torts to survive a motion to dismiss. *Id.* at 540, 762 S.E.2d at 267. On 22 January 2015, we allowed petitions for discretionary review filed by defendants Thomas and Deaver (hereinafter, defendants).

In determining whether the trial court properly dismissed plaintiff's claims against defendants for malicious prosecution and intentional infliction of emotional distress, we consider "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)). "This Court treats factual allegations in a complaint as true when reviewing a dismissal under Rule 12(b)(6)." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010)

2. It appears from the record that the citation to Rule 12(b)(1), lack of subject matter jurisdiction, refers to constitutional claims brought against defendants. None of those constitutional claims are before us now and the parties have made no arguments relating to jurisdiction. Accordingly, we will address the trial court's Rule 12(b)(6) rulings only.

(citing *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006)).

[1] To establish malicious prosecution, a plaintiff must show that the defendant (1) initiated or participated in the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff. *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) (citations omitted). Defendants contend that the Court of Appeals correctly identified the elements of a malicious prosecution claim but erred in concluding that plaintiff's complaint sufficiently alleged that probable cause was lacking to pursue a first-degree murder case against him. Defendants do not challenge the sufficiency of the evidence as to the other elements of malicious prosecution. Accordingly, we begin by considering plaintiff's allegations that defendants did not have probable cause to initiate criminal proceedings against plaintiff.

"Where the claim is one for malicious prosecution, '[p]robable cause . . . has been properly defined as the existence of such facts and circumstances, known to [the defendant] at the *time*, as would induce a reasonable man *to commence* a prosecution.' " *Best v. Duke Univ.*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994) (alterations in original) (emphasis added) (quoting *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966)). We have consistently held that whether or not probable cause exists is determined at the time prosecution begins. *Williams v. Boylan–Pearce, Inc.*, 69 N.C. App. 315, 318-19, 317 S.E.2d 17, 19 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985); *see also Cook*, 267 N.C. at 170, 147 S.E.2d at 914 ("In order to give a cause of action for malicious prosecution, such prosecution must have been maliciously instituted." (citing *Wingate v. Causey*, 196 N.C. 71, 144 S.E. 530 (1928)); *Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E. 307, 309 (1948) (establishing that malicious prosecution claims hinge on whether a defendant "laid the charge" regardless of facts that should have convinced him of plaintiff's innocence); *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907) ("Probable cause, in cases of this kind, has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." (citation omitted)). The subsequent acquittal of a defendant does not, as a matter of law, automatically negate the existence of probable cause at the time prosecution was commenced. *Bell v. Pearcy*, 33 N.C. (11 Ired.) 233, 234 (1850).

The grand jury indicted plaintiff for first-degree murder on 13 December 2007. Plaintiff argues correctly that a grand jury's action

in returning an indictment is only prima facie evidence of probable cause and that, as a result, the return of an indictment does not as a matter of law bar a later claim for malicious prosecution. *See*, *e.g.*, *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948) (holding that even though a magistrate initially found probable cause, the defendant in a malicious prosecution suit was not entitled to dismissal as a matter of law after the suit concluded in the plaintiff's favor). However, cases cited to us by both parties and referenced in the opinion of the Court of Appeals involve conduct by defendants that occurred *before* the return of an indictment. *See Williams v. Kuppenheimer Mfg. Co.*, 105 N.C. App. 198, 201, 412 S.E.2d 897, 900 (1992) (concluding that criminal prosecution of the plaintiff would have been unlikely if the defendant had not provided virtually all the evidence to investigators prior to indictment); *see also Jones v. Gwynne*, 312 N.C. 393, 403, 323 S.E.2d 9, 15 (1984) (noting that the malicious prosecution claim was based on the issuance of arrest warrants that the prosecutor voluntarily dismissed, not on subsequent grand jury indictments that initiated new proceedings against the defendant); *Stanford v. Grocery Co.*, 143 N.C. 419, 425, 55 S.E. 815, 817 (1906) (explaining that the action triggering the malicious prosecution claim was "taking out the warrant and causing the plaintiff's arrest"). Here, in contrast, plaintiff's suit focuses on actions defendants took *after* the grand jury returned indictments against him. Accordingly, to determine whether probable cause existed, we must consider the evidence that was available to the investigators and presented to the grand jury in December 2007.

That evidence indicated that plaintiff inflicted two lethal slashes to his wife's neck, resulting in her death. This evidence was supported by defendants' original forensic report, which stated that the bloodstain on plaintiff's T-shirt was consistent with a bloody hand being wiped on the shirt. Based on this and other evidence, the grand jury returned an indictment for first-degree murder. This independent determination by the grand jury established prima facie the existence of probable cause. *See Stanford*, 143 N.C. at 426, 55 S.E. at 817. Although plaintiff was subsequently acquitted on the basis of self-defense, that defense was presented at trial and does not necessarily negate the existence of probable cause at the time the case was brought to the grand jury. Plaintiff's complaint alleges that defendants failed to investigate the incident properly and generated incorrect and inaccurate information for presentation to the grand jury. However, the critical actions complained of took place after the indictment was returned. Based on the facts known to the investigators at the time of the grand jury proceedings, we are satisfied

that a reasonable and prudent person would believe there was probable cause sufficient to prosecute plaintiff for first-degree murder.

The concurring opinions argue that this Court should recognize that a malicious prosecution case can arise after a magistrate or grand jury finds probable cause if that probable cause later evaporates but the prosecution nevertheless continues in bad faith (the "continuation theory"). We need not address that theory here for, assuming arguendo that this Court would adopt it under the proper circumstances, it is not before us now. Plaintiff's complaint is not that the original probable cause dissipated. Instead, the gravamen of plaintiff's argument is that probable cause never existed and that defendants' investigation following indictment was corrupt and shoddy. However, we have determined that the grand jury correctly found probable cause, and nothing in the subsequent investigation revealed facts that disproved that probable cause. As a result, we are not faced with facts that invoke the continuation theory.

Therefore, the trial court properly concluded that plaintiff's malicious prosecution claim against defendants should be dismissed under Rule 12(b)(6) because plaintiff failed to state a claim upon which relief may be granted. We reverse the holding of the Court of Appeals to the contrary.

We next address plaintiff's claim of intentional infliction of emotional distress. Elements of this tort are "(1) extreme and outrageous conduct [by the defendant], (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The tort also may be established when a "defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Id.* at 452, 276 S.E.2d at 335. Conduct constituting this cause of action may be found in "an abuse by the actor of a position . . . which gives him . . . power to affect" the interests of another. Restatement (Second) of Torts § 46 cmt. e (Am. Law Inst. 1965). We have held that extreme and outrageous conduct is that which "exceeds all bounds of decency tolerated by society." *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988) (citing *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), *abrogated in part by Dickens*, 302 N.C. 437, 276 S.E.2d 325), and is "regarded as atrocious, and utterly intolerable in a civilized community," *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (1985). Our state has set a "high threshold" to satisfy this element. *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000). Foreseeability of injury, while not an

element of the tort, is a factor to consider in assessing the outrageousness of a defendant's conduct. *West*, 321 N.C. at 705, 365 S.E.2d at 625 (citing *Dickens*, 302 N.C. 437, 276 S.E.2d 325).

[2] We begin by considering the first element of the tort, whether defendants' conduct as alleged was extreme and outrageous. According to plaintiff, defendants concocted a motive for plaintiff to murder his wife and a theory to explain how that murder was carried out. Defendants then made a calculated decision to conduct and repeat experiments until they achieved a bloodstain pattern that supported their theory. When they achieved results they deemed satisfactory, defendant Thomas then rewrote the conclusion of his earlier blood spatter and bloodstain report without stating that he was presenting a new or amended version of the original report. To the contrary, defendant Thomas's report indicated the conclusion reached resulted from the original analysis of the evidence conducted on 14 September 2007.

Plaintiff's allegations do not portray agents vigorously pursuing an investigation with a determination to find the truth, a practice law-abiding citizens not only endorse but expect. Instead, plaintiff's allegations paint a picture of law enforcement officials deliberately abusing their authority as public officials to manipulate evidence and distort a case for the purpose of reaching a foreordained conclusion of guilt. We do not doubt that plaintiff's complaint alleged extreme and outrageous conduct by these defendants sufficient to withstand a Rule 12(b)(6) motion to dismiss.

[3] As to the second element of the tort, plaintiff alleged that defendants acted with intent to inflict emotional distress. While standing trial for first-degree murder is unquestionably stressful for anyone, plaintiff's complaint does not allege that defendants were merely negligent or that their investigation was inadequate. Instead, the complaint alleges sinister motives and conduct by defendants specifically aimed toward the improper purpose of wrongfully convicting plaintiff of murder. *See Needham v. Price*, ___ N.C. ___, 780 S.E.2d 549, 551 (2015) (holding that the "defendant's conduct did not rise to the level of willful and malicious conduct" in the context of parent-child immunity because the evidence did not show the defendant's "conduct was directed towards the [injured children]"). Specifically, the complaint, which we read in the light most favorable to plaintiff, alleges that defendants "wantonly and maliciously conducted unscientific tests to 'shore up' " their theory of the case, "wantonly failed to label [their] work properly," altered and manipulated evidence, and acted "to maintain the appearance of probable cause where none existed and to obtain a first-degree murder conviction of

[plaintiff] despite evidence to the contrary." These allegations do not describe an investigation that was incompetent or incomplete, or one that skeptically explored the validity of plaintiff's self-defense claim. Instead, the complaint contends that defendants knew the results they wanted before they began and disregarded all evidence to the contrary. That plaintiff would suffer mental anguish as a result of defendants' conduct is readily foreseeable. Moreover, plaintiff's allegations indicated that defendants were recklessly indifferent to the consequences of their actions. Accordingly, plaintiff's allegation of the intent element of his claim is sufficient to survive a Rule 12(b)(6) motion to dismiss.

[4] Finally, we consider whether plaintiff has sufficiently alleged that he suffered severe emotional distress. The complaint states, among other things, that severe emotional distress manifested itself "in diagnosable form . . . including, *inter alia*: a. Depression; b. Anxiety; c. Loss of sleep; d. Loss of appetite; e. Lack of concentration; f. Difficulty remembering things; g. Feeling alienated from loved ones; h. Shame; and i. Loss of respect with the community and co-workers." Plaintiff further alleged that defendants' conduct caused him damages "in excess of $10,000.00." We find that these are sufficient allegations of severe emotional distress.

Taking all of plaintiff's allegations in the light most favorable to him, as we must at the pleading stage, we hold plaintiff has alleged elements of intentional infliction of emotional distress sufficient to withstand a motion to dismiss made pursuant to Rule 12(b)(6). As this case moves forward to summary judgment or trial, plaintiff will have to prove that his allegations are true, including that defendants' conduct amounted to more than substandard police work and was, instead, directed at plaintiff for an improper purpose. Accordingly, we affirm the decision of the Court of Appeals holding the trial court erred in dismissing this claim. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings consistent with this opinion.

REVERSED IN PART; AFFIRMED IN PART AND REMANDED.

Justice ERVIN concurring, in part, and concurring in the result, in part.

Although I concur in the Court's decision with respect to plaintiff's intentional infliction of emotional distress claim and in the Court's determination that plaintiff has failed to sufficiently state a malicious prosecution claim in his complaint, I am unable to agree with the logic that the Court has employed in upholding the dismissal of plaintiff's malicious

prosecution claim. As a result, I concur in the Court's opinion, in part, and concur in the result reached by the Court, in part.

In determining that plaintiff's complaint fails to state a malicious prosecution claim, the Court begins by stating that "[w]hether or not probable cause exists is determined at the time prosecution begins."[1] After noting that "plaintiff's suit focuses on actions defendants took *after* the grand jury returned indictments against him" and stating that, "to determine whether probable cause existed, we must consider the evidence that was available to the investigators and presented to the grand jury in December 2007," the Court points out that the fact that the Davie County grand jury returned a bill of indictment charging plaintiff with first-degree murder in connection with the death of his wife "established prima facie the existence of probable cause." In addition, after acknowledging that plaintiff has alleged "that defendants failed to investigate the incident properly and generated incorrect and inaccurate information for presentation to the grand jury," the Court notes that "the critical actions complained of took place after the indictment was returned" and holds that, "[b]ased on the facts known to the investigators at the time of the grand jury proceedings," "a reasonable and prudent person would believe there was probable cause sufficient to prosecute plaintiff for first-degree murder."

The Court's focus upon the necessity for plaintiff to establish the absence of probable cause at the time that criminal charges were initially lodged against him takes an unduly narrow view of the scope of the malicious prosecution claim that plaintiff has attempted to assert in his complaint. Simply put, the Court reads plaintiff's malicious prosecution claim as being focused entirely upon the fact that he was indicted for murdering his wife. I do not, however, believe that plaintiff's claim is limited in the manner described by the Court.[2] A significant component

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1. Although the majority relies on *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 318-19, 317 S.E.2d 17, 19 (1984), *aff'd per curiam on other grounds*, 313 N.C. 321, 327 S.E.2d 870 (1985), in support of this proposition, I do not view the opinion in that case as holding that the issue of probable cause in a malicious prosecution case must be resolved based solely upon an analysis of the facts in existence during a window of time between the commission of the underlying criminal act and the point at which the prosecution of the plaintiff began. Moreover, the only issue before this Court in that matter, which came to us by way of a partial dissenting opinion, related to the availability of punitive damages rather than the sufficiency of the plaintiff's showing of a want of probable cause. *Id.* at 322-23, 317 S.E.2d at 21-22 (Johnson, J., concurring in part and dissenting in part).

2. In fact, a careful study of the brief that plaintiff filed before this Court causes me to question the extent to which plaintiff attempted to state a malicious prosecution claim against either defendant arising from the Davie County grand jury's initial decision to charge him with murdering his wife. However, I do not believe that we need to make a

of plaintiff's allegations against defendants[3] consists of a description of their conduct in concocting and performing a supplemental blood smear "test" for the purpose of producing results that validated the State's decision to proceed against plaintiff. According to plaintiff's complaint, "[t]his evidence was crucial to maintain probable cause for a first-degree murder charge," with the underlying "test" having been conducted in order "to maintain the appearance of probable cause where none existed." In addition, plaintiff has alleged that both defendants should be found liable to plaintiff for malicious prosecution on the grounds that they "participated in and caused the institution of criminal proceedings against" plaintiff, with their misconduct having included, among other things, a failure "to properly investigate the circumstances of" the death of plaintiff's wife and plaintiff's "claim of self-defense"; the inclusion of "false and misleading information in investigative reports"; and a failure to "remain fair, neutral and truthful prior to and after the institution of criminal proceedings against" plaintiff. As a result, I am inclined to believe that plaintiff seeks to obtain a malicious prosecution recovery from defendants based upon claims that criminal charges were both initially instituted against him and continued against him without probable cause and cannot, for that reason, agree with the Court's decision to limit its analysis to a determination of the sufficiency of the allegations that defendants participated in the institution of criminal charges against plaintiff despite the absence of probable cause to believe that he was guilty of the offense with which he was charged and conclude, for that reason, that we must evaluate the validity of plaintiff's effort to plead a "continuation" claim in order to fully resolve the issues that have been properly presented for our consideration in this case.

"To make out a case of malicious prosecution [based upon a prior criminal prosecution,] the plaintiff must allege and prove that the defendant instituted, or procured, or participated in, a criminal prosecution against him maliciously, without probable cause, which ended in

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definitive determination of the exact nature of the malicious prosecution claim that plaintiff has attempted to state in his complaint given his failure to allege a viable malicious prosecution claim against defendants on the basis of either of the two theories discussed in the text of this separate opinion.

3. Special Agent Deaver did not become involved in the prosecution of plaintiff until sometime after the Davie County grand jury charged plaintiff with murdering his wife. For that reason, the fact that plaintiff sought to obtain a malicious prosecution recovery against Special Agent Deaver clearly indicates that plaintiff's claim rested upon more than an assertion that he was initially indicted for murdering his wife in the absence of probable cause.

failure." *Cook v. Lanier*, 267 N.C. 166, 169, 147 S.E.2d 910, 913 (1966) (citing *Greer v. Skyway Broad. Co.*, 256 N.C. 382, 124 S.E.2d 98 (1962); *Carson v. Doggett*, 231 N.C. 629, 58 S.E.2d 609 (1950); and *Dickerson v. Atl. Ref. Co.*, 201 N.C. 90, 159 S.E. 446 (1931)). Consistently with this Court's reference to the possibility of malicious prosecution liability for "participation" in a wrong prosecution, a divided panel of the Court of Appeals upheld the sufficiency of the evidence to support a trial court judgment awarding the plaintiff $12,500 in damages in a malicious prosecution case in which the defendant continued to pursue a criminal citation charging the plaintiff with shoplifting several packs of cigarettes despite the fact that the plaintiff, on the day after the issuance of the shoplifting citation, presented the defendant with a receipt indicating that he had purchased the cigarettes that he had been charged with concealing. *Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 252-55, 352 S.E.2d 256, 256-58 (1987). Although then-Judge Parker dissented from the court's decision on the grounds that, "[a]t the critical time, i.e., the moment at which [the] plaintiff was apprehended in [the] defendant's store, the undisputed evidence" tended to support a determination that the plaintiff had shoplifted the cigarettes in question, *id.* at 256, 352 S.E.2d at 258 (Parker, J., dissenting), and that "[t]he pertinent inquiry is not whether [the] defendant's store manager should have believed [the] plaintiff, but rather whether under the circumstances existing at the time the criminal action was instituted, the store manager acted as a person of reasonable prudence in concluding that the crime charged had been committed," *id.* at 256, 352 S.E.2d at 259, this Court was apparently never asked to examine the correctness of the majority's decision. As a result, the Court of Appeals' determination that a malicious prosecution action could properly be maintained in the event that the plaintiff demonstrated, based upon events occurring after the institution of the underlying criminal case, that the defendant persisted in pursuing a prosecution that had become groundless, has been an established and unquestioned part of North Carolina malicious prosecution jurisprudence since 1987.[4] *See* 2 N.C.P.I. – Civ. 801.00 (gen. civ. vol. June 2014) ("Malicious Prosecution–Criminal Proceeding"), at 1 & n.2 (allowing a finding of liability in the event that the jury determines, among other things, that

4. Before the trial court, plaintiff's counsel argued that defendants lacked "a very good answer" for *Allison*, which he described as holding that "[m]alicious prosecution is either the initiation of a criminal proceeding without probable cause or the continuation of a proceeding when it is discovered that probable case no longer exists," and stated that plaintiff's complaint "clearly alleged" a claim stemming from defendants' involvement in the continuation of the criminal charges that had earlier been lodged against plaintiff in the absence of the necessary probable cause.

the defendant "[caused a criminal proceeding to be continued] against the plaintiff without probable cause" (citing *Allison*, 84 N.C. App. at 254, 352 S.E.2d at 257) (majority opinion)));[5] *see also* Charles E. Day & Mark W. Morris, *North Carolina Law of Torts* § 9.40, at 105 (3d ed. 2012) (stating that, in light of *Allison*, "it can be suggested that a continuation of prosecution after probable cause is known not to exist may be a basis for a malicious prosecution action, notwithstanding that probable cause might have existed when the prosecution was initiated"); 1 William S. Haynes, *North Carolina Tort Law* § 14-3(A), at 513-14 (1989) (stating that "[t]he gist of an action for malicious prosecution is the wrongful initiation, encouragement or continuation, of a prior valid process or proceeding" (citation omitted), and that "[a] defendant may also be found liable for the tort of malicious prosecution, notwithstanding the fact that he initially had probable cause to instigate a criminal prosecution, if he afterwards secures knowledge that the charge is not well founded and thereafter fails to intervene for the purpose of having the criminal prosecution discontinued or to do all that is reasonably possible to do to sever his connection with the prosecution").

Aside from the well-established nature of the "continuation" theory for purposes of North Carolina law, the logic underlying that theory has been consistently recognized by leading encyclopedias and treatises addressing American tort law. *See* Restatement (Second) of Torts § 655 (Am. Law. Inst. 1977) (stating that "[a] private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings"); *id.* § 655 cmt. b (pointing out that "[t]he rule stated in this Section applies when the defendant has himself initiated criminal proceedings against another or procured their institution, upon probable cause and for a proper purpose, and thereafter takes an active part in pressing the proceedings after he has discovered that there is no probable cause for them," and "applies also when the proceedings are initiated by a third person, and the defendant, knowing that there is no probable cause for them, thereafter takes an active part in procuring their continuation"); 52 Am. Jur. 2d *Malicious Prosecution* § 21, at 207-08 (2011) (stating that a malicious prosecution action can be maintained in the event that "the

5. Although the "Pattern Jury Instructions are not binding on this Court," *Stark v. Ford Motor Co.*, 365 N.C. 468, 478, 723 S.E.2d 753, 760 (2012) (citation omitted), they do express " 'the long-standing, published understanding' of . . . case law and statutes," *State v. Walston*, 367 N.C. 721, 731, 766 S.E.2d 312, 319 (2014) (quoting *Stark*, 365 N.C. at 478, 723 S.E.2d at 760).

defendant instigated or encouraged, commenced or continued, initiated or procured, or caused or assisted in causing the prosecution complained of, or advised, aided, cooperated, or assisted in the prosecution of the case" and that "[a] person who had no part in the commencement of the action, but who participated in it at a later time, may be held liable for malicious prosecution" (footnotes omitted)); *id.* § 26, at 211-12 (stating that "[a] person who plays an active role in continuing an unfounded criminal proceeding is liable for malicious prosecution, and even if there was probable cause for the commencement of an action, if the person afterwards acquires the means of asserting the charge was not well founded, his or her failure to intervene and have the prosecution discontinued or to sever his or her connection with it subjects that person to malicious prosecution liability" (footnotes omitted)); *id.* § 54, at 236 (stating that, although "the critical time" in some jurisdictions "for determining whether probable cause existed . . . is when the prosecution was initiated or began," in other jurisdictions, "liability for malicious prosecution may arise, even though the lawsuit was commenced with probable cause, if the suit is prosecuted after it later appears there is no probable cause" (citations omitted)); 54 C.J.S. *Malicious Prosecution* § 13, at 747 (2010) (stating that "[a] cause of action for malicious prosecution is not limited to the situation where the present defendant initiated the prior proceeding, and one who plays an active role in continuing an unfounded criminal proceeding when otherwise it would have been terminated may be liable for malicious prosecution" (footnotes omitted)); *id.* § 18, at 751 (stating that, even if "the defendant is granted immunity for complying with a statute governing disclosure of information to a prosecutorial officer, the defendant may nevertheless be liable for malicious prosecution where he or she fails to request termination of the proceeding after learning facts regarding [the] accused's innocence subsequent to swearing out a complaint leading to the accused's arrest" (citation omitted)); *id.* § 29, at 762 (stating that "[c]ontinuation of a prosecution in the face of facts that undermine probable cause can support a malicious prosecution claim" (citation omitted)); 3 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 587, at 389 (2d ed. 2011) (stating that "[m]alicious prosecution can be established only if [ ] the defendant has instigated or continued to pursue a criminal proceeding"); *id.* § 588, at 396 (stating that, "[w]hen liability is based upon continuance rather than initiation of the prosecution, probable cause must be judged on appearances at the time the accuser acts to continue the prosecution, as where he refuses to withdraw his complaint even after he has learned of the accused's innocence" (citation omitted)); 1 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 4.3, at 467-68 (3d ed.

2006) (stating that "continuing to prosecute [criminal] proceedings maliciously after learning of their groundless nature will result in liability, although they had been begun in good faith and with probable cause," since "it is as much a wrong against the victim, and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such proceedings in the first place" (citations omitted)); *id.* § 4.5, at 481 (stating that "only facts known at the time the defendant initiated the prosecution or wrongfully continued an action are pertinent" in the probable cause determination (citations omitted)); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 872 (5th ed. 1984) (stating that "[t]he defendant may be liable either for initiating or for continuing a criminal prosecution without probable cause" (footnote omitted)).[6] As a result, a wide variety of recognized secondary authorities in the field of tort law uphold the validity of the "continuation" theory adopted in *Allison*.

An analysis of the reported decisions concerning this issue clearly indicates that the vast majority of American jurisdictions that have considered the viability of the "continuation" theory have recognized its existence. As the Supreme Court of California stated in *Zamos v. Stroud*, 32 Cal. 4th 958, 87 P.3d 802 (2004), "the rule in every other state that ha[d] addressed the question [at the time the Supreme Court of California rendered its decision was], and in many states has long been, that the tort of malicious prosecution *does* include continuing to prosecute a lawsuit discovered to lack probable cause," *id.* at 966, 87 P.3d at 807, that "[t]he Restatement's position on this question has been adopted or was anticipated by the courts of a substantial number of states," *id.* at 967, 87 P.3d at 808 (citations omitted), and that the defendants had not presented, nor had the Court as of that point found, "a single state that has declined to adopt the Restatement's view in this regard," *id.* at 967, 87 P.3d at 808. The states noted in *Zamos* include Alabama, *Laney v. Glidden Co.*, 239 Ala. 396, 399, 194 So. 849, 851 (1940) (stating that "[a] suit for malicious prosecution may lie, not only for the commencement of the original proceeding, but for its continuance as well" (citations omitted)); Arizona, *Smith v. Lucia*, 173 Ariz. 290, 294, 295, 842 P.2d 1303,

6. To be sure, the authors of the same treatise also state that "[p]robable cause is judged by appearances to the defendant at the time he initiates prosecution, not by facts discovered later," with such subsequently discovered facts being "relevant only to show the entirely different defense based on the accused's guilt in fact." *Id.* § 119, at 876 (footnote omitted). However, I do not believe that this statement undercuts the argument advanced in the text of this separate opinion given that, when read literally, it only applies to situations involving the initiation of the underlying criminal proceeding rather than to its continuation.

1307, 1308 (Ct. App. 1992) (defining the tort of malicious prosecution without making any reference to the continuation rule, noting that "comment c to Restatement [Second of Torts] section 674 recognizes that an attorney who has properly commenced a civil action may be liable for continuing it without probable cause" and stating that "that rule is not applicable here" for the reasons stated in the court's opinion); Arkansas, *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 368, 922 S.W.2d 327, 331 (1996) (stating that "the essential elements of malicious prosecution are: '(1) [a] proceeding instituted or continued by the defendant against the plaintiff[;] (2) [t]ermination of the proceeding in favor of the plaintiff[;] (3) [a]bsence of probable cause for the proceedings[;] (4) [m]alice on the part of the defendant[;] (5) [d]amages' " (alterations in original) (quoting *Farm Serv. Coop. v. Goshen Farms*, 267 Ark. 324, 331-32, 590 S.W.2d 861, 865 (1979))); Colorado, *Slee v. Simpson*, 91 Colo. 461, 465, 15 P.2d 1084, 1085 (1932) (stating that "one of the essential elements of a malicious prosecution is the commencement or continuance of an original criminal or civil judicial proceeding" (citations omitted)); Idaho, *Badell v. Beeks*, 115 Idaho 101, 102-04, 765 P.2d 126, 127-29 (1988) (defining the tort of malicious prosecution without making any reference to the continuation rule, noting that "the Restatement [Second of Torts] speaks in terms of initiating *or continuing* the proceeding" and "affirm[ing] the trial court's ruling that [the defendant] possessed probable cause, as a matter of law, to initiate and carry forward the malpractice action against" the plaintiff (citation omitted)); Iowa, *Wilson v. Hayes*, 464 N.W.2d 250, 259-61, 264 (Iowa 1990) (defining the tort of malicious prosecution without making any reference to the continuation rule, and stating that, "[t]o subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based" (quoting Restatement (Second) of Torts § 676); that "under the Restatement rule as expressed in comment d [to section 674], an attorney would only be liable if the attorney knowingly initiated or continued a suit for a clearly improper purpose"; and that "[e]ven though a lawsuit is commenced with probable cause, if the suit is prosecuted after it later appears there is in fact no probable cause, liability may arise" (citation omitted)); Kansas, *Nelson v. Miller*, 227 Kan. 271, 276, 607 P.2d 438, 443 (1980) (stating that "[t]o maintain an action for malicious prosecution of a civil action the plaintiff must prove," among other things, "[t]hat the defendant initiated, continued, or procured civil [proceedings] against the plaintiff," with it being "sufficient if it is shown that the defendant continued or procured the filing of the action" on the grounds that "[a]

person may also be held liable for the wrongful continuance of the original proceeding" (citations omitted)); Mississippi, *Benjamin v. Hooper Elec. Supply Co.*, 568 So. 2d 1182, 1188, 1189 n.6 (Miss. 1990) (stating that the tort of malicious prosecution requires proof, among other things, of the "institution [or continuation] of a criminal proceeding" since, "[w]ithout doubt, it is as much a wrong against the victim and as socially or morally unjustifiable to take an active part in a prosecution after knowledge that there is no factual foundation for it, as to instigate such proceedings in the first place" (first alteration in original) (citations omitted)); New York, *Broughton v. State*, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 94 (stating that "[t]he elements of the tort of malicious prosecution" include "the commencement or continuation of a criminal proceeding by the defendant against the plaintiff" (citation omitted)), *cert. denied*, 423 U.S. 929, 46 L. Ed. 2d 257 (1975); Ohio, *Siegel v. O.M. Scott & Sons Co.*, 73 Ohio App. 347, 351, 56 N.E.2d 345, 346-47 (1943) (stating that "[t]he general rule is that to maintain an action for malicious prosecution," the plaintiff must show, among other things, "[t]he institution or continuation of original judicial proceedings, either civil or criminal," with "the continuation of an original judicial proceeding . . . after acquiring means of ascertaining that the charge is not well founded" being sufficient to support a finding of liability (citations omitted)); Oregon, *Wroten v. Lenske*, 114 Or. App. 305, 308-09, 835 P.2d 931, 933-34 (defining the tort of malicious prosecution without making any reference to the continuation rule and holding that the trial court had erred by directing a verdict in favor of the defendant on the grounds that "there is evidence that *continuation* of the action was without probable cause" given that, after "plaintiff's counsel wrote to defendant and informed him that plaintiff's letter had not been published, a question was raised whether a reasonable person would have investigated to verify the accuracy of that statement" (footnote omitted) and that "[t]here is an issue of fact regarding whether defendant should have investigated before continuing with the action" (citing *Lampos v. Bazar, Inc.*, 270 Or. 256, 268, 527 P.2d 376, 381-82 (1974) (en banc), and Restatement (Second) of Torts § 674 cmt. c (1977))), *rev. denied*, 314 Or. 574, 840 P.2d 1296 (1992); Pennsylvania, *Wenger v. Phillips*, 195 Pa. 214, 219, 45 A. 927, 927 (Pa. 1900) (stating that the fact "[t]hat the binding over was after the prosecution was barred by the statute of limitations did not make the defendant liable unless it appeared that he had persisted in the prosecution after he knew it was barred"); and Washington, *Banks v. Nordstrom, Inc.*, 57 Wash. App. 251, 255, 787 P.2d 953, 956 (stating that "to maintain an action for malicious prosecution, the plaintiff must establish," among other things, " 'that the prosecution claimed to have

been malicious was instituted or continued by the defendant' " (quoting *Peasley v. Puget Sound Tug & Barge Co.* 13 Wash. 2d 485, 497, 125 P.2d 681, 687 (1942))), *rev. denied*, 115 Wash. 2d 1008, 797 P.2d 511 (1990). In addition to the decisions from the thirteen states referenced in *Zamos*, the continuation rule also appears to have been recognized in Alaska, *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007) (stating that "[t]he following elements are required to maintain a cause of action for the tort of malicious prosecution" and include, but are not limited to, " 'a criminal proceeding instituted or continued by the defendant against the plaintiff' " (citations omitted)); Florida, *Fischer v. Debrincat*, 169 So. 3d 1204, 1206 (Fla. Dist. Ct. App. 2015) (stating that "[t]o prevail in a malicious prosecution action, a plaintiff must establish," among other things, that " 'an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued' " (quoting *Alamo Rent–A–Car, Inc. v. Mancus*i, 632 So. 2d 1352, 1355 (Fla. 1994)));[7] Georgia, *Horne v. J.H. Harvey Co.*, 274 Ga. App. 444, 446, 448, 617 S.E.2d 648, 650, 652 (2005) (defining the tort of malicious prosecution without making any reference to the continuation rule, stating that "even if a defendant has probable cause to initiate a criminal proceeding, if afterward, the defendant 'acquired knowledge, or the reasonable means of knowledge, that the charge was not well founded, his continuation of the prosecution is evidence of the want of probable cause, requiring that the question be submitted to the jury' " (quoting *Fuller v. Jennings*, 213 Ga. App. 773, 776-77, 445 S.E.2d 796, 799, *cert. denied*, Ga. LEXIS 1114 (Ga. Oct. 17, 1994)), and holding that while the defendant "could have formed a reasonable belief that probable cause existed to initiate the prosecution . . . an issue arises as to whether [the defendant] could reasonably believe that probable cause existed to pursue the prosecution"); Hawaii, *Arquette v. State*, 128 Haw. 423, 433, 290 P.3d 493, 503 (2012) (holding that "the tort of the continuation of a malicious prosecution is not an unwarranted enlargement of the current doctrine but, rather, logically stems from the policies underlying the tort"); Illinois, *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 11, 20 N.E.3d 775, 780 (2014) (stating that "[t]he elements of a cause of action for malicious prosecution" include "the commencement or continuance by the defendant of an original judicial proceeding against the plaintiff" (citing *Miller v. Rosenberg*, 196 Ill. 2d 50, 58, 749 N.E.2d 946, 952 (2001))); Maine, *Trask v. Devlin*, 2002 ME 10, ¶ 11, 788 A.2d 179, 182 (2002) (stating that "[t]o prevail in a malicious prosecution action, a plaintiff must prove, by a preponderance

7. The Supreme Court of Florida has "accepted jurisdiction" over *Debrincat*, but has not yet decided it. 182 So. 3d 631 (2015).

of the evidence, that," among other things, "[t]he defendant initiated, procured or continued a criminal action without probable cause" (citations omitted)); Maryland, *Safeway Stores, Inc. v. Barrack*, 210 Md. 168, 173, 122 A.2d 457, 460 (1956) (stating that "[t]he necessary elements of a case for malicious prosecution of a criminal charge are well established" and include, among other things, that there was "a criminal proceeding instituted or continued by the defendant against the plaintiff" (citations omitted)), *abrogated on other grounds by Montgomery Ward v. Wilson*, 339 Md. 701, 732-36, 664 A.2d 916, 931-33 (1995); Michigan, *Fort Wayne Mortg. Co. v. Carletos*, 95 Mich. App. 752, 757, 291 N.W.2d 193, 195 (1980) (stating that "[t]he elements of malicious prosecution are," among other things, " 'a criminal proceeding instituted or continued by the defendant against the plaintiff' " (quoting *Wilson v. Yono*, 65 Mich. App. 441, 443, 237 N.W.2d 494, 496 (1975))); Montana, *Plouffe v. Mont. Dep't of Pub. Health & Human Servs.*, 2002 MT 64, ¶ 16, 309 Mont. 184, 190, 45 P.3d 10, 14 (2002) (stating that, "[i]n a civil action for malicious prosecution, the plaintiff's burden at trial is to introduce proof sufficient to allow reasonable jurors to find each of the six following elements," including that "a judicial proceeding was commenced and prosecuted against the plaintiff" and that "the defendant was responsible for instigating, prosecuting or continuing such proceeding" (citations omitted)); Nebraska, *McKinney v. Okoye*, 287 Neb. 261, 271-72, 842 N.W.2d 581, 591 (2014) (stating that "[i]n a malicious prosecution case, the conjunctive elements for the plaintiff to establish" include, among other things, "the commencement or prosecution of the proceeding against the plaintiff" (citation omitted)); Nevada, *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879-80 (2002) (stating that "[a] malicious prosecution claim requires that the defendant initiated, procured the institution of, or actively participated in the continuation of a criminal proceeding against the plaintiff" (citations omitted)); New Jersey, *LoBiondo v. Schwartz*, 199 N.J. 62, 89, 90, 970 A.2d 1007, 1022 (2009) (stating that "[m]alicious prosecution provides a remedy for harm caused by the institution or continuation of a criminal action that is baseless" before stating the elements of the tort without mentioning the continuation rule (citation omitted));[8] North Dakota, *Richmond v. Haney*, 480 N.W.2d 751, 755 (N.D. 1992) (stating

8. In its earlier decision in *Lind v. Schmid*, the New Jersey Supreme Court defined the tort of malicious prosecution without making any mention of the continuation rule. 67 N.J. 255, 262, 337 A.2d 365, 368 (1975). Aside from the fact that *Lind* preceded *LoBiondo*, nothing in *Lind* expressly rejects the validity of the continuation rule and some of the Court's language may tend to show its validity. *Lind*, 67 N.J. at 263, 337 A.2d at 368 (stating that "[t]he fallacy of this rationale is that it fails to recognize that the concept of probable cause in malicious prosecution is not fixed from one frame of reference"). As a result, it appears to me that New Jersey does, in fact, accept the validity of the continuation rule.

that "[i]n order to maintain an action for malicious prosecution one must establish," among other things, that " '[a] criminal proceeding [was] instituted or continued by the defendant against the plaintiff' " (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119, at 871 (5th ed. 1984))); Oklahoma, *Empire Oil & Ref. Co. v. Williams*, 1938 OK 654, ¶ 5, 184 Okla. 172, 173, 86 P.2d 291, 292 (1938) (stating that "[t]he essential elements in a cause of action for malicious prosecution" include, but are not limited to, "[t]he commencement or continuance of an original criminal or civil proceeding" (citing *Sawyer v. Shick*, 1911 OK 475, ¶ 4, 30 Okla. 353, 354, 120 P. 581, 582 (1911)));[9] South Carolina, *Eaves v. Broad River Elec. Coop.*, 277 S.C. 475, 477, 289 S.E.2d 414, 415 (1982) (stating that "[t]o maintain an action for malicious prosecution, a plaintiff must establish," among other things, "the institution or continuation of original judicial proceedings . . . by or at the instance of the defendant" (citation omitted)); Tennessee, *Pera v. Kroger Co.*, 674 S.W.2d 715, 722 (Tenn. 1984) (stating that "[i]t is well settled in the law of torts that even though one has probable cause to initiate criminal charges, there can be liability for the malicious continuation of a criminal proceeding");[10] Texas, *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203,

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9. In two decisions, the Oklahoma Supreme Court omitted any reference to the continuation rule in stating the elements of the tort of malicious prosecution. *Greenberg v. Wolfberg*, 1994 OK 147, ¶¶ 13-15, 890 P.2d 895, 901-92 (1994); *Imo Oil & Gas Co. v. Knox*, 1931 OK 440, ¶ 9, 154 Okla. 100, 102, 6 P.2d 1062, 1064 (1931). I do not believe that a failure to expressly incorporate the continuation rule into the definition of the tort of malicious prosecution in those cases can be understood as a refusal to recognize the existence of the continuation rule. *Greenberg*, 1994 OK 147, ¶ 14 n.22, 890 P.2d at 902 n.22, expressly relies upon *Sawyer v. Shick*, in which the continuation rule is expressly recognized, 1911 OK 475, ¶ 4, 30 Okla. 353, 354, 120 P. 581, 582 (1911). Similarly, the omission of any reference to the continuation rule in *Imo Oil*, 1931 OK 440, ¶ 9, 154 Okla. at 102, 6 P.2d at 1064, appears to be an anomaly given that one of the two cases cited in support of the definition of malicious prosecution utilized in that decision incorporates the continuation rule, *Sawyer*, 1911 OK 475, ¶ 4, 30 Okla. at 354, 120 P. at 582, and the other case does not define the elements of the tort of malicious prosecution at all, *Robberson v. Gibson*, 1917 OK 131, 62 Okla. 306, 162 P. 1120 (1917).

10. To be sure, there is no reference to the continuation rule in the definition of the tort of malicious prosecution set out in *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 247-48 (Tenn. 1992). However, the fact that *Roberts* does not question *Pera* and the fact that the Tennessee Court of Appeals has reiterated the validity of the continuation rule in reliance upon *Pera* within the past five years, *Bovat v. Nissan N. Am.*, No. M2013-00592-COA-R3-CV, 2013 WL 6021458, at *3 (Tenn. Ct. App. Nov. 8, 2013) (stating that, despite the absence of any reference to the continuation rule in the definition of malicious prosecution set out in *Roberts*, 842 S.W.2d at 248, and *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992), and "even though one has probable cause to initiate criminal charges, there can be liability for the malicious continuation of a criminal proceeding" (quoting *Pera*, 674 S.W.2d at 722)), I believe that Tennessee recognizes the viability of the continuation rule.

207 (Tex. 1996) (stating that "[t]o prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish," among other things, "the institution or continuation of civil proceedings against the plaintiff" (citation omitted));[11] Utah, *Cline v. State*, 2005 UT App 498, ¶ 30, 142 P.3d 127, 137 (2005) (stating that the first element of a malicious prosecution claim "requires a plaintiff to establish that there is '[a] criminal proceeding instituted or continued by the defendant against the plaintiff' " (alteration in original) (quoting *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 959 (Utah Ct. App. 1989)), *cert. denied*, 133 P.3d 437 (Utah 2006);[12] Wisconsin, *Elmer v. Chicago & Nw. Ry. Co.*, 257 Wis. 228, 231, 43 N.W.2d 244, 246 (1950) (stating that "[t]he six essential elements in an action for malicious prosecution" include, but are not limited to, "a prior institution or continuation of some regular judicial proceedings against the plaintiff" (citations omitted)); and Wyoming, *Toltec Watershed Improvement Dist. v. Johnston*, 717 P.2d 808, 811 (Wyo. 1986) (stating that "the following elements [are] necessary to sustain a cause of action for malicious prosecution," including " '[t]he institution or continuation of original judicial proceedings, either criminal or civil' " (quoting *Consumers Filling Station Co. v. Durante*, 79 Wyo. 237, 248, 333 P.2d 691, 694 (1958))). Admittedly, a number of states have defined the tort of malicious prosecution without making reference to the continuation doctrine. *See Bhatia v. Debek*, 287 Conn. 397, 404, 948 A.2d 1009, 1017 (2008);[13] *Crosson v. Berry*, 829 N.E.2d 184, 189 (Ind. Ct. App. 2005); *Williamson v. Gueuntzel*, 584 N.W.2d 20, 23 (Minn. Ct. App. 1998); *DeVaney v. Thriftway Mktg. Corp.*, 1998-NMSC-001, ¶ 17, 124 N.M. 512, 518, 953 P.2d 277, 283 (1997), *overruled in part by Durham v. Gues*t, 2009-NMSC-007, ¶ 29, 145 N.M. 694, 701, 204 P.3d 19, 26

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11. In *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997), the tort of malicious prosecution was defined without reference to the continuation rule. However, since *Richey* did not overrule *Texas Beef Cattle* and focused upon an issue other than the viability of the continuation rule, I do not believe that *Richey* can properly be understood as holding that Texas has rejected the validity of the continuation rule.

12. The Utah Supreme Court made no mention of the continuation rule in reciting the elements of the tort of malicious prosecution in *Neff v. Neff*, 2011 UT 6, ¶ 52, 247 P.3d 380, 394 (2011), but did not overrule either *Cline* or *Schettler*.

13. The Connecticut Court of Appeals did hold in *Diamond 67, LLC v. Oatis*, 167 Conn. App. 659, 681, 144 A.3d 1055, 1069 (2016), that the related tort of vexatious litigation permitted a finding of liability predicated on a defendant's "initiation, continuation, and/or procurement" of a prior civil action, while suggesting that the continuation rule did not apply in malicious prosecution cases, *id.* at 683, 144 A.3d at 1070-71, which, in Connecticut, are limited to claims for relief based upon the initiation of baseless criminal charges, *see Bhatia*, 287 Conn. at 404-05, 948 A.2d at 1017.

(2009);[14] *Henshaw v. Doherty*, 881 A.2d 909, 915 (R.I. 2005); *Czechorowski v. State*, 2005 VT 40, ¶ 30, 178 Vt. 524, 533, 872 A.2d 883, 895 (2005); *Hudson v. Lanier*, 255 Va. 330, 333, 497 S.E.2d 471, 473 (1998); *Norfolk S. Ry. Co. v. Higginbotham*, 228 W. Va. 522, 526-27, 721 S.E.2d 541, 545-46 (2011). However, I am not convinced that the failure of these decisions to mention the continuation rule in the course of defining the tort of malicious prosecution necessarily means that the courts in question would refuse to recognize the continuation rule in the event that the issue of its viability was squarely presented to them, as is evidenced by the fact that the continuation rule was recognized in *Smith*, 173 Ariz. at 294-95, 842 P.2d at 1308; *Badell*, 115 Idaho at 102-04, 765 P.2d at 127-29; *Wilson*, 464 N.W.2d at 259-64; and *Wroten*, 114 Or. App. at 308-09, 835 P.2d at 933-34, despite the fact that the tort of malicious prosecution was defined in each of those cases without making any reference to the continuation rule and the fact that two other courts have refused to decide whether to accept or reject the continuation rule given the absence of any need to do so in order to resolve the case under consideration, *Maynard v. 84 Lumber Co.*, 657 N.E.2d 406, 408 (Ind. Ct. App. 1995); *Williamson*, 584 N.W.2d at 24-25[15] As far as I have been able to

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14. The New Mexico Supreme Court has consolidated what are, in most jurisdictions, the separate torts of malicious prosecution and abuse of process into the tort of malicious abuse of process. *Durham*, 2009-NMSC-007, ¶ 18, 145 N.M. at 698, 204 P.3d at 23. Although the New Mexico Supreme Court initially held in *DeVaney* that the elements of the tort of malicious abuse of process of process are "the initiation of judicial proceedings against the plaintiff by the defendant," "an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim," "a primary motive by the defendant in misusing the process to accomplish an illegitimate end," and " damages," 1998-NMSC-001, ¶ 17, 124 N.M. at 518, 953 P.2d at 283, that court subsequently overruled its prior decision in *DeVaney* and modified the definition of the first element of the consolidated tort so as to delete the requirement that "the defendant . . . have initiated a judicial proceeding against the plaintiff," *Durham*, 2009-NMSC-007, ¶ 29, 145 N.M. at 701, 204 P.3d at 26, and to replace it with "the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge," with this improper use of process consisting of either the "filing [of] a complaint without probable cause," or " 'an irregularity or impropriety suggesting extortion, delay, or harassment' or other conduct formerly actionable under the tort of abuse of process," *id.* at ¶ 29, 145 N.M. at 701, 204 P.3d at 26 (quoting *Fleetwood Retail Corp. of N.M. v. LeDoux*, 2007-NMSC-047, ¶ 12, 142 N.M. 150, 154, 164 P.3d 31, 35 (2007)). Although one could argue that this restatement of the elements of the tort of malicious abuse of process suffices to recognize something akin to the continuation rule for malicious abuse of process claims, the validity of that argument has not, to my knowledge, been tested.

15. I do not wish to be understood as making any claim that the discussion of the decisions made by other jurisdictions with respect to the validity of the continuation rule set out in the text of this separate opinion is complete. I merely offer it in support of my general belief that the validity of the continuation rule is well recognized across the United States.

determine, only Delaware appears to have explicitly rejected the "continuation" theory. *See Blue Hen Mech., Inc. v. Christian Bros. Risk Pooling Tr.*, 117 A.3d 549, 557 (Del. 2015) (rejecting a request for recognition of a claim for malicious prosecution "based on the wrongful continuation of proceedings after probable cause no longer exists" because the Court could see "no reason to extend the tort of malicious prosecution beyond the limited scope given to it by long-standing Delaware case law, and many reasons" for declining to do so (footnote omitted)). At an absolute minimum, these decisions make it clear to me that the overwhelming majority of American jurisdictions recognize the viability of the continuation rule in malicious prosecution cases.

In spite of the well-established nature of the "continuation" theory both nationally and in North Carolina, the Court refrains from commenting upon its viability on the grounds that, since "[p]laintiff's complaint is not that the original probable cause dissipated" and focuses, instead, upon a claim that "probable cause never existed," "[w]e need not address [the viability of] that theory in this jurisdiction. I am not, given my belief that plaintiff has, in fact, attempted to assert a valid "continuation" claim; the breadth of the authorities that recognize the validity of the "continuation" theory; the fact that neither party has openly questioned the validity of that theory in their briefs or during oral argument; and the fact that the logic underlying the "continuation" theory strikes me as fully consistent with this Court's malicious prosecution jurisprudence, comfortable with such a result, which seems to cast the validity of the "continuation" theory in North Carolina into unnecessary doubt. As a result, in light of my understanding of the allegations set forth in plaintiff's complaint, I believe that our analysis of the "lack of probable cause" allegations contained in plaintiff's complaint must necessarily focus upon both the allegations concerning the time at which plaintiff was originally charged with the murder of his estranged wife by the Davie County grand jury and the time at which the decision was made to continue proceeding against plaintiff on the charge of murdering his wife following the additional blood smear "tests" conducted by defendants.

According to well-established North Carolina law,

> [a] pleading complies with [N.C. R. Civ. P. Rule 8(a)(1)] if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970). Although notice pleading pursuant to Rule 8(a)(1) of the North Carolina Rules of Civil Procedure does not require "detailed fact-pleading," *id.* at 104, 176 S.E.2d at 167, it does "manifest the legislative intent to require a more specific statement, or notice in more detail, than Federal Rule 8(a)(2) requires," *id.* at 100, 176 S.E.2d at 164, so that "no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense," *id.* at 105, 176 S.E.2d at 167 (quoting William C. Myers & James E. Humphreys, Jr., *Pleadings and Motions*, 5 Wake Forest Intramural L. Rev. 70, 73 (1969)). As a result, our precedent suggests that at least some allegations supplying a factual basis for a malicious prosecution claim are necessary to preclude dismissal for failure to state a claim for which relief can be granted. *See Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979) (stating that "a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim" to preclude dismissal for failure to state a claim for which relief can be granted), *disapproved on other grounds by Dickens v. Puryear*, 302 N.C. 437, 447-48, 276 S.E.2d 325, 331-32 (1981). In view of the fact that "the well-pleaded material allegations of the complaint are taken as admitted" while the "conclusions of law or unwarranted deductions of fact[ ] are not admitted," *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (quoting *Sutton*, 277 N.C. at 98, 176 S.E.2d at 163), "it is our task to determine whether" plaintiff's factual "allegations as a matter of law demonstrate the adequacy, or lack thereof, of" plaintiff's claim" *id.* at 427, 251 S.E.2d at 851. Thus,

> [d]ismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). When considered in light of the applicable legal standard, I believe plaintiff's complaint fails to allege a valid claim for malicious prosecution against defendants arising from either the initiation of criminal charges against plaintiff or the decision to continue prosecuting him following the performance of the unscientific blood smear "tests."

"It is certainly the general rule, applicable to [malicious prosecution cases], that when a committing magistrate has bound the party over or a grand jury has found a true bill against him, such action *prima facie* makes out a case of probable cause, and the jury should be directed to consider the evidence as affected by this principle." *Stanford v. Grocery Co.*, 143 N.C. 419, 426, 55 S.E. 815, 817 (1906) (citations omitted). In view of plaintiff's acknowledgement that the Davie County grand jury returned a bill of indictment charging him with murder, he has, in effect, pleaded a fact that serves to defeat his malicious prosecution claim in the absence of an allegation providing some basis for overcoming the prima facie case of probable cause that he has set out in his complaint. Although plaintiff asserts that he acted in self-defense at the time that he killed his wife and that defendants "fail[ed] to properly investigate the circumstances of [Mrs.] Turner's death" and plaintiff's "claim of self-defense," these conclusory allegations provide no support for the legal conclusion stated in his complaint to the effect that "there was a lack of probable cause to sustain an indictment on first-degree murder and but for the malicious, intentional acts of [defendants, plaintiff] would not have been indicted and tried for first-degree murder." *See Carson*, 231 N.C. at 633, 58 S.E.2d at 612 (stating that, "when the facts are admitted or established, the question of probable cause is one of law for the court" (citing *Rawls v. Bennett*, 221 N.C. 127, 130, 19 S.E.2d 126, 128 (1942); *Morgan v. Stewart*, 144 N.C. 424, 425, 57 S.E. 149, 149 (1907)). For example, plaintiff failed to allege that defendants unreasonably declined to believe his protestations of innocence, that he did nothing to provoke the attack that he claimed that his wife had made upon him, or that defendants had no basis whatsoever for failing to accept plaintiff's assertion that he acted in perfect self-defense. As a result, given that plaintiff has failed to allege any factual support for his assertion that, despite the grand jury's decision to charge him with murdering his wife, there was no probable cause to believe that he was guilty of murder, plaintiff's complaint fails to give defendants sufficient notice of the events or transactions which produced the claim so as to enable defendants to understand the nature of plaintiff's claim and the basis for it, and consequently, plaintiff's complaint must be deemed fatally defective.

Similarly, I do not believe that plaintiff has stated a malicious prosecution claim against defendants arising from the unlawful continuation of the underlying murder prosecution without probable cause stemming from the actions taken in the aftermath of the 15 January 2008 meeting. In essence, plaintiff alleges that, following this meeting, defendants "wantonly and maliciously conducted unscientific tests to 'shore up' the new theory that [plaintiff's] wounds were self-inflicted and therefore,

not a result of self-defense." Although the allegations set forth in plaintiff's complaint clearly describe a highly unethical attempt to manufacture evidence in support of the State's attempt to convict plaintiff of first-degree murder, the complaint provides no indication whatsoever that the machinations in which defendants allegedly engaged had any effect beyond bolstering the State's existing case against plaintiff. Put another way, the existence of additional, albeit manufactured, evidence, while certainly enhancing the likelihood that plaintiff would be wrongly convicted of murdering his wife, could not have done anything to detract from the existing evidence that had resulted in the Davie County grand jury's decision to charge plaintiff with murder.[16] Thus, I do not believe that plaintiff has stated a claim for relief sounding in malicious prosecution arising from the additional "unscientific" blood smear testing that defendants performed in early 2008.

In summary, while I am unable to agree with the manner in which the Court has analyzed the sufficiency of plaintiff's complaint to allege a malicious prosecution claim against defendants, I do agree that plaintiff failed to state a malicious prosecution claim against them in his complaint. Despite the presence of an allegation that makes out a prima facie showing that probable cause was not lacking, plaintiff has completely failed to provide any factual support for his conclusory allegation that plaintiff's prosecution was initiated and continued in the absence of the requisite probable cause. As a result, I concur in the Court's opinion with respect to the sufficiency of plaintiff's complaint to state a claim for intentional infliction of emotional distress and concur in the result that the Court has reached with respect to the sufficiency of plaintiff's complaint to state a malicious prosecution claim against defendants.

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16. Although plaintiff has argued that he had alleged that defendants had "a collateral purpose in initiating or continuing the proceedings" against him and that this fact provides "prima facie evidence of a lack of probable cause," citing *Taylor v. Hodge*, 229 N.C. 558, 50 S.E.2d 307 (1948) and *Wilson v. Pearce*, 105 N.C. App. 107, 412 S.E.2d 148, *disc. rev. denied*, 331 N.C. 291, 417 S.E.2d 72 (1992), that logic does not suffice to resuscitate plaintiff's malicious prosecution claim in this case given that defendants' desire "to secure a conviction [in] a high publicity murder case regardless of guilt to further [defendants'] careers" and "to assist the District Attorney in winning a very public case for political purposes" does not seem to me to rise to the level of personal malice and effort to obtain personal gain present in the cases upon which plaintiff relies.

Justice HUDSON concurring in part, and dissenting in part.

I agree with the majority's disposition of the claims for intentional infliction of emotional distress, which affirms the Court of Appeals' reversal of the dismissal of these claims as to defendants Thomas and Deaver. I disagree with the majority's analytical framework for malicious prosecution claims; therefore, I agree with Justice Ervin's analysis in his concurring opinion, which recognizes that North Carolina has long allowed malicious prosecution claims under a "continuation theory." Even under the majority's theory of malicious prosecution, in my view, plaintiff has sufficiently stated claims for malicious prosecution to survive dismissal under Civil Procedure Rule 12(b)(6) and proceed with his claim against Thomas. I also conclude that under the law previous to this opinion, as well as under the framework explained by Justice Ervin, the complaint sufficiently states a claim for malicious prosecution against Deaver as well. Therefore, as to the malicious prosecution claims against Thomas and Deaver, I respectfully dissent.

As the majority states, a claim for malicious prosecution requires a showing that "the defendant (1) initiated or *participated in* the earlier proceeding, (2) did so maliciously, (3) without probable cause, and (4) the earlier proceeding ended in favor of the plaintiff." (Emphasis added.) Furthermore, I agree with the majority's discussion of the applicable principles regarding a motion to dismiss under Rule 12(b)(6). The relevant inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)).

As noted in the concurring opinion, North Carolina adopted notice pleading many years ago. Civil Procedure Rule 8(a)(1) does not require "detailed fact-pleading," but rather requires only that a pleading give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970); *see Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988) ("Through [Rule 8(a)(1) of the North Carolina Rules of Civil Procedure], the General Assembly of North Carolina adopted the concept of notice pleading.") Although there is some precedent for requiring that allegations supply a factual basis for extreme conduct in a claim of intentional infliction of emotional distress, *see Chidnese v. Chidnese*, 210 N.C. App. 299, 317, 708 S.E.2d 725, 738 (2011) ("Plaintiff's complaint

and brief simply state that defendants' previously discussed behavior was extreme and outrageous, without providing any support or case for this assertion. However, 'this Court has set a high threshold for a finding that conduct meets the standard' of extreme and outrageous conduct." (quoting *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000)), a claim of malicious prosecution must satisfy only the basic requirements of notice pleading. To the extent that the majority goes beyond treating the allegations as true and analyzing evidence of probable cause, I conclude it has gone too far.

The majority also states that "plaintiff's suit focuses on actions defendants took *after*" the grand jury indicted him. I do not accept this characterization because a number of specific allegations against Thomas address what he knew and did before plaintiff was indicted. As to Deaver, specific allegations address his "participation" in the continuing prosecution after plaintiff's indictment.[1]

Turning to the complaint, the allegations that in my view adequately state a claim for malicious prosecution include the following:

> 14. Acting in self-defense, Dr. Kirk Turner grabbed a pocketknife from his right front pocket and made two cuts in rapid succession to Jennifer Turner's neck area which resulted in her death.
>
> . . . .
>
> 26. Prior to examining any evidence for bloodstains or bloodstain patterns, SA Thomas was informed by Special Agent D. J. Smith that Jennifer Turner had apparently stabbed Dr. Kirk Turner with the spear and in response Dr. Kirk Turner reached into his right front pocket of his pants and retrieved a knife which Dr. Kirk Turner used to cut Jennifer Turner causing her death.

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1. Although the majority correctly states that a claim for malicious prosecution may be based on participation in a proceeding, it then (improperly, as noted in the concurring opinion) limits that participation to pre-indictment activities. Defendant Deaver's alleged involvement in these events, which began after the indictment, nonetheless can constitute malicious prosecution by participation, both under existing law and as discussed in the concurring opinion.

. . . .

43. Upon information and belief, SA Thomas and SA Deaver conducted these additional tests in an effort to prove the new theory that Dr. Kirk Turner had planned the murder of Jennifer Turner, to maintain the appearance of probable cause where none existed and to obtain a first-degree murder conviction of Dr. Kirk Turner despite evidence to the contrary.

. . . .

67. SA Thomas and SA Deaver, acting in their individual capacities, participated in and caused the institution of criminal proceedings against Dr. Kirk Turner for the murder of his wife Jennifer Turner by, *inter alia*:

    a. Failing to properly investigate the circumstances of Jennifer Turner's death;

    b. Failing to properly investigate Dr. Kirk Turner's claim of self-defense;

    c. Hiding and/or attempting to hide pertinent information about evidence collected at the scene;

    d. Failing to adhere to the administrative practices of SBI report writing;

    e. Including false and misleading information in investigative reports; and

    f. Otherwise failing to remain fair, neutral and truthful prior to and after the institution of criminal proceedings against Dr. Kirk Turner.

68. In an effort to secure a first-degree murder indictment and conviction, SA Thomas and SA Deaver intentionally, maliciously, and without just cause, failed to take the appropriate measures described above.

69. At all times relevant to the investigation and prosecution of Dr. Kirk Turner, there was a lack of probable cause to sustain an indictment on first-degree murder and but for the malicious, intentional acts of SA Thomas and SA Deaver, Dr. Kirk Turner would not have been indicted and tried for first-degree murder.

In my view, these allegations are sufficient to state claims for malicious prosecution against Thomas and Deaver under existing North Carolina law. The allegations set forth in the last two paragraphs, when taken together with the complaint as a whole and particularly those in paragraph 67(a)-(e), allege a lack of probable cause and knowledge of the same on the part of defendants, and also provide "sufficient notice of the events or transactions which produced the claim." *Sutton*, 277 N.C. at 104, 176 S.E.2d at 167.

The majority asserts that it "must *consider the evidence* that was available to the investigators and presented to the grand jury in December 2007" and concludes, "*[b]ased on the facts known to the investigators* at the time of the grand jury proceedings, we are satisfied that a reasonable and prudent person would believe there was probable cause." (Emphases added.) The majority further states that the grand jury properly found probable cause and that "nothing in the subsequent investigation revealed facts that disproved that." Again, the focus of our review should be on the allegations in the complaint, taken as true. In considering whether the complaint has adequately stated claims for malicious prosecution, I do not think we need to consider the evidence or subsequent investigation at all. Instead, we must look at the allegations of the complaint and, taking them as true, determine if they have stated the elements of the claims. I express no opinion concerning the sufficiency of the evidence or the potential merits of plaintiff's claims at trial. Rather, looking solely at the allegations in the complaint, and taking them as true, I conclude that plaintiff has sufficiently stated claims for malicious prosecution against Thomas and Deaver. Accordingly, I would affirm the Court of Appeals' holding reversing dismissal under Rule 12(b)(6) of these claims, as well as the claims for intentional infliction of emotional distress. I would allow plaintiff's claims for malicious prosecution to proceed as to Thomas and Deaver.

As such, I respectfully dissent as to these two claims but concur in the majority's decision regarding plaintiff's claims for intentional infliction of emotional distress.

Justice BEASLEY joins in this opinion.

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2017-01

May 15, 2017

QUESTION:

Is a sitting judge required to resign the judge's judicial office before becoming a candidate in a public primary or general election for the office of district attorney?

CONCLUSION:

Yes. Canon 7B(5) of the North Carolina Code of Judicial Conduct provides that a judge must "resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for non-judicial office." As the office of district attorney is a non-judicial office, resignation is required before becoming a candidate in a public primary or general election for such office.

DISCUSSION:

Canon 7B(5) of the North Carolina Code of Judicial Conduct provides that a judge must "resign the judge's judicial office prior to becoming a candidate either in a party primary or in a general election for non-judicial office." This restriction serves the important purpose of furthering the fundamental values of impartiality, independence and integrity that underlie the Code of Judicial Conduct in general. While a judge's impartiality and independence would not be threatened by a campaign for another judicial office that requires the same impartiality and independence, the same cannot be said for running for an elected office that in fact depends on partiality. The Commission finds that it would be particularly concerning if a sitting judge who presides over criminal cases was simultaneously campaigning for district attorney. Campaigning for prosecutorial office could raise reasonable questions as to the judge's impartiality in cases he or she must adjudicate in accordance with the Code of Judicial Conduct. See, e.g., Canon 2B (a judge "should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"); Canon 3 ("A judge should perform the duties of the judge's office impartially and diligently"); Canon 3A(1) ("A judge should be unswayed by partisan interests, public clamor, or fear of criticism"); Canon 3C(1) ("a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned.").

With respect to Canon 7B(5) in particular, the Commission in Formal Advisory Opinion No. 2009-05 advised that the office of clerk of superior court is a judicial office of the General Court of Justice as set forth in N.C. Const. Article IV, Section 9 and N.C. Gen. Stat. Chapter 7A, Article 12. In addition, N.C. Gen. Stat. § 7A-40 provides that the "clerk of superior court in the exercise of the judicial power conferred upon him . . . is a judicial officer of the Superior Court Division . . . ." As such, resignation of judicial office is not required to seek election as clerk of court. By contrast, the District Attorney exercises no judicial power and instead prosecutes, in the name of the State of North Carolina, "all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district" and performs such other duties as authorized pursuant to N.C. Gen Stat. § 7A-61. While the District Attorney does possess some calendaring authority, *see e.g.* N.C. Gen. Stat. § 7A-49.4, and is administratively assigned to the North Carolina Administrative Office of the Courts for certain purposes, these facts do not transform the District Attorney as an officer of the court into a judicial officer who exercises judicial power in the State of North Carolina. The District Attorney thus cannot be considered a judicial officer for purposes of Canon 7B(5).

References:

Canons 2B, 3, 3A, 3C and 7B(5) of the North Carolina Code of Judicial Conduct
Formal Advisory Opinion No. 2009-05
N.C. Const. Art. IV, Section 9
N.C. Gen. Stat. Chapter 7A, Art. 12
N.C. Gen. Stat. § 7A-40
N.C. Gen. Stat. § 7A-49.4
N.C. Gen. Stat. § 7A-61

AMENDMENTS TO THE RULES CONCERNING THE ORGANIZATION OF THE 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 22, 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 its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. ...

(8) Technology and Social Media Committee. It shall be the duty of this committee to stay abreast of technological developments that might enable the North Carolina State Bar to better serve and communicate with its members and the public, and to develop processes, procedures and policies for the deployment and use of social media and other means of disseminating official information.

(b) Boards ...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a specially called meeting on July 22, 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 discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0114 ~~Formal Hearing~~ Proceedings Before the Disciplinary Hearing Commission: General Rules Applicable to All Proceedings

(a) Applicable Procedure ~~Complaint and Service~~ - Except where specific procedures are provided by these rules, pleadings and proceedings before a hearing panel will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trial of nonjury civil cases in the superior courts. Any specific procedure set out in these rules controls, and where specific procedures are set out in these rules, the Rules of Civil Procedure will be supplemental only. ~~Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.~~

~~(b) Service - Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure~~.

(b)~~(c)~~ Continuances - The chairperson of the hearing panel may continue any hearing for good cause shown. After a hearing has commenced, continuances will only be granted pursuant to Rule .0116(b). ~~Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.~~

(c)~~(d)~~ Appearance By or For the Defendant ~~Designation of Hearing Committee and Date of Hearing~~ - The defendant may appear *pro se* or may be represented by counsel. The defendant may not act *pro se* if he or she is represented by counsel. ~~Within 20 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 90 nor more than 150 days from the date of service of the last complaint upon the defendant. By agreement between the parties and with the consent of the chair, the date for the initial setting of the hearing may be set less than 90 days after the date of service on the defendant.~~

(1) *Pro Se* Defendant's Address - When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the clerk, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from the address on record with the State Bar's membership department.

(2) Notice of Appearance - When a defendant is represented by an attorney in a proceeding, the attorney will file with the clerk a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing will be sent to defendant's attorney of record in lieu of transmission to the defendant.

(d)~~(e)~~ Filing Time Limits ~~Answer~~ - Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the clerk of the commission within the time limits, if any, for such filing. The date of the receipt by the clerk, and not

the date of deposit in the mail, is determinative. - ~~Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.~~

(e)~~(f)~~ Form of Papers ~~Default~~ - All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The clerk will require a party to refile any paper that does not conform to this size. ~~Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing panel for a default order imposing discipline, and the hearing panel will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing panel may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing panel may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.~~

(f)~~(g)~~ Subpoenas ~~Discovery~~ - The hearing panel will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing as permitted in civil cases under the North Carolina Rules of Civil Procedure. Such process will be issued in the name of the hearing panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. The plaintiff and the defendant have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents. ~~Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing panel. The chairperson of the hearing panel may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.~~

(g)~~(h)~~ Admissibility of Evidence ~~Settlement~~ - In any hearing, admissibility of evidence will be governed by the rules of evidence applicable in the superior court of North Carolina at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the panel to question the ruling. If a member of the panel challenges a ruling relating to admissibility of evidence, the question will be decided by a majority vote of the hearing panel. ~~The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. If the panel rejects a proposed settlement, another hearing panel must be empaneled to try the case, unless all parties consent to proceed with the original panel. The parties may submit a proposed settlement to a second hearing panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hear the disciplinary matter.~~

(h) Defendant as Witness – The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either party.

~~(i) Pre-Hearing Conference - At the discretion of the chairperson of the hearing panel, and upon five days' notice to parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the panel designated by its chairperson, who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the following:~~

~~(1) the simplification of the issues;~~

~~(2) the exchange of exhibits proposed to be offered in evidence;~~

~~(3) the stipulation of facts not remaining in dispute or the authenticity of documents;~~

~~(4) the limitation of the number of witnesses;~~

~~(5) the discovery or production of data;~~

~~(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.~~

The chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) Pretrial Motions - The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing panel. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel.

(k) Continuance of Hearing Date - The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing panel for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) Public Hearing - The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Procedure for Pleadings and Proceedings - Pleadings and proceedings before a hearing panel will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Filing Time Limits - Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing.

~~The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.~~

~~(p) Form of Papers - All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.~~

~~(q) Pro Se Defendant's Address - When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.~~

~~(r) Notice of Appearance - When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.~~

~~(s) Subpoenas - The hearing panel will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.~~

~~(t) Admissibility of Evidence - In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the hearing panel to question the ruling. If a member of the hearing panel challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing panel.~~

(u) Orders - If the hearing panel finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing panel finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing panel will enter an order of discipline. In either instance, the panel will file an order which will include the panel's findings of fact and conclusions of law.

(v) Preservation of the Record - The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing panel will then consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

(2) Disbarment shall be considered where the defendant is found to engage in:

(A) acts of dishonesty, misrepresentation, deceit, or fabrication;

(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;

(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source;

(D) commission of a felony.

(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:

(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;

(B) remoteness of prior offenses;

(C) dishonest or selfish motive, or the absence thereof;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) indifference to making restitution;

(F) a pattern of misconduct;

(G) multiple offenses;

(H) effect of any personal or emotional problems on the conduct in question;

(I) effect of any physical or mental disability or impairment on the conduct in question;

(J) interim rehabilitation;

(K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;

(L) delay in disciplinary proceedings through no fault of the defendant attorney;

(M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(O) refusal to acknowledge wrongful nature of conduct;

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(x) Stayed Suspensions - In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing panel as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing panel that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing. After such a hearing, the hearing panel may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing panel finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing panel will include in its order findings of fact and conclusions of law in support of its decision.

(y) Service of Orders - All reports and orders of the hearing panel will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served

by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United Sates Postal Service.

(z) Posttrial Motions

(1) Consent Orders After Trial - At any time after a disciplinary hearing and prior to the execution of the panel's final order pursuant to Rule .0114(y) above, the panel may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing panel which heard the disciplinary case no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section

~~will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.~~

~~(4) Effect of Filing Motion - The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.~~

.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure

(a) Complaint and Service - The counsel will file the complaint with the clerk of the commission. The counsel will cause a summons and a copy of the complaint to be served upon the defendant and will inform the clerk of the date of service. The clerk will deliver a copy of the complaint to the chairperson of the commission and will inform the chairperson of the date that service on the defendant was effected. Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(b) Notice Pleading - Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(c) Answer - Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the commission or of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the clerk of the commission and will serve a copy on the counsel.

(d) Designation of Hearing Panel - Within 20 days after service of the complaint upon the defendant, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel.

(e) Scheduling Conference - The chairperson of the hearing panel will hold a scheduling conference with the parties within 20 days after the filing of the answer by the defendant unless another time is set by the chairperson of the commission. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, video conference) of the scheduling conference. At the scheduling conference, the parties will discuss anticipated issues, amendments, motions, any settlement conference, and discovery. The chairperson of the hearing panel will set dates for the completion of discovery and depositions, for the filing of motions, for the pre-hearing

conference, for the filing of the stipulation on the pre-hearing conference, and for the hearing, and may order a settlement conference. The hearing date shall not be less than 60 days from the final date for discovery and depositions unless otherwise consented to by the parties. The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in the scheduling conference or willfully fails to comply with a scheduling order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Civil Procedure.

(f) Failure to File an Answer - Failure to file an answer admitting or denying the allegations of the complaint or asserting the grounds for failing to do so within the time specified by this rule will be grounds for entry of the defendant's default. If the defendant fails to file an answer to the complaint, the allegations contained in the complaint will be deemed admitted.

(g) Default

(1) The clerk will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise.

(2) The counsel may thereupon apply to the hearing panel for default orders as follows:

(A) For an order making findings of fact and conclusions of law. Upon such motion, the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. The hearing panel shall then set a date for hearing at which the sole issue shall be the discipline to be imposed.

(B) For an order of discipline. Upon such motion the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. If such facts provide sufficient basis, the hearing panel shall enter an order imposing the discipline deemed to be appropriate. The hearing panel may, in its discretion, set a hearing date and hear such additional evidence as it deems necessary to determine appropriate discipline prior to entering the order of discipline.

(3) For good cause shown, the hearing panel may set aside the entry of default.

(4) After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(h) Discovery - Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed by the date set in the scheduling order unless the time for discovery is extended by the chairperson of the hearing panel for good cause shown. Upon a showing of good cause, the chairperson of the hearing panel may reschedule the hearing to accommodate completion of reasonable discovery.

(i) Settlement - The parties may meet by mutual consent prior to the hearing to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. If the panel rejects a proposed settlement, another hearing panel must be empanelled to try the case, unless all parties consent to proceed with the original panel. The parties may submit a proposed settlement to a second hearing panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) Settlement Conference - Either party may request, or the chair of the hearing panel may order, appointment of a commission member to conduct a settlement conference.

(1) Such request shall be filed with the clerk of the commission and must be made no later than 60 days prior to the date set for hearing.

(2) Upon such request, the chairperson of the commission shall select and assign a commission member not assigned to the hearing panel in the case to conduct a settlement conference and shall notify the parties of the commission member assigned and the date by which the settlement conference must be held. The settlement conference must be no later than 30 days prior to the date set for hearing.

(3) The commission member conducting the settlement conference will set the date, time, and manner.

(4) At the settlement conference, the parties will discuss their positions and desired resolution and the commission member will provide input regarding the case and resolution.

(5) The commission member's evaluation and input shall be advisory only and not binding.

(6) All statements and/or admissions made at the settlement conference shall be for settlement purposes only and shall not be admissible at any hearing in the case. Evidence that is otherwise discoverable, however, shall not be excluded from admission at hearing merely because it is presented in the course of the settlement conference.

(k) Prehearing Conference and Order

(1) Unless default has been entered by the clerk, the parties shall hold a prehearing conference. The prehearing conference shall be arranged and held by the dates established in the scheduling order.

(2) Prior to or during the prehearing conference, the parties shall: exchange witness and exhibit lists; discuss stipulations of undisputed facts; discuss the issues for determination by the hearing panel; and exchange contested issues if the parties identify differing contested issues.

(3) Within five days after the date of the prehearing conference, each party shall provide the other with any documents or items identified as exhibits but not previously provided to the other party.

(4) The parties shall memorialize the prehearing conference in a document titled "Stipulation on Prehearing Conference" that shall address the items and utilize the format in the sample provided to the parties by the clerk. By the date set in the scheduling order, the parties shall submit the Stipulation on Prehearing Conference to the clerk to provide to the hearing panel.

(5) Upon five days' notice to the parties, at the discretion of the chairperson of the hearing panel, the chairperson may order the parties to meet with the chairperson or any designated member of the hearing panel for the purpose of promoting the efficiency of the hearing. The participating member of the panel shall have the power to issue such orders as may be appropriate. The venue (e.g., telephone, videoconference, in person) shall be set by the hearing panel member.

(6) The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in a prehearing conference or hearing or who willfully fails to comply with a prehearing order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Procedure.

(7) Evidence or witnesses not included in the Stipulation on Prehearing Conference may be excluded from admission or consideration at the hearing.

(l) Prehearing Motions - The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all prehearing motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing panel. The following procedures shall apply to all prehearing motions, including motions which could result in dismissal of all or any of the allegations or could result in final judgment for either party on all or any claims:

(1) Parties shall file motions with the clerk of the commission. Parties may submit motions by regular mail, overnight mail, or in person. Motions transmitted by facsimile or by email will not be accepted for filing except with the advance written permission of the chairperson of the hearing panel. Parties shall not deliver motions or other communications directly to members of the hearing panel unless expressly directed in writing to do so by the chairperson of the hearing panel.

(2) Motions shall be served as provided in the NC Rules of Civil Procedure.

(3) The non-moving party shall have ten days from the filing of the motion to respond. If the motion is served upon the non-moving party by regular mail only, then the non-moving party shall have 13 days from the filing of the motion to respond. Upon good cause shown, the chairperson of the hearing panel may shorten or extend the time period for response.

(4) Any prehearing motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing panel. The chairperson shall set the time, date, and manner of oral argument. The chairperson may order that argument on any prehearing motion may be heard in person or by telephone or electronic means of communication.

(5) Any motion included in or with a defendant's answer will not be acted upon, and no response from the non-moving party will be due, unless and until a party files a notice requesting action by the deadline for filing motions set in the scheduling order. The due date for response by the non-moving party will run from the date of the filing of the notice.

.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) Public Hearing - The defendant will appear in person before the hearing panel at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing panel may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant.

(b) Continuance After a Hearing Has Commenced - After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(c) Burden of Proof

(1) Unless otherwise provided in these rules, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the defendant violated the Rules of Professional Conduct.

(2) In any complaint or other pleading or in any trial, hearing, or other proceeding, the State Bar is not required to prove the nonexistence of any exemption or exception contained in the Rules of Professional Conduct. The burden of proving any exemption or exception shall be upon the person claiming its benefit.

(d) Orders - At the conclusion of any disciplinary case, the hearing panel will file an order which will include the panel's findings of fact and conclusions of law. When one or more rule violations has been established by summary judgment, the order of discipline will set out the undisputed material facts and conclusions of law established by virtue of summary judgment, any additional facts and conclusions of law pertaining to discipline, and the disposition. All final orders will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the clerk.

(e) Preservation of the Record - The clerk will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The clerk will preserve the record and the pleadings, exhibits, and briefs of the parties.

(f) Discipline - If the charges of misconduct are established, the hearing panel will consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

(2) Disbarment shall be considered where the defendant is found to engage in:

(A) acts of dishonesty, misrepresentation, deceit, or fabrication;

(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;

(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source; or

(D) commission of a felony.

(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:

(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;

(B) remoteness of prior offenses;

(C) dishonest or selfish motive, or the absence thereof;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) indifference to making restitution;

(F) a pattern of misconduct;

(G) multiple offenses;

(H) effect of any personal or emotional problems on the conduct in question;

(I) effect of any physical or mental disability or impairment on the conduct in question;

(J) interim rehabilitation;

(K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;

(L) delay in disciplinary proceedings through no fault of the defendant attorney;

(M) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(N) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(O) refusal to acknowledge wrongful nature of conduct;

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

(T) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint;

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(g) Service of Final Orders - The clerk will serve the defendant with the final order of the hearing panel by certified mail, return receipt

requested, or by personal service. A defendant who cannot, with reasonable diligence, be served by certified mail or personal service shall be deemed served when the clerk deposits a copy of the order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service addressed to the defendant's last known address on file with the NC State Bar.

.0117 Proceedings Before the Disciplinary Hearing Commission: Posttrial Motions

(a) New Trials and Amendments of Judgments (N.C. R. Civ. 59)

(1) Either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(2) A motion for a new trial or amendment of judgment will be filed with the clerk no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(3) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(4) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(b) Relief from Judgment or Order (N.C. R. Civ. 60)

(1) Either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(2) A motion for relief from the final judgment or order will be filed with the clerk no later than one year after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(3) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(4) The clerk will promptly transmit the motion and any response to the chairperson of the commission, who will appoint a hearing

panel. The chairperson will appoint the members of the hearing panel that originally heard the matter wherever practicable.

(5) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(c) Effect of Filing Motion - The filing of a motion requesting a new trial, amendment of the judgment, or relief from the final judgment or order under this section will not automatically stay or otherwise affect the effective date of an order of the commission.

.0118 Proceedings Before the Disciplinary Hearing Commission: Stayed Suspension

(a) Procedures: Non-compliance with Conditions - In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. The following procedures apply during a stayed suspension:

(1) If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the clerk of the commission specifying the violation and seeking an order lifting the stay and activating the suspension. The counsel will serve a copy of the motion upon the defendant.

(2) The clerk will promptly transmit the motion to the chairperson of the commission. The chairperson will appoint a hearing panel to hold a hearing, appointing the members of the hearing panel that originally heard the matter wherever practicable. The chairperson of the commission will notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing.

(3) At the hearing, the State Bar will have the burden of proving by the greater weight of the evidence that the defendant violated a condition of the stay.

(4) If the hearing panel finds by the greater weight of the evidence that the defendant violated a condition of the stay, the panel may enter an order lifting the stay and activating the suspension, or any portion thereof. Alternatively, the panel may allow the stay to remain in effect for the original term of the stay, may extend the term of the stay, and/or may include modified or additional conditions for the suspension to remain stayed. If the panel finds

that the defendant violated a condition of the stay, the panel may tax the defendant with administrative fees and costs.

(A) In any order lifting a stay and activating a suspension in whole or in part, the panel may include a provision allowing the defendant to apply for a stay of the activated suspension on such terms and conditions as the panel concludes are appropriate.

(B) The panel may impose modified or additional conditions: (a) which the defendant must satisfy to obtain a stay of an activated suspension; (b) with which the defendant must comply during the stay of an activated suspension; and/or (c) which the defendant must satisfy to be reinstated to active status at the end of the activated suspension period.

(C) If the panel activated the entire period of suspension, in order to be reinstated at the end of the activated suspension, the defendant must comply with the requirements of Rule .0129(b) of this subchapter and with any requirements imposed in previous orders entered by the commission.

(D) If the panel activated only a portion of the suspension, in order to be returned to active status at the end of the period of activated suspension the defendant must file a motion with the commission seeking a stay of the remainder of the original term of suspension. If the defendant is granted a stay of the remainder of the original term of suspension, the panel may impose modified and/or additional conditions with which the defendant must comply during the stayed suspension.

(5) If the panel finds that the greater weight of the evidence does not establish that the defendant violated a condition of the stay, it will enter an order continuing the stay.

(6) In any event, the panel will include in its order findings of fact and conclusions of law in support of its decision.

(b) Completion of Stayed Suspension; Continuation of Stay if Motion Alleging Lack of Compliance is Pending

(1) Unless there is pending a motion or proceeding in which it is alleged that the defendant failed to comply with the conditions of the stay, the defendant's obligations under an order of discipline end upon expiration of the period of the stay.

(2) When the period of the stay of the suspension would otherwise have terminated, if a motion or proceeding is pending in which it is alleged that the defendant failed to comply with the conditions

of the stay, the commission retains jurisdiction to lift the stay and activate all or any part of the suspension. The defendant's obligation to comply with the conditions of the existing stay remains in effect until any such pending motion or proceeding is resolved.

(c) Applying for Stay of Suspension - The following procedures apply to a motion to stay a suspension:

(1) The defendant shall file a motion for stay with the clerk and serve a copy of the motion and all attachments upon the counsel. Such motion shall be filed no earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion filed earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion unless it is delivered to the clerk and served upon the counsel contemporaneously.

(2) The motion must identify each condition for stay and state how the defendant has met each condition. The defendant shall attach supporting documentation establishing compliance with each condition. The defendant has the burden of proving compliance with each condition by clear, cogent, and convincing evidence.

(3) The counsel shall have 30 days after the motion is filed to file a response.

(4) The clerk shall transmit the motion and the counsel's response to the chairperson of the commission. Within 14 days of transmittal of the motion and the response, the chairperson shall issue an order appointing a hearing panel and setting the date, time, and location for the hearing. Wherever practicable, the chairperson shall appoint the members of the hearing panel that entered the order of discipline.

(d) Hearing on Motion for Stay

(1) The defendant bears the burden of proving compliance with all conditions for a stay by clear, cogent, and convincing evidence.

(2) Any hearing on a motion for stay will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts.

(3) The decision to grant or deny a defendant's motion to stay a suspension is discretionary. The panel should consider whether the defendant has complied with Rule .0128 and Rule .0129 of this section, and any conditions in the order of discipline, as well as

whether reinstatement of the defendant will cause harm or potential harm to clients, the profession, the public, or the administration of justice.

(e) Order on the Motion for Stay - The hearing panel will determine whether the defendant has established compliance with all conditions for a stay by clear, cogent, and convincing evidence. The panel must enter an order including findings of fact and conclusions of law. The panel may impose modified and/or additional conditions: (a) for the suspension to remain stayed; (b) for eligibility for a stay during the suspension; and/or (c) for reinstatement to active status at the end of the suspension period. The panel may tax costs and administrative fees in connection with the motion.

~~.0115~~ .0119 Effect of a Finding of Guilt in Any Criminal Case

~~(a) Criminal Offense Showing Professional Unfitness - Any member who has been found guilty of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.~~

~~(b)~~(a) Conclusive Evidence of Guilt - A certified copy ~~certificate~~ of the conviction of an attorney for any crime or a certified copy ~~certificate~~ of ~~the~~ a judgment entered against an attorney where a plea of guilty, *nolo contendre*, or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member. For purposes of any disciplinary proceeding against a member, such conviction or judgment shall conclusively establish all elements of the criminal offense and shall conclusively establish all facts set out in the document charging the member with the criminal offense.

~~(c) Discipline Based on Criminal Conviction - Upon receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member of a criminal offense showing professional unfitness, or a certificate of the judgment entered against an attorney where a plea of nolo contendre or no contest has been accepted by the court, the Grievance Committee, at its next meeting following notification of the conviction, may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d)(1). Such a stay shall not present the North Carolina State Bar from~~

~~proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.~~

~~(d)~~(b) Interim Suspension- ~~Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension~~. Any member who has been convicted of, pleads guilty to, pleads no contest to, or is found guilty by a jury of a criminal offense showing professional unfitness in any state or federal court may be suspended from the practice of law as set out below.

(1) The counsel shall file with the clerk of the commission and serve upon the member a motion for interim suspension accompanied by proof of the conviction, plea, or verdict.

(2) The member shall have ten days in which to file a response.

(3) The chairperson of the commission may hold a hearing to determine whether the criminal offense is one showing professional unfitness and whether, in the chairperson's discretion, interim suspension is warranted. In determining whether interim suspension is warranted, the chairperson may consider harm or potential harm to a client, the administration of justice, the profession, or members of the public, and impact on the public's perception of the profession. The parties may present additional evidence pertaining to harm or to the circumstances surrounding the offense, but the member may not collaterally attack the conviction, plea or verdict.

(4) The chairperson shall issue an order containing findings of fact and conclusions of law addressing whether there is a qualifying conviction, plea, or verdict, and whether interim suspension is warranted, and either granting or denying the motion.

(5) If the member consents to entry of an order of interim suspension, the parties may submit a consent order of interim suspension to the chairperson of the commission.

(6) The provisions of Rule .0128(c) of this subchapter will apply to the interim suspension.

~~(e) Criminal Offense Which Does Not Show Professional Unfairness - Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of judgment against a member upon a plea of no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the Grievance Committee will take whatever action, including authorizing of the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of th4e disciplinary action as set out in G.S. §84 28(d)(1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceedings.~~

~~In addition to the other powers contained herein, in proceedings before any subcommittee or panel of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the panel contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.~~

~~.0116~~ .0120 Reciprocal Discipline & Disability Proceedings

...

[Renumbering all remaining rules and internal cross-references to 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 specially called meeting on July 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 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 discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100 Discipline and Disability of Attorneys

.0129 Confidentiality

(a) Allegations of Misconduct or Alleged Disability - Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice;

(5) the member files an affidavit of surrender of license; ~~or~~

(6) a member is transferred to disability inactive status pursuant to Rule .0118(g). In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0118(c), unless provided otherwise in the order.

(b) Disciplinary Complaints filed pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4)-

The State Bar may disclose that it filed the complaint before the Disciplinary Hearing Commission pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4):

(1) after proceedings before the Disciplinary Hearing Commission have concluded; or

(2) while proceedings are pending before the Disciplinary Hearing Commission, in order to address publicity not initiated by the State Bar.

(c)~~(b)~~ Letter of Warning or Admonition

...

(d)~~(c)~~ Attorney's Response to a Grievance

...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the 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 April 22, 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 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, Rules Governing the Board of Law Examiners and the Training of Law Students

.0105 Approval of Law Schools

Every applicant for admission to the ~~N.C.~~ North Carolina State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

(1) …

(4) The applicant holds an LL.B. or J.D. degree from a law school that was approved for licensure purposes in another state of the United States or the District of Columbia and was licensed in such state or district., ~~and, at the time of the application for admission to the North Carolina State Bar, has been an active member in good standing of the bar in that state or district in each of the ten years immediately preceding application.~~

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 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 Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement.

...

(c) Requirements for Reinstatement.

(1) Completion of Petition.

...

(4) Additional CLE Requirements.

If more than 1 year has elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive up to a maximum of 7 years. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 6 hours may be taken online; and 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism~~; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee~~. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision

without regard to whether they were taken during the 2 years prior to filing the petition.

(5) Bar Exam Requirement If Inactive 7 or More Years.

...

(d) Service of Reinstatement Petition.

...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

...

(d) Requirements for Reinstatement.

(1) Completion of Petition.

...

(3) Additional CLE Requirements.

If more than 1 year has elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended up to a maximum of 7 years. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 6 hours may be taken online; and 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism~~; and 5 hours must be earned by attending courses determined to be practical skills courses by the Board of Continuing Legal Education or its designee~~. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years.

...

(e) Procedure for Review of Reinstatement Petition.

...

ADMINISTRATIVE 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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 22, 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 Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0905 Pro Bono Practice of 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: ...

(b) ...

(d) Upon receipt of a petition and other information satisfying the provisions 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. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the petitioner and to the supervising member. No person permitted to practice pursuant to such an order shall pay any membership fee to the North Carolina State Bar or any district bar or any other charge ordinarily imposed upon active members, nor shall any such person be required to attend continuing legal education courses.

(e) ...

(g) Permission to practice under this rule terminates upon notice from the member identified in the petition pursuant to Rule .0905(a)(3) above, or from the nonprofit corporation employing such member, that the out-of-state lawyer is no longer supervised by any member employed by the

corporation. In addition, ~~Permission to~~ practice under this rule being entirely discretionary on the part of the council, the order granting such permission may be withdrawn by the council for good cause shown ~~pursuant to the procedure set forth in Rule .0903 of this subchapter~~ without notice to the out-of-state lawyer or an opportunity to be heard.

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 arolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 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 continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1512 Source of Funds

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) ...

(b) ...

(c) No Refunds for Exemptions and Record Adjustments.

(1) Exemption Claimed. If a credit hour of attendance is reported to the board, the fee for that credit hour is earned by the board regardless of an exemption subsequently claimed by the member pursuant to Rule .1517 of this subchapter. No paid fees will be refunded and the member shall pay the fee for any credit hour reported on the annual report form for which no fee has been paid at the time of submission of the member's annual report form.

(2) Adjustment of Reported Credit Hours. When a sponsor is required to pay the sponsor's fee, there will be no refund to the sponsor or to the member upon the member's subsequent adjustment, pursuant to Rule .1522(a) of this subchapter, to credit hours reported on the annual report form. When the member is required to pay the attendee's fee, the member shall pay the fee for any credit hour reported after any adjustment by the member to credit hours reported on the annual report form.

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 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 continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1517 Exemptions

(a) Notification of Board.

...

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks.

...

(d) Nonresidents.

...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
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 22, 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 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 .1804 Appeal to the Council

(a) Appealable Decisions. An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. The rejection of an application because it is incomplete shall not be appealable. ~~(Persons who appeal the board's decision are referred to herein as appellants.)~~

(b) Filing the Appeal. An appeal from a decision of the board as described in paragraph (a) may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the date of the notice of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

~~(c) Time and Place of Hearing. The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.~~

~~(d) Record on Appeal to the Council.~~

~~(1) The record on appeal to the council shall consist of all documents and oral statements by witnesses offered at any reconsideration~~

~~hearing. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.~~

~~(2) If a court reporter was present at a reconsideration hearing at the election of the appellant, the appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.~~

~~(e) Parties Appearing Before the Council. The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.~~

(c) ~~(f)~~ Appeal Procedure. ~~The council shall consider the appeal *en banc*. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the hearing may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.~~ The appeal to the council shall be under such rules and regulations as the council may prescribe.

(d) ~~(g)~~ Scope of Review. Review by the council shall be limited to whether the ~~appellant~~ applicant was provided with procedural rights and whether the board, or the reconsideration panel where applicable, applied the correct procedural standards and State Bar rules in rendering its decision. The ~~appellant~~ applicant shall have the burden of making a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of the procedural standards or State Bar rules.

(e) ~~(h)~~ Notice of the Council's Decision. The ~~appellant~~ applicant shall receive written notice of the council's decision.

(f) Costs. The council may tax the costs attributable to the proceeding against the applicant.

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
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 were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 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 legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2400 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2400 Certification Standards for the Family Law Specialty

.2406 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 .2406(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, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter; however, for the purpose of continued certification, service as a district court judge in North Carolina hearing a substantial number of family law cases may be substituted, year for year, for the experience required to meet the five-year requirement.

(b) Continuing Legal Education -...

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 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
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 22, 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 legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2700, Certification Standards for Workers' Compensation Law Specialty

.2706 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 .2706(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 - ...

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the five years preceding application. ~~Not less than six credits may be earned in any one year~~. Of the 60 hours of CLE, at least 30 hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; insurance; mediation; medical injuries, medicine, or anatomy; labor and employment law; Social Security disability law; and the law relating to long-term disability or Medicaid/Medicare claims. ~~Effective March 10, 2011,~~ Tthe specialist must earn not less than six credits in courses on workers' compensation law each year and the balance of credits may be earned in courses on workers' compensation law or any of the related fields previously listed.

(c) Peer Review - ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
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 22, 2016.

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, Rules of Professional Conduct

Rule 1.0, Terminology

(h) ~~"Partner"~~ "Principal" denotes a member of a partnership for the practice of law, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law, or a lawyer having management authority over the legal department of a company, organization, or government entity.

Rule 1.17, Sale of a Law Practice

...

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing ~~partners~~ principals of law firms. *See* Rules 5.4 and 5.6.

Rule 5.1, Responsibilities of Partners Principals, Managers, and Supervisory Lawyers

(a) A ~~partner~~ principal in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a ~~partner~~ principal or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] ...

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated ~~senior partner~~ principal or special committee. *See* Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the ~~partners~~ principals and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] ...

[5] Paragraph (c)(2) defines the duty of a ~~partner~~ principal or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. ~~Partners~~ Principals and lawyers with comparable authority have

at least indirect responsibility for all work being done by the firm, while a ~~partner~~ principal or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a ~~partner~~ principal or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] ...

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a ~~partner~~ principal, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] ...

Rule 5.3, Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a ~~partner~~ principal, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a ~~partner~~ principal or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, ~~partner~~ principal, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) ...

(b) ...

Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law

...

Comment

[1] ...

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in North Carolina under circumstances that do not create an unreasonable risk to the interests of their clients, the courts, or the public. ... A lawyer not admitted to practice in North Carolina must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in North Carolina. *See also* Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is ~~partner~~ a principal, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

...

Rule 7.5, Firm Names and Letterheads

...

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic."...A firm name that includes the surname of a deceased or retired ~~partner~~ principal is, strictly speaking, a trade name. However, the use of such names, as well as designations such as "Law Offices of John Doe," "Smith and Associates," and "Jones Law Firm" are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired ~~partner~~ principal may be used in the name of a law firm only if the ~~partner~~ principal has ceased the practice of law.

[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 July 22, 2016.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 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 22nd day of September, 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 22nd day of September, 2016.

s/Sam J. Ervin
For the Court

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