371 N.C.—No. 2 Pages 121-344

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

NOVEMBER 21, 2018

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

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OF
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SUPREME COURT OF NORTH CAROLINA

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CONSTITUTIONAL LAW

Constitutional Law—Confrontation Clause—statements made by deceased victim—ongoing emergency—nontestimonial—Where the trial court admitted, through the testimony of a police officer, statements made by the murder victim approximately nine months before the murder during a domestic dispute with defendant (her estranged husband), the Court of Appeals erred by holding that admission of the statements violated the Confrontation Clause of the U.S. Constitution. The statements were nontestimonial. They occurred during the course of an ongoing emergency that resulted from defendant entering the victim's apartment, detaining her there, and physically assaulting her; and they led to the officer's decision to enter the apartment to ensure that defendant had left and no longer posed a threat to the victim. **State v. Miller, 273.**

Constitutional Law—due process—cumulative effect—There was no due process violation in a prosecution for kidnapping, rape, and murder where defendant contended that such a violation resulted from the cumulative effect of alleged ineffective assistance of counsel, admission of testimony that defendant's lawyers revealed the location of the victim to police, and the evidence driving from the discovery of the body. Defendant did not receive ineffective assistance of counsel, and the trial court did not err in any evidentiary rulings. **State v. McNeill, 198.**

Constitutional Law—ineffective assistance of counsel—location of victim's body—understanding with counsel—Defendant was not denied the effective assistance of counsel where he was charged with kidnapping, rape, and murder; his attorneys revealed the location of the victim's body; and defendant asserted on appeal that his attorneys erroneously advised him that they would shield his identity as the source of the information. The entire purpose of the disclosure, to which defendant agreed, was to show cooperation by defendant, and the method of disclosure allowed an immediate inference of cooperation but avoided any inadvertent admission of guilt. Whether defendant's attorneys should have advised him to adopt a different strategy is a separate question which defendant did not raise. **State v. McNeill, 198.**

Constitutional Law—ineffective assistance of counsel—Cronic claim—location of victim revealed—A defendant charged with the kidnapping, rape, and murder of a 5-year-old child received effective assistance of counsel, despite his claim of a breakdown of the adversarial process under *United States v. Chronic*, 466 U.S. 648 (1984), where his attorneys' disclosure of the location of the victim was a reasonable strategic decision. **State v. McNeill, 198.**

Constitutional Law—ineffective assistance of counsel—investigation of case—A defendant received effective assistance of counsel where he was charged with kidnapping, rape, and murder and alleged that his attorneys did not conduct an adequate investigation before disclosing the location of the victim's body. The investigation was at an early stage, so there was no discovery file to examine, and defendant did not identify anything that the allegedly inadequate investigation failed to uncover which would have had any effect on the reasonableness of the strategic decision to make the disclosure. **State v. McNeill, 198.**

Constitutional Law—ineffective assistance of counsel—revealing location of missing victim's body—A defendant who was eventually tried for the kidnapping, rape, and murder of a five-year-old girl received effective assistance of counsel where his attorneys disclosed the location of the victim's body. His attorneys had been involved in the case for one day, there was uncertainty over whether the victim was still alive, the weather was cold and rainy, there was a massive law enforcement search in the area, and the attorneys were concerned that the value of the information would diminish if the girl died or was found without defendant's information. There was other heavily incriminating evidence, and attorneys' goal was to avoid the death penalty through a plea bargain or the mitigating circumstances of remorse and cooperation. A plea bargain was not secured before the information was released, but defendant subsequently twice declined plea bargain offers to remove the death penalty. **State v. McNeill, 198.**

CRIMINAL LAW

Criminal Law—intellectual disability defense—motion to set aside verdict—The trial court did not abuse its discretion by failing to set aside the jury's verdict on intellectual disability in a prosecution for kidnapping, rape, and murder. Although defendant presented evidence to support a determination that he should be deemed exempt from the death penalty on the grounds of intellectual disability, the State presented expert testimony that supported the verdict. The relative credibility of the testimony of the various expert witnesses was a matter for the jury. **State v. Rodriguez, 295.**

CRIMINAL LAW—Continued

Criminal Law—prosecutor's arguments—location of victim's body—disclosure by defense—The trial court did not abuse its discretion when it denied defendant's motions for mistrial in a prosecution for kidnapping, rape, and murder and where the prosecutor made two comments in his closing arguments about the victim's location being revealed by the defense. The statement that the body was found where "defendant's lawyer said he put the body" was improper because the statement was couched as a statement of fact, which was not accurate, rather than as an inference. The statement that defendant's "attorney telling law enforcement where to look for the body puts him there" was not improper and was a permissible inference. However, the improper statement was not such a serious impropriety as to make it impossible to attain a fair and impartial verdict. The judge gave curative instructions, and the evidence against defendant was overwhelming. **State v. McNeill, 198.**

Criminal Law—Racial Justice Act—failure to raise issues—A defendant in a kidnapping, rape, and murder prosecution could not complain of the trial court's failure to strictly adhere to the Racial Justice Act's pretrial statutory procedures where he himself failed to follow those procedures. There was no prejudice to defendant's ability to raise a claim in a motion for appropriate relief. **State v. McNeill, 198.**

EVIDENCE

Evidence—attorney-client privilege—revelation of victim's location—Information about the location of the victim in a prosecution for the kidnapping, rape, and murder of a five-year-old child was not protected by the attorney-client privilege because defendant communicated the information to his attorneys with the purpose that it be relayed to law enforcement. The attorney-client privilege and the ethical duty of confidentiality are not synonymous, although the two principles are related. **State v. McNeill, 198.**

Evidence—expert witness—prior testimony for defense in another case—In a prosecution for kidnapping, rape, and murder in which the defense of intellectual disability was raised, the trial court did not err by allowing the State to elicit evidence that its expert had previously testified for a criminal defense client in another case. The testimony was relevant to the witness's lack of bias, and it could not be said that the testimony constituted impermissible prosecutorial vouching for the witness's credibility. **State v. Rodriguez, 295.**

Evidence—hearsay—admission—location of victim—officer's testimony—information received from defendant's attorneys—Testimony from a police officer that he received information about the location of the victim from defendant's attorneys was not inadmissible hearsay where defendant authorized his attorneys to convey the information to law enforcement. Moreover, the officer was not permitted to testify about any feelings as to the source of the information. **State v. McNeill, 198.**

HOMICIDE

Homicide—first-degree murder—identity—sufficiency—The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge for insufficient evidence of defendant's identity. The evidence contained ample support for the State's contention that defendant caused the victim's death and permitted the inference that defendant acted with premeditation and deliberation. **State v. Rodriguez, 295.**

JURY

Jury—selection—death penalty—intellectually disabled person—In a capital prosecution for first-degree murder, the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues did not constitute an abuse of discretion or render the trial fundamentally unfair. Defendant was allowed explain that intellectual disability is a defense to the death penalty and ask prospective jurors about their experience with intellectual disabilities and their ability to follow the trial court's instruction. **State v. Rodriguez, 295.**

MOTOR VEHICLES

Motor Vehicles—driving while impaired—license revocation—standard of review—Where the N.C. Department of Motor Vehicles (DMV) revoked defendant's driving privileges for his refusal to submit to a chemical analysis, and the superior court reversed the DMV hearing officer's decision, the Court of Appeals erred on review by making witness credibility determinations and resolving contradictions in the evidence when it determined that the DMV hearing officer's conclusion was "not supported by the record evidence or the findings." Based on the unchallenged findings of fact, petitioner's repeated failure to follow the chemical analyst's instructions on how to provide a sufficient breath sample, after being warned that a refusal to comply would be recorded if such failure continued, constituted willful refusal to submit to a chemical analysis. **Brackett v. Thomas, 121.**

SCHOOLS AND EDUCATION

Schools and Education—State Board of Education and Superintendent of Public Instruction—powers and duties—Legislation that amended numerous provisions of N.C.G.S. Chapter 115C—eliminating certain aspects of the N.C. State Board of Education's oversight of a number of the Superintendent of Public Instruction's powers and duties, and assigning several powers and duties that had formerly belonged to the Board or the Governor to the Superintendent—did not, on its face, violate Article IX, Section 5 of the N.C. Constitution. The Board's continued ability to exercise its constitutional authority to generally supervise and administer the public school system was preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties assigned to the Superintendent. The Court further determined that the "needed rules and regulations" to which the legislation referred were not subject to the rulemaking requirements of the Administrative Procedure Act. **N.C. State Bd. of Educ. v. State, 170.**

Schools and Education—State Board of Education rules—review by Rules Review Commission—plain language of N.C. Constitution—The plain language of Article IX, Section 5 of the N.C. Constitution authorized the General Assembly to require the State Board of Education to submit its proposed rules to the Rules Review Commission for review because this procedure was statutorily enacted and the Board's prescribed constitutional duties are subject to laws enacted by the General Assembly. **N.C. State Bd. of Educ. v. State, 149.**

Schools and Education—State Board of Education rules—review by Rules Review Commission—delegation of authority—The General Assembly properly delegated authority to the Rules Review Commission to review the State Board of Education's proposed rules. The statutes at issue included sufficient restrictions on

the Commission and safeguards to ensure the Board's continued ability to fulfill its mandates as set forth in the state constitution. Further, the Commission was tasked only with the responsibility to review the Board's rules from a procedural perspective for clarity and to ensure that the rules were adopted in compliance with the Administrative Procedure Act. **N.C. State Bd. of Educ. v. State, 149.**

SEARCH AND SEIZURE

Search and Seizure—appeal of admissibility of evidence—no motion to suppress before or at trial—complete waiver of review on direct appeal—In a case of first impression, where defendant did not move to suppress—before or at trial—evidence of cocaine found in his pocket during a traffic stop, but instead argued for the first time on appeal that the seizure of the cocaine resulted from Fourth Amendment violations, the Supreme Court held that the Court of Appeals erred by conducting plain error review and concluding that the trial court committed plain error by admitting evidence of the cocaine. Defendant's Fourth Amendment claims were not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress the evidence of the cocaine before or at trial. **State v. Miller, 266.**

Search and Seizure—objective, reasonable interpretation—robbery by back seat passenger—A police officer had reasonable suspicion of criminal activity to briefly detain defendant for questioning where: (1) it was 4:00 a.m.; (2) the vehicle was stopped in the road with no turn signal on; (3) there were only two people sitting in the car, one in the driver's seat and the other directly behind him in the back seat; (4) defendant (sitting behind the driver) appeared to be pulling some sort of toboggan or ski mask down over his face until he saw the officer and pushed it back up; (5) when the officer asked whether the occupants were okay, each said yes, but the driver made a hand motion at his neck area; (6) after the officer drove into the store parking lot and waited for an additional thirty seconds, the vehicle still did not move or display a turn signal; (7) after defendant got out of the car, the driver was edging forward and about to leave defendant, who he had just said was his brother, on the side of the road on a cold, wet night; (8) when the officer again asked whether everything was okay, the driver shook his head "no" while defendant said everything was fine; and (9) after the officer confronted defendant with the fact that the driver had shaken his head "no," the driver quickly stated that everything was okay. The Court of Appeals erroneously placed undue weight on the officer's subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would view them. **State v. Nicholson, 284.**

SENTENCING

Sentencing—capital—mitigating circumstance—mental or emotional disturbance—intellectual disability—The trial court erred in a capital sentencing proceeding by not submitting the mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his conduct. The trial court has no discretion in determining whether to submit a mitigating circumstance when substantial evidence is submitted supporting the circumstance and the issue does not hinge on whether the defendant was under the influence of a mental or emotional disturbance at the time of the killing. In this case, the record contained ample evidence supporting the admission of the circumstance. **State v. Rodriguez, 295.**

Sentencing—capital—proportionality—aggravating circumstances supported by record—sentence not result of passion, prejudice, or arbitrary factors—not disproportionate to similar cases—A sentence of death was not disproportionate where defendant kidnapped a five-year-old child from her home and sexually assaulted her before strangling her and discarding her body under a log in a remote area used for field dressing deer carcasses. **State v. McNeill, 198.**

Sentencing—capital—prosecutor's closing arguments—defendant's decision not to present mitigating evidence or arguments—The prosecutor's remarks in a capital sentencing proceeding were not so grossly improper that the trial court should have intervened *ex mero motu* where the prosecutor commented on defendant's decision not to present mitigating evidence or closing arguments. The thrust of the argument was an admonition to the jury to make its decision based on the facts and the law presented in the case. **State v. McNeill, 198.**

SEXUAL OFFENSES

Sexual Offenses—anal penetration—evidence sufficient to submit to jury—The evidence, taken in the light most favorable to the State, was sufficient to submit to the jury the issue of defendant's guilt of sexual offense, as well as the aggravating circumstance related to a sexual offense, based upon a theory of anal penetration. **State v. McNeill, 198.**

TAXATION

Taxation—out-of-state trust—beneficiary residing in N.C.—minimum contacts—Where the N.C. Department of Revenue taxed the income of The Kimberly Rice Kaestner 1992 Family Trust—which was created in New York and governed by the laws of New York—pursuant to N.C.G.S. § 105-160.2 solely based on the North Carolina residence of the beneficiaries during tax years 2005 through 2008, the Trust did not have sufficient minimum contacts with the State of North Carolina to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the N.C. Constitution. Therefore, N.C.G.S. § 105-160.2 was unconstitutional as applied to collect the disputed income taxes from the Trust. **Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, 133.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA SUPREME COURT

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

January 8, 9, 10
February 5, 6, 7
March 12, 13, 14, 15
April 16, 17, 18
May 14, 15, 16, 17
August 27, 28, 29, 30
October 1, 2, 3, 4
November 6, 7, 8
December 3, 4, 5, 6

WAYNE T. BRACKETT, JR., Petitioner
v.
KELLY J. THOMAS, Commissioner of the North Carolina
Division of Motor Vehicles, Respondent

No. 146PA17

Filed 8 June 2018

Motor Vehicles—driving while impaired—license revocation—standard of review

Where the N.C. Department of Motor Vehicles (DMV) revoked defendant's driving privileges for his refusal to submit to a chemical analysis, and the superior court reversed the DMV hearing officer's decision, the Court of Appeals erred on review by making witness credibility determinations and resolving contradictions in the evidence when it determined that the DMV hearing officer's conclusion was "not supported by the record evidence or the findings." Based on the unchallenged findings of fact, petitioner's repeated failure to follow the chemical analyst's instructions on how to provide a sufficient breath sample, after being warned that a refusal to comply would be recorded if such failure continued, constituted willful refusal to submit to a chemical analysis.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 778 (2017), affirming an order signed on 14 June 2016 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 13 March 2018.

Joel N. Oakley for petitioner-appellee.

Joshua H. Stein, Attorney General, by Christopher W. Brooks, Special Deputy Attorney General, for respondent-appellant.

MORGAN, Justice.

In this matter, we reaffirm the well-established standard of review when a court reviews a final agency decision by the North Carolina Division of Motor Vehicles (DMV) to revoke a driver's license for willful refusal to submit to a chemical analysis. In determining that the DMV erred in concluding that such a willful refusal had occurred, the Court of Appeals here overstepped its role by making witness

credibility determinations and resolving contradictions in the evidence presented during the DMV's administrative hearing concerning the license revocation. Utilizing the proper standard of review, we conclude that the unchallenged findings of fact made by the DMV support the only disputed legal conclusion, thus requiring us to uphold the DMV's decision to revoke the driving privileges at issue. Accordingly, we reverse the decision of the Court of Appeals in this matter.

On 13 August 2015, petitioner Wayne T. Brackett, Jr. was arrested in Guilford County and charged with the offense of driving while impaired. Thereafter, respondent Kelly J. Thomas, Commissioner of the DMV, notified petitioner that, effective 20 September 2015, petitioner's driving privileges would be suspended and revoked based on petitioner's refusal to submit to a chemical analysis. In response, petitioner requested an administrative hearing before the DMV pursuant to the Uniform Driver's License Act. *See* N.C.G.S. § 20-16.2(d) (2017). That hearing was conducted on 7 January 2016, after which the DMV hearing officer upheld the revocation of petitioner's driving privileges, making numerous findings of fact and conclusions of law in his written decision. Petitioner has never challenged the hearing officer's findings of fact,[1] which are therefore binding on each reviewing court. *See e.g.*, *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962) ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." (citations omitted)); *see also Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). These findings therefore provide the factual record of the events underlying this appeal:

> 1. On August 13, 2015, Officer Brent Kinney, Guilford County Sheriff's Office, was stationary in the Food Lion parking lot at 7605 North NC Hwy 68 when he observed the petitioner and a female walking to the connecting parking lot of a bar, Stoke Ridge, between 9:30-9:40 [p.m.]. He noted the petitioner had a dazed appearance and was unsure on his feet.
>
> 2. Officer Brent Kinney observed the petitioner enter the driver's seat of a gold Audi, back out of the parking space, and quickly accelerate to about 26 mph in the Food Lion parking [lot].

1. In his 19 January 2016 petition for judicial review of the DMV's final agency decision in the superior court, petitioner challenged only "the conclusion of the [DMV] that [he] willfully and unlawfully refused to submit to a chemical test."

3. Officer Brent Kinney got behind the petitioner until the petitioner stopped in the parking lot. At that point Officer Brent Kinney observed both doors open and the petitioner and the female exit the vehicle.

4. Officer Brent Kinney lost sight of the vehicle when he exited the parking lot. Then he got behind the vehicle when it exited the parking lot.

5. Officer Brent Kinney observed the gold Audi cross the yellow line twice and activated his blue lights and siren.

6. The female was driving and Officer Brent Kinney determined she was not impaired.

7. Officer Brent Kinney detected a strong odor of alcohol on the petitioner, whom he saw driving in the PVA of Food Lion and observed he had slurred speech, glassy eyes and was red-faced.

8. The petitioner put a piece of candy in his mouth even after Officer Brent Kinney told him not to do so. He subsequently removed the piece of candy when asked to do so.

9. Officer Brent Kinney asked the petitioner to submit to the following tests: 1) Recite alphabet from E-U—Petitioner recited E, F, G, H, I, J, K, L, M, N, O, P and stopped; and 2) Recite numbers backwards from 67-54—Petitioner recited 67, 66, 65, 4, 3, 2, 1, 59, 8, 7, 6, 5, 4, 3, 2, 1.

10. Officer Brent Kinney arrested the petitioner, charging him with driving while impaired, and transported him to the Guilford County jail control for testing.

11. Officer Brent Kinney, a currently certified chemical analyst with the Guilford County Sheriff's Office, read orally and provided a copy of the implied consent rights at 10:30 [p.m.] The petitioner refused to sign the rights form and did not call an attorney or witness.

12. Officer Brent Kinney explained and demonstrated how to provide a sufficient sample of air for the test.

13. Officer Brent Kinney requested the petitioner submit to the test at 10:49 [p.m.] The petitioner did not take a deep breath as instructed and faked blowing as the instrument gave no tone and the [gauge] did not move, indicating no air was being introduced.

14. Officer Brent Kinney warned the petitioner that he must blow as instructed or it would be determined he was refusing the test and explained again how to provide a sufficient sample.

15. The petitioner made a second attempt to submit to the test. This time he did take a breath but then gave a strong puff and then stopped; and then gave a second strong puff and stopped.

16. The petitioner's second attempt concluded at 10:50 [p.m.] at which time Officer Brent Kinney determined he was refusing the test by failing to follow his instructions and marked the refusal at that time.

17. The petitioner's second attempt resulted in a detection of mouth alcohol. With that, Officer Brent Kinney had to reset the instrument, not to provide another opportunity for the petitioner to take the test, but to enter the refusal into the instrument.

18. In spite of the test ticket recording the refusal at 10:56 [p.m.], the DHHS 4081 indicates the refusal was actually at 10:50 [p.m.]

19. The doctor's note indicates the petitioner's asthma appears to be stabilized with medication and anxiety disorder is managed by Xanax.

Based upon these findings of fact, the hearing officer made the following conclusions of law and upheld the revocation of petitioner's driver's license:

1. [Petitioner] was charged with an implied-consent offense.

2. Officer Brent Kinney had reasonable grounds to believe that [petitioner] had committed an implied-consent offense.

3. The implied-consent offense charged involved no death or critical injury to another person.

4. [Petitioner] was notified of his rights as required by N.C.G.S. 20-16.2(a).

5. [Petitioner] willfully refused to submit to a chemical analysis.

See N.C.G.S. § 20-16.2(d) (providing that the hearing before the DMV "shall be limited to consideration of" five matters: whether a driver was charged with an implied-consent offense, whether a law enforcement officer had reasonable grounds to believe the driver committed an implied-consent offense, whether the implied-consent offense charged involved death or critical injury to another person, whether the driver was notified of his rights, and whether the driver "willfully refused to submit to a chemical analysis").

On 19 January 2016, petitioner filed a petition for judicial review in the Superior Court, Guilford County, challenging the hearing officer's final conclusion of law: that petitioner had willfully refused to submit to a chemical analysis. *See id.* § 20-16.2(e) (2017) (providing that a "person whose license has been revoked has the right to file a petition [for judicial review] in the superior court"). The superior court heard the matter on 6 June 2016, ultimately reversing the DMV hearing officer's decision because "[t]he record does not support the conclusion under N.C.G.S. § 20-16.2(d)(5). Therefore, the [DMV] Hearing Officer should not have found that the petitioner willfully refused to submit to a chemical analysis of his breath."

The Commissioner appealed that decision to the Court of Appeals, arguing that the superior court failed to conduct the type of review mandated by statute, *see id.* § 20-16.2(e) ("superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license"), that sufficient evidence in the record supports the hearing officer's findings of fact, and that those findings of fact in turn support the hearing officer's conclusion of law that petitioner willfully refused to submit to a chemical analysis test. The Court of Appeals agreed that the superior court did not employ the correct standard of review and did "not explain which of the agency's fact findings were unsupported." *Brackett v. Thomas*, ___ N.C. App. ___, ___, 798 S.E.2d 778, 781 (2017).

Citing this Court's per curiam opinion in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment*, 355 N.C. 269, 559 S.E.2d 547 (2002), in which this Court reversed the decision of the Court of Appeals for

the reasons stated in the dissenting opinion, including that "an appellate court's obligation to review a superior court order for errors of law . . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court," 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (internal citation omitted), the Court of Appeals stated it would "consider the issue under the applicable statutory standard of review, without remanding the case to the superior court." *Brackett*, ___ N.C. App. at ___, 798 S.E.2d at 781. But, the Court of Appeals then utilized the same flawed analysis that it identified in the superior court's review, namely: considering whether *the evidence in the record* supported the hearing officer's conclusion of law that petitioner willfully refused a chemical analysis,[2] rather than determining whether *the uncontested findings of fact* supported the hearing officer's legal conclusion that petitioner willfully refused a chemical analysis.[3]

The General Assembly has explicitly directed that for a driver's license revocation based upon a person's refusal to submit to a chemical analysis, "[t]he superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C.G.S. § 20-16.2(e). Factual findings that are supported by evidence are conclusive, "even though the evidence might sustain findings to the contrary." *Seders v. Powell*, 298 N.C. 453, 460-61, 259 S.E.2d 544, 549 (1979) (citations omitted). It is the role of the agency,

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2. Petitioner may have contributed to the confusion experienced by the reviewing courts in this matter by suggesting in his original petition for judicial review in the superior court that the willful refusal "conclusion is not sustained by the evidence presented." Petitioner has continued to make this argument in his briefs to the Court of Appeals and this Court.

3. Although not directly pertinent to the matter before this Court, we observe that the Court of Appeals also erred in undertaking an analysis of the hearing officer's first four conclusions of law—whether petitioner was charged with an implied-consent offense, whether Officer Kinney had reasonable grounds to believe petitioner had committed an implied-consent offense, whether the implied-consent offense charged involved death or critical injury, and whether petitioner was notified of his rights—even though, in seeking judicial review in the superior court, petitioner challenged only the conclusion that he willfully refused chemical analysis. Further, in that analysis, the Court of Appeals stated that it considered whether "substantial" evidence supported the hearing officer's factual findings, rather than the proper standard under N.C.G.S. § 20-16.2(e) of whether "sufficient" evidence in the record supports challenged findings of fact. *See Brackett*, ___ N.C. App. at ___, 798 S.E.2d at 781.

rather than a reviewing court, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980) (citations omitted); *see also Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 202, 593 S.E.2d 764, 771 (2004). In the present case, the Court of Appeals engaged in the prohibited exercises of reweighing evidence and making witness credibility determinations, essentially making its own findings of fact in several areas where evidence presented to the hearing officer was conflicting.

As previously noted, unchallenged findings of fact are binding on appeal; therefore, the only question for the Court of Appeals was whether the hearing officer's findings of fact supported the legal conclusion that petitioner willfully refused chemical analysis. As the court acknowledged in its opinion,

> Officer Kinney testified that: (1) he instructed Petitioner on how to provide a valid sample of breath for testing; (2) Petitioner failed to follow the officer's instructions on the first Intoximeter test, as the pressure gauge on the instrument did not indicate that air was being breathed by Petitioner; (3) Officer Kinney provided Petitioner a second opportunity to provide an air sample; and (4) contrary to Officer Kinney's instructions, Petitioner finished blowing before being told to stop and then followed up with another puff of air.
>
> Petitioner urges us to affirm the superior court's decision and asserts the admitted evidence in the record shows: (1) the results of Petitioner's second Intoximeter test registered "mouth alcohol;" (2) the operating manual and procedures for the EC/IR II Intoximeter requires that if the machine detects "mouth alcohol," then a subsequent test should be administered after a 15-minute observation period; (3) Petitioner testified that he blew as long and hard as he could into the Intoximeter; (4) Petitioner testified he told the arresting officer before being administered the Intoximeter that he suffered from asthma.

Brackett, ___ N.C. App. at ___, 798 S.E.2d at 783. With these observations, the Court of Appeals recognized that petitioner had asked that court and the superior court to (1) make witness credibility determinations about Officer Kinney and petitioner concerning their conflicting

accounts whether petitioner followed the officer's direction to blow without stopping in order to give a valid breath sample, (2) evaluate evidence from the operating manual and procedures for the EC/IR II Intoximeter about which the hearing officer made no findings, and (3) weigh those factual determinations to decide whether they support a legal conclusion of willful refusal by petitioner to submit to a chemical analysis. The court's opinion then states:

> Here, the findings of fact show and it is undisputed that when Petitioner blew a second time, the Intoximeter registered "mouth alcohol" as the result of the sample. The arresting officer asserted Petitioner failed to follow instructions by blowing insufficiently into the machine and he marked it as a willful refusal. *Rather than indicating Petitioner blew insufficiently to provide a sample on his second attempt, Petitioner provided an adequate sample for the Intoximeter to read and register "mouth alcohol". The arresting officer's testimony that Petitioner blew insufficiently is directly contradicted by the Intoximeter's registering a sample with a "mouth alcohol" test result.*
>
> Respondent did not produce any evidence to demonstrate the EC/IR II Intoximeter will produce a "mouth alcohol" reading if the test subject fails to submit a sufficient sample. The undisputed evidence shows *the EC/IR II Intoximeter registered "mouth alcohol" and did not indicate an inadequate sample or refusal from Petitioner's failure to blow sufficiently.*
>
> *Officer Kinney's testimony asserting Petitioner willfully refused is contradicted by the machine's acceptance of Petitioner's sample. The indicated procedure to follow from this result of "mouth alcohol" is for a subsequent EC/IR II Intoximeter test to be administered after a 15-minute observation period elapses.* This procedure was not followed here. The DMV Hearing Officer's conclusion that "[Petitioner] willfully refused to submit to a chemical analysis" is not supported by the record evidence or the findings.

Id. at ___, 798 S.E.2d at 784 (emphases added).

Thus, instead of rejecting petitioner's request to invade the province of the fact-finder in this case—the hearing officer—and correctly

focusing solely on whether the unchallenged findings of fact support the conclusion of law of a willful refusal, the Court of Appeals first impermissibly reviewed the record evidence to make new factual determinations about, *inter alia*, the meaning of a "mouth alcohol" reading on the Intoximeter, the adequacy of a breath sample, and the procedures to be followed when a "mouth alcohol" reading is produced. Thereupon, the appellate court improperly determined the weight that such a reading should be given in determining whether an adequate breath sample has been produced and resolved contradictions in the evidence regarding whether petitioner followed Officer Kinney's directions. These unnecessary and superfluous steps by the Court of Appeals constitute error.

To properly review the hearing officer's determination of a willful refusal to submit to a chemical analysis test by petitioner, we must determine whether that conclusion of law is supported by the following findings of fact pertinent to that issue:

> 12. Officer Brent Kinney explained and demonstrated how to provide a sufficient sample of air for the test.
>
> 13. Officer Brent Kinney requested the petitioner submit to the test at 10:49 [p.m.] The petitioner did not take a deep breath as instructed and faked blowing as the instrument gave no tone and the [gauge] did not move, indicating no air was being introduced.
>
> 14. Officer Brent Kinney warned the petitioner that he must blow as instructed or it would be determined he was refusing the test and explained again how to provide a sufficient sample.
>
> 15. The petitioner made a second attempt to submit to the test. This time he did take a breath but then gave a strong puff and then stopped; and then gave a second strong puff and stopped.
>
> 16. The petitioner's second attempt concluded at 10:50 [p.m.] at which time Officer Brent Kinney determined he was refusing the test by failing to follow his instructions and marked the refusal at that time.
>
> 17. The petitioner's second attempt resulted in a detection of mouth alcohol. With that, Officer Brent Kinney had to reset the instrument, not to provide another opportunity for the petitioner to take the test, but to enter the refusal into the instrument.

18. In spite of the test ticket recording the refusal at 10:56 [p.m.], the DHHS 4081 indicates the refusal was actually at 10:50 [p.m.]

19. The doctor's note indicates the petitioner's asthma appears to be stabilized with medication and anxiety disorder is managed by Xanax.

These factual findings indicate that petitioner was instructed on how to provide a sufficient breath sample, did not follow the instructions on the first blow, was warned that failing to follow the instructions on providing a sufficient breath sample would constitute a refusal, was re-instructed on providing a sufficient breath sample, failed again to follow the instructions during the second blow, was then recorded as refusing to submit to a chemical analysis on the basis of his failure to follow instructions, had a breathing condition that his doctor indicated was "stabilized with medication," and was ultimately marked as willfully refusing to submit to a chemical analysis based upon his failure to follow Officer Kinney's repeated instructions despite being warned. Based on these unchallenged facts, we hold that the repeated failure to follow the chemical analyst's instructions on how to provide a sufficient breath sample, after being warned that a refusal to comply would be recorded if such failure continues, constitutes willful refusal to submit to a chemical analysis.

Section 20-16.2 has consistently included the phrase "willful refusal" to submit to a chemical analysis as a basis for revocation of one's driving privileges over the course of its original enactment and numerous amendments spanning more than five decades. This Court has held that, as provided in N.C.G.S. § 20-16.2, "*refusal* is defined as 'the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey.' " *Joyner v. Garrett*, 279 N.C. 226, 233, 182 S.E.2d 553, 558 (1971) (quoting *refusal*, *Black's Law Dictionary* (4th ed. 1951)). For such a refusal to be willful, the driver's actions must reflect "a conscious choice purposefully made." *Seders*, 298 N.C. at 461, 259 S.E.2d at 550; *see also Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980) (citing *Seders* for the same proposition). Our discussion of the driver's willful refusal in *Seders* is illustrative of the enunciated principle.

In *Seders* the driver was informed of his right to consult an attorney but was also warned that, in any event, testing could be delayed for no longer than thirty minutes. 298 N.C. at 461, 259 S.E.2d at 549; *see* N.C.G.S. § 20-16.2(a)(6) (2017) (stating that a driver must be informed

of his right to "call an attorney for advice . . . , but the testing may not be delayed for [this] purpose[ ] longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney . . . ."). The chemical analyst in *Seders*, who was also a North Carolina state trooper,

> warned [the driver] on three occasions that his time was running out and told [the driver] how many minutes he had remaining. The trooper also stated that he told [the driver] that the test could not be delayed for more than 30 minutes and that if [the driver] did not take the test within that time it would be noted as a refusal.

Id. at 461, 259 S.E.2d at 549. This Court observed that the driver "was told the consequences of his failure to submit to the test within the 30 minute time limitation yet still elected to run the risk of awaiting his attorney's call," and held that the driver's "action constituted a *conscious choice purposefully made* and his omission to comply with this requirement of our motor vehicle law amounts to a willful refusal." *Id.* at 461, 259 S.E.2d at 549 (emphasis added) (citations omitted).

Both the driver in *Seders* and petitioner in the instant case were instructed repeatedly about the process of submitting to a valid chemical analysis. In *Seders*, the instruction at issue was the requirement that the chemical analysis test be implemented no longer than thirty minutes from the time that a vehicle operator is informed of his or her rights to consult an attorney regarding the test. In the case at bar, the instruction at issue is the proper method by which to provide a breath sample sufficient for a chemical analysis. Both the driver in *Seders* and petitioner here were warned that continued failure to comply with instructions repeatedly given by law enforcement officers would result in a determination of a willful refusal to submit to a chemical analysis. Despite these warnings, both the driver in *Seders* and petitioner here remained noncompliant with the pertinent instructions, "action[s] constitut[ing] a conscious choice purposefully made" not to submit to chemical testing. *See id.* at 461, 259 S.E.2d at 550. Petitioner here was instructed about how to produce a sufficient breath sample, but he instead chose to give an initial "faked" blow and then a "puff-stop-puff-stop," both of which were insufficient for analysis. A motor vehicle operator who intentionally and repeatedly fails to follow the instructions that have been explained in order for a chemical analysis to be performed, therefore thwarting the execution of the test, commits willful refusal to submit to a chemical analysis under N.C.G.S. § 20-16.2.

The superior court and the Court of Appeals both employed an incorrect standard of review and thus erred in reversing the administrative decision of the DMV hearing officer revoking petitioner's operator's license. Accordingly, the Court of Appeals decision is reversed and this matter is remanded to that court for further remand to the superior court with instructions to reinstate the order of the DMV dated 7 January 2016.

REVERSED AND REMANDED.

IN THE MATTER OF J.M. AND J.M.

No. 363PA17

Filed 8 June 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 830 (2017), affirming in part, vacating in part, and reversing and remanding in part an order entered on 21 November 2016 by Judge William A. Marsh, III in District Court, Durham County. Heard in the Supreme Court on 16 May 2018 in session in the Buncombe County Courthouse in the City of Asheville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem; and Cathy L. Moore, Senior Assistant County Attorney, for petitioner-appellee Durham County Department of Social Services.

Joyce L. Terres, Assistant Appellate Defender, for respondent-appellant father.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST
v.
NORTH CAROLINA DEPARTMENT OF REVENUE

No. 307PA15-2

Filed 8 June 2018

Taxation—out-of-state trust—beneficiary residing in N.C.—minimum contacts

Where the N.C. Department of Revenue taxed the income of The Kimberly Rice Kaestner 1992 Family Trust—which was created in New York and governed by the laws of New York—pursuant to N.C.G.S. § 105-160.2 solely based on the North Carolina residence of the beneficiaries during tax years 2005 through 2008, the Trust did not have sufficient minimum contacts with the State of North Carolina to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the N.C. Constitution. Therefore, N.C.G.S. § 105-160.2 was unconstitutional as applied to collect the disputed income taxes from the Trust.

Justice ERVIN dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 645 (2016), affirming an opinion and order of summary judgment dated 23 April 2015 entered 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. Heard in the Supreme Court on 11 October 2017.

Moore & Van Allen PLLC, by Thomas D. Myrick, Neil T. Bloomfield, Jonathan M. Watkins, and Kara N. Bitar, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Tenisha S. Jacobs, Special Deputy Attorney General, and James W. Doggett, Deputy Solicitor General; and Law Office of Robert F. Orr, by Robert F. Orr, for defendant-appellant.

JACKSON, Justice.

In this case we consider whether defendant North Carolina Department of Revenue could tax the income of plaintiff The Kimberly

Rice Kaestner 1992 Family Trust pursuant to N.C.G.S. § 105-160.2 solely based on the North Carolina residence of the beneficiaries during tax years 2005 through 2008. Because we determine that plaintiff did not have sufficient minimum contacts with the State of North Carolina to satisfy due process requirements of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina, we conclude that the taxes at issue were collected unconstitutionally and, therefore, affirm the decision of the Court of Appeals affirming the North Carolina Business Court's 23 April 2015 Opinion and Order on Motions for Summary Judgment in favor of plaintiff.

As the Business Court noted, the underlying, material facts of this case as established by the evidence in the record are not in dispute. The Joseph Lee Rice, III Family 1992 Trust was created in New York in 1992 for the benefit of the children of the settlor Joseph Lee Rice, III pursuant to a trust agreement between Rice and the initial trustee, William B. Matteson. In 2005 Matteson was replaced as trustee by David Bernstein, who was a resident of Connecticut. Bernstein remained in the position of trustee and remained a Connecticut resident during the entire period of time relevant to this case. The trust was and is governed by the laws of the State of New York, of which Rice was a resident. No party to the trust resided in North Carolina until Rice's daughter and a primary beneficiary of the trust, Kimberly Rice Kaestner, moved to North Carolina in 1997.

On 30 December 2002, the trust was divided into three share sub-trusts one each for the benefit of Rice's three children, including Kaestner. The sub-trusts were divided into three separate trusts in 2006 by Bernstein for administrative convenience. Plaintiff is the separate share trust formed for the benefit of Kaestner and her three children, all of whom resided in North Carolina during the tax years at issue.

During the tax years at issue, the assets held by plaintiff consisted of various financial investments, and the custodians of those assets were located in Boston, Massachusetts. Documents related to plaintiff such as ownership documents, financial books and records, and legal records were all kept in New York. All of plaintiff's tax returns and accountings were prepared in New York.

None of the beneficiaries of plaintiff had an absolute right to any of plaintiff's assets or income because distributions could only be made at the discretion of Bernstein, who had broad authority to manage the property held by plaintiff. No distributions were made to beneficiaries in

North Carolina, including Kaestner, during the tax years at issue; however, in January 2009, plaintiff loaned $250,000 to Kaestner at Bernstein's discretion to enable her to pursue an investment opportunity. This loan was repaid.

The terms of the original trust provided that the trustee was to distribute the trust assets to Kaestner when she reached the age of forty. Before her fortieth birthday on 2 June 2009, Kaestner had conversations with her father and Bernstein about whether she wished to receive the trust assets on that date. Ultimately, she requested to extend the trust, and accordingly, Bernstein transferred the assets of plaintiff into a new trust, the KER Family Trust, in 2009. That transfer occurred after the tax years at issue, and KER Family Trust is not a party to this case.

In managing plaintiff, Bernstein provided Kaestner with accountings of trust assets, and she received legal advice regarding plaintiff from Bernstein and his firm. Kaestner and her husband also met with Bernstein in New York to discuss investment opportunities for the trust and whether Kaestner desired to receive income distribution as set forth in the original trust agreement.

During tax years 2005 through 2008, defendant taxed plaintiff on income accumulated each year, regardless of whether any of that income was distributed to any of the North Carolina beneficiaries. Plaintiff sought a refund of those taxes totaling more than $1.3 million, including $79,634.00 paid for 2005, $106,637.00 paid for 2006, $1,099,660.00 paid for 2007, and $17,241.00 paid for 2008. Defendant denied the refund request on 11 February 2011.

On 21 June 2012, plaintiff filed a complaint in Superior Court, Wake County, alleging that defendant wrongfully denied plaintiff's request for a refund because N.C.G.S. § 105-160.2 is both unconstitutional on its face and as applied to collect income taxes from plaintiff during those tax years. Plaintiff claimed that the taxes collected pursuant to section 105-160.2 violate the Due Process Clause because plaintiff did not have sufficient minimum contacts with the State of North Carolina. Plaintiff also claimed that the taxes violate the Commerce Clause on several grounds, including that the tax was not applied to an activity with a substantial nexus to the taxing state. Plaintiff claimed that consequently, the tax also violated Article I, Section 19 of the state constitution. Based on these claims, plaintiff requested a declaration that section 105-160.2 is unconstitutional and an order from the court requiring defendant to refund any taxes, penalties, and interest paid by plaintiff for tax years 2005 through 2008, and enjoining defendant from enforcing any future

assessments against plaintiff pursuant to section 105-160.2. Subsequent evidence indicated that penalties were assessed against plaintiff for tax years 2005 and 2006. These penalties were not paid by plaintiff and were ultimately waived at plaintiff's request, rendering moot that specific portion of plaintiff's claim for relief.

In accord with N.C.G.S. § 7A-45.4(b), this case was designated as a mandatory complex business case by the Chief Justice on 19 July 2012. On 11 February 2013, the Business Court issued an Opinion and Order on Defendant's Motion to Dismiss in which it granted the motion as to plaintiff's claim for injunctive relief, but denied the motion as to plaintiff's constitutional claims.

Relevant to this appeal, plaintiff filed a motion for summary judgment on its constitutional claims on 8 July 2014, and defendant filed its own motion for summary judgment on 4 September 2014. In its Opinion and Order on Motions for Summary Judgment, the Business Court observed that when a taxed entity such as plaintiff is not physically present in the taxing state, the taxed entity must "purposefully avail[ ] itself of the benefits of an economic market in the forum state" for the tax to satisfy due process requirements. *Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue*, No. 12 CVS 8740, 2015 WL 1880607, at *4 (N.C. Super. Ct. Wake County (Bus. Ct.) Apr. 23, 2015), *aff'd*, ___, N.C. App. ___, 789 S.E.2d 645 (2016) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 307, 112 S. Ct. 1904, 1910 (1992)). Determining that plaintiff did not purposefully avail itself of the benefits of the taxing state based solely on the beneficiaries' residence in North Carolina, the Business Court concluded that the provision of section 105-160.2 allowing taxation of trust income "that is for the benefit of a resident of this State," N.C.G.S. § 105-160.2 (2005), violated both the Due Process Clause and Article I, Section 19 of the state constitution as applied to plaintiff. Applying the four-pronged analysis for determining the constitutionality of a tax pursuant to the Commerce Clause as set forth by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079 (1977), the Business Court also determined that the same provision of section 105-160.2 violated the Commerce Clause as applied to plaintiff. Therefore, the Business Court denied defendant's motion for summary judgment, granted plaintiff's motion for summary judgment, and ordered that any taxes and penalties paid by plaintiff pursuant to section 105-160.2 be refunded with interest.

Defendant noticed its appeal to the Court of Appeals on 22 May 2015. Before that court, defendant challenged the substantive conclusions of the Business Court that taxation of the trust based solely on

the residency of the beneficiaries violated both the Due Process and Commerce Clauses as applied to plaintiff. *Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue*, ___ N.C. App. ___, ___, 789 S.E.2d 645, 647-48 (2016). Like the Business Court, the Court of Appeals also reasoned from the United States Supreme Court's guidance that "[t]he Due Process Clause requires [(1)] some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and [(2)] that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Id.* at ___, 789 S.E.2d at 649 (second and third alterations in original) (quoting *Quill*, 504 U.S. at 306, 112 S. Ct. at 1909-10 (citations and internal quotation marks omitted)). Noting that a trust has a separate legal existence for the purpose of income taxes pursuant to *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420 (1933), *Kaestner 1992 Family Tr.*, ___ N.C. App. at ___, 789 S.E.2d at 650, the Court of Appeals held that the connection between North Carolina and the trust based solely on the residence of the beneficiaries was insufficient to satisfy due process requirements, *id.* at ___, 789 S.E.2d at 651. Consequently, the Court of Appeals affirmed the Business Court's order granting summary judgment for plaintiff. *Id.* at ___, 789 S.E.2d at 651. The Court of Appeals chose not to address whether taxation of plaintiff also violated the Commerce Clause. *Id.* at ___, 789 S.E.2d at 651.

On appeal to this Court from the decision of the Court of Appeals, defendant continues to argue that plaintiff had minimum contacts with the State of North Carolina sufficient to satisfy due process based on the presence of the beneficiaries in the state. Defendant also argues that plaintiff had sufficient minimum contacts with North Carolina through certain acts of the trustee whereby plaintiff benefitted from "the ordered society maintained by taxation in North Carolina." We disagree.

"Our standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely [substitutes] its own judgment for' [that of the lower court]." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016) (first and fifth alterations in original) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (second and third alterations in original)). On a motion for summary judgment, "[t]he judgment sought 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) (2017).

The relevant provision of section 105-160.2 has remained substantively unchanged since the tax years at issue and states that income tax on an estate or trust "is computed on the amount of the taxable income of the estate or trust that is for the benefit of a resident of this State." *Id.* § 105-160.2 (2017). In its complaint and motion for summary judgment, plaintiff maintained that this section is both unconstitutional on its face and as applied to plaintiff. We presume "that any act passed by the legislature is constitutional, and [we] will not strike it down if [it] can be upheld on any reasonable ground." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998) (second alteration in original)). Consequently, "[a]n individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.' " *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282 (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)). Given this exacting standard and that the allegations and evidence appear relevant solely to whether defendant unconstitutionally collected income taxes from plaintiff for tax years 2005 through 2008, we consider only whether section 105-160.2 is unconstitutional as applied to plaintiff to collect the taxes at issue.

In considering an as-applied challenge to the constitutionality of a statute, we look to whether the statute is constitutional in the limited context of the facts of the case before us. Then, as with any constitutional challenge, "[i]f there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978) (quoting *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969)).

The Fourteenth Amendment directs that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. Similarly, our state constitution declares that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Indeed, we have determined that "[t]he term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution."

Rhyne v. K-Mart Corp., 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)). Accordingly, our analysis of plaintiff's due process challenge below also applies to plaintiff's state constitutional claim.

When applied to taxation, "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Quill*, 504 U.S. at 306, 112 S. Ct. at 1909 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S. Ct. 535, 539 (1954)). Due process also requires that "the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State,' " *id.* at 306, 112 S. Ct. at 1909-10 (internal quotation marks omitted) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S. Ct. 2340, 2344 (1978)); however, in this case we are concerned only with the first requirement. This "minimum connection," which is more commonly referred to as "minimum contacts," *see id.* at 307, 112 S. Ct. at 1910 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)), exists when the taxed entity "purposefully avails itself of the benefits of an economic market" in the taxing state "even if it has no physical presence in the State," *id.* at 307, 112 S. Ct. at 1910 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985)). The Court in *Quill Corporation* therefore declared: "[T]o the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State" for imposition and collection of a tax, "we overrule those holdings as superseded by developments in the law of due process." *Id.* at 308, 112 S. Ct. at 1911. Applying that standard, the Court went on to hold that the plaintiff in *Quill Corporation* "purposefully directed its activities at North Dakota residents, that the magnitude of those contacts [was] more than sufficient for due process purposes, and that the use tax [was] related to the benefits Quill receive[d] from access to the State," *id.* at 308, 112 S. Ct. at 1911, when the plaintiff generated revenue of almost $1 million annually from selling office equipment and supplies to approximately 3,000 customers in North Dakota even though all merchandise was delivered from out of state by mail or common carriers, *id.* at 302, 112 S. Ct. at 1907-08.

We have similarly determined that a finding of minimum contacts sufficient to satisfy due process "will vary with the quality and nature of the [party's] activity, but it is essential in each case that there be some act by which the [party] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Skinner v. Preferred Credit*, 361 N.C. 114, 123,

638 S.E.2d 203, 210-11 (2006) (quoting *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974)). In light of *Quill Corporation* and our understanding of minimum contacts analysis, we therefore consider defendant's first argument in terms of whether plaintiff can be said to have minimum contacts with North Carolina based on the presence of its beneficiaries in our State.

The Supreme Court has observed that even though a "trust is an abstraction . . . . the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." *Anderson*, 289 U.S. at 27, 53 S. Ct. at 420. The Internal Revenue Code imposes a separate tax on the income of trusts, *see* 26 U.S.C. § 1(e) (2012), implicitly recognizing, at least for tax purposes, that a trust is a separate entity to which income is separately attributed. Any tax on that income is physically paid by the fiduciary or trustee, with the amount of the tax being "computed in the same manner as in the case of an individual." *Id.* § 641(a)-(b). In North Carolina "[t]he taxable income of an estate or trust is the same as taxable income for such an estate or trust under the provisions of the Code." N.C.G.S. § 105-160.2. Neither the Code nor Chapter 105 conflates the income of the trust with the income of a beneficiary.

In *Brooke v. City of Norfolk* the Supreme Court considered whether the City of Norfolk and Commonwealth of Virginia had violated the Due Process Clause by taxing the body of a Maryland trust when none of the property held by the trust had ever been present in Virginia. 277 U.S. 27, 28, 48 S. Ct. 422, 422 (1928). Although the Supreme Court applied presence-focused due process analysis that has since been supplanted by the minimum contacts test, *see Quill*, 504 U.S. at 308, 112 S. Ct. at 1911, the Court also recognized that a trust and its beneficiary are legally independent entities when it observed that the property held by the trust "is not within the State, does not belong to the [beneficiary] and is not within her possession or control. The assessment is a bare proposition to make the [beneficiary] pay upon an interest to which she is a stranger," *Brooke*, 277 U.S. at 29, 48 S. Ct. at 422.

That plaintiff and its North Carolina beneficiaries have legally separate, taxable existences is critical to the outcome here because a taxed entity's minimum contacts with the taxing state cannot be established by a third party's minimum contacts with the taxing state. *See Walden v. Fiore*, ___ U.S. ___, ___, 134 S. Ct. 1115, 1122 (2014) (stating that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts

with a forum State" (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1984))); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40 (1958) ("The unilateral activity of those who claim some relationship with a nonresident [party] cannot satisfy the requirement of contact with the forum State."). Here it was plaintiff's beneficiaries, not plaintiff, who reaped the benefits and protections of North Carolina's laws by residing here. Because plaintiff and plaintiff's beneficiaries are separate legal entities, due process was not satisfied solely from the beneficiaries' contacts with North Carolina.

Defendant challenges this conclusion by citing to two decisions in which foreign jurisdictions allegedly reached the opposite result. The Supreme Court of Connecticut held that taxation of an *inter vivos* trust did not violate due process because the beneficiary of the trust was a Connecticut domiciliary. *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 204, 733 A.2d 782, 802, *cert. denied*, 528 U.S. 965, 120 S. Ct. 401 (1999). Describing the domicile of the beneficiary as the "critical link," the Court in *Gavin* went on to reason that the beneficiary "enjoyed all of the protections and benefits afforded to other domiciliaries. Her right to the eventual receipt and enjoyment of the accumulated income was, and so long as she is such a domiciliary will continue to be, protected by the laws of the state." *Id.* at 204, 733 A.2d at 802. Therefore, the Court concluded in *Gavin*:

> [J]ust as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws; it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits.

Id. at 205, 733 A.2d at 802 (internal citation omitted). Defendant also cites to a decision of the Supreme Court of California for the similar proposition that a "beneficiary's state of residence may properly tax the trust on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income." *McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186, 196, 390 P.2d 412, 419 (1964) (emphasis omitted).

We do not find either *Gavin* or *McCulloch* persuasive in deciding the present case. The Court in *Gavin* erroneously failed to consider that a trust has a legal existence apart from the beneficiary and that,

consequently, for taxation to satisfy due process pursuant to *Quill*, the trust itself must have "some definite link, some minimum connection" with the taxing state by "purposefully avail[ing] itself of the benefits of an economic market" in that state. *Quill*, 504 U.S. at 306-07, 112 S. Ct. at 1909-10. Furthermore, both the Court in *Gavin* and defendant, in its arguments before this Court, misconstrue a trust's existence as "a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person," *Wescott v. First & Citizens Nat'l Bank of Elizabeth City*, 227 N.C. 39, 42, 40 S.E.2d 461, 462-63 (1946) (quoting Restatement (First) of Trusts § 2 (Am. Law Inst. 1935)), to mean that any possible benefit received by the beneficiary may be imputed to the trust. That conclusion simply does not follow.

In contrast to *Gavin*, several other jurisdictions have applied reasoning similar to our analysis here in the context of deciding whether taxation of a given trust violated due process. *See Linn v. Dep't of Revenue*, 2013 IL App (4th) 121055, ¶ 33, 2 N.E.3d 1203, 1211 (2013) (applying *Quill* and holding that there was insufficient contact between Illinois and the taxed trust to satisfy due process when the trust, *inter alia*, "had nothing in and sought nothing from Illinois" and conducted all of its business in Texas), *appeal dismissed*, 387 Ill. Dec. 512, 22 N.E.3d 1165 (2014); *Fielding v. Comm'r of Revenue*, File Nos. 8911–R, 8912–R, 8913–R, 8914–R, 2017 WL 2484593, at *19-20 (Minn. T.C. May 31, 2017) (deciding that taxation of an *inter vivos* trust based solely on the in-state domicile of the grantor at the time the trust became irrevocable violated due process); *Residuary Tr. A v. Director, Div. of Taxation*, 27 N.J. Tax 68, 72-73, 78 (2013) (holding that neither the New Jersey domicile of a deceased testator nor the New Jersey business interests of several corporations in which the testamentary trust held stock justified New Jersey's taxation of "undistributed income from sources outside New Jersey" pursuant to the due process minimum contacts standard), *aff'd per curiam*, 28 N.J. Tax 541 (2015); *T. Ryan Legg Irrevocable Tr. v. Testa*, 149 Ohio St. 3d 376, 2016-Ohio-8418, 75 N.E.3d 184, at ¶ 68 (2016) (applying *Quill* and holding that a tax assessment by Ohio against a Delaware trust did not violate due process when the trust was created by an Ohio resident to dispose of his interest in a corporation that "conducted business in significant part in Ohio" and the settlor's "Ohio contacts [were] still material for constitutional purposes"), *cert. denied*, ___ U.S. ___, 138 S. Ct. 222 (2017).

McCulloch, on the other hand, was decided before *Quill Corporation*, and therefore has a limited ability to inform our application of the Court's

due process analysis in *Quill*. Moreover, we find *McCulloch* to be factually distinguished from the present case because the taxed entity in that case was both a beneficiary and a trustee of the trust and also resided in the taxing jurisdiction. Indeed, in holding that the taxes at issue did not violate due process, the Court in *McCulloch* particularly relied on the fact that the trustee was a domiciliary of the taxing jurisdiction. *See McCulloch*, 61 Cal. 2d at 194, 390 P.2d at 418. However, that circumstance is not present in this case.

As an alternative to its argument that due process was satisfied based on the North Carolina residence of the beneficiaries, defendant also presents the theory that taxation satisfied due process here because plaintiff "reached out to North Carolina by purposefully taking on a long-term relationship with the trust's beneficiaries, even though the trustees . . . never entered the state." In support, defendant notes that Bernstein restructured the original trust for Kaestner's benefit, regularly communicated with her about management of plaintiff, and directed a loan to Kaestner from plaintiff's assets—all actions that, according to defendant, indicated that plaintiff would have a continuing relationship with Kaestner while she was in North Carolina.

This argument stems from misapprehension of both the facts and law relevant to this case. The undisputed evidence in the record shows that contact between Bernstein and Kaestner regarding administration of the trust was infrequent—consisting of only two meetings during the tax years in question, both of which occurred in New York. Any connection between plaintiff and North Carolina based on the loan is also irrelevant given that the loan was issued in January 2009, after the tax years at issue. Additionally, the United States Supreme Court has directed that " 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, ___ U.S. at ___, 134 S. Ct. at 1122 (citations omitted). As we have already stated, for due process purposes plaintiff, as a separate legal entity in the context of taxation, would have needed to purposefully avail *itself* of the benefits and protections offered by the State. *See Quill*, 504 U.S. at 306-07, 112 S. Ct. at 1909-10. Mere contact with a North Carolina beneficiary does not suffice.

For taxation of a foreign trust to satisfy the due process guarantee of the Fourteenth Amendment and the similar pledge in Article I, Section 19 of our state constitution, the trust must have some minimum contacts with the State of North Carolina such that the trust enjoys the benefits and protections of the State. When, as here, the income of a foreign trust is subject to taxation solely based on its beneficiaries'

availing themselves of the benefits of our economy and the protections afforded by our laws, those guarantees are violated. Therefore, we hold that N.C.G.S. § 105-160.2 is unconstitutional as applied to collect income taxes from plaintiff for tax years 2005 through 2008. Accordingly, we affirm the decision of the Court of Appeals that affirmed the Business Court's order granting summary judgment for plaintiff and directed that defendant refund to plaintiff any taxes paid by plaintiff pursuant to section 105-160.2 for tax years 2005 through 2008.

AFFIRMED.

Justice ERVIN dissenting.

As the majority correctly indicates, the proper resolution of this case hinges upon the extent, if any, to which the taxpayer had sufficient minimum contacts with North Carolina to satisfy federal due process requirements. Although we are required to make what I believe to be a close call in this case, I feel compelled to conclude, after careful scrutiny of the record in light of the applicable relevant legal standard, that taxpayer "purposefully avail[ed] itself of the benefits of an economic market" in North Carolina despite having "no physical presence in the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 307, 112 S. Ct. 1904, 1910, 119 L. Ed. 2d 91, 102-03 (1992) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528, 543 (1985)). As a result, I respectfully dissent from my colleagues' decision.

According to the undisputed facts contained in the record as identified by the trial court, Joseph Lee Rice, III, established the Rice Family 1992 Trust for the benefit of his children in 1992. The Family Trust was created in New York, with the trust instrument providing that the Family Trust was to be governed by New York law. In 2005, David Bernstein, a resident of Connecticut, was appointed trustee of the Family Trust and continued to act in that capacity throughout the time period at issue in this case. In 2006, Mr. Bernstein, physically divided the Family Trust into three trusts, one of which, plaintiff Kimberly Rice Kaestner 1992 Family Trust, was intended to benefit Kimberly Rice Kaestner and her three children, "all of whom were residents and domiciliaries of North Carolina in the tax years at issue." Mr. Bernstein served as the trustee of the Kaestner Trust following the division of the Family Trust into its three constituent parts.

Throughout the entire interval from 2005 through 2008, which are the tax years at issue in this case, the documents related to the Kaestner

Trust were kept in New York, while the custodian of the Kaestner Trust's assets was located in Boston, Massachusetts. No distributions were made to any beneficiary of the Kaestner Trust during the 2005 through 2008 tax years. During the period from 2005 through 2008, Mr. Bernstein communicated with Ms. Kaestner regarding the Kaestner Trust and provided her with accountings relating to the Kaestner Trust covering the periods from 22 December 2005 through 31 December 2006 and 23 June 2006 through 8 October 2009. In addition, Mr. Bernstein and the law firm with which he was affiliated provided Ms. Kaestner with legal advice regarding matters relating to the Kaestner Trust.

As the entire Court appears to agree, the resolution of this case hinges upon a proper understanding of the decision of the United States Supreme Court in *Quill*, which involved a Delaware corporation that sold office equipment and had physical offices and warehouses in Illinois, California, and Georgia. *Quill*, 504 U.S. at 302, 112 S. Ct. at 1907, 119 L. Ed. at 100. Quill solicited business by using catalogs, flyers, and telephone calls and placing advertisements in national periodicals. *Id.* at 302, 112 S. Ct. at 1907, 119 L. Ed. at 100. As a result of its business activities, Quill had about 3,000 customers and made $1 million in sales in North Dakota during the relevant period. *Id.* at 302, 112 S. Ct. at 1908, 119 L. Ed. at 100. A North Dakota statute provided that retailers, including mail-order companies, were subject to a use tax "even if they maintain no property or personnel in North Dakota." *Id.* at 303, 112 S. Ct. at 1908, 119 L. Ed. at 100. The State argued that, despite Quill's lack of a physical presence within North Dakota, the State "had created 'an economic climate that fosters demand for' Quill's products, maintained a legal infrastructure that protected that market, and disposed of 24 tons of catalogs and flyers mailed by Quill into the State every year." *Id.* at 304, 112 S. Ct. at 1908-09, 119 L. Ed. at 101.

According to the United States Supreme Court, "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax' and that the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.' "[1] *Id.* at 306, 112 S. Ct. at 1909-10, 119 L. Ed. 2d at 102 (first quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S. Ct. 535, 539, 98 L. Ed. 744 (1954);

1. The extent to which the second prong of the due process analysis has been satisfied does not appear to be before us in this case at this time.

then quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S. Ct. 2340, 2344, 57 L. Ed. 2d 197 (1978)). As the United States Supreme Court noted, it has "abandoned more formalistic tests that focused on [an entity's] 'presence' within a State in favor of a more flexible inquiry into . . . [an entity's] contacts with the forum." *Id.* at 307, 112 S. Ct. at 1910, 119 L. Ed. 2d at 102 (citing, *inter alia*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). "Applying these principles, we have held that if a foreign [entity] purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's" collection of taxes "even if it has no physical presence in the State." *Id.* at 307, 112 S. Ct. at 1910, 119 L. Ed. 2d at 103 (citing *Burger King Corp.*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528). As a result, given that Quill had "purposefully directed its activities at North Dakota residents," its contacts with North Dakota were "more than sufficient for due process purposes." *Id.* at 308, 112 S. Ct. at 1911, 119 L. Ed. 2d at 104.

The parties have spent considerable time and effort debating the extent, if any, to which the fact that the beneficiaries of the Kaestner Trust resided in North Carolina during the relevant tax years has any bearing on the required due process analysis. In reaching the conclusion that the residence of the beneficiaries has no bearing upon the proper resolution of this case, my colleagues have deemed *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 733 A.2d 782, *cert. denied*, 528 U.S. 965, 120 S. Ct. 401, 145 L. Ed. 2d 312 (1999), and *McCulloch v. Franchise Tax Board*, 61 Cal. 2d 186, 390 P.2d 412 (1964), to be essentially irrelevant. I am not inclined to completely disregard either of those decisions, which, to the best of my knowledge, appear to be the only cases decided by state courts of last resort to address the question that is before us in this case, while recognizing that there are distinguishing features which may serve to render them somewhat less persuasive than they might otherwise be.

Admittedly, the assertion of taxing authority over the inter vivos trust at issue in *Gavin* arose from a situation in which "the settlor of the trust was a Connecticut domiciliary when the trust was established and the beneficiary is a Connecticut domiciliary." *Gavin*, 249 Conn. at 183, 733 A.2d at 790. However, in upholding the taxability of the undistributed income held in an inter vivos trust, the Connecticut Supreme Court specifically stated that, "just as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws," "it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits."

Id. at 205, 733 A.2d at 802. As a result, the Connecticut Supreme Court's decision with respect to the taxability of the undistributed income held in the inter vivos trust appears to me to hinge upon the residence of the beneficiary rather than the fact that the settlor had been a resident of Connecticut at the time that the inter vivos trust had been created.

I am loath to completely disregard *McCulloch* for similar reasons. Although the beneficiary of the trust at issue in *McCulloch* also served as one of the trustees, the California Supreme Court's analysis in that case clearly relies upon the status of the person in question as a beneficiary rather than upon his status as a trustee, with this fact being evidenced by the California Supreme Court's statement that "the beneficiary's state of residence may properly tax the trust on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income." *McCulloch*, 61 Cal. 2d at 196, 390 P.2d at 419 (emphasis omitted). Similarly, while *McCulloch* antedates *Quill* and *Burger King*, the logic utilized by the California Supreme Court appears to me to rest upon the same considerations that underlie the United States Supreme Court's modern due process jurisprudence. For example, the California Supreme Court states that "[t]he tax imposed by California upon the beneficiary is constitutionally supported by a sufficient connection with, and protection afforded to, plaintiff as such beneficiary." *Id.* at 196, 390 P.2d at 419. As a result, I am unable to agree with my colleagues' determination that neither *Gavin* nor *McCulloch* has any bearing upon the proper resolution of this case and am inclined to be persuaded by their logic to believe that, while not dispositive, the presence of the beneficiaries of the Kaestner Trust in North Carolina has some bearing on the proper performance of the required due process analysis.

I also cannot concur in the argument adopted by the Court of Appeals to the effect that the United States Supreme Court has already made our decision for us in *Brooke v. City of Norfolk*, 277 U.S. 27, 48 S. Ct. 422, 72 L. Ed. 767 (1928). Although *Brooke* has not been overruled, it antedates *Quill* and *Burger King* and rests upon the sort of formalistic, presence-focused approach that the United States Supreme Court rejected in those cases in favor of a less rigid "minimum connections" approach. *See Quill*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91; *Burger King*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528. In addition, *Brooke* involved an attempt by one state to tax a trust corpus held in another state, which is a very different undertaking than an attempt to tax the undistributed income of a non-North Carolina trust that is held for the benefit of a

North Carolina resident.[2] The same logic renders the Kaestner Trust's reliance upon the decision of the United States Supreme Court in *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180 (1929), which involved an attempt to tax the corpus, rather than the undistributed income, of a non-jurisdictional trust based upon the existence of a resident beneficiary that the Court rejected on the basis of a pre-*Quill* method of analysis, unpersuasive. As a result, neither of these cases supports, much less compels, a decision in the Kaestner Trust's favor. Instead, my review of the decisions cited by both parties compels me to conclude that the only way to properly resolve this case involves reliance upon a very fact-specific analysis of the extent, if any, to which the Kaestner Trust "purposefully avail[ed] itself of the benefits of an economic market in the forum State," *see Quill*, 504 U.S. at 307, 112 S. Ct. at 1910, 119 L. Ed. 2d at 103, with this analysis deeming the presence of the beneficiary in North Carolina to be relevant, but not dispositive.

As the Supreme Court explained in *Burger King*,

> it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contact can defeat personal jurisdiction there.

471 U.S. at 476, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544 (citations omitted). Although the assets contained in the Kaestner Trust were held in Boston, and the relevant documents were held in New York and although the trustee worked in New York and resided in Connecticut during the tax years at issue in this case, "business [was] transacted . . . by mail and wire communications across state lines," including those of North Carolina. *See id.* at 476, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544.

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2. Admittedly, this Court has not adopted the Court of Appeals' treatment of *Brooke* as dispositive in its opinion. Instead, the Court simply cites *Brooke* for the unexceptionable proposition that "a trust and its beneficiary are legally independent entities." For the reasons set forth in the text of this dissenting opinion, I believe that a proper due process analysis focused upon the activities of the Kaestner Trust in light of Ms. Kaestner's residence suffices to establish sufficient "minimum contacts" to support the Department of Revenue's attempt to tax the undistributed income applicable to Ms. Kaestner.

Among other things, Ms. Kaestner was known to be a resident of North Carolina at the time that the Kaestner Trust was created for her benefit. In addition, the trustee transmitted information to Ms. Kaestner, provided advice to Ms. Kaestner, and communicated with Ms. Kaestner in other ways with full knowledge of the fact that she resided in North Carolina. The Kaestner Trust could not have successfully carried out these functions in the absence of the benefits that North Carolina provided to Ms. Kaestner during the time that she lived here. As a result, I am unable to conclude, given the applicable standard of review, that the Kaestner Trust lacked sufficient contacts with North Carolina to permit the State to tax the undistributed income held by the Kaestner Trust for Ms. Kaestner's benefit. Therefore, I see no due process violation. As a result, for all of these reasons, I respectfully dissent from my colleagues' decision to affirm the Court of Appeals' decision.

NORTH CAROLINA STATE BOARD OF EDUCATION
v.
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA
RULES REVIEW COMMMISSION

No. 110PA16-2

Filed 8 June 2018

1. **Schools and Education—State Board of Education rules—review by Rules Review Commission—plain language of N.C. Constitution**

   The plain language of Article IX, Section 5 of the N.C. Constitution authorized the General Assembly to require the State Board of Education to submit its proposed rules to the Rules Review Commission for review because this procedure was statutorily enacted and the Board's prescribed constitutional duties are subject to laws enacted by the General Assembly.

2. **Schools and Education—State Board of Education rules—review by Rules Review Commission—delegation of authority**

   The General Assembly properly delegated authority to the Rules Review Commission to review the State Board of Education's proposed rules. The statutes at issue included sufficient restrictions on the Commission and safeguards to ensure the Board's continued ability to fulfill its mandates as set forth in the state constitution.

Further, the Commission was tasked only with the responsibility to review the Board's rules from a procedural perspective for clarity and to ensure that the rules were adopted in compliance with the Administrative Procedure Act.

Chief Justice MARTIN dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 518 (2017), reversing and remanding an order granting summary judgment entered on 2 July 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 7 February 2018.

Robert F. Orr, PLLC, by Robert F. Orr; and Poyner Spruill LLP, by Andrew H. Erteschik, Saad Gul, and John M. Durnovich, for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Olga Vysotskaya de Brito, Special Deputy Attorney General, and Amar Majmundar, Senior Deputy Attorney General, for defendant-appellee State of North Carolina.

Troutman Sanders LLP, by Christopher G. Browning, Jr., for defendant-appellee North Carolina Rules Review Commission.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith and Taylor M. Dewberry, for North Carolina Chamber Legal Institute; P. Andrew Ellen, General Counsel for North Carolina Retail Merchants Association; and J. Michael Carpenter, General Counsel for North Carolina Home Builders Association, amici curiae.

MORGAN, Justice.

This appeal arises from proceedings instituted by the State Board of Education (the Board) seeking a declaratory ruling that laws requiring the Board to submit the rules and regulations it proposes to a statutorily created committee for review and approval are unconstitutional. We determine that the General Assembly lawfully delegated authority to the

Rules Review Commission (the Commission) to review rules adopted by the Board. Therefore, we affirm the opinion of the Court of Appeals.

The Board's complaint listed seven challenges to the Commission's interpretation and application of N.C.G.S. § 150B-2(1a) (definition of "Agency") to the Board. The complaint alleged two as-applied challenges to the Commission's interpretation and application of N.C.G.S. § 150B-2(1a), one joint as-applied and facial challenge regarding the application of the Administrative Procedure Act (the APA), and four facial challenges to the Commission's enabling legislation. The complaint asserted that since the establishment of the Commission in 1986, the Commission "has objected to or modified every rule adopted by the Board and submitted to the [Commission] for approval." The Board claimed in its complaint that it had "declined to adopt a number of rules that it otherwise would have adopted" but for the Commission's actions and that the review process "typically takes a minimum of six months," which has "erode[d] the Board's ability to timely address critical issues facing our State in the area of education." In addition, the Board maintained that it would no longer voluntarily submit its rules to the Commission, and would instead independently deem its rules to have the force and effect of law.

On 12 January 2015, the State of North Carolina and the Commission moved to dismiss the Board's complaint. The Board voluntarily dismissed without prejudice five of its seven claims, leaving the two as-applied challenges for determination. The Board moved for summary judgment as to its remaining claims. In addition to their motion to dismiss the Board's action, the State and the Commission opposed the Board's motion for summary judgment and argued that they were entitled to summary judgment in their favor. On 2 July 2015, the trial court allowed summary judgment for the Board.

The State and the Commission appealed the trial court's summary judgment order to the North Carolina Court of Appeals. On 19 September 2017, the Court of Appeals filed a divided opinion reversing the trial court's order and remanding the matter to the trial court for entry of judgment in favor of defendants, the State and the Commission. *N. C. State Bd. of Educ. v. State*, ___ N.C. App. ___, 805 S.E.2d 518 (2017). The majority determined that "[t]he General Assembly, by enacting laws adopting a uniform statutory scheme governing administrative procedure, including the establishment of the Commission to review administrative rules, has imposed the requirement that the Board's rules be reviewed and approved prior to becoming effective." *Id.* at ____, 805 S.E.2d at 529. After detailing the history surrounding the creation

and evolution of the Board, the majority stated that the 1942 amendment to the North Carolina Constitution, which included the last substantive changes to the constitution pertaining to the Board, removed the Board's "full power to legislate" but authorized the Board to "make all needful rules and regulations in relation" to specific powers given to the Board, including the ability "generally to supervise and administer the free public school system of the State." *Id.* at ____, 805 S.E.2d at 523. The court's majority further noted that the 1942 amendment made the Board's exercise of its authority "wholly subject to laws enacted by the General Assembly" by stating that "[a]ll the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted . . . by the General Assembly." *Id.* at ____, 805 S.E.2d at 527. The majority also concluded that the legislative delegation to the Commission of the review and approval process over the Board's administrative rules is exercised subject to proper limitations on the Commission's authority. *Id.* at ____, 805 S.E.2d at 531. Such limitations include a recognition that the "Commission's review is limited to determining whether a proposed rule" meets the four criteria listed in N.C.G.S. § 150B-21.9(a). *Id.* at ____, 805 S.E.2d at 531.

The Court of Appeals majority amplified this recognition by further noting that the "General Assembly has also expressly protected its legislative authority from encroachment by the Commission" via subsection 150B-21.9(a) by prohibiting the Commission from "consider[ing] questions relating to the quality or efficacy of the rule" at issue and limiting the Commission's review "to determination of the standards set forth in this subsection." *Id.* at ____, 805 S.E.2d at 532. Therefore, as found by the majority, the General Assembly has "restrict[ed] the Commission from providing substantive review of proposed rules." *Id.* at ____, 805 S.E.2d at 532. The majority observed that by allowing for judicial review of a Commission decision regarding an agency's proposed rule, "the General Assembly has provided adequate procedural safeguards" for agencies. *Id.* at ____, 805 S.E.2d at 532. Accordingly, the court held that "the review and approval authority delegated to the Commission is an appropriate delegable power and that the General Assembly has adequately directed the Commission's review of the Board's proposed rules and limited the role of the Commission to evaluating those proposed rules to ensure compliance with the APA." *Id.* at ____, 805 S.E.2d 532. Moreover, the majority concluded that "[b]y providing adequate guidelines for rules review, the General Assembly has ensured that the Commission's authority as it relates to the rules promulgated by the Board is not 'arbitrary and unreasoned' and is sufficiently defined to maintain the separation of powers required by our state constitution." *Id.* at ____, 805 S.E.2d at 532

(quoting *In re Declaratory Ruling*, 134 N.C. App. 22, 33, 517 S.E.2d 134, 142, *appeal dismissed and disc. rev. denied*, 351 N.C. 105, 540 S.E.2d 356 (1999)). The majority ultimately summarized its holding as:

> (1) the 1942 amendment to Article IX of the North Carolina Constitution rebalanced the division of power between the Board and the General Assembly by limiting the Board's authority to be subject more broadly to enactments by the General Assembly; (2) the General Assembly, by enacting the APA and creating the Commission, acted within the scope of its constitutional authority to limit the Board's rulemaking authority by requiring approval of rules prior to enactment; (3) the General Assembly's delegation to the Commission of the authority to review and approve Board rules does not contravene the Board's general rulemaking authority; and (4) the General Assembly has delegated review and approval authority to the Commission without violating the separation of powers clause by providing adequate guidance and limiting the Commission's review and approval power.

Id. at ____, 805 S.E.2d at 532.

In contrast, the dissenting opinion viewed the delegation of authority by the General Assembly to the Commission to review and approve the Board's rules as improper, characterizing that delegation as an act in contravention of the constitutional authority that "granted and conveyed to the State Board powers, which are not intended to be, and cannot be, removed from the State Board and subordinated to or overruled by an executive agency review body." *Id.* at ____, 805 S.E.2d at 534 (Tyson, J., dissenting). The dissent described the Commission, as an entity "created by statute in 1986, long subsequent to the ratification of the current version of Article IX, § 5, and consist[ing] of ten non-elected members appointed by the General Assembly," to be a body of individuals who have "purported to act on their own accord in delaying and striking down 'needed rules and regulations' established under constitutionally mandated policy of the State Board, without bicameral review and presentment of a bill." *Id.* at ____, 805 S.E.2d at 533. Opining that "[t]he General Assembly cannot either usurp [or] delegate the specific constitutional authority vested in the State Board" regarding "educational policy and rulemaking authority," *id.* at ___, 805 S.E.2d at 533, the dissent here adopted a stance that "[b]y enacting the [APA], the General Assembly could not and did not transfer the State Board's constitutionally specified rulemaking power to an agency rule oversight

commission under the [APA]," *id.* at ____, 805 S.E.2d at 534. As a result, the dissenting judge at the Court of Appeals would affirm the trial court's summary judgment determination in favor of the Board in light of a perceived failure by the State and the Commission to show error by the trial court and in light of the dissent's interpretation of the relevant law. *Id.* at ____, 805 S.E.2d at 536.

I. History of the Board of Education

In their 1868 constitution, the people of North Carolina created the Board to supervise and administer the State's free public school system. The Constitution of North Carolina established the State Board of Education using the following language:

> The Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, they shall not be re-enacted by the Board.

N.C. Const. of 1868, art. IX, § 9. In 1937 the General Assembly directed Governor Clyde R. Hoey to appoint a commission to examine North Carolina's public educational system and recommend improvements to lawmakers. Act of Mar. 22, 1937, ch. 379, 1937 N.C. Pub. Sess. Laws, 709. The resulting Commission on Education determined that North Carolina's public education system was being governed not only by the State Board of Education but by several other boards as well. *Report and Recommendations of the Governor's Commission on Education* 30 (Dec. 1, 1938) [hereinafter 1938 Report]. The Commission recommended that the General Assembly transfer all duties and work from the various other education-related boards and commissions to the State Board of Education. *Id.* at 30-31. In 1942 the voters of North Carolina adopted a constitutional amendment proposed by the General Assembly making several changes to the governance and authority of the Board as follows:

> The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the

> grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.

N.C. Const. of 1868, art. IX, § 9 (1942). These were the last material changes to the Board's power.

The constitution was rewritten again in 1970 and included the following language, which remains unchanged:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5. The plain language of the constitution does not expressly mention a review process for the Board's rules.

II. Review of the General Assembly's Constitutional Authority Regarding the State Board of Education

A cursory review of the history of the North Carolina Constitution indicates that the General Assembly has always been authorized to check the Board's power to some degree. The 1868 constitution provided that acts, rules, and regulations enacted by the Board could be "altered, amended or repealed" by the General Assembly. N.C. Const. of 1868, art. IX, § 9. Each change to the constitution thereafter stated in more general terms that the Board's authority over the State's public education system is "subject to laws enacted by the General Assembly." *Id.*; N.C. Const. of 1868, art. IX, § 9 (1942); N.C. Const. art. IX, § 5. This review of the provisions of the North Carolina Constitution and its changes to these dictates clearly shows that the General Assembly currently has the power to enact laws with respect to education that govern the Board's rules and regulations. In light of this authority of the General Assembly, which is derived from Article IX, Section 5 of the North Carolina Constitution and is consistent with this Court's analysis of

further relevant considerations, we conclude that the General Assembly is empowered to delegate authority to the Commission to review the Board's rules.

III. History of the APA and the Rules Review Commission

In 1973 the General Assembly enacted the APA in response to the United States Supreme Court's grant of "extensive remedial relief from state and federal bureaucratic action through an expansive interpretation of the constitutional right to an administrative hearing." Julian Mann, III, *Administrative Justice: No Longer Just A Recommendation*, 79 N.C. L. Rev. 1639, 1642 (2001); see N.C.G.S. § 150A-1(b) (Supp. 1977). As noted by the Court of Appeals majority in the present case, "[t]he APA provides a comprehensive statutory scheme for procedures to allow and require, *inter alia*, notice to the public of proposed rules, public input regarding proposed rules, and due process for individuals affected by administrative rules and decisions." *State Bd. of Educ.*, ___ N.C. App. at ___, 805 S.E.2d at 524 (majority opinion). The APA was rewritten and recodified as Chapter 150B of the North Carolina General Statutes, effective 1 January 1986, with the stated purpose of "establish[ing] a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C.G.S. § 150B-1(a) (2017). When the APA was recodified, the General Assembly enacted an additional statute that established the Administrative Rules Review Commission. Act of July 16, 1986, ch. 1028, sec. 32, 1985 N.C. Sess. Laws (Reg. Sess. 1986) 640, 642-45 (codified at N.C.G.S. § 143B-30.1). As currently provided in N.C.G.S. § 143B-30.1(a), "[t]he Commission shall consist of 10 members to be appointed by the General Assembly, five upon the recommendation of the President Pro Tempore of the Senate, and five upon the recommendation of the Speaker of the House of Representatives." N.C.G.S. § 143B-30.1(a) (2017). An agency must submit all temporary and permanent rules it adopts to the Commission before any such rules can be published in the North Carolina Administrative Code. *Id.* § 150B-21.8 (2017).[1] If the Commission objects to an agency's adopted rule, then the

1. "Agency" is defined by the APA as

> an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

rule is not deemed acceptable for inclusion in the Administrative Code unless the agency revises the rule and the revised version is approved by the Commission. *See id.* §§ 150B-21.10(2), -21.12(a)(1), -21.19(4) (2017).

The Commission is subject to oversight by the Joint Legislative Administrative Procedure Oversight Committee. *Id.* §§ 120-70.100 to -70.102 (2017). Among other things, the Committee is specifically responsible for reviewing each rule objected to by the Commission "to determine if statutory changes are needed to enable the agency to fulfill the intent of the General Assembly." *Id.* § 120-70.101(1). The Committee also receives a report regarding each rule approved by the Commission. *Id.* § 120-70.101(2).

IV. Standard of Review

This Court construes and applies the provisions of the Constitution of North Carolina with finality. *E.g.*, *Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989). We review constitutional questions de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991) (citations omitted). In other words, the constitutional violation must be plain and clear. *Preston*, 325 N.C. at 449, 385 S.E.2d at 478. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the constitutional provision at issue, and our precedents. *See id.* at 449, 385 S.E.2d at 479 ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere."); *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."); *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932) ("Likewise, we may have recourse to former decisions, among which are several dealing with the subject under

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N.C.G.S. § 150B-2(1a) (2017). Although some government agencies are partially or fully exempt from the APA, the Board is not one of these agencies.

consideration."). With these principles in mind, we now examine the issues raised by the Board's appeal.

V. Issues of First Impression

This case concerns issues of first impression in the jurisprudence of North Carolina. Prior cases decided by this Court that addressed issues resembling those presented in the current case, namely *Guthrie v. Taylor* and *State v. Whittle Communications*, have been cited here by the Board, the State, and the Commission, and their applicability to the instant matter was addressed by the Court of Appeals.

In *Guthrie* the plaintiff school teacher disagreed with a regulation of the State Board of Education requiring "a teacher in the public school system to procure the renewal of his or her teachers' certificate each five years by earning, at the teacher's expense, credits, at least some of which must be earned by the successful completion of additional college or university courses." *Guthrie v. Taylor*, 279 N.C. 703, 709, 185 S.E.2d 193, 198 (1971) *cert. denied*, 406 U.S. 920 (1972). The General Assembly had passed several statutes requiring all teachers in the public schools of North Carolina to hold such certificates. *Id.* at 711, 185 S.E.2d at 199. The Board was authorized to "control [the] certificating [of] all applicants for teaching, supervisory, and professional positions in all public elementary and high schools of North Carolina." *Id.* at 711, 185 S.E.2d at 199. The plaintiff in *Guthrie* contended that the authority to determine teacher certification requirements was not properly delegated to the Board because the applicable statutes did not set forth standards to govern the Board in the exercise of its duty to promulgate and administer rules related to the certification of teachers. *Id.* at 711, 185 S.E.2d at 199. We determined that this argument was meritless because the statutes at issue "neither enlarge[d] nor restrict[ed] the authority to make rules and regulations concerning the certification of teachers conferred by the Constitution of North Carolina upon the State Board of Education. Thus, [the statutes] are not delegations of power to the State Board of Education by the General Assembly." *Id.* at 711, 185 S.E.2d at 199. *Guthrie* is therefore not particularly helpful in resolving the present case, which concerns the General Assembly's delegation of authority to the Commission related to reviewing administrative rules of the Board.

Likewise, in *Whittle* the defendant Whittle Communications, L.P. developed a short video news program, known as *Channel One*, that was designed to keep students abreast of current affairs. *State v. Whittle Commc'ns*, 328 N.C. 456, 458, 402 S.E.2d 556, 557 (1991). The Board sought to adopt a temporary rule barring contracts between companies

such as Whittle and local school boards for the use of supplementary materials like *Channel One* to educate children. *Id.* at 459-60, 402 S.E.2d at 558. The dispute in *Whittle* was prompted by the Commission's disapproval of the temporary rule on the ground that it exceeded the Board's statutory authority. *Id.* at 460, 402 S.E.2d at 558. The trial court reviewed the matter and found that the Board's rule was adopted in violation of the APA making it invalid. *Id.* at 462, 402 S.E.2d at 559. On appeal, this Court noted that the Board's temporary rule concerned an area which the General Assembly had "specifically placed under the control and supervision of the local school boards." *Id.* at 458, 402 S.E.2d at 557. We opined that

> [s]ince *Channel One* is a supplementary instructional material and since the General Assembly placed the procurement and selection of supplementary instructional materials under the control of the local school boards, the State Board acted in excess of its authority in enacting this rule because the State Board had no authority to enact a rule on this subject.

Id. at 466, 402 S.E.2d at 562. As with *Guthrie*, the *Whittle* case does not address the issue presently before the Court because *Whittle* involved the Board's attempt to enact a rule on a subject that had specifically been delegated to local school boards by the General Assembly. *Whittle* states the principle that "Article IX, § 5 of the North Carolina Constitution, which grants the State Board the authority to 'make all needed rules,' also limits this authority by making it 'subject to the laws enacted by the General Assembly.' " *Id.* at 464, 402 S.E.2d at 560. While that principle certainly applies here, neither *Guthrie* nor *Whittle* specifically addresses the issue presented in this case.

VI. Plain Language and Intent of Article IX, Section 5

[1] Turning to the issues presently before the Court, the Board first contends that the plain language of Article IX, Section 5 of the North Carolina Constitution does not allow the Commission to review the Board's rules. Constitutional interpretation begins with the plain language as it appears in the text. *E.g.*, *Coley v. State*, 360 N.C. 493, 498, 631 S.E.2d 121, 125 (2006). Article IX, Section 5 states:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all

> needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

The plain language of this provision expressly indicates that the Board's prescribed power is subject to laws enacted by the General Assembly. The pertinent issue framed by the Board in this appeal concerns its ability to promulgate rules and regulations free of scrutiny from the Commission. While the plain language of the cited constitutional passage does not mention the Commission or its power to review the Board's rules, the Commission's authority to do so derives from laws enacted by the General Assembly—laws to which the Board is unequivocally subject under Article IX, Section 5. The constitution therefore grants the General Assembly the power to enact a law to delegate its authority to the Commission, even though such a law could directly affect the Board's exercise of its constitutionally recognized duties.

Additionally, while a review of the intent of the framers of the North Carolina Constitution provides welcome guidance about the extent of authority reposed in the Board with relation to the General Assembly, there is no indication that the Commission is somehow inhibited from reviewing and approving the Board's rules and regulations. Questions regarding construction of a constitution "are . . . governed by the same general principles which control in ascertaining the meaning of all written instruments, and '[t]he fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and [the individuals] adopting it.' " *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (first citing and then quoting 11 Am. Jur. *Construction of Constitutions* § 49, at 658 (1937); *id.* § 61, at 674; then citing *Branch Banking & Tr. v. Hood*, 206 N.C. 268, 173 S.E. 601 (1934); and then citing *Atlas Supply Co. v. Maxwell*, 212 N.C. 624, 194 S.E. 117 (1937); and then citing *State v. Emery*, 224 N.C. 581, 31 S.E.2d 858 (1944)). Likewise, in interpreting our state's constitution, we are bound to "give effect to the intent of the framers of the organic law and of the people adopting it." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) (quoting *Perry*, 237 N.C. at 444, 75 S.E.2d at 514). Moreover, "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977).

In 1931, while the 1868 constitution was still in effect, the General Assembly established a Constitutional Commission to study the need for various constitutional amendments. *Report of the North Carolina Constitutional Commission*, *as reprinted in* 11 N.C. L. Rev. 5 (1932).

In preparation for considering amendments involving the implementation and oversight of the public education system in North Carolina, the Constitutional Commission requested the Department of Legislative Research and Drafting at Duke University Law School to prepare a narrowly focused report on constitutional provisions involving public education governance. *See* Dep't. of Legis. Research & Drafting, Duke Univ. Law Sch., *Report on the Subject of the Existing Constitutional Provisions Relating to Public Education in North Carolina* 1 (May 1932) [hereinafter Education Report]. The purpose of the Education Report was to "set[ ] forth the actual workings of those provisions in the present Constitution of North Carolina relating to public education," and its objective was "to discover, if possible, wherein these existing constitutional provisions hamper the proper development of the State's educational system, and thus to indicate what changes may be desirable." *Id.*

The Education Report detailed an alleged abuse of legislative power that ultimately led to a constitutional amendment in 1942. *Id.* at 9-10. The Education Report described how the General Assembly used the then-existing language of the constitution "as a means of stripping the Board of its authority over the public schools" rather than "as a mere reserved veto or amending power." *Id.* at 9. The report noted that the General Assembly "from time to time t[ook] certain powers of control from . . . [the] Board and vested them in new boards created by legislative authority." *Id.* at 9-10. The Education Report added that "it appears to be a fact that the Legislature has thus taken the control of the State's public school system from the Board of Education set up in the Constitution and vested the same in a board of its own creation." *Id.* at 10-11. Ultimately, the report recommended amendments to strengthen the public education system aimed at, *inter alia*, remedying the alleged abuse of power exercised by the General Assembly. *Id.* at 31-32. The Education Report suggested that "[c]omplete control over the State's public school system [be] vested in this one Board, subject only to general supervision by the General Assembly.' " *Id.* at 32. Nonetheless, the constitution was not amended at that time.

Subsequently, in 1937 the General Assembly directed the Governor to appoint a commission to review the public education system again. Ch. 379, 1937 N.C. Pub. [Sess.] Laws 709. The report issued by the commission reiterated some of the problems discussed in the earlier Education Report. For example, the latter report discussed how three commissions were created to tackle the specific administrative duties related to textbooks, namely the State Textbook Commission, the

Elementary Textbook Commission and the State Committee for High School Textbooks. See 1938 Report at 30. The 1938 Report concluded that "[t]here seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators." *Id.* Thus, the Commission on Education concluded that "all these boards should be consolidated under [the Board]," and "the direction of all activities of the teaching profession should come from this central board" and not from other administrative agencies. *Id.* The Commission encouraged the General Assembly to accomplish the amendment's purpose *statutorily* in advance of the constitutional amendment, as a means of providing "immediate relief . . . rather than wait[ing]." *Id.* at 31.

In 1942 the constitution was amended[2] in response to concerns identified by the two reports from the 1930s. Specifically, the 1942 version of the constitution clarified the Board's authority stating, in pertinent part, that the Board

> shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State. . . .

N.C. Const. of 1868 art. IX, § 9 (1942). As noted earlier, the Board's constitutional authority was preserved when the constitution was amended again in 1971. The General Assembly's authority to enact laws to which the Board's rules and regulations are subject has remained throughout every version of the constitution.

While this review of the history of the Board's constitutional authority reveals a concerted effort to mollify the General Assembly's alleged attempt to dilute the Board of its power in the past, the Board's present contention that the Commission's review of the Board's rules is "consistent with the mischief sought to be remedied" from the 1930s is without merit. There are major differences between the General Assembly's actions regarding the Board in the past and the General Assembly's more recent delegation to the Commission in relation to the Board's rulemaking. As detailed above, in the past the General Assembly created new

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2. The amendment was authorized to be submitted to a vote of the people by Act of Mar. 13, 1941, ch. 151, 1941 N.C. Pub. [Sess.] Laws 240.

boards that allegedly stripped the Board of much of its power in response to unflattering reports about the Board's administrative shortcomings; in the present, the General Assembly has delegated authority to a sole entity—the Commission—that has a well-defined role, subject to legislative oversight, regarding the Board's and other agencies' rulemaking procedures. In the 1930s multiple state boards had the power to exercise authority over various aspects of public educational matters; now, that power has been consolidated into the Board. The Commission's authority to review the Board's proposed rules is not a corrective measure, but a process that applies uniformly to numerous state agencies like the Board. Lastly, the Commission does not review the Board's rules from a substantive standpoint. Section 150B-21.9 states that "[t]he Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to a determination of the standards set forth in this subsection" which are procedural in nature. N.C.G.S. § 150B-21.9(a) (2017).

We conclude that the plain language of Article IX, Section 5 of the North Carolina Constitution authorizes the General Assembly to enact laws that delegate authority to the Commission to review rules adopted by the Board. Moreover, a review of the history of the relevant amendments to the constitution does not indicate that the document's framers intended that the Board would have the unbridled power to adopt rules and regulations of its own volition. We therefore conclude that the General Assembly has lawfully required the Board to submit its proposed rules to the Commission for review because this procedure was statutorily enacted and the Board's prescribed constitutional duties are subject to laws enacted by the General Assembly. The Board's proposed rules which are subject to this mandated submission to the Commission for review and approval are those which fall within the purview of the Administrative Procedure Act in order to ensure compliance with the provisions of this legislative enactment.

VII. Delegation of Authority

[2] The General Assembly properly delegated authority to the Commission to review the Board's rules.[3] Article I, Section 6 of

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3. At the outset the Commission contends that the Board dismissed all counts in its complaint except Counts 2 and 3. It is the Commission's view that these counts presented an exceedingly narrow issue before the Court: whether the Commission correctly interpreted N.C.G.S. § 150B-2(1a) as requiring the Board to comply with the APA's rulemaking provisions. Thus, the Commission attempts to limit the issues before this Court to statutory construction as opposed to constitutional issues. However, a review of the complaint

the North Carolina Constitution mandates that the State's three branches of government "shall be forever separate and distinct from each other." Nonetheless, in *Adams v. North Carolina Department of Natural & Economic Resources*, the cornerstone case concerning the General Assembly's ability to delegate authority to agencies, we acknowledged that a literal interpretation of the

> Constitution would absolutely preclude any delegation of legislative power. However, it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers.

295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (citations omitted). "[W]e have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Id.* at 697, 249 S.E.2d at 410 (first citing *State ex rel. Dorothea Dix Hosp. v. Davis*, 292 N.C. 147, 232 S.E.2d 698 (1977); then citing *Guthrie*, 279 N.C. 703, 185 S.E.2d 193).

"In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only 'as specific as the circumstances permit.' " *Id.* at 698, 249 S.E.2d at 411 (first quoting *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965) then citing *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971)). The General Assembly is required only to articulate "general policies and standards . . . which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Id.* at 698, 249 S.E.2d at 411. Procedural safeguards are also an indication that a particular delegation of authority is supported by adequate guiding standards. As previously stated by this Court in *Adams*, "[p]rocedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated." *Id.* at 698, 249 S.E.2d at 411.

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and the superior court's decision clearly shows that the Board raised constitutional arguments as opposed to statutory challenges. We therefore conclude that the Commission's statutory construction argument is meritless.

In the current case, the Commission was given adequate guidance to enable it to properly review the administrative rules of other agencies. First, the Commission must determine whether a rule meets all of the following criteria:

> (1) It is within the authority delegated to the agency by the General Assembly.
>
> (2) It is clear and unambiguous.
>
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
>
> (4) It was adopted in accordance with Part 2 of this Article.

N.C.G.S. § 150B-21.9(a). Second, "[t]he Commission shall not consider questions relating to the quality or efficacy of the rule." *Id.* Under the rubric of its constitutional authority enunciated in Article IX, Section 5, the General Assembly has enacted laws to which the Board is subject and, in accord with this constitutional authority, has provided clear and ample statutory direction concerning the Commission's powers and restrictions. The Commission is directed to initially determine whether the agency has the authority to adopt a given rule. The Commission next determines whether the agency followed the proper procedure to promulgate the rule. The Commission is charged with reviewing all previous rules related to the specific purpose for which the current rule is proposed in order to determine if the rule under scrutiny is necessary. The Commission reviews the rule for clarity to ensure that it is understandable. While the General Assembly's authority is clearly established by way of the North Carolina Constitution and the Commission's authority is clearly established by way of statutory law, if an agency such as the Board desires to challenge the Commission's exercise of its delineated duties, "[w]hen the Commission returns a permanent rule to an agency . . . the agency may file an action for declaratory judgment in Wake County Superior Court." N.C.G.S. § 150B-21.8(d) (2017). In light of these observations, we therefore hold that the General Assembly has enacted appropriate statutes to Article IX, Section 5 of the North Carolina Constitution that properly and clearly delegate to the Commission the authority to review the Board's rules and that include sufficient restrictions on the

Commission and safeguards to ensure the Board's continued ability to fulfill its mandates as set forth in the state constitution.

The Board also asserts that the Commission is not equipped to properly assess public education legislation and rules adopted thereunder in response to complex conditions that the General Assembly cannot directly confront. The Board's argument might have some merit if the Commission were tasked with reviewing the rules from a substantive standpoint. But, in its delegation of authority to the Commission regarding its review of the Board's rulemaking the General Assembly has expressly eliminated such involvement by the Commission via N.C.G.S. § 150B-21.9(a). The Commission is tasked only with the responsibility to review the Board's rules from a procedural perspective for clarity and to ensure that the rules are adopted in compliance with the APA. Such a review does not require special expertise pertaining to public education.

We hold that Article IX, Section 5 of the North Carolina Constitution authorizes the General Assembly to statutorily delegate authority to the Rules Review Commission to review and approve the administrative rules that are proposed by the State Board of Education for codification. We therefore affirm the majority opinion of the Court of Appeals.

AFFIRMED.

Chief Justice MARTIN dissenting.

The plain language of our state constitution and an analysis of that language in light of the delegation doctrine both point to a particular result in this case. But they both point to the opposite of the result that the majority reaches. As a result, I respectfully dissent.[1]

Article IX, Section 5 of the North Carolina Constitution says:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules

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1. The Superintendent of Public Instruction serves as the Secretary and Chief Administrative Officer of the Board of Education. N.C. Const. art. IX, § 4(2). This case does not concern the respective duties of the Superintendent and the Board under our state constitution, and nothing in this dissent should be construed to express any opinion on the merits of *North Carolina State Board of Education v. State of North Carolina, et al.*, Case No. 333PA17.

> and regulations in relation thereto, *subject to laws enacted by the General Assembly*.

(Emphasis added.) The issue here, in a nutshell, is whether the italicized language allows the General Assembly to subject the Board of Education's proposed rules and regulations to review and approval by the Rules Review Commission.

The plain language of Article IX, Section 5 gives us an answer, but not the one that the majority provides. The words "subject to" tell us that the phrase that comes after those words will specify something that can restrict the Board of Education's constitutional authority to make rules and regulations. Because only the "subject to" clause qualifies the Board's authority, only that thing—outside of the constitution itself—can restrict the Board's authority. That thing is "laws enacted by the General Assembly." N.C. Const. art. IX, § 5. And a "law[ ] enacted by the General Assembly" must go through the bicameral legislative approval process and be presented to the Governor. *Id.* art. II, § 22. If the Governor vetoes a bill that has been presented to him, the General Assembly has to override that veto for the bill to become a law. *Id.* But a determination by the Rules Review Commission—which does not go through this enactment process—is *not* a law. It follows from this, as sure as spring follows winter, that the phrase "subject to laws enacted by the General Assembly" does not mean—and cannot mean—"subject to determinations by the Rules Review Commission."

The majority, however, does not merely disagree with this conclusion. The majority does not say, for instance, that the pertinent language is ambiguous and that our Court must therefore seek guidance outside of the constitutional text. Instead, it says that the *plain language* of Article IX, Section 5 *affirmatively permits* the Rules Review Commission to exert control over the Board of Education's power to make rules and regulations. I, for one, cannot see how this construction is even plausible. Remember, for a legal provision to have a plain-language meaning, its text must be so clear and unambiguous that it cannot be read any other way. *See, e.g.*, *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809-10 (2012). So the majority's plain-language argument would be right only if Article IX, Section 5 said something like "subject to laws enacted by the General Assembly *or to a body created by laws enacted by the General Assembly*." Alas, it does not. In essence, the majority is adding words to the constitution in the guise of interpreting it, and is violating a canon of construction so basic that it doesn't even have a name: the "don't add twelve words to a legal text"

canon. If this is a plain-language interpretation, then the phrase "plain language" no longer has any meaning in our jurisprudence.

The majority also holds that "[t]he General Assembly properly delegated authority to the Commission to review the Board's rules." But this is not a delegation case because it does not concern our state constitution's delegation *provision*. The delegation doctrine, after all, arises out of Article II, Section 1, which states that "[t]he legislative power of the State shall be vested in the General Assembly." *See, e.g.*, *Northampton County Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 48, 392 S.E.2d 352, 356 (1990) (alteration in original) (quoting N.C. Const. art. II, § 1). Our caselaw interpreting this provision undoubtedly indicates that, as a practical matter, "[t]he legislative power of the State" includes the power to delegate rulemaking and regulatory authority to administrative bodies. *See, e.g.*, *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410-11 (1978). This case, though, arises out of the much more specific language of Article IX, Section 5—which, as I have said, speaks of "laws enacted by the General Assembly." And we have never held that the General Assembly can delegate *the power to enact laws*. In fact, "[i]t is well settled that the Legislature *may not* delegate its power to make laws[,] even to an administrative agency." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 475, 206 S.E.2d 141, 147 (1974) (emphasis added); *see also Adams*, 295 N.C. at 696, 249 S.E.2d at 410 ("[T]he legislature may not abdicate its power to make laws . . . ." (quoting *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965))). Well settled, that is, until today. What's next? Are we going to hand over our power to decide cases to the Rules Review Commission, too?

But there is another, equally compelling reason that the delegation doctrine cannot permit the Rules Review Commission to exert the power that it claims to have in this context. Bear in mind that the delegation doctrine, as relevant here, pertains to the General Assembly's ability to delegate the power *to make rules and regulations*. In the realm of education, Article IX, Section 5 has already assigned that power exclusively to the Board of Education. *See* N.C. Const. art. IX, § 5 ("The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make *all needed rules and regulations* in relation thereto . . . ." (emphasis added)). So what exactly is left for the General Assembly to delegate?

This analysis reveals an additional problem with the majority's position. When the Rules Review Commission reviews the Board of

Education's proposed rules and regulations, the Commission is exercising power that the constitution has already granted to the Board. Let's look at the Commission's statutory powers. The Commission can object to rules or regulations, delay rules or regulations, and suggest changes to rules or regulations on a number of highly discretionary grounds. *See* N.C.G.S. §§ 150B-2(8a), 21.9(a)(1)-(4), -21.10 (2017). Ultimately, the Commission can decide to block the Board of Education's adoption of a rule or regulation unless and until the Board changes the rule or regulation to conform to the Commission's wishes. *See id.* §§ 150B-21.12, -21.19(4) (2017). The Board's only recourse, if it does not change the rule or regulation, is to bring a declaratory judgment action in superior court. *See id.* § 150B-21.8(d) (2017). In effect, then, the Commission controls the final step in the process of adopting rules and regulations, and keeps the Board from adopting rules and regulations of which the Commission disapproves unless the Board gets a favorable ruling from a court. That cannot be constitutional, given that the Board has the sole constitutional authority to make rules and regulations in this area of the law, subject only to "laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

The majority rests its holding on the assertion that "[t]he Commission is tasked only with the responsibility to review the Board's rules from a procedural perspective" and is not "tasked with reviewing the rules from a substantive standpoint." But the plain language of Article IX, Section 5, which subjects the Board's power to make rules and regulations only to "laws enacted by the General Assembly," does not draw any distinction between procedural and substantive restrictions on the Board's power. Once again, the majority is simply adding words to the constitution that are not there.

Anyway, checking for compliance with procedural requirements is inherently part of the process of making rules and regulations. And, in the education context, the General Assembly cannot delegate procedural rulemaking authority any more than it can delegate substantive rulemaking authority. So even procedural rulemaking authority cannot be delegated to the Rules Review Commission.

Not every constitutional provision has a plain meaning. But Article IX, Section 5 does. It prevents the Rules Review Commission from conducting its statutorily prescribed review of the Board of Education's proposed rules and regulations. I therefore respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

NORTH CAROLINA STATE BOARD OF EDUCATION
v.
THE STATE OF NORTH CAROLINA AND MARK JOHNSON, IN HIS OFFICIAL CAPACITY

No. 333PA17

Filed 8 June 2018

Schools and Education—State Board of Education and Superintendent of Public Instruction—powers and duties

Legislation that amended numerous provisions of N.C.G.S. Chapter 115C—eliminating certain aspects of the N.C. State Board of Education's oversight of a number of the Superintendent of Public Instruction's powers and duties, and assigning several powers and duties that had formerly belonged to the Board or the Governor to the Superintendent—did not, on its face, violate Article IX, Section 5 of the N.C. Constitution. The Board's continued ability to exercise its constitutional authority to generally supervise and administer the public school system was preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties assigned to the Superintendent. The Court further determined that the "needed rules and regulations" to which the legislation referred were not subject to the rulemaking requirements of the Administrative Procedure Act.

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

Justice HUDSON concurring in result.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order granting summary judgment entered on 14 July 2017 by a three-judge panel of the Superior Court, Wake County, appointed by the Chief Justice pursuant to N.C.G.S. § 1-267.1. Heard in the Supreme Court on 7 February 2018.

Robert F. Orr, PLLC, by Robert F. Orr; and Poyner Spruill LLP, by Andrew H. Erteschik, Saad Gul, and John M. Durnovich, for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Olga Vysotskaya de Brito, Special Deputy Attorney General, and Amar Majmundar, Senior Deputy Attorney General, for defendant-appellee State of North Carolina.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis and Philip R. Isley, for defendant-appellee Mark Johnson.

ERVIN, Justice.

This case requires us to determine whether legislation amending portions of Chapter 115C and other provisions of the North Carolina General Statutes violates Article IX, Section 5 of the Constitution of North Carolina. Plaintiff North Carolina State Board of Education is an entity established by the North Carolina Constitution that consists of the Lieutenant Governor, State Treasurer, and eleven additional members, including one member from each of the State's eight educational districts, who are appointed by the Governor, subject to confirmation by the General Assembly, and serve eight-year overlapping terms. N.C. Const. art. IX, § 4. The Superintendent of Public Instruction is a popularly elected official who holds an office established by Article III, Section 7 of the North Carolina Constitution.

On 8 November 2016, defendant Mark Johnson was elected Superintendent of Public Instruction for a four-year term commencing on 1 January 2017. On 16 December 2016, the General Assembly enacted House Bill 17, which is captioned, in part, "An Act to Clarify the Superintendent of Public Instruction's Role as the Administrative Head of the Department of Public Instruction." Act of Dec. 19, 2016, ch. 126, 2017-1 N.C. Adv. Legis. Serv. 37 (LexisNexis) (Session Law 2016-126). House Bill 17, which amended numerous provisions of N.C.G.S. Chapter 115C, eliminated certain aspects of the Board's oversight of a number of the Superintendent's powers and duties, and assigned several powers and duties that had formerly belonged to the Board or the Governor to the Superintendent. Former Governor Patrick L. McCrory signed House Bill 17, which became Session Law 2016-126, into law on 19 December 2016.

On 29 December 2016, the Board filed a complaint in the Superior Court, Wake County, in which it sought a declaratory judgment to the effect that certain provisions of Session Law 2016-126 are unconstitutional and to have the challenged statutory provisions temporarily restrained and preliminarily and permanently enjoined. According to

the allegations set out in the Board's complaint, Session Law 2016-126 unconstitutionally transferred the authority conferred upon the Board in Article IX, Section 5 to "supervise . . . the free public school system," to "administer the free public school system," to "supervise . . . the educational funds provided for [the free public school system's] support," and to "administer . . . the educational funds provided for [the free public school system's] support" to the Superintendent. On the same date, Judge Donald W. Stephens entered a temporary restraining order in which he concluded, among other things, that, "when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment" and that "the [challenged] provisions of [House Bill 17] . . . attempt to transfer these constitutional powers and duties . . . from the Board to the Superintendent of Public Instruction." As a result, Judge Stephens enjoined the State and its "officers, agents, servants, employees, and attorneys" from "taking any action to implement or enforce" Session Law 2016-126.

On 30 December 2016, Judge Stephens entered an order transferring this case to a three-judge panel of the Superior Court, Wake County, on the grounds that N.C.G.S. § 1-267.1 and N.C.G.S. § 1-1A, Rule 42(b)(4) require that facial challenges to the constitutionality of statutes, such as the one advanced by the Board in this case, be heard and determined by such an entity. On 6 January 2017, the three-judge panel entered a consent order extending Judge Stephens' temporary restraining order "until a preliminary injunction hearing can be consolidated with the parties' dispositive motions." On 20 January 2017, the Superintendent indicated that he intended to intervene in this case. On 30 January 2017, the Board filed a summary judgment motion. On 1 March 2017, the three-judge panel entered an order that, among other things, recognized the Superintendent's intervention. On 12 April 2017, the Superintendent filed a summary judgment motion and the State filed a motion seeking to have the Board's complaint dismissed on subject matter and personal jurisdiction grounds and for failure to state a claim for which relief could be granted.

On 14 July 2017, the three-judge panel entered an order converting the State's dismissal motion into a summary judgment motion and granting summary judgment in favor of the State and the Superintendent. On the same day, the three-judge panel filed a memorandum of opinion explaining its decision to grant summary judgment in favor of the State and the Superintendent in which it concluded, in pertinent part, that:

[M]any of the provisions of [Session Law 2016-126], particularly those which were not specifically addressed by the [p]laintiffs in their briefs and oral arguments, simply shift the details of day-to-day operations, such as hiring authority, from the State Board to the Superintendent. This court further concludes that those aspects of the legislation appear to fall well within the constitutional authority of the General Assembly to define specifics of the relationship between the State Board of Education and the Superintendent of Public Instruction.

North Carolina's Constitution establishes two entities responsible for the governance of the public school system: the State Board and the Superintendent. The allocation of powers and duties between these two constitutional entities has changed over time such that there has been an ebb and flow of the powers of each entity over the years, depending on various acts of legislation. Nevertheless, it appears to be the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system and the educational funds provided for the support thereof, and that the State Board is empowered to make all needed rules and regulations related to each of those functions, subject to laws passed by the General Assembly. It also appears clear that as secretary to the State Board and chief administrative officer of the State Board, the Superintendent is primarily responsible for overseeing the day-to-day management and operations of the state's free public school system.

While the parties disagree as to what, if any, limits are placed on the power of the General Assembly to shift responsibilities back and forth between the State Board and Superintendent, this Court does not consider it necessary to articulate a precise definition on that boundary. Suffice it to say, it is at least abundantly clear to this Court that this action by the General Assembly in enacting [Session Law 2016-126] is not such a pervasive transfer of powers and authorities so as to transfer the inherent powers of the State Board to supervise and administer the public schools, nor does it render the State Board an "empty shell," nor does this action, which [p]laintiffs contend to

> be an infringement upon the constitutional powers and duties of the State Board of Education, operate to "unnecessarily restrict[ ] [the State Board of Education's] engaging in constitutional duties."

N.C. State Bd. of Educ. v. State, No. 16 CVS 15607 (N.C. Super. Ct. Wake County July 14, 2017), at 4-5 (unpublished) [hereinafter *Memorandum*] (last alteration in original) (quoting *State v. Camacho*, 329 N.C. 589, 596, 406 S.E.2d 868, 872 (1991)). The three-judge panel paid particular attention to a provision of the newly enacted legislation providing that the Superintendent will "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system," ch. 126, sec. 4, 2017-1, N.C. Adv. Legis. Serv. at 39 (amending N.C.G.S. § 115C-21(a)(5)), and concluded that, rather than transferring authority from the Board to the Superintendent, the provision in question gives the Superintendent the ability "to manage the day-to-day operations of the school system, subject to general oversight by the State Board," and noted that other provisions of Session Law 2016-126, including those providing that the Board "shall establish all needed rules and regulations for the system of free public schools," *id.*, sec. 2, at 38 (amending N.C.G.S. § 115C-12), and that the Superintendent "shall administer all needed rules and regulations adopted by the [Board,]" *id.*, serve to "place[ ] a limit on the Superintendent's power, leaving the ultimate authority to supervise and administer the public school system with the State Board." *Memorandum* at 6. Similarly, the three-judge panel concluded that the provision of Session Law 2016-126 authorizing the Superintendent to "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units," *id.*, sec. 4, at 40 (enacting N.C.G.S. § 115C-21(b)(1b)), is subject to "a limiting principle" given that Section 5 of Session Law 2016-126 requires the Superintendent to "administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education," "thereby leaving the ultimate authority to supervise and administer the school system's funds with the State Board." *Memorandum* at 6. Finally, the three-judge panel concluded that replacement of the word "policy" with the phrase "all needed rules and regulations" in N.C.G.S. § 115C-12 "does not change the constitutional role of the State Board of Education" or "conflict with the roles of the parties as defined by the state constitution" given the Board's constitutional authority to establish rules and regulations for the purpose of supervising and administering the public school system. *Id.* at 6-7. As a result, given that Session Law 2016-126 allows the Board to continue

to "supervise and administer the public schools and make all necessary rules and regulations" and subjects the Superintendent's duties to the "power of the State Board," the three-judge panel concluded that statutory changes worked by Session Law 2016-126 do not contravene the relevant provisions of the North Carolina Constitution. *Id.* at 7.

On 20 July 2017, the Board noted an appeal to the Court of Appeals from the three-judge panel's order. On 5 September 2017, the Board requested the three-judge panel to continue to stay its decision pending completion of all proceedings on appeal. On 11 September 2017, the three-judge panel entered an order allowing the existing stay to remain in effect until a hearing on the extension motion could be held. On 20 September 2017, the Board sought a temporary stay and a writ of supersedeas from the Court of Appeals, which, on 5 October 2017, granted the requested temporary relief "to the extent that the challenged provisions of [Session Law 2016-126] empower the Superintendent of Public Instruction to enter into statewide contracts for the public school system which could not be terminated by the Board immediately upon any decision by our Court in this matter which determines that the Board has the authority under our State Constitution to enter into such contracts." On 5 October 2017, the Board sought a temporary stay and the issuance of a writ of supersedeas from this Court, which granted a temporary stay on 16 October 2017 and allowed the Board's supersedeas petition on 7 December 2017. On 15 November 2017, the Board filed a petition with this Court seeking discretionary review of the three-judge panel's order prior to determination by the Court of Appeals. We allowed the Board's discretionary review petition on 7 December 2017.

In seeking relief from the three-judge panel's decision from this Court, the Board argues that the panel erroneously concluded that Session Law 2016-126 did not impermissibly transfer authority from the Board to the Superintendent given the newly enacted statutory language providing that "[i]t shall be the duty of the Superintendent" to "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system" and to "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units." Ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 38-40 (amending N.C.G.S. § 115C-21(a)(5) and enacting N.C.G.S. § 115C-21(b)(1b)). According to the Board, these provisions clearly "attempt[ ] to transfer to the [Superintendent] the same powers that the people of North Carolina in their Constitution vested in the Board." In the Board's view, Session Law 2016-126's "attempt[ ] to statutorily reassign the Board's constitutional powers to

the" Superintendent runs afoul of the Board's "constitutional power to supervise and administer the public school system and its funds" on the grounds that, "when a constitution expressly commits certain powers and duties to an entity, those powers and duties cannot be reassigned to a different entity without a constitutional amendment," citing *Camacho*, 329 N.C. at 594, 406 S.E.2d at 871; *Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Wilmington, Columbia & Augusta Railroad Co. v. Board of Commissioners of Brunswick County*, 72 N.C. 10, 13 (1875); and *King v. Hunter*, 65 N.C. 603, 612 (1871).

The Board contends that a decision to transfer its constitutional authority to the Superintendent "defies the intent of the framers" of the North Carolina Constitution, who included the Board and its powers in the constitution in order to effectuate Article I, Section 15 of the same document, which provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Although the constitutional provisions establishing the Board and defining its authority have been amended on a number of occasions, the authority granted to the Board by the 1868 constitution, which provided that "[t]he Board of Education . . . shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools," and that "all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, . . . shall not be re-enacted by the Board," N.C. Const. of 1868 art. IX, § 9, have been carried forward in subsequent revisions to the educational provisions of the North Carolina Constitution. For example, the 1942 amendments to the relevant constitutional provisions state that the Board "shall succeed to all the powers . . . of the State Board of Education as heretofore constituted," while the drafters of the 1971 constitution indicated that the proposed revisions, among other things, "restate[ ], in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced." *Report of the North Carolina State Constitution Study Commission* 34 (1968). In view of the fact that the framers of the North Carolina Constitution intended that "[t]he general supervision and administration of the free public school system, and of the educational funds provided for the support thereof . . . shall . . . be vested in the State Board of Education," N.C. Const. of 1868, art. IX, § 8 (1944), with the Superintendent to fill the narrow role of serving as a non-voting "secretary and chief administrative officer of the [Board]," *id.* art. IX, § 4(2), the attempt made in Session Law 2016-126 to transfer the Board's authority to the Superintendent so as to empower him or her to administer the public schools conflicts with the intent underlying the relevant constitutional provisions.

This Court should not, according to the Board, interpret the constitutional reference in Article IX, Section 5, subjecting the Board's authority "to laws enacted by the General Assembly," to allow the General Assembly to reassign the Board's authority to the Superintendent. According to the Board, such an interpretation ignores the principle set out by this Court in *State v. Lewis*, 142 N.C. 626, 631, 55 S.E. 600, 602 (1906), to the effect that state constitutions must be construed "as limitations upon the power of the state Legislature" and fails to give effect to each and every word contained in the text of the constitutional provisions that delineate the Board's authority rather than "lean[ing] in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory," first citing *Town of Boone v. State*, 369 N.C. 126, 132, 794 S.E.2d 710, 715 (2016); then quoting *Board of Education of Macon County v. Board of Com'rs of Macon County*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904). Furthermore, the Board points out that such an interpretation has no limiting principle and would allow the General Assembly to "remove constitutional entities or officers, replace them with individuals who better suit its political agenda, and effectively remake state government in its image."

The Superintendent argues that the trial court correctly ruled that Session Law 2016-126, which was intended, in part, to "reinforce[ ] the State Board's traditional role as the chief policy-setting, general administrative body for the schools," did not violate the Constitution by "disenfranchising" the Board. According to the Superintendent, nearly every statutory provision reworked in Session Law 2016-126 contains language subjecting the Superintendent's actions to "rules and regulations adopted by the State Board of Education." In addition, the Superintendent argues that the provision making the assignment of responsibilities contained in Article IX, Section 5 "subject to laws enacted by the General Assembly," makes both the Board and the Superintendent "wholly subservient and auxiliary to the General Assembly." The Superintendent claims that this interpretation has support in the constitutional text, which provided in 1868, and continues to provide today, that the Superintendent's duties "shall be prescribed by law" and which has consistently made the Board's authority subject to that of the General Assembly. In fact, the General Assembly's authority over the Board has increased over time, with the 1868 Constitution having limited the General Assembly to reacting to rules and regulations adopted by the Board while the 1942 amendments authorized the General Assembly to take "preemptive measures to exercise its control over the public schools" and made the Board's authority subject to "such laws as may be enacted from time to time by the General Assembly," quoting N.C. Const. of 1868, art. IX, § 9 (1942). The

Superintendent further contends that this Court's opinions in *Guthrie v. Taylor*, 279 N.C. 703, 712, 185 S.E.2d 193, 200 (1971), *cert. denied*, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972), and *State v. Whittle Communications*, 328 N.C. 456, 464, 402 S.E.2d 556, 561 (1991), establish that the General Assembly "has plenary power to limit and revise even the *express* authority conferred" upon the Board. As a result, the Superintendent asserts that Session Law 2016-126 is nothing more than "a legitimate exercise of the constitutionally-conferred plenary authority of the General Assembly."

The Superintendent further argues that the General Assembly has the authority to allocate education-related responsibilities to the Superintendent, who is an elective constitutional officer who "stands on an equal constitutional footing with the State Board" and whose power stems from Article IX, Section 4, and Article III, Section 7(2), which provide that the Superintendent's "duties shall be prescribed by law" and whose office has "inherent functions" relating to public education, just like the Board. Prior to 1995, the relevant provisions of the General Statutes indicated that the Superintendent was the "chief day-to-day, or *direct*, administrator of the State's public schools," with the Board serving as the "chief policy-setting, *general* administrative body for the schools," with this structure clearly recognizing that the Superintendent occupies a full-time position while the Board meets for a "a total of 18 days a year." According to the Superintendent, Session Law 2016-126 is nothing more than "the latest of a series of efforts by the General Assembly over at least the past 50 years to attain an optimal allocation of authority and duties among the entities charged with overseeing the State's public school system."

In the Superintendent's view, "the People of North Carolina have chosen what is essentially a bicameral approach to the operation of the State's public school system," having "provid[ed] for two entities to exercise powers and duties simultaneously within a single field of government activity." In light of the unique nature of this constitutional assignment of authority, it makes sense that each entity's authority would be "subject to laws enacted" by the General Assembly. In the event that the Board's authority to "supervise and administer" was not "subject to laws enacted by the General Assembly," there would be no point in having an elective Superintendent. As a result, "[t]he citizens of North Carolina have decreed that a Superintendent and a State Board shall oversee the public school system, have granted the General Assembly the authority to allocate powers and duties among them, and have empowered the General Assembly to make changes to such allocations of powers and duties to meet the changing priorities of the People over time."

Similarly, the State argues that Session Law 2016-126 has not imposed an unconstitutional limitation upon the Board's authority over the public education system because it specifies that "[t]he general supervision and administration of the free public school system shall be vested in the State Board of Education," provides that the Board "shall establish all needed rules and regulations for the system of free public schools," and retains much of the Board's existing authority over public education, including, among other things, the Board's authority to make budgets, apportion funds, determine standard course of study and graduation requirements, adopt textbooks, and establish and regulate teacher salaries. Ch. 126, sec. 2, 2017-1 N.C. Adv. Legis. Serv. at 38 (amending N.C.G.S. § 115C-12). In addition, the State contends that Session Law 2016-126 preserves the Board's general fiscal powers by leaving those portions of N.C.G.S. § 115C-408(a) recognizing that "[t]he Board shall have general supervision and administration of the educational funds provided by the State and federal governments" unchanged, by allowing the Board to adopt rules and regulations regarding "available educational funds," and by leaving certain of the specific financial powers granted the Board by the existing statutory provisions intact. In the State's view, "[t]he Board's general supervisory and administrative powers over the public school system" and the "Board's power to supervise educational funds provided for the system's support" have not been unconstitutionally impaired.

According to the State, most of the changes that Session Law 2016-126 makes to the existing educational laws constitute statutory changes that have no constitutional significance. The State asserts that the "Board does not contend that the General Assembly must be restrained in its allocation of statutory, rather than constitutional, duties," with "the General Assembly's allocation of the statutory duties to the Superintendent [being] within its legislative authority." The State argues that the General Assembly's authority over the public schools, which antedates that of both the Board or the Superintendent, represents the "sturdiest leg of the three-legged design created by the framers" to govern the operation of the public schools, with the General Assembly having the authority "to shape [the] particulars of [the] relationship" between the Board and the Superintendent and to "enact laws that may limit and define the extent of the Board's and the Superintendent's authority over public education." In addition, the State joins the Superintendent in asserting that the Superintendent has "inherent constitutional authority" by virtue of his role as "chief administrative officer of the State Board of Education." In view of the fact that the Superintendent is required to "administer all needed rules and regulations adopted by the State Board of Education

through the Department of Public Instruction," the General Assembly has appropriately limited the Superintendent's authority to that authorized by the relevant constitutional provisions, citing N.C.G.S. § 115C-12 (as amended by S.L. 2016-126).

"[A] statute enacted by the General Assembly is presumed to be constitutional," *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (citation omitted), and "will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground," *id.* at 29, 399 S.E.2d at 315 (citing, *inter alia*, *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)). Put another way, since "[e]very presumption favors the validity of a statute," that statute "will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. City of Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). "[A] facial challenge to the constitutionality of an act . . . is the 'most difficult challenge to mount successfully,' " *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (quoting *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)), with the challenger being required to show "that there are no circumstances under which the statute might be constitutional," *Beaufort Cty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280 (citations omitted). "Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne Cty. Citizens Ass'n*, 328 N.C. at 29, 399 S.E.2d at 315 (citing *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949)). Before noting that, "[i]n respect to legislative offices, it is entirely within the power of the Legislature to deal with them as public policy may suggest and public interest may demand," *Mial*, 134 N.C. at 162, 46 S.E. at 971, this Court stated that, "in respect to offices created and provided for by the Constitution, the people in convention assembled alone can alter, change their tenure, duties, or emoluments, or abolish them," *id.* at 162, 46 S.E. at 971.

The Board asserts that several provisions of Session Law 2016-126 contravene the provisions of Article IX, Section 5 of the North Carolina Constitution, which provides that the Board "shall supervise and administer the free public school system and the educational funds provided for its support," with the exception of certain funds enumerated in Article IX, Section 7, "and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." In addition,

however, Article IX, Section 4 provides that "[t]he Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education," while Article III, Sections 7 and 8 provide that the Superintendent is an "elective officer[ ]" and member of the Council of State whose "duties shall be prescribed by law." As a reading of the plain language of the relevant constitutional provisions clearly suggests, the Board, the Superintendent, and the General Assembly all have constitutionally based roles in the governance and operation of the public school system in North Carolina. On the one hand, the Board has the authority to "supervise and administer the free public school system and the educational funds provided for its support" and to "make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. The Superintendent, on the other hand, serves as "the secretary and chief administrative officer of the State Board of Education," *id.* art. IX, § 4, and performs other "duties [as] shall be prescribed by law," *id.* art. III, § 7(2). A "plain meaning" construction of the relevant constitutional provisions seems to us to clearly provide that the Board has the constitutionally based responsibility for the general supervision and administration of the public school system; that the Superintendent has the constitutionally based responsibility for directly administering the operations of the public school system; and that the General Assembly has the authority to make ultimate educational policy determinations and to enact legislation providing for the management and operation of the public school system, so long as that legislation does not deprive the Board of responsibility for the general supervision and administration of the public school system or deprive the Superintendent of the responsibility for directly administering the operations of that system. As a result, in order to evaluate the validity of the Board's challenge to the relevant provisions of Session Law 2016-126, we must determine whether the legislation in question does, in fact, interfere with the Board's constitutionally based authority to generally supervise and administer North Carolina's system of public education.

Session Law 2016-126 made several changes to the "administrative duties" of the Superintendent as enumerated in N.C.G.S. § 115C-21. Among other things, the General Assembly deleted language from N.C.G.S. § 115C-21(a) making performance of the Superintendent's duties "[s]ubject to the direction, control, and approval of the State Board of Education"; removed various references to direction, approval, or delegation by the Board from various specific provisions contained in N.C.G.S. § 115C-21(a); and modified the descriptions of the administrative duties that were assigned to the Superintendent set out in N.C.G.S.

§ 115C-21(a). Pursuant to the modifications to N.C.G.S. § 115C-21(a) worked by Session Law 2016-126, the Superintendent was authorized to:

- "organize and establish a Department of Public Instruction which shall include divisions and departments for supervision and administration of the public system"
- "administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education"
- "enter into contracts for the operations of the Department of Public Instruction;"
- "control and manag[e]" "all appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction and the State Board of Education, except for certain personnel appointed by the State Board of Education," and to "terminate these appointments in conformity with . . . the North Carolina Human Resources Act"
- "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system"
- "[c]reate and administer special funds within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education in accordance with G.S. 115C-410"
- "administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education"
- "have under his or her direction and control all matters relating to the provision of staff services, except certain personnel appointed by the State Board as provided in G.S. 115C-11(j)" and
- "have under his or her direction and control all matters relating to the . . . support of the State Board of Education, including implementation of federal programs on behalf of the State Board."

Ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 38-39 (amending N.C.G.S. § 115C-21(a)(1), (5), (8), and (9)). Similarly, Session Law 2016-126 deleted the language "[s]ubject to the direction, control, and approval of the State Board of Education" from the statutory provision defining the Superintendent's duties "as Secretary to the Board of Education" contained in N.C.G.S. § 115C-21(b); deleted various references to the necessity for compliance with "the instructional policies and procedures of" and the assignment of duties and responsibilities by the Board specified in certain subparagraphs contained in N.C.G.S. § 115C-21(b); and amended specific duties assigned to the Superintendent set out in N.C.G.S. § 115C-21(b) so as to provide that the Superintendent, while acting as Secretary to the Board, must:

- "communicate to the public school administrators all information and instructions regarding needed rules and regulations adopted by the Board," and
- "perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the Board."

Id. at 39-40 (amending N.C.G.S. § 115C-21(b)(6), (9)).

Session Law 2016-126 modified the division of responsibility between the Board and the Superintendent in other ways as well. Aside from making the Superintendent the administrative head of the Department of Public Instruction, *id.*, secs. 9, 10, 11 at 44 (amending N.C.G.S. §§ 143-745(a)(1), 143A-44.1 and repealing N.C.G.S. § 143A-22 (conferring powers and duties upon the State Board of Education)), the General Assembly enacted N.C.G.S. § 115C-11(i), requiring the Superintendent to "provide technical . . . and administrative assistance, including all personnel . . . to the State Board of Education through the Department of Public Instruction," and amended N.C.G.S. § 115C-19, requiring him to

- "carry out the duties prescribed under G.S. 115C-21 as the administrative head of the Department of Public Instruction . . . . [and] administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction."

Id., secs. 1, 3, at 38. In addition, the General Assembly amended N.C.G.S. § 126-5(d) to allow the Superintendent to designate the greater of seventy positions, or two percent of the total number of full-time positions in the Department of Public Instruction, as exempt policymaking positions, and the same number as exempt managerial positions; to request that

additional positions be designated as exempt; to designate as exempt positions created or transferred to a different department or located in a department that has been reorganized; and to reverse the status of positions that had been previously designated as exempt. *Id.*, sec. 8, at 41-44 (amending N.C.G.S. § 126-5(d)(2), (2a), (4), (5), and (6)). The General Assembly further provided that the Superintendent would serve as the Board's Chief Administrative Officer; would administer, along with the Board, the Achievement School District; would appoint, establish the salary for, supervise, and determine the tenure of the Superintendent of the Achievement School District; and "be responsible for the administration, including appointment of staff," for the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf, having the authority to reduce the number of positions at those institutions, and at the North Carolina Center for Advancement of Teaching, for the purpose of implementing budget reductions established for the 2015-2017 fiscal biennium. *Id.*, secs. 15, 16, 28, at 44-45, 50 (amending N.C.G.S. §§ 115C-75.6, -150.11, and amending "Section 8.37 of S.L. 2015-241, as amended by Section 8.30 of S.L. 2016-94"). Similarly, Session Law 2016-126 authorized the Superintendent to appoint, establish the salary for, and assign otherwise unenumerated duties to the Executive Director of the Office of Charter Schools, with that individual to serve at the Superintendent's pleasure. *Id.*, sec. 17, at 45-47 (amending N.C.G.S. § 115C-218). Finally, Session Law 2016-126 allows the Superintendent to "establish a division to manage and operate a system of insurance for public school property in accordance with all needed rules and regulations adopted by the State Board of Education," to employ staff "necessary to insure and protect effectively public school property," and to "fix their compensation consistent with the policies of the State Human Resources Commission." *Id.*, sec. 25, at 49 (amending N.C.G.S. § 115C-535).

The General Assembly's description of Session Law 2016-126 as "clarify[ing]" the Superintendent's "role as the administrative head of the Department of Public Instruction" reflects that body's expressly stated intent "to restore authority to the Superintendent of Public Instruction as the administrative head of the Department of Public Instruction and the Superintendent's role in the direct supervision of the public school system," *id.*, sec. 30, at 50, and to assign several duties to the Superintendent that he or she either did not have or carried out subject to the Board's "direction, control, and approval" under prior law. The resulting statutory changes, which make the Superintendent the chief administrative officer for the Department of Public Instruction, give the Superintendent the authority to hire and fire the Department's

employees and a large majority of the Board's employees, and authorize the Superintendent to manage certain funds available for the support of the public schools, also provide that the Superintendent's actions are subject to rules and regulations adopted by the Board. For that reason, these statutory changes do not strike us as inconsistent with the Superintendent's constitutional authority as the "secretary and chief administrative officer of the State Board of Education" and as an "elective officer [ ]" whose "duties shall be prescribed by law." N.C. Const. art. IX, § 4(2), *id.* art. III, § 7(1)(2).[1] The General Assembly's decision to assign additional responsibilities to the Superintendent does not interfere with the Board's constitutional authority to generally supervise and administer the public school system given that the current statutory provisions governing the provision of public education in North Carolina, by providing that "[t]he general supervision and administration of the free public school system shall be vested in the" Board, ch. 126, sec. 2, 2017-1 N.C. Adv. Legis. Serv. at 38, and that the Board "shall establish *all* needed rules and regulations for the system of free public schools," *id.*, subject the Superintendent's authority to directly supervise and administer the public schools to the Board's more general oversight and control. As a result, we conclude that the General Assembly's decision to give greater administrative authority to the Superintendent in Session Law 2016-126 is not, at least on its face, violative of Article IX, Section 5 of the North Carolina Constitution.

The essence of the Board's challenge to the validity of the statutory changes worked by Session Law 2016-126 rests upon a legislative determination that the Superintendent should "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system." Ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 39 (amending N.C.G.S. § 115C-21(a)(5)). However, as we have previously noted, the Board's argument fails to fully take into account the fact that the constitutional text authorizes the Board to "supervise

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1. Our decision to this effect is consistent with the determination that former Judge Robert H. Hobgood made in an order invalidating legislation creating a chief executive officer position within the Department of Public Instruction, the occupant of which was solely responsible to the Board, to the effect that, while "the State Constitution does not prohibit the General Assembly from establishing a position that has the authority and power to administer the day to day operations of the Department of Public Instruction as designated by the State Board of Education," such legislation must provide that "such responsibilities be exercised through the Superintendent of Public Instruction or under her supervision," given the Superintendent's "inherent powers" as an elected officer and as the Board's chief administrative officer. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. Wake County July 17, 2009) (order).

and administer" the public school system, N.C. Const. art. IX, § 5, while the newly enacted statutory language provides that the Superintendent shall direct and control "all matters relating to the *direct* supervision and administration" of the public school system, ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 39 (emphasis added). The General Assembly's reference to "direct supervision" suggests that the Superintendent has been assigned responsibility for managing and administering the day-to-day operations of the school system, subject to rules and regulations adopted by the Board, with this allocation of responsibility between the Superintendent and the Board appearing to us to avoid an invasion of the Board's constitutionally based authority to generally supervise and administer the public school system while admittedly giving the Superintendent great immediate administrative authority.

The Board directs a similar argument against the provisions of Session Law 2016-126 transferring the authority to administer the funds provided for the operation of the public school system to the Superintendent, subject to rules and regulations adopted by the Board. More specifically, the Board asserts that section 4 of Session Law 2016-126 (enacting N.C.G.S. § 115C-21(b)(1b)), which provides that the Superintendent shall "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units," and sections 3 and 4 of Session Law 2016-126, (amending N.C.G.S. §§ 115C-19 and 115C-21(a)(1)), which provide that, as "administrative head of the Department of Public Instruction," the Superintendent shall "administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education," unconstitutionally transfer the Board's constitutional authority to supervise and administer the funds provided for the support of the public schools to the Superintendent. However, given that the Superintendent's authority over the funds to be utilized for public educational purposes is subject to rules and regulations adopted by the Board and given that N.C.G.S. § 115C-408 provides that "[t]he Board shall have general supervision and administration of the educational funds provided by the State and federal governments," we are unable to say that the relevant provisions of Session Law 2016-126 unconstitutionally transfer the Board's constitutionally based authority over the State's educational funds to the Superintendent.

The same logic precludes us from accepting the Board's challenges to other transfers of fiscal authority worked by Session Law 2016-126. Although the Board argues that the newly enacted provisions requiring the Superintendent to "collect and organize information regarding

the public schools, on the basis of which he or she shall furnish the Board such tabulations and reports as may be required by the Board," ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 40 (amending N.C.G.S. § 115C-21(b)(5)), and to "accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions," *id.*, sec. 6, at 40 (amending N.C.G.S. § 115C-410), each of these additional grants of authority is also limited by the Board's authority to adopt appropriate rules and regulations applicable to these situations. As a result, we hold that the Board's continued ability to exercise its constitutional authority to generally supervise and administer the public school system is preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties that have been assigned to the Superintendent.

Our decision that the statutory changes worked by Session Law 2016-126 do not, at least on their face, invade the Board's constitutional authority under Article IX, Section 5, rests, in considerable part, upon the existence of numerous statutory provisions subjecting the Superintendent's authority to appropriate rules and regulations adopted by the Board. We do not, after carefully reviewing these provisions and considering their likely impact upon the constitutionality of the statutory changes worked by Session Law 2016-126, believe that these references to "rules and regulations" contemplate the exercise of the Board's general supervisory and administrative authority exclusively by means of rules adopted and reviewed in compliance with the formal rule making provisions of the Administrative Procedure Act.[2]

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2. The "rules and regulations" repeatedly mentioned in Session Law 2016-126 are not, in our opinion, necessarily equivalent to the rules and regulations at issue in our contemporaneous decision in *N.C. State Bd. of Educ. v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 8, 2018) (110PA16-2), which holds that rules and regulations adopted by the Board are not exempt from the statutory provisions governing the submission of proposed rules for consideration by the Rules Review Commission. The rules and regulations at issue in that case are, generally speaking, subject to the rulemaking procedures specified in Chapter 150B of the General Statutes because they affect and are directed toward third parties, rather than merely seeking to govern the mechanics of the relationship between the Board and the Superintendent, as well as how their respective departments will operate internally. In other words, the rules at issue in *N.C. State Board of Education v. State* are, necessarily, subject to the full panoply of rulemaking procedures, including review by the Rules Review Commission, set out in the Administrative Procedure Act. Otherwise, there would be no need for us to decide the constitutionality of subjecting the Board's proposed rules to review by the Rules Review Commission. The rules and regulations at issue in this case are, on the other hand, directed primarily toward the internal governance of the state-level entities responsible for the governance of the public education system rather

We reach this conclusion for at least two different reasons. First, the General Assembly's repeated use of the phrase "rules and regulations," rather than "rules," in each of the newly enacted provisions transferring authority from the Board to the Superintendent subject to "rules and regulations" adopted by the Board contained in Session Law 2016-126 suggests that the General Assembly did not contemplate that the exercise of the Board's general supervisory and administrative authority over the public education system would be exclusively effectuated through the use of the formal rulemaking process described in the Administrative Procedure Act, which applies to explicitly defined "rules" rather than to "rules and regulations." Secondly, we need not make our decision explicitly dependent upon this logic because, even if the General Assembly intended the repeated references to "rules and regulations" in Session Law 2016-126 to be equivalent to "rules" as defined in the Administrative Procedure Act, we do not believe that the formal rulemaking provisions of the Administrative Procedure Act apply to the "rules and regulations" referenced in Session Law 2016-126.

In reaching the second of these two conclusions, we note that the Administrative Procedure Act excludes a number of agency actions from the ambit of its rulemaking provisions. N.C.G.S. § 150B-2(8a) (2017); *see State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 411, 269 S.E.2d 547, 567-68 (1980), *abrogated on other grounds by In re Redmond*, 369 N.C. 490, 496-97, 797 S.E.2d 275, 279-280 (2017) (distinguishing between procedural rules, legislative rules, and interpretative rules and noting that "interpretative rules and general policy statements of agencies are excluded from the [Administrative Procedure Act's] rulemaking provisions"). More specifically, we note that, while N.C.G.S. § 115C-2 does provide that "[a]ll action of agencies taken pursuant to this Chapter, as agency is defined in G.S. 150B-2, is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes," the Administrative Procedure Act excludes from the statutory definition of "rule" "[s]tatements concerning only the internal

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than toward the activities of parties external to those entities. For the reasons set forth in the text, these rules and regulations are not, as a general proposition, subject to the rule-making procedures set out in the Administrative Procedure Act. As a result, the rules and regulations at issue in the cases we decide today represent distinct categories of Board decisions and are not, generally speaking, both subject to the rulemaking procedures, including the review process conducted before the Rules Review Commission, specified in the Administrative Procedure Act. In the event that a rule adopted by the Commission is subject to the current version of the Administrative Procedure Act, however, it must be adopted and reviewed in accordance with the provisions of Chapter 150B of the General Statutes regardless of the statutory provision authorizing the Board's action.

management of an agency or group of agencies within the same principal office or department" to the extent that "the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies," N.C.G.S. § 150B-2(8a)(a), "[s]tatements of agency policy made in the context of another proceeding," such as "[d]eclaratory rulings," *id.* § 150B-2(8a)(e), and "[s]tatements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases," *id.* § 150B-2(8a)(g). As a result of the fact that the "rules and regulations" repeatedly referenced in Session Law 2016-126 appear to us to apply primarily to internal management or general policy statements than to the sort of rules that are subject to the Administrative Procedure Act's rulemaking requirements and the fact that a decision to treat Board decisions adopted for the purpose of exercising its general supervisory or administrative authority over the public education system as equivalent to formal Administrative Procedure Act-compliant rules could cast serious doubt upon the constitutionality of at least some of the statutory provisions enacted in Session Law 2016-126, we hold that the "needed rules and regulations" to which Session Law 2016-126 refers are not subject to the rulemaking requirements of the Administrative Procedure Act.

Our decision to interpret the relevant statutory language in this fashion is further bolstered by the fact that, in at least two instances, the General Assembly substituted the phrase "needed rules and regulations" for the word "policy." As the three-judge panel noted, this amendment tends to make the relevant statutory language consistent with the language in which Article IX, Section 5, is couched rather than to suggest the existence of a legislative intention to make a substantive change in law. *See* ch. 126, sec. 2, 2017-1 N.C. Adv. Legis. Serv. at 38 (providing that "[t]he State Board of Education shall establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly"); *id.*, sec. 4, at 39-40 (amending N.C.G.S. § 115C-21(b)(6) to provide that "it shall be the duty of the Superintendent of Public Instruction . . . to communicate to the public school administrators all information and instructions regarding needed rules and regulations adopted by the Board"). Although we need not delineate with precision each and every instance in which the Board's authority to adopt rules and regulations is and is not subject to the formal rulemaking requirements set out in the Administrative Procedure Act, we do wish to be clearly understood as holding that the Board is not required to exclusively exercise the general supervisory and administrative authority

over the Superintendent set out in Session Law 2016-126 through the promulgation of Administrative Procedure Act-compliant rules.[3]

Thus, for the reasons set forth in greater detail above, we hold that the enactment of Session Law 2016-126 does not, at least on its face, contravene Article IX, Section 5 of the Constitution of North Carolina. As a result, the three-judge panel's decision is affirmed.

AFFIRMED.

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

Justice HUDSON concurring in result.

I agree with the majority that the enactment of Session Law 2016-126 does not on its face contravene Article IX, Section 5, of the North Carolina Constitution because the Board's "constitutional authority to generally supervise and administer the public school system is preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties that have been assigned to the Superintendent." I express no opinion on—and view as unnecessary to the decision here—the majority's discussion of categories of rules that may or may not be subject to the general rulemaking provisions of the APA. Instead, I would conclude only that rules or regulations adopted by the Board, regardless of category, would not be subject to review and approval by the Rules Review Commission. *See N.C. State Bd. of Educ. v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2018) (110PA16-2) (Martin, C.J., dissenting). Therefore, I concur in the result.

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3. The textual analysis assumes the continued applicability of the existing version of Chapter 150B of the General Statues and should not be understood to expand or contract the current coverage of the Administrative Procedure Act. We express no opinion concerning the impact of any future change that might be made to the Administrative Procedure Act upon the constitutionality of any of the statutory changes worked by Session Law 2016-126.

STATE OF NORTH CAROLINA
v.
SAM BABB CLONTS, III

No. 222A17

Filed 8 June 2018

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. ___, 802 S.E.2d 531 (2017), granting defendant a new trial after appeal from a judgment entered on 19 June 2015 and from orders entered on 29 February and 24 March 2016, all by Judge Jeffrey P. Hunt in Superior Court, Mecklenburg County. On 7 December 2017, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court on 16 May 2018 in session in the Buncombe County Courthouse in the City of Asheville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

*Hale & Blau, Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appe*llee.

PER CURIAM.

We affirm the decision of the Court of Appeals. With respect to Issue II raised by the State's petition for discretionary review as to additional issues, we conclude that discretionary review was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. 402PA15-2

Filed 8 June 2018

Appeal and Error—petition to Court of Appeals for writ of certiorari—absence of procedural rule

Where defendant pleaded guilty to driving while impaired and petitioned the Court of Appeals for review by writ of certiorari of the denial of her motion to dismiss, the Court of Appeals erroneously concluded that it was procedurally barred from issuing a discretionary writ because there was no procedural process under Rule of Appellate Procedure 21. The Court of Appeals had jurisdiction pursuant to N.C.G.S. § 15A-1444(e) to issue a writ of certiorari, and the absence of a procedural rule did not limit its jurisdiction or authority to do so.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 551 (2016) (per curiam), denying defendant's petition for writ of certiorari to review an order entered on 20 October 2014 by Judge C.W. Bragg and dismissing defendant's appeal from a judgment entered on 27 October 2014 by Judge Jeffrey P. Hunt, both in Superior Court, Rowan County. Heard in the Supreme Court on 17 April 2018.

Joshua H. Stein, Attorney General, by Christopher W. Brooks, Special Deputy Attorney General, for the State.

Meghan Adelle Jones for defendant-appellant.

BEASLEY, Justice.

In this case we consider whether the absence of a procedural rule limits the Court of Appeals' discretionary authority to issue a writ of certiorari. In denying defendant's petition for writ of certiorari, the Court of Appeals held that although it had jurisdiction to issue the writ, it lacked a procedural mechanism under Rule 21 of the North Carolina Rules of Appellate Procedure to do so without further exercising its discretion to invoke Rule 2 to suspend the Rules. *See State v. Ledbetter*, ___ N.C. App. ___, ___, 794 S.E.2d 551, 555 (2016) (per curiam); *see also* N.C. Rs. App.

P. 2, 21. Because we conclude that the absence of a procedural rule limits neither the Court of Appeals' jurisdiction nor its discretionary authority to issue writs of certiorari, we reverse the decision of the Court of Appeals and remand this case for further proceedings.

On 1 January 2013, defendant was charged with driving while impaired. Defendant filed a motion to dismiss the charge on 23 December 2013, arguing that the State violated N.C.G.S. § 20-38.4 (setting forth procedures for magistrates to follow when the arrestee appears to be impaired during the initial appearance) and *State v. Knoll*, 322 N.C. 535, 545-48, 369 S.E.2d 558, 564-66 (1988) (holding that a charge of driving while impaired is subject to dismissal when the defendant was prejudiced by the magistrate's failure to inform the defendant of certain statutory rights). The trial court denied defendant's motion on 20 October 2014.

Following the trial court's denial of her motion, on 27 October 2014, defendant pleaded guilty to driving while impaired.[1] The plea arrangement stated that "[defendant] expressly retains the right to appeal [t]he [c]ourt's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case." Defendant gave notice of appeal and petitioned the Court of Appeals for review by writ of certiorari under N.C.G.S. § 15A-1444(e). The Court of Appeals dismissed the appeal and denied the certiorari petition, holding that defendant did not have a statutory right to appeal from the trial court's denial of her motion to dismiss prior to her guilty plea and that the petition did not assert grounds included in or permitted by Rule 21. *See State v. Ledbetter*, 243 N.C. App. 746, 757, 779 S.E.2d 164, 171 (2015). On 22 September 2016, this Court remanded the case to the Court of Appeals for reconsideration in light of the Court's recent decisions in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), and *State v. Thomsen*, 369 N.C. 22, 789 S.E.2d 639 (2016). *State v. Ledbetter*, 369 N.C. 64, 64, 793 S.E.2d 216, 216-17 (2016) (per curiam order).

Upon reconsideration, the same panel of the Court of Appeals issued a unanimous opinion that again denied defendant's petition for writ of certiorari and dismissed her appeal. *See Ledbetter*, ___ N.C. App. at ___, 794 S.E.2d at 555. The Court of Appeals held that

> [a]fter further consideration and review of both *Thomsen* and *Stubbs*, and under the jurisdictional

1. In addition to the charge of driving while impaired, the State charged defendant with simple possession of both a Schedule II and a Schedule IV controlled substance; however, the two possession charges were dismissed pursuant to the plea arrangement.

> authority provided by N.C. Gen. Stat. § 15A-1444(e), [d]efendant's petition for writ of certiorari to review her motion to dismiss, prior to entry of her guilty plea, does not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, this Court is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

Id. at ___, 794 S.E.2d at 555. The court further declined to invoke Rule 2 to suspend the requirements of the rules to issue the writ of certiorari. *Id.* at ___, 794 S.E.2d at 555.

The North Carolina Constitution states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). The General Assembly has exercised this constitutional authority by giving the Court of Appeals "jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A-32(c) (2017). "This statute empowers the Court of Appeals to review trial court rulings . . . by writ of certiorari unless some other statute restricts the jurisdiction that subsection 7A-32(c) grants." *Thomsen*, 369 N.C. at 25, 789 S.E.2d at 641 (citing *Stubbs*, 368 N.C. at 42-43, 770 S.E.2d at 76). Therefore, "[s]ubsection 7A-32(c) . . . creates a default rule that the Court of Appeals has jurisdiction to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts jurisdiction in the particular class of cases at issue." *Id.* at 25, 789 S.E.2d at 642.

In *State v. Stubbs* we addressed whether the Court of Appeals has jurisdiction to review a trial court's grant of a defendant's motion for appropriate relief by writ of certiorari. *See* 368 N.C. at 41, 770 S.E.2d at 75. We noted that a separate statute, N.C.G.S. § 15A-1422(c), specifically addresses review of trial court rulings on motions for appropriate relief under section 15A-1415. *Id.* at 42-43, 770 S.E.2d at 76. In *Stubbs* "we were not concerned with whether subsection 15A-1422(c) provided an independent source of jurisdiction for the Court of Appeals to issue the writ. Rather, we focused on the *absence* of language in subsection 15A-1422(c) that would *limit* the court's review." *Thomsen*, 369 N.C. at 25, 789 S.E.2d at 642 (citing *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76) (citations omitted). Finding no limiting language, we held that the Court of Appeals had jurisdiction to issue the writ. *Id.* at 25, 789 S.E.2d at 642 (citing *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76).

In *State v. Thomsen* the sole difference from *Stubbs* was that the trial court granted appropriate relief on its own motion pursuant to N.C.G.S. § 15A-1420(d), rather than on defendant's motion pursuant to N.C.G.S. § 15A-1415. *Compare Thomsen*, 369 N.C. at 25, 789 S.E.2d at 642, *with Stubbs*, 368 N.C. at 41, 770 S.E.2d at 75. N.C.G.S. § 15A-1422(c) does not mention review of relief granted "pursuant to" subsection 15A-1420(d); therefore, the parties disagreed on whether the *sua sponte* grant of relief was "pursuant to" subsection 15A-1415(b) or subsection 15A-1420(d). *See Thomsen*, 369 N.C. at 26, 789 S.E.2d at 642. We held that the answer to this question did not matter, and that the Court of Appeals had jurisdiction in either event "because nothing in the Criminal Procedure Act, or any other statute that defendant has referenced, revokes the jurisdiction in this specific context that subsection 7A-32(c) confers more generally." *Id.* at 26, 789 S.E.2d at 642. Therefore, the Court of Appeals maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction.

Although *Stubbs* and *Thomsen* concerned reviews of motions for appropriate relief, the same statutory analysis applies in this case. With respect to guilty pleas, subsection 15A-1444(e) states that

> [e]xcept as provided in subsections (a1) and (a2) of this section and [N.C.]G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

N.C.G.S. § 15A-1444(e) (2017). Here, given that none of the other listed exceptions apply, defendant's only method for appeal was by petition for writ of certiorari. *See id.* Subsection 15A-1444(e) specifically addresses review of a defendant's guilty plea through issuance of a writ of certiorari and contains no language limiting the Court of Appeals' jurisdiction or discretionary authority. Therefore, the Court of Appeals correctly acknowledged that it had jurisdiction to issue the writ; however, the court mistakenly concluded that the absence of a specific "procedural process" in the Rules of Appellate Procedure left the court without authority to invoke that jurisdiction.[2]

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2. We note that a separate, unanimous panel of the Court of Appeals correctly followed *Stubbs* to exercise its discretion to grant a defendant's petition for writ of certiorari in essentially identical procedural circumstances. *See State v. Jones*, ___ N.C. App. ___,

The Court of Appeals held that because defendant's petition for writ of certiorari to review her motion to dismiss did not assert any of the procedural grounds set forth in Rule 21, the court was "without a procedural process" to issue the writ other than by invoking Rule 2. *See Ledbetter*, ___ N.C. App. at ___, 794 S.E.2d at 555. Rule 21 states, in relevant part, that

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

N.C. R. App. P. 21(a)(1). Regardless of whether Rule 21 contemplates review of defendant's motion to dismiss, this Court made it clear in both *Stubbs* and *Thomsen* that "if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." *Thomsen*, 369 N.C. at 27, 789 S.E.2d at 643 (citing *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76); *see also* N.C. R. App. P. 1(c) ("These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.").

By concluding it is procedurally barred from exercising its discretionary authority to assert jurisdiction in this appeal, the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction to issue writs of certiorari. "The practice and procedure [of issuing the prerogative writs] shall be as provided by statute or rule of the Supreme Court, or, *in the absence of statute or rule*, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(c) (emphasis added). Therefore, in the absence of a procedural rule explicitly allowing review, such as here, the Court of Appeals should turn to the common law to aid in exercising its discretion rather than automatically denying the petition for writ of certiorari or requiring that the heightened standard set out in Rule 2 be satisfied.[3]

___, ___, 802 S.E.2d 518, 520-23, 526 (2017) (holding that the Court of Appeals had jurisdiction and discretionary authority to grant the defendant's petition for writ of certiorari to review a judgment entered upon his plea of guilty, even though Rule 21 did not include the particular circumstance among its enumerated bases for issuance of the writ).

3. *See, e.g.*, *Surratt v. State*, 276 N.C. 725, 726, 174 S.E.2d 524, 525 (1970) (per curiam) (stating that a particular judgment was "reviewable only by way of *certiorari* if the court

Accordingly, the Court of Appeals had both the jurisdiction and the discretionary authority to issue defendant's writ of certiorari. Absent specific statutory language limiting the Court of Appeals' jurisdiction, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari. Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Therefore, the Court of Appeals should exercise its discretion to determine whether it should grant or deny defendant's petition for writ of certiorari. The decision of the Court of Appeals is reversed, and this case is remanded to that court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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in its discretion chooses to grant such writ" (second italics added) (first citing *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968); then citing *In re Croom*, 175 N.C. 455, 95 S.E. 903 (1918); and then citing 4 Strong's North Carolina Index 2d: *Habeas Corpus* § 4, at 149-50 (1968))); *State v. Walker*, 245 N.C. 658, 659, 97 S.E.2d 219, 220 (1957) (stating that a writ of certiorari "may be allowed by the Court *in its discretion*, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right" (emphasis added)), *cert. denied*, 356 U.S. 946 (1958); *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 . . . ." (second italics added) (first citing *Waller v. Dudley*, 193 N.C. 354, 137 S.E. 149 (1927); then citing *People's Bank & Tr. v. Parks*, 191 N.C. 263, 131 S.E. 637 (1926); then citing *Finch v. Comm'rs of Nash Cty.*, 190 N.C. 154, 129 S.E. 195 (1925); and then citing *State v. Farmer*, 188 N.C. 243, 124 S.E. 562 (1924))); *Luther v. Seawell*, 191 N.C. App 139, 142, 662 S.E.2d 1, 3 (2008) (stating that the Court of Appeals has "the authority . . . to 'treat the purported appeal as a petition for writ of certiorari' and grant it *in* [*its*] *discretion*" (emphasis added) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985); and then citing *Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002))).

STATE OF NORTH CAROLINA
v.
MARIO ANDRETTE McNEILL

No. 446A13

Filed 8 June 2018

1. Appeal and Error—ineffective assistance of counsel—sufficient evidence received at trial—merits addressed on appeal

The merits of an ineffective assistance of counsel claim were heard on appeal (as opposed to through a motion for appropriate relief) where defendant first raised his claim in a motion before trial and again in a hearing on the State's motion in limine. The trial court was able to receive evidence and make findings, and the cold record revealed that no further investigation was required.

2. Constitutional Law—ineffective assistance of counsel—revealing location of missing victim's body

A defendant who was eventually tried for the kidnapping, rape, and murder of a five-year-old girl received effective assistance of counsel where his attorneys disclosed the location of the victim's body. His attorneys had been involved in the case for one day, there was uncertainty over whether the victim was still alive, the weather was cold and rainy, there was a massive law enforcement search in the area, and the attorneys were concerned that the value of the information would diminish if the girl died or was found without defendant's information. There was other heavily incriminating evidence, and attorneys' goal was to avoid the death penalty through a plea bargain or the mitigating circumstances of remorse and cooperation. A plea bargain was not secured before the information was released, but defendant subsequently twice declined plea bargain offers to remove the death penalty.

3. Constitutional Law—ineffective assistance of counsel—investigation of case

A defendant received effective assistance of counsel where he was charged with kidnapping, rape, and murder and alleged that his attorneys did not conduct an adequate investigation before disclosing the location of the victim's body. The investigation was at an early stage, so there was no discovery file to examine, and defendant did not identify anything that the allegedly inadequate investigation failed to uncover which would have had any effect on the reasonableness of the strategic decision to make the disclosure.

4. Constitutional Law—ineffective assistance of counsel—location of victim's body—understanding with counsel

Defendant was not denied the effective assistance of counsel where he was charged with kidnapping, rape, and murder; his attorneys revealed the location of the victim's body; and defendant asserted on appeal that his attorneys erroneously advised him that they would shield his identity as the source of the information. The entire purpose of the disclosure, to which defendant agreed, was to show cooperation by defendant, and the method of disclosure allowed an immediate inference of cooperation but avoided any inadvertent admission of guilt. Whether defendant's attorneys should have advised him to adopt a different strategy is a separate question which defendant did not raise.

5. Constitutional Law—ineffective assistance of counsel—Cronic claim—location of victim revealed

A defendant charged with the kidnapping, rape, and murder of a 5-year-old child received effective assistance of counsel, despite his claim of a breakdown of the adversarial process under *United States v. Chronic*, 466 U.S. 648 (1984), where his attorneys' disclosure of the location of the victim was a reasonable strategic decision.

6. Evidence—attorney-client privilege—revelation of victim's location

Information about the location of the victim in a prosecution for the kidnapping, rape, and murder of a five-year-old child was not protected by the attorney-client privilege because defendant communicated the information to his attorneys with the purpose that it be relayed to law enforcement. The attorney-client privilege and the ethical duty of confidentiality are not synonymous, although the two principles are related.

7. Evidence—hearsay—admission—location of victim—officer's testimony—information received from defendant's attorneys

Testimony from a police officer that he received information about the location of the victim from defendant's attorneys was not inadmissible hearsay where defendant authorized his attorneys to convey the information to law enforcement. Moreover, the officer was not permitted to testify about any feelings as to the source of the information.

8. Constitutional Law—due process—cumulative effect

There was no due process violation in a prosecution for kidnapping, rape, and murder where defendant contended that such a

violation resulted from the cumulative effect of alleged ineffective assistance of counsel, admission of testimony that defendant's lawyers revealed the location of the victim to police, and the evidence driving from the discovery of the body. Defendant did not receive ineffective assistance of counsel, and the trial court did not err in any evidentiary rulings.

9. Criminal Law—prosecutor's arguments—location of victim's body—disclosure by defense

The trial court did not abuse its discretion when it denied defendant's motions for mistrial in a prosecution for kidnapping, rape, and murder and where the prosecutor made two comments in his closing arguments about the victim's location being revealed by the defense. The statement that the body was found where "defendant's lawyer said he put the body" was improper because the statement was couched as a statement of fact, which was not accurate, rather than as an inference. The statement that defendant's "attorney telling law enforcement where to look for the body puts him there" was not improper and was a permissible inference. However, the improper statement was not such a serious impropriety as to make it impossible to attain a fair and impartial verdict. The judge gave curative instructions, and the evidence against defendant was overwhelming.

10. Sexual Offenses—anal penetration—evidence sufficient to submit to jury

The evidence, taken in the light most favorable to the State, was sufficient to submit to the jury the issue of defendant's guilt of sexual offense, as well as the aggravating circumstance related to a sexual offense, based upon a theory of anal penetration.

11. Confessions and Incriminating Statements—defendant's statement to police—confession to one of three crimes—stipulation at trial—effect on credibility—harmless error

The trial court did not err in a prosecution for kidnapping, rape, and murder by admitting defendant's statements to police where defendant admitted only to the kidnapping, a fact to which he stipulated at trial. Any prejudice caused by the admission of his statements was limited to the effect on his credibility, and any effect on defendant's credibility would be harmless error due to the overwhelming evidence of his guilt.

12. Criminal Law—Racial Justice Act—failure to raise issues

A defendant in a kidnapping, rape, and murder prosecution could not complain of the trial court's failure to strictly adhere to the Racial Justice Act's pretrial statutory procedures where he himself failed to follow those procedures. There was no prejudice to defendant's ability to raise a claim in a motion for appropriate relief.

13. Sentencing—capital—prosecutor's closing arguments—defendant's decision not to present mitigating evidence or arguments

The prosecutor's remarks in a capital sentencing proceeding were not so grossly improper that the trial court should have intervened *ex mero motu* where the prosecutor commented on defendant's decision not to present mitigating evidence or closing arguments. The thrust of the argument was an admonition to the jury to make its decision based on the facts and the law presented in the case.

14. Sentencing—capital—proportionality—aggravating circumstances supported by record—sentence not result of passion, prejudice, or arbitrary factors—not disproportionate to similar cases

A sentence of death was not disproportionate where defendant kidnapped a five-year-old child from her home and sexually assaulted her before strangling her and discarding her body under a log in a remote area used for field dressing deer carcasses.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge James Floyd Ammons Jr. on 29 May 2013 in Superior Court, Cumberland County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 9 May 2017 in session in the Old Chowan County Courthouse (1767) in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Joshua H. Stein, Attorney General, by Anne M. Middleton and Derrick C. Mertz, Special Deputy Attorneys General, for the State.

Glenn Gerding, Appellate Defender, and Andrew DeSimone, Benjamin Dowling-Sendor, and Daniel Shatz, Assistant Appellate Defenders, for defendant-appellant.

HUDSON, Justice.

Defendant Mario Andrette McNeill appeals his conviction and sentence of death for the first-degree murder of Shaniya Davis. Defendant was found guilty of first-degree murder based on malice, premeditation, and deliberation, and under the felony murder rule, with the underlying felonies being sex offense of a child and kidnapping. Defendant was also convicted of related charges of sexual offense of a child by an adult offender, taking indecent liberties with a child, first-degree kidnapping, human trafficking, and subjecting the victim to sexual servitude. We find no error in defendant's trial or sentencing, and we further determine that defendant's sentence of death is not disproportionate to his crimes.

Background

The evidence at trial tended to show that in September 2009, Shaniya Davis was five years old and, along with her mother, Antoinette Davis, and her seven-year-old brother, C.D., lived in the trailer of Antoinette's sister, Brenda Davis, located in Sleepy Hollow Trailer Park (Sleepy Hollow) in Fayetteville, North Carolina. Brenda had previously "been seeing" defendant, who also went by the nickname "Mano,"[1] and he had given her the deposit to move into the Sleepy Hollow trailer. Because defendant spent time at the trailer, he knew Antoinette and had been in the presence of Shaniya and C.D. before, and he also knew how to get into the trailer, even when the door was locked. At the time of the events at issue, Brenda was "seeing" Jeroy Smith, the father of her children. Brenda, Jeroy, and their children stayed in the back bedroom, while Antoinette and her children stayed in the front room of the trailer. Defendant lived with April Autry, the mother of his eighteen-month-old daughter, on Washington Drive in Fayetteville.

On the evening of 9 November and continuing into the early morning hours of 10 November 2009, after ingesting cocaine and "a couple shots of liquor," defendant began "text[ing] all the females in [his] phone." He tried to text Brenda, but her phone was turned off. Another woman, Taisa McClain, who also lived in Sleepy Hollow, began exchanging text messages with defendant and agreed to invite him over; however, by the time defendant arrived at Sleepy Hollow at 2:52 a.m. on 10 November, Taisa had fallen asleep and did not answer defendant's texts. At 3:06 a.m., defendant texted "Goodnight" to Taisa and then at 3:07 a.m., defendant again attempted to text Brenda.

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1. Because defendant is referred to as "Mano" in the transcript, we use that spelling here; however, in a police interview, he explained that he was known as "Mono," which people confused with the "kissing disease."

At around 5:30 a.m., Brenda woke up because she thought she heard the bedroom door open, and she mentioned this to Jeroy. Brenda and Jeroy went back to sleep but were reawakened at around 6:00 a.m. by Antoinette, who came into the room and asked if they had seen Shaniya. When they responded in the negative, Antoinette told them she was going outside to search for Shaniya. While Antoinette was outside, C.D. told Brenda and Jeroy that defendant had been there the previous night. Jeroy asked C.D. if he was sure about this, and C.D. responded, "yeah." Brenda texted and called defendant, but he did not answer his telephone. Jeroy then called April Autry, who told him that defendant was not with her.

Antoinette returned to the trailer and reported that she had knocked on doors in Sleepy Hollow but that no one had seen Shaniya. Brenda told Antoinette to call the police, but Antoinette was hesitant to do so. Brenda and Jeroy went outside and noticed that the stairs and railings of the trailer contained feces that had not been there the night before. There was also what appeared to be illegible yellow writing scribbled within the feces on a railing.

Shortly after 6:00 a.m. that same morning, defendant arrived at the Comfort Inn & Suites (Comfort Suites) in Sanford where he entered the hotel alone, provided identification, and checked into Room 201 under his own name. There was video footage of the transaction because cameras operated continually throughout the hotel.[2] Defendant told the front desk clerk, Jacqueline Lee, that he was traveling with his daughter to take her to her mother in Virginia. Video footage from hotel security cameras showed that after checking in, defendant returned to his vehicle in the back of the parking lot at approximately 6:17 a.m, where he remained for several minutes, before coming back into the hotel carrying a child covered up with a blue blanket. Lee observed defendant carrying the child on the video feed and noticed the texture of her hair, which Lee recalled when she saw an Amber Alert that was issued for Shaniya. Additionally, Seth Chambers, who was staying at the hotel during a business trip, passed defendant in the hallway near Room 201 at 6:24 a.m. and observed defendant carrying a child.

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2. The general manager of the hotel, Angela Thompson, testified at trial and explained that because the cameras are manually programmed, the time varies slightly between separate cameras, but by no more than a minute apart. Additionally, Thompson testified that on 10 November she had not yet changed the time on the recorders to reflect the recent daylight savings time change on 1 November 2009; as a result, the time stamps on the video recordings were one hour ahead of the actual time. For clarity, we refer simply to the actual time.

At the hotel's morning shift change, Regina Bacani replaced Lee at the front desk. During the shift change, defendant came to the breakfast area alone, got a banana, some juice, and a muffin, and took them back to his room. Lee pointed defendant out to Bacani and told her about the recent check-in. Hotel cameras showed defendant walking toward the breakfast area at 6:36 a.m. and returning down the hall and into his room with food and drink in his hands.

Back at Sleepy Hollow, Antoinette called the police at 6:52 a.m. at the urging of Brenda. About ten minutes after Antoinette's telephone call, the police arrived, began searching for Shaniya with canines, and started interviewing people. Fayetteville Police Officer Elizabeth Culver observed a substance that was later determined to be feces on both railings of the front porch. The substance was smooth, like something had been poured on it. Antoinette Davis had a cooking pot in her hand when Officer Culver arrived, and someone said Antoinette had poured water on the railings, so Officer Culver asked her not to do that. In the trash can of unit 1119, police found a blanket that Antoinette Davis identified as hers and which Jeroy Smith recognized as having been in the living room of the trailer recently. The blanket was a thick child's comforter-type blanket, and it had feces on it. Jennifer Slish, a forensic technician for the Fayetteville Police Department at that time, took the blanket into evidence to be processed for fluids, fibers, and hairs.

Officer Culver spoke with Antoinette, Brenda, Jeroy, and C.D. at the scene. C.D. seemed very distracted and would look at his aunt before responding. C.D. said he remembered Shaniya coming to bed but did not remember her leaving the bedroom. At trial, C.D. ultimately testified that he had seen defendant at the trailer that morning. Because Antoinette and Brenda were consistently looking at their phones and texting, Officer Culver had difficulty getting them to focus on the questions being asked, so her Lieutenant agreed to take them downtown to be interviewed. Officer Culver and her partner, Daniel Suggs, went to the main office of the trailer park to view the security video so as to look for a child roaming around the trailer park or for vehicles coming into the area.

At approximately 7:34 a.m., the video cameras at the Comfort Suites showed defendant leaving Room 201 and going to the elevator with a child later identified as Shaniya. At 7:35 a.m., the video shows defendant exiting the side door of the hotel and walking down the sidewalk still carrying Shaniya. Matthew Argyle, the hotel's maintenance worker at the time, appeared on the video one minute later. Argyle later testified that he was outside the side door picking up cigarette butts and trash

when he saw defendant come out with a five- or six-year-old female child on his shoulder. Defendant had her covered, and Argyle thought she was asleep. When Argyle said hello, defendant made eye contact with him before looking away without saying anything in response and continuing walking toward the parking lot. Argyle "noticed something was amiss," and he thus tried to observe defendant without making it obvious that he was doing so. Defendant put the child in the right rear passenger side of his car, got into the driver's seat, and began smoking a cigarette or cigar. Argyle continued to watch defendant while acting like he was doing busy work, because he just felt something was amiss. Defendant then drove to the pavilion at the front entrance of the hotel, extinguished his smoking material, and entered the hotel.

Defendant approached the front desk and asked Bacani for his security deposit, stating that he had to get back on the road to drive his daughter to Virginia to meet her mother. Security cameras show Bacani giving defendant the cash receipt to sign and returning the deposit. The housekeeper who later cleaned Room 201 brought Bacani one or two small, clear, open plastic packets with white residue that she had found in the room, which Bacani believed to be cocaine.

Meanwhile, Argyle watched defendant leave the hotel entrance, get back in his car, drive away, and turn left onto the main road. Argyle did not act on his feeling that something was wrong until the following day when hotel staff saw an Amber Alert and called law enforcement. The hotel security cameras show defendant leaving the hotel's front entrance and getting into his car at 7:40 a.m., after which the car turned left towards Highway 87.

Telephone records indicate that at approximately 7:49 a.m., defendant sent a text saying "Hey" to Brenda Davis, who was at the police station at this time and had texted "Hey" to defendant at 6:53 a.m. after learning from C.D. that defendant had been in the trailer the previous night. At approximately 8:22 a.m., cell phone tower pings showed defendant's phone to be near the intersection of Highway 87, Highway 24, and Highway 27 in an area known as the Johnsonville and Barbeque area of Highway 87. At approximately 8:33 a.m., Brenda sent a text message to defendant stating, "U been 2 my house." At 8:35 a.m., defendant responded to Brenda, "No [wh]y." Brenda sent a return message at 8:37 a.m. stating, "U lyin," to which defendant responded, "No can i come though." At 8:39 a.m., Brenda responded, "Hell no." At 8:40 a.m., defendant sent a message to Brenda stating, "Dam its [sic] like that." At 8:41 a.m., defendant sent a message to Brenda adding, "Him there." At 8:47 a.m., Brenda sent a message to defendant telling him, "Dont text

me no mo [sic].” At 8:50 a.m., defendant sent a message to Brenda saying, “Sure what ever.” At 9:19 a.m., defendant sent a message to Brenda inquiring, “[Wh]y [your] baby dad call my baby ma askin 4 me.” At 9:48 a.m., defendant sent a final message to Brenda asking, “What da hell is going on.” Brenda testified that she did not tell law enforcement she was text messaging defendant during the same time she was at the station because she “didn’t want to assume” anything at that point. For the same reason, she did not immediately tell police what C.D. had said about seeing defendant in the trailer.

Bacani finished working at the Comfort Suites at 3:00 p.m. and reported back for the 7:00 a.m. shift change the next day, 11 November 2009. Bacani and Lee then noticed an Amber Alert on the hotel’s computer screen. Lee thought the picture shown on the screen was that of the same child she had observed with defendant the previous morning, and accordingly, she called the Amber Alert hot line. Slish, the forensic technician, responded to the call and processed Room 201 for evidence. The hotel manager advised Slish that the bedding had not been changed but that the trash had been taken out and a towel had been removed before staff became aware of the situation. Two comforters from the beds in Room 201 were among the evidence Slish collected.

Charles Kimble, who was at that time a Captain in the Fayetteville Police Department and in charge of its investigation bureau, was responsible for the logistics of trying to find Shaniya. Based on the video from the hotel, police believed that defendant had been with Shaniya and that she was still alive. After obtaining defendant’s cell phone number from his mother, police gave the number to FBI Special Agent Frank Brostrom, who began an analysis of defendant’s phone.

Brostrom testified that the National Center for Missing and Exploited Children had already notified the FBI about the case. According to Brostrom, when the FBI receives a notification of a missing child, agents immediately contact local law enforcement to offer assistance. Brostrom contacted Sergeant Chris Courseon of the Fayetteville Police Department, who quickly invited Brostrom to come and help with the search for Shaniya. Brostrom arrived at Sleepy Hollow on the afternoon of 10 November.

In exigent circumstances, including situations when young children are missing, the FBI can make a showing of imminent danger of serious bodily injury or death and thereby obtain from communications carriers information such as telephone data, “GPS, toll records,” and cell tower records. Brostrom had already telefaxed exigent circumstance requests

to telephone companies to obtain information on phone numbers belonging to Brenda Davis, Antoinette Davis, and an associate of theirs, and on 12 November, Brostrom made a request for information regarding defendant's phone number. Brostrom quickly obtained information associated with defendant's cell phone including call details, cell phone tower locations, and text messaging, with longitudes and latitudes for the cell towers for which the phone number would have pinged.

Defendant's cell phone data were analyzed by Special Agent Michael Sutton of the FBI's Cellular Analysis Survey Team (CAST). CAST assesses cellular telephone records and applies the cell tower and sectors utilized by a particular phone to map its location. When Sutton received the electronic information from defendant's cell phone, he performed an initial analysis, created some rough draft maps, and provided Brostrom an initial search area in the Highway 87 area along Highway 27. Following the FBI's recommendation, police began searching for Shaniya in the area around Highway 87 from Spring Lake toward Sanford. Having received offers of assistance from volunteers and different law enforcement agencies, investigators mobilized a huge search and rescue effort.

After the hotel video showing defendant with a child believed to be Shaniya came to light, Brenda Davis and Jeroy Smith told police that C.D. had seen defendant at the trailer the night Shaniya disappeared. Brenda had also seen defendant try to talk to Antoinette at their aunt's house, to which Antoinette responded, "I don't have shit to say to you. I just want to know where my mother fucking baby's at." Defendant said, "All right," and jumped in his car and sped away. Brenda began to think Antoinette was lying about what she knew, and Brenda and Antoinette argued and did not speak after this. In the evening hours of 12 November, Brenda talked to detectives again, told them about the text messages with defendant, and ultimately gave them her phone to take photos of these texts.

That same day, police found defendant, and he agreed to come to the station to speak with them. Police also located defendant's Mitsubishi Gallant, which was backed into a space at the Mount Sinai apartments, away from his residence on Washington Drive. Police did an exigent circumstances search of the vehicle's trunk and then had the car towed to the police department. The car was processed for forensic evidence, which included taking soil samples from the wheel wells and taking the brake and gas pedal covers for substance analysis.

Beginning at around 9:30 p.m. on the evening of 12 November, several law enforcement officers interviewed defendant in an effort to find

Shaniya. Although Shaniya had now been missing for two days, officers were still hopeful of finding her alive. The officers did not handcuff defendant or place him under arrest, and they specifically informed him that the door to the interview room was unlocked and that he was free to leave the room. Defendant also had his cell phone, on which he continued to receive messages and which he used during breaks in the interview. Defendant admitted he was at Sleepy Hollow just after midnight on 10 November driving around in the black Mitsubishi, but at first he denied going to Brenda Davis's trailer, denied seeing Shaniya or even knowing her, denied having her in the vehicle, and denied leaving the city limits or being in Sanford at a hotel. When police showed defendant a photograph of himself at the hotel, defendant initially denied it was he. When confronted with the information that the same person signed in to the hotel as Mario McNeill showing defendant's identification and listing defendant's home address, defendant suggested that maybe he had lost his identification. Defendant then admitted he had been at the hotel with Shaniya.

About fifty-four minutes into the interview, defendant began telling a story about receiving a text message, which he said he thought came from Brenda Davis's phone, telling him to come to Sleepy Hollow and pick Shaniya up on the porch. Defendant said he got Shaniya and took her to the hotel room, where he ingested cocaine. According to defendant, while he was at the hotel, he got a call or text message from some unknown people to bring Shaniya to a dry cleaning establishment at the corner of Country Club Drive and Ramsey Street. Defendant stated that he delivered Shaniya to these unnamed people and that they were driving a gray Nissan Maxima.

Agent Brostrom testified that the focus of the interview changed when defendant suddenly stated he was waiting to get a call "to come to kill her." The interviewing officers tried to get defendant to expand on this statement, but he would not. The messages on defendant's phone exchanges with Brenda did not pertain to picking up someone waiting on the porch, as defendant claimed during the interview. There were no calls or text messages to defendant's phone from unknown persons, as claimed by defendant; the only messages during this time period were between defendant's and Brenda's phones. At the end of the interview, defendant was arrested for kidnapping Shaniya.

When police later viewed the videotape of the interview, they saw that when they left defendant alone in the interview room during a break, defendant made the sign of the cross, took out a key, got down on the floor, put the key in a wall electrical socket, and appeared to receive

a jolt. Defendant then took off his shoes and put the key in the electrical socket again.

Shaniya had been reported missing on 10 November, and a massive search was continuing along Highway 87 but had not yet located Shaniya. Kimble, the head investigator for the Fayetteville Police Department, later testified in a pretrial hearing that on the morning of 13 November, he met with then-District Attorney Ed Grannis about several cases, including this one. The District Attorney pulled Kimble aside and told Kimble that Allen Rogers, a Fayetteville defense attorney, might have some information that could help them in the case and that Rogers would be calling him. Kimble did not know how Grannis knew Rogers might be able to assist. Rogers had accompanied defendant at his first appearance on Friday morning following his arrest on kidnapping charges, and it was Kimble's understanding that Rogers was defendant's attorney in this matter.

The following day, Kimble received a telephone call from attorney Coy Brewer. Brewer said the information Kimble needed was to look for green porta-potties on Highway 87. Based on the information he received earlier that Allen Rogers would be calling, Kimble assumed after receiving the call from Coy Brewer, that Brewer and Rogers were working together on the case.

Police did look for green porta-potties along Highway 87 and saw numerous porta-potties along the road. Kimble told District Attorney Grannis that the information he had received from Brewer was vague, and Grannis suggested he talk to Rogers. On Sunday, 15 November, Kimble called Allen Rogers and told him that the information he had received from Brewer about looking for green porta-potties along Highway 87 was somewhat vague. Rogers said he was traveling and would talk to his client when he returned to town. Rogers later followed up with Kimble and said police needed "to look for green porta-potties in an area where they kill deer" on Highway 87 between Spring Lake and Sanford. According to Kimble, Rogers stated in a subsequent phone call, "let me talk to my guy" and later called back to say they need to look in an area where hunters field dress deer after they kill them. Kimble called Rogers once more to see if there were additional details, and Rogers said "that's all my guy remembers."[3]

3. Rogers later testified in a pre-trial hearing that he did not recall using the phrase "my guy."

Searchers did not locate Shaniya that day, and the search resumed the following morning, 16 November 2009. A Sanford company training canine officers from the Virgin Islands volunteered to assist in the search. Around 1:00 p.m. that day, one of the officers from the Virgin Islands and his training dog found Shaniya's body lying partially under a log in an area with deer carcasses near the intersection of Highway 87 and Walker Road. Police collected forensic evidence at the scene. On 19 November 2009, defendant was charged with first-degree murder and first-degree rape of the victim. On 5 July 2011, a Cumberland County Grand Jury indicted defendant for first-degree murder, rape of a child by an adult offender, sexual offense of a child by an adult offender, felony child abuse inflicting serious bodily injury, felony child abuse by prostitution, first-degree kidnapping, human trafficking (minor victim), sexual servitude (minor victim), and taking indecent liberties with a child.[4]

Defendant filed various pre-trial motions, several of which are relevant to his contentions on appeal. Before the indictments, on 9 June 2011, defendant filed a Motion To Prohibit The State from Seeking the Death Penalty Pursuant to the North Carolina Racial Justice Act, and on 5 June 2012, defendant filed a supplement to the motion. A Rule 24 conference was held on 5 October 2011, during which the State gave notice of its intent to seek the death penalty. Defendant did not raise his claim under the Racial Justice Act at the Rule 24 conference. The trial court conducted a hearing on numerous pre-trial motions on 11 January 2013, at which time the trial court denied defendant's motions under the Racial Justice Act.

On 9 January 2013, defendant filed a motion to suppress all statements he made to law enforcement officers during his interview on 12 November 2009. The motion was heard on 2 April 2013, and on 4 April 2013, the trial court signed an order denying the motion in part and granting it in part, in which the court suppressed defendant's statements made during a one-minute period near the end of the interview, when Brostrom "answered the Defendant's question by telling the Defendant that he had been free to leave until he had confessed to kidnapping" but had not yet advised defendant of his *Miranda* rights.

The next day, 5 April, defendant filed a document captioned in part a Motion to Require Specific Performance or, Alternatively, to Suppress

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4. On 25 July 2011, the grand jury returned superseding indictments for all the charges. On 11 February 2013, the grand jury again returned superseding indictments for first-degree kidnapping, human trafficking (minor victim), and sexual servitude (minor victim).

Statements and Evidence.[5] The motion alleged that, in exchange for information regarding the location of Shaniya's body as conveyed through defendant's initial attorneys, Allen Rogers and Coy Brewer, the State had agreed not to seek the death penalty. Defendant sought "specific performance" of the purported agreement, suggesting that the trial court should declare the case noncapital or, in the alternative, suppress the evidence that defendant's attorneys had disclosed the location of Shaniya's body as well as all evidence obtained from discovery of the body because defendant had received ineffective assistance of counsel. At the hearing on the motion on 8 April 2013, defendant presented documentary evidence, but offered no testimony. The trial court orally denied defendant's motion at the hearing and entered its written order on 17 April 2013. The trial court found that no agreements existed between the State of North Carolina and defendant in exchange for his information regarding the location of Shaniya and that his attorneys were authorized by him to provide the information to law enforcement. Further, the trial court ruled that the disclosure did not occur at a " 'critical stage' of the proceeding," but that even if such had been the case, defendant did not receive ineffective assistance of counsel.

Additionally, when the trial court became aware at the 8 April hearing that the State was offering defendant a plea of guilty to first-degree murder with a sentence of life imprisonment without parole in lieu of a possible death sentence, the trial court inquired of defendant's counsel if defendant and they were aware of the offer and whether they needed additional time to consider it. Defendant's counsel informed the trial court that defendant had elected to proceed to trial. The trial court required the State to hold the offer open for at least one more day to give defendant and his counsel more time to consider the offer. On 9 April 2013, defendant, through his counsel, rejected the State's offer of life imprisonment and elected to proceed to trial.

Also on 5 April 2013, the State filed a motion *in limine* asking the court to determine the admissibility, under Rule of Evidence 801(d), of statements made by defendant through his counsel to law enforcement concerning the location of the body of Shaniya Davis. When this motion came on for hearing on 26 and 29 April 2013, defendant made oral motions arguing, *inter alia*, that evidence regarding the disclosure of

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5. The full title of defendant's motion was "MOTION TO REQUIRE SPECIFIC PERFORMANCE BY THE STATE OF ITS PROMISE TO DEFENDANT; OR, IN THE ALTERNATIVE, MOTION TO SUPPRESS STATEMENTS OF DEFENDANT THAT LED TO DISCOVERY OF BODY, ALONG WITH SUPPRESSION OF ANY AND ALL EVIDENCE DERIVED FROM THE DISCOVERY OF THE BODY."

Shaniya's location was inadmissible on grounds of: (1) ineffective assistance of counsel; (2) attorney-client privilege, the Sixth Amendment to the United State Constitution, and Article I, Section 23 of the North Carolina Constitution; (3) N.C.G.S. § 8C-1, Rule 801(d); and (4) the Due Process and Law of the Land Clauses of the Federal and North Carolina constitutions. The trial court heard testimony from Kimble, Rogers, and Brewer;[6] defendant again did not testify at this hearing. The trial court entered a written order, which included findings and conclusions and also adopted and incorporated by reference the findings and conclusions set forth in its 17 April 2013 order, concluding that defendant's right to effective assistance of counsel had not been violated and that the attorneys' statements to law enforcement regarding Shaniya's location were admissible through Captain Kimble as an exception to the hearsay rule under N.C.G.S. § 8C-1, Rule 801(d) ("Exception for Admissions by a Party-Opponent").

Defendant was tried before Judge James Floyd Ammons Jr. at the 8 April 2013 criminal session of the Superior Court in Cumberland County. Before trial, the State dismissed the two charges of felony child abuse. At trial, defendant stipulated to four items: (1) that he was at Sleepy Hollow; (2) that he left the trailer park with Shaniya Davis; (3) that he was at the Comfort Suites with Shaniya Davis; and (4) that he left the Comfort Suites with Shaniya Davis. In addition to the evidence previously discussed, the State presented considerable forensic evidence at trial.

Thomas Clark, M.D., Deputy Chief Medical Examiner for the State of North Carolina until his retirement in 2010, conducted the autopsy on Shaniya Davis on 17 November 2009 and testified at trial as an expert in the field of forensic pathology. The autopsy identified a small bruise on the left side of Shaniya's face, injuries to her vaginal area, and two abrasions on her upper thighs. Dr. Clark testified that abrasions are a scraping type of injury in which part or all of the outer layer of skin is removed by a blunt object, and that two linear or line-like abrasions at

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6. Brewer asserted the attorney-client privilege as to all questions asked, including whether he represented defendant. After Brewer's testimony the trial court noted that for the privilege to exist, the relationship of attorney and client had to be shown, and defendant had not even established this fact. Defendant then called attorney Allen Rogers, who in similar vein asserted the attorney-client privilege as to each question asked. The trial court noted that Rogers's client was present; the State noted that defendant was asserting ineffective assistance of counsel in the alternative and thus had waived the privilege as to this subject. The trial court ruled defendant had waived the privilege as to the things alleged and ordered Rogers to answer the questions.

the upper part of Shaniya's inner thighs matched the band of the underwear Shaniya was wearing. Dr. Clark noted injuries consistent with sexual assault, specifically, the absence of a hymen and the presence of a ring of abrasion or scraping injury surrounding the entrance to the vagina indicating that a blunt object had penetrated the vagina and left the ring of injury. In addition to preparing a sexual assault kit, Dr. Clark collected several hairs that were found during the external examination and preserved the sheet on which Shaniya was initially examined. Shaniya's lungs showed edema, chronic bronchitis, and focal intra-alveolar hemorrhage. Edema is caused by an imbalance of pressure in the body that causes fluid from capillaries to enter the air spaces in the lung. Dr. Clark concluded that the most likely cause of death was external airway obstruction or asphyxiation.

Special Agent Jody West, a supervisor in the forensic biology section of the State Crime Lab, testified as an expert in the field of forensic serology and forensic DNA analysis. Special Agent West examined the evidence in this case, including performing a Kastle-Meyer or phenolphthalein test, which is a test used to indicate whether blood is present on an item. This chemical analysis indicated the presence of blood on the vaginal swabs, rectal swabs, oral swabs, and the crotch area of Shaniya's panties. Samples from the small blanket recovered from the trash can gave the chemical indication for blood, as did the inside bottom rear portion of the shirt Shaniya was wearing. The white sheet from the medical examiner's office also gave a chemical indication for the presence of blood. Examination of the items failed to produce a chemical indication for the presence of semen, spermatazoa, or human saliva.

DNA analysis on samples taken from the rear seat of defendant's car was consistent with multiple contributors; defendant could not be excluded as a contributor, and no conclusion could be rendered regarding the contribution of Shaniya Davis to this mixture. Special Agent West transferred some items to Jennifer Remy of the trace evidence section at the Crime Lab for DNA hair analysis and to Kristin Hughes of the forensic biology section to perform Y-STR analysis—a type of DNA analysis focusing on the Y chromosome. Analysis of hairs collected in the case ultimately revealed a pubic hair having the same mitochondrial DNA as defendant's pubic hair found on the hotel comforter, and another pubic hair with the same mitochondrial DNA as defendant's pubic hair found on the small blanket found in the trash can of the mobile home park. Defendant could not be excluded as the source of these two hairs. Two head hairs found on the small blanket located in the trash can of the mobile home park had the same mitochondrial DNA sequence as

Shaniya Davis's head hair; therefore, Shaniya could not be excluded as the source of those hairs. Three hairs recovered from Shaniya's right hand by the medical examiner were consistent with Shaniya's own head hair and were not sent for further testing. The Y-STR analysis on the vaginal swabs, the rectal swabs, and the oral swabs revealed no male DNA; Special Agent Hughes testified that this result was not unexpected because DNA begins to degrade or break down over time and that beyond a seventy-two hour window, it becomes more and more likely that investigators will not be able to obtain any DNA profile.

Heather Hanna, a geologist with the North Carolina Geological Survey, testified as an expert in forensic geochemistry and forensic geology. Hanna analyzed soil samples, including those from the roadside near where the body was found, from the body recovery site, and from the gas pedal of defendant's Mitsubishi Gallant. In all three samples she found garnet, a mineral grain that was unique to two geologic units upstream from near where the body was discovered and which would not naturally be found in Fayetteville. Hanna concluded that it was "highly unlikely" that the soil from those three samples did not come from the same source.

Hanna also found a tiny metal fiber in the soil sample taken from the shoulder of the road near the body recovery site and another metal fiber in the soil collected from the gas pedal of defendant's car. These samples were analyzed by Roberto Garcia, an expert in materials characterization and identification who is a materials engineer at N.C. State University in the analytical instrumentation facility. Garcia testified that the measurements of the two pieces of metal were consistent with each other and that their thickness and shape suggested they came from a braided metal wire. Further, a chemical analysis using an energy dispersive spectroscopy (an EDS detector) indicated that the two samples also were chemically consistent. Garcia's conclusion was that the metallic fiber from the gas pedal of defendant's car and the metallic fiber from the soil sample from the body recovery site were consistent with each other and consistent with having the same source.

Following Special Agent Sutton's initial analysis of defendant's cell phone activity, which led to his recommendation to law enforcement to search in the Highway 87 area along Highway 27, he later conducted a more extensive analysis of defendant's cell phone. Based on defendant's cell phone records, Sutton testified where defendant's phone had been at certain times on 10 November 2009: at approximately 2:33 a.m., it was in the area of Fayetteville at and around defendant's residence on Washington Drive; at approximately 2:59 a.m., 3:02 a.m., 3:05 a.m., 3:19

a.m., and 3:57 a.m., it was in the area of and around Shaniya's residence at Sleepy Hollow; at approximately 7:00 a.m., 7:32 a.m., and 7:45 a.m., it was in the Sanford area at or near the Comfort Suites; at approximately 8:22 a.m. and 8:25 a.m., it was south of Walker Road near the intersection of Highway 87, Highway 24, and Highway 27, in an area that is between the Johnsonville and Barbecue area on Highway 87 and is the area in which Shaniya's body was eventually discovered; and during a remaining block of calls beginning at approximately 9:38 a.m., the phone was back in the area of defendant's residence.

Defendant did not present any evidence during the guilt-innocence proceeding of the trial.

On 23 May 2013, a jury found defendant guilty of first-degree murder based on malice, premeditation, and deliberation, and under the felony murder rule, with the underlying felonies being sex offense of a child and kidnapping. The jury also found defendant guilty of all other remaining charges, except for rape of a child by an adult offender.

The trial court then held a capital sentencing proceeding, during which the State introduced evidence that defendant had been convicted on 10 January 2003 of three counts of assault inflicting serious bodily injury. Defendant stipulated that this information was correct.

Shaniya's father and half-sister testified as impact witnesses. Shaniya's father, Bradley Lockhart, testified that he had met Shaniya's mother at a party, had been in a brief relationship with her, and had learned that Antoinette was pregnant only shortly before Shaniya's birth on 14 June 2004. For a little less than two years after Shaniya's birth, Shaniya lived with Antoinette and her family. Mr. Lockhart had frequent contact with Shaniya and would pick her up every weekend for visits.

Toward the end of 2006 or the beginning of 2007, Mr. Lockhart bought a fairly large house in Fayetteville, and Shaniya moved in with him and his four other children. Shaniya had frequent contact with her mother during this time. Shaniya was very close with Mr. Lockhart and the other children; she enjoyed dress-up and prancing around the house in her plastic dress-up shoes but was also a little bit of a tomboy and liked to play basketball with her little brother and ride her little scooter. Shaniya considered herself a singer and desired to join the children's choir at the church they attended.

Shaniya moved back to be with her mother in October 2009. Even when he was out of town for work, Mr. Lockhart talked to Shaniya on the telephone four to five times a week. Mr. Lockhart testified that

Shaniya's death was one of the hardest things he had experienced, that it tears him up every day, and that he still finds it hard to sleep even after three-and-a-half years. He said he suffered two collapsed lungs from the stress, finds it hard to stay focused and to function, and questions if he could have done anything different.

Cheyenne Lockhart, Bradley Lockhart's twenty-one-year-old daughter and Shaniya's half-sister, described Shaniya as her little "mini-me" who followed her everywhere. Shaniya was bubbly and loved to talk and play jokes. She was caring and would always tell them she loved them. Shaniya's loss was very painful, and Cheyenne thinks about Shaniya every day.

Defendant did not present additional mitigation evidence or give closing arguments in the sentencing proceeding; he understood that this decision was against the advice of counsel. The trial court determined that there was an absolute impasse between defendant and his attorneys and ordered the attorneys to acquiesce to defendant's wishes.

On 29 May 2013, the jury returned a binding recommendation that defendant be sentenced to death for the first-degree murder. The trial court accordingly sentenced Mr. McNeill to death for first-degree murder, and to consecutive sentences of 336 to 413 months for sexual offense against a child by an adult offender, 116 to 149 months for first-degree kidnapping, 116 to 149 months for human trafficking of a minor victim, 116 to 149 months for sexual servitude of a minor victim, and 21 to 26 months for taking indecent liberties with a child. Defendant immediately filed his appeal of right to this Court.

Analysis

Ineffective Assistance of Counsel

[1] Defendant first argues that he received ineffective assistance of counsel from his original attorneys because they disclosed to law enforcement where to look for Shaniya. Defendant contends that even though he was asserting his innocence, his attorneys, Rogers and Brewer, made this disclosure only one day into their representation, without seeking any benefit or protection in return, without any deal in place, without receiving or consulting any formal discovery from the State, and after giving defendant erroneous advice.

As an initial matter, we have held that ineffective assistance of counsel claims brought on direct review, as opposed to in a motion for appropriate relief, "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be

developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). Defendants "should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record" and are "not required to file a separate [motion for appropriate relief] in the appellate court during the pendency of that appeal." *Id.* at 167, 557 S.E.2d at 525. Accordingly, "on direct appeal we must determine if . . . ineffective assistance of counsel claims have been prematurely brought," in which event "we must 'dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding.' " *State v. Campbell*, 359 N.C. 644, 691, 617 S.E.2d 1, 30 (2005) (second alteration in original) (quoting *Fair*, 354 N.C. at 167, 557 S.E.2d at 525), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006).

Here defendant first raised his ineffective assistance of counsel argument before trial in his Motion to Require Specific Performance or, Alternatively, to Suppress Statements and Evidence. Thus, defendant was able to present evidence and arguments during a hearing on that motion, which the trial court took into consideration in its 17 April 2013 order denying defendant's motion and ruling that defendant did not receive ineffective assistance of counsel. Additionally, in its subsequent ruling on the State's motion *in limine* and defendant's oral motions relating to the admissibility of evidence about the disclosure, the trial court considered further arguments and evidence, including the testimony of Captain Kimble, as well as that of defendant's original attorneys, Rogers and Brewer. Defendant reasserted his ineffective assistance of counsel argument at this hearing. In an order entered on 16 May 2013, the trial court again ruled that defendant's attorneys were not ineffective. Because the trial court was able to receive evidence and make findings on this issue before trial, we conclude that "the cold record reveals that no further investigation is required." *Fair*, 354 N.C. at 166, 557 S.E.2d at 524. Accordingly, we may properly address the merits of defendant's ineffective assistance of counsel claim.

[2] "The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. Sneed*, 284 N.C. 606, 611, 201 S.E.2d 867, 871 (1974). A defendant's right to assistance of counsel "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441, 1449 &

n.14, 25 L. Ed. 2d 763, 773 & n.14 (1970)).[7] A defendant challenging his conviction on the basis of ineffective assistance of counsel must establish that his counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In *Strickland* the United States Supreme Court set out a two-part test that a defendant must satisfy in order to meet his burden:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248 ("[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution.").

With regard to the first *Strickland* prong, "[r]ather than articulating specific guidelines for appropriate attorney conduct, the Court in *Strickland* emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837-38 (2017) (second alteration in original) (quoting *Strickland* 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694). We have stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that

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7. The State argues, and the trial court found in its 17 April 2013 order, that because the Sixth Amendment is offense specific, and because defendant had at the time of the disclosure only been charged with kidnapping, defendant's Sixth Amendment right to counsel had not attached for purposes of the subsequent first-degree murder charge. Therefore, the State argues that the trial court correctly found that defendant could not have had an ineffective assistance of counsel claim under the Sixth Amendment. Because we conclude that defendant did not receive ineffective assistance of counsel, we need not address whether defendant's Sixth Amendment right to counsel had attached with respect to the first-degree murder charge at the time of the disclosure.

counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184, 154 L. Ed. 2d 73 (2002); *see also Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). "Moreover, this Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30 (citing *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986)). As the Court stated in *Strickland*:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

With regard to the second *Strickland* prong, "[p]rejudice is established by showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29-30 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "[B]oth deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *Todd*, 369 N.C. at 711, 799 S.E.2d at 837.

When the trial court has made findings of fact and conclusions of law to support its ruling on a defendant's claim of ineffective assistance

of counsel, "we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).[8] We review conclusions of law de novo. *E.g.*, *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*, 512 U.S. 1254, 114 S. Ct. 2784, 129 L.E.2d 895 (1994), *judgment vacated*, Nos. 83 CRS 15506-07 (Robeson Co.), 91 CRS 40727 (Cumberland Co.), 2014 WL 4345428 (N.C. Super Ct. Robeson County Sept. 2, 2014)).

Defendant's claim stems from the conduct of his original attorneys, Rogers and Brewer. After defendant was charged with kidnapping, he waived court appointed counsel and engaged the services of Rogers, who had previously represented defendant in 2003 and 2008. Rogers is a former JAG attorney who at that time had practiced law for twenty years, and a large part of his practice was criminal defense work. Rogers immediately associated Brewer, with whom he had a working relationship in criminal cases, to assist in the matter. Brewer is a former assistant district attorney and former district court judge. Additionally, Brewer was a superior court judge for the 12th Judicial District from 1977 until 1998, and he was the senior resident superior court judge for the 12th Judicial District from 1991 to 1998. Brewer had returned to practicing law, and since 1999 a large part of his practice was criminal defense. The trial court made findings that Rogers and Brewer were both experienced criminal defense attorneys.

When Rogers and Brewer undertook representation of defendant on 13 November 2009, Shaniya had been missing since the morning of 10 November. A massive search had been underway since the morning of Shaniya's disappearance, and law enforcement officers, having seen a child resembling Shaniya in the hotel videos, hoped to find her still alive. Defendant had admitted to police that he had taken Shaniya from Sleepy Hollow to the Comfort Suites in Sanford, where he had been observed by hotel cameras and multiple witnesses and was the last person to be seen with Shaniya. By 12 November, multiple law enforcement agencies and

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8. While in *Frogge* the trial court's order addressed a claim of ineffective assistance of counsel brought in a postconviction motion for appropriate relief, 359 N.C. at 230, 607 S.E.2d at 628-29, we can find no reason to apply a different standard in reviewing a trial court's ruling on a claim of ineffective assistance of counsel brought before trial and challenged on direct appeal.

volunteers were searching in the area around Highway 87 near Sanford, where defendant's cell phone data had placed him.

Rogers had conversations with Kimble to gauge the status of the investigation, and he was aware of the evidence against defendant and defendant's admission to taking Shaniya from Sleepy Hollow to the Comfort Suites. Rogers testified that he was also aware of defendant's three felony convictions for assault in 2003, which constituted aggravating circumstances that could be used at a capital sentencing proceeding. Accordingly, when Rogers and Brewer met with defendant, "there was conversation about the search and about the consequences of the child not being found," and they began discussing with defendant the possibility that forthcoming charges could result in a capital case. Defendant "was denying that he was involved in hurting [Shaniya] or killing her," and Rogers asked defendant "if he had any information about the location of [Shaniya]." Defendant told Rogers and Brewer he did have information about Shaniya's location, but according to Rogers, "[defendant] didn't tell me where he got the information from." When Rogers was asked at the hearing whether there was a presumption that Shaniya was alive, he stated:

> Again, didn't know -- really didn't know. As I said, [defendant] denied, you know, causing her harm, assaulting her in any way. There certainly was some concerns with the amount of time, but I can't say that we knew.

Rogers testified that it was in this "atmosphere"—with a five-year-old child missing over several cold and rainy days, with law enforcement performing a massive search, and with defendant being the sole suspect and the last person to be seen with Shaniya—that this conversation came about.

According to Rogers, they discussed the death penalty with defendant, and defendant "agreed that it would be in his best interests to offer information that might be helpful to the location." Rogers explained to defendant that providing this information could be helpful because such action could show cooperation and remorse, which could either help achieve a plea agreement for a life sentence or be presented as mitigating circumstances in a sentencing proceeding, and ultimately "could avert the imposition of the -- and execution of the death penalty." Accordingly, defendant agreed with Rogers and Brewer that they would recommend where to search to law enforcement without specifically stating defendant's name or that he was the source of the information. According to Rogers, he was trying to give defendant the best advice he

could to help save defendant's life, and defendant understood the situation at that point and agreed with the strategy.

Accordingly, Brewer spoke with Captain Kimble on 14 November 2009 and instructed him to "look for green porta-potties on Highway 87." Rogers then spoke with Kimble on 14 and 15 November and told him to "look for green porta-potties in an area where they kill deer . . . . on Highway 87 between Spring Lake and Sanford," and also to "look in an area where they -- where they take the deer after they -- after they've been killed." Captain Kimble narrowed the search, and at approximately 1:00 p.m. on 16 November 2009, one of the searchers found Shaniya's body in the woods "near the area where they were field dressing deer."

Defendant first raised his pretrial ineffective assistance of counsel argument in his 5 April 2013 Motion to Require Specific Performance or, Alternatively, to Suppress Statements and Evidence. In its 17 April 2013 order denying defendant's motion, the trial court found as fact:

> 2. The Court provided the Defendant the opportunity to present evidence and arguments during the hearing on his Motion, and the Defendant did so.
>
> 3. The Defendant offered into evidence without objection four (4) exhibits, Defendant's Exhibits A, B, C, and D.[9] The Court carefully examined the Defendant's exhibits.
>
> 4. When the Court provided the Defendant an opportunity to present sworn testimony, the Defendant did not do so.
>
> . . . .

9. Exhibit A was an e-mail apparently from Agent Brostrom in which he stated:

> I think we should monitor the possibility, at the appropriate time, to approach the attorneys for the kidnaper/rapist Mario McNeill and for the mother Antoinette Davis, regarding potential cooperation agreements in order to get the whole story. To date, I [sic] the DA has offered to take the Death Penalty off the table in exchange for the body.

The trial court found that "[n]either the District Attorney nor anyone acting on his behalf" made such an offer and that there existed "no agreement of any kind as to what would happen if the Defendant provided law enforcement with information concerning the location" of Shaniya. Defendant does not challenge the trial court's findings regarding the existence of any agreement, but instead directs his arguments towards his attorneys' purported failure to pursue such an agreement.

6. During Mr. Rogers' representation, the Defendant provided specific information to Mr. Rogers as to the location of Shaniya Davis' body, and the Defendant authorized Mr. Rogers to provide that specific information to law enforcement.

7. Pursuant to the Defendant's authorization, Mr. Rogers provided to law enforcement that specific information as to the location of Shaniya Davis' body.

8. The Defendant's information regarding the location of Shaniya Davis' body did not constitute an admission to a crime.

. . . .

13. Under the totality of the circumstances, Mr. Rogers did not ineffectively assist the Defendant in providing information to law enforcement concerning the location of Shaniya Davis' body without an agreement of some kind as to what would happen should the Defendant provide that information.

14. The Defendant's provision of such information to law enforcement through his attorney at that stage in the search for Shaniya Davis was objectively reasonable in that it provided the State a basis for it to consider future plea negotiations with the Defendant should the Defendant be charged with more offenses related to the missing child during which negotiations the death penalty might be eliminated from the range of possible punishments. The provision of such information was also objectively reasonable in that it provided the Defendant the opportunity to obtain the benefit of a mitigating circumstance should charges be brought against the Defendant for which the death penalty was a possible punishment.

. . . .

17. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

From these findings, the trial court made the following conclusions, in relevant part:

3. . . . [E]ven if the exchange of information at issue in this matter occurred at a "critical stage" of the proceeding, the Defendant has not shown that his counsel's performance fell below an objective standard of reasonableness.

4. Likewise, even if the exchange of information at issue in this matter occurred at a "critical stage" of the proceeding, the Defendant has not shown that the alleged deficient performance prejudiced the defense in such a way as will deprive the defendant of a fair trial.

5. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

6. None of the Defendant's rights under the United States Constitution, North Carolina Constitution, or the North Carolina General Statutes were violated.

Additionally, in its subsequent ruling on the State's motion *in limine* and defendant's oral motions regarding the admissibility of evidence relating to the disclosure, the trial court considered further arguments and evidence, including the testimony of Captain Kimble, as well as that of defendant's original attorneys, Rogers and Brewer. At this hearing, defendant reasserted his ineffective assistance of counsel argument; however, he did not testify at the hearing. In an order entered on 16 May 2013, the trial court made the following relevant findings:

5. During their representation of the Defendant, Mr. Brewer and Mr. Rogers talked to the Defendant while he was in jail about cooperating with the police in looking for Shaniya Davis. They discussed how the Defendant might benefit from cooperating with the police on this issue by avoiding the imposition and execution of the death penalty. During these discussions, the Defendant specifically authorized his attorneys, Brewer and Mr. Rogers, to give information to the police relating to the location of Shaniya Davis. Nothing about their discussions suggests that the Defendant involuntarily provided the information at issue to his attorneys.

. . . .

9. The Defendant authorized his attorneys to communicate information to the police that would aid them in locating Shaniya Davis. The Defendant did not authorize his attorneys to make any admissions on his behalf, and they did not make any admissions on his behalf. Neither Mr. Rogers nor Mr. Brewer told Captain Kimble the specific source of the information as to the directions where to search. As this Court has previously found and concluded in its prior Order relating to the Defendant's Motion for Specific Performance, the State of North Carolina, through the District Attorney's office, never offered any deal, plea concessions, immunity, or any other incentives to the Defendant for this information, and neither Mr. Brewer nor Mr. Rogers ever communicated any deal, plea concessions, or any other incentives from the State to the Defendant.

. . . .

17. Under the totality of the circumstances, the Defendant's attorneys did not ineffectively assist the Defendant in providing information to law enforcement concerning the location of Shaniya Davis' body without an agreement of some kind as to what would happen should the Defendant provide that information.

18. The Defendant's provision of such information to law enforcement through his attorney at that stage in the search for Shaniya Davis was objectively reasonable in that it provided the State a basis for it to consider future plea negotiations with the Defendant should the Defendant be charged with more offenses related to the missing child during which negotiations the death penalty might be eliminated from the range of possible punishments. The provision of such information was also objectively reasonable in that it provided the Defendant the opportunity to obtain the benefit of a mitigating circumstance should charges be brought against the Defendant for which the death penalty was a possible punishment.

19. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

20. In keeping with this Court's prior Order on the Defendant's claim of ineffective assistance of counsel, the Court adopts and incorporates by reference all of its findings of fact and conclusions of law in this Order as if fully set forth herein. In so doing, the Court again does not find or conclude that any ineffective assistance of counsel has occurred. The Defendant has not shown that the advice and conduct of his attorneys fell below an objective standard, and the Defendant has not shown any prejudice. Even if the Defendant is prejudiced by the disclosure of this information, he has also benefited by the disclosure of this information in that the State offered to allow the Defendant to plead guilty and avoid the death penalty. He received that benefit. Further assuming that the Defendant could show prejudice, the Court does not find ineffective assistance of counsel. This finding is without prejudice to the Defendant and may be raised on appeal.

21. Furthermore, the Court finds that the Defendant's attorneys were not ineffective in their representation of the Defendant as the Defendant made a voluntary strategic decision to provide the information at issue so as to obtain the benefit of avoiding the imposition and execution of the death penalty. The Defendant may also receive a future benefit of this disclosure if he is convicted of first degree murder and thereby faces a sentencing hearing in that the disclosure of the information as to the location of Shaniya Davis may be offered as a mitigating circumstance to the jury.

From these findings, the trial court made the following conclusions, in relevant part:

7. Under the totality of the circumstances, the Defendant's attorneys did not ineffectively assist the Defendant in providing information to law enforcement concerning the location of Shaniya Davis' body without an agreement of some kind as to what would happen should the Defendant provide that information.

8. The Defendant's provision of such information to law enforcement through his attorney at that stage in the search for Shaniya Davis was objectively reasonable in that it provided the State a basis for it to consider future plea negotiations with the Defendant should the Defendant be charged with more offenses related to the missing child during which negotiations the death penalty might be eliminated from the range of possible punishments. The provision of such information was also objectively reasonable in that it provided the Defendant the opportunity to obtain the benefit of a mitigating circumstance should charges he brought against the Defendant for which the death penalty was a possible punishment.

9. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

10. In keeping with this Court's prior Order on the Defendant's claim of ineffective assistance of counsel, the Court adopts and incorporates by reference all of its findings of fact and conclusions of law in this Order as if fully set forth herein.

11. The Defendant has not shown that the advice and conduct of his attorneys fell below an objective standard, and the Defendant has not shown any prejudice. Even if the Defendant is prejudiced by the disclosure of this information, he has also benefited by the disclosure of this information in that the State offered to allow the Defendant to plead guilty and avoid the death penalty. He received that benefit. Further assuming that the Defendant could show prejudice, there was no ineffective assistance of counsel.

12. Furthermore, the Defendant's attorneys were not ineffective in their representation of the Defendant as the Defendant made a voluntary strategic decision to provide the information at issue so as to obtain the benefit of avoiding the imposition and execution of the death penalty. The Defendant may also receive a future benefit of this disclosure if he is convicted of first degree murder and thereby faces a sentencing hearing in that

> the disclosure of the information as to the location of Shaniya Davis may he offered as a mitigating circumstance to the jury.
>
> . . . .
>
> 14. None of the Defendant's rights under the United States Constitution, North Carolina Constitution, or the North Carolina General Statutes were violated.

Here defendant does not challenge any of the trial court's findings of fact, but rather, he disputes the trial court's ultimate determination that he did not receive constitutionally deficient counsel under *Strickland*.

A. Benefit of Disclosure

Defendant initially attempts to meet his burden under the first *Strickland* prong by arguing that his attorneys' conduct was deficient because they "handed the State the single most incriminating piece of evidence against [defendant] without even seeking any benefit or protection for [defendant] in return." Defendant points out that Rogers testified that he never tried to get any type of agreement from the State before disclosing the information. Defendant asserts that under the "[p]revailing norms of practice," *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, his attorneys had a duty to seek or secure a benefit for him in exchange for the disclosure, and that their breach of this duty was constitutionally deficient. We disagree.

In making this argument, defendant relies upon the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, as they were applicable at the time. *See id.* at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides."). Specifically, Guideline 10.5.B.2 provided:

> Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

Additionally, Guideline 10.9.1 provided, in relevant part:

> A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.
>
> B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision.

Defendant also relies upon the ABA Standards for Criminal Justice, Prosecution Function and Defense Function applicable at that time. Specifically, Standard 4-3.6, entitled "Prompt Action to Protect the Accused," provided, *inter alia*:

> Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights.

While these provisions, which undoubtedly furnish sound guidance to defense attorneys in criminal cases, are perhaps broader in scope than the specific duty contemplated by defendant here, they do in general terms tend to support defendant's assertion that defense counsel should protect their client's rights by pursuing benefits in return for the disclosure of potentially incriminating information.

Yet, to the extent that counsel has a duty to *seek* a benefit in exchange for disclosing such information, it is plain that defendant's attorneys did seek a benefit in exchange for the disclosure of Shaniya's location—the purpose of the disclosure was to show that defendant could demonstrate cooperation and remorse, which would benefit defendant in the form of achieving a plea agreement for a life sentence or as a mitigating circumstance, and ultimately, to avoid the imposition of the death penalty. This was the "agreed-upon disposition," ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.9.1 (Feb. 2003), which defendant later repudiated when he rejected the State's plea offer of life in prison and refused to present mitigating evidence at trial.

Despite defendant's assent at the time of the disclosure, he argues on appeal that a plea agreement for life in prison so as to avoid the death penalty was not a reasonable objective that would justify the disclosure of incriminating information at that stage of the case because his attorneys were aware he had denied causing Shaniya any harm and because, according to defendant, "everything turned" on his innocence defense. This contention, however, is difficult to square with the record, because his attorneys were also aware that he had in essence confessed to kidnapping a five-year-old child from her home in the middle of the night and taking her to a remote hotel where he was the last and only person to be seen with Shaniya. Moreover, they were aware of the fact that he possessed information on the remote location of Shaniya, though he was unwilling to disclose how he had acquired that information, and that this information directed law enforcement to search a more specific area in the same vicinity in which an extensive search tracking defendant's cell phone data was already underway, suggesting that an incriminating discovery could be imminent. Even if defendant possessed a reasonable explanation for his actions that could exculpate him from directly causing harm to Shaniya, he was, at a minimum, likely to face charges of felony murder if, as feared, Shaniya was found deceased. Thus, while the disclosure certainly would be incriminating to defendant and could lead to the discovery of additional incriminating evidence against him, as proved to be the case here, the disclosure must be viewed in light of the already heavily incriminating evidence against defendat, as well as the apparent likelihood that the discovery of further incriminating evidence could be forthcoming.

Similarly, defendant argues that the "agreed-upon disposition" was inadequate in that his attorneys should have endeavored to obtain a more favorable outcome. For example, defendant argues that his attorneys should have attempted to secure an agreement from the State to proceed noncapitally, which he alleges would have both protected him from imposition of the death penalty and preserved his ability to assert a defense of factual innocence. But defendant fails to explain how making the disclosure with such an agreement in place would have in any way affected his ability to assert a defense of factual innocence. Here defendant was not required to plead guilty absent such an agreement; rather, he was free to put on any available evidence of his innocence, just as he would have been had the State proceeded noncapitally.

Additionally, defendant asserts that his attorneys should have attempted to secure a non-attribution agreement, which could have limited the State's use of any evidence regarding the disclosure solely to

impeachment purposes at trial, or a proffer letter, which could have provided that the prosecutors would not use anything that defendant or his lawyers told them against defendant during the case-in-chief. Whether prosecutors would have been amenable to these considerations is speculative, but given the nature of the situation at that time—with the ongoing search for Shaniya and the considerable evidence against defendant—we are deeply skeptical. Moreover, while we recognize that in many situations it would make strategic sense to attempt to negotiate for the best possible agreement before disclosing potentially incriminating information, that is not necessarily true in situations when, as here, time was a substantial factor. Had law enforcement located Shaniya before defendant's disclosure, the opportunity to obtain any benefit in return for defendant's information would have been irrevocably lost. Additionally, given that defendant was denying causing any harm to Shaniya, there was the possibility, however remote, that Shaniya was still alive.

Defendant attempts to minimize the role of time as a factor by suggesting that Shaniya might never have been discovered absent the disclosure, pointing to several of the State's arguments at trial. For instance, defendant notes that the State argued at trial that Shaniya's body was "well hidden," "hardly visible," and "was very difficult to find -- and may not have been found without this information. Authorities had been searching in that general area and had not been able to locate the victim prior to this information." Given that a massive search was underway in the same general area in which Shaniya was ultimately discovered, we are skeptical of defendant's claim. More importantly, however, entertaining this type of speculative argument would be contrary to our mandate that "every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. The information Rogers and Brewer received from defendant directed law enforcement to search a more specific area in the same vicinity in which an extensive search was already underway at that time, suggesting that a discovery could very well be imminent. Rogers and Brewer could in no way anticipate how well hidden or how difficult to discover the body of Shaniya might be, nor could they have anticipated receiving that information from defendant, who denied causing any harm to Shaniya. *See Sneed*, 284 N.C. at 614, 201 S.E.2d at 872 ("We think that the attorney-client relationship is such that when a client gives his attorney facts constituting a defense, the attorney may rely on the statement given unless it is patently false.").

In sum, we cannot agree with defendant that it was unreasonable for his attorneys to target a plea agreement for life in prison and the avoidance of the death penalty in exchange for making the disclosure. We note that the commentary to Guideline 10.9.1 from the same ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases cited by defendant, states:

> "Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible"; as a result, plea bargains in capital cases are not usually "offered" but instead must be "pursued and won." Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case.

(Footnote call number omitted.) Certainly, the decision to consider a client's situation as a potential capital case and seek a disposition accordingly is not one to be taken lightly; on that account, we note that, as found by the trial court, Rogers and Brewer were both experienced criminal defense attorneys. *See Strickland*, 466 U.S. at 681, 104 S. Ct. at 2061, 80 L. Ed. 2d at 689 ("Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney . . . ."). We hold only that under the unique and difficult circumstances here—with the already heavily incriminating evidence against defendant, as well as the apparent likelihood that the discovery of further incriminating evidence could be imminent—and "indul[ging] a strong presumption that [defendant's attorneys'] conduct falls within the wide range of reasonable professional assistance," *Id.* at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, Rogers and Brewer's decision to disclose potentially incriminating information with the sought-after goal of avoiding imposition of the death penalty did not fall below "an objective standard of reasonableness," *id.* at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Whether defendant's attorneys erred in not first securing, or attempting to secure, a plea agreement for life in prison before making the disclosure is a separate and more difficult question. On the one hand, as we have previously noted, any negotiations with prosecutors may have been an uphill battle and would have been further complicated by the issue of time. On the other hand, a plea agreement for life in prison would likely have been a more attainable benefit than the alternatives proffered by defendant in his brief (a non-attribution agreement or a proffer letter). Additionally, without any agreement firmly in place, defendant's

attorneys exposed him to the possibility of further incrimination without any guaranteed benefit save for the existence of potential mitigating evidence at trial. Yet, we need not answer this question because, given that we have held that a plea agreement for life in prison and avoidance of the death penalty was a reasonable disposition in these circumstances, defendant cannot establish any prejudice when the State did offer defendant a plea agreement for life in prison. That is—even assuming *arguendo* that defendant's attorneys were deficient in disclosing the information without any plea agreement in place, defendant cannot show "a reasonable probability that, but for [his attorneys'] unprofessional errors, the result of the proceeding would have been different" when the very result that was desired did materialize and was rejected by defendant's own choice. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

B. Adequate Investigation

[3] Defendant next argues that his attorneys were deficient in their performance because they failed to conduct an adequate investigation before disclosing to police where to search for Shaniya when they were only one day into their representation of defendant. *See id.* at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") According to defendant, "everything turned" on his innocence defense, and his attorneys had a duty to adequately investigate that defense before destroying it by disclosing incriminating evidence to the State. Defendant argues that this disclosure was contrary to the applicable ABA guidelines, under which attorneys should investigate issues of guilt regardless of overwhelming evidence against a defendant or the defendant's own admissions or statements constituting guilt.

Defendant's assertions, however, are not borne out by the record. For example, defendant argues that Rogers failed to look at any formal discovery materials before making the disclosure. Yet, Rogers testified that at that early stage in the investigation, there was no discovery file to examine. Similarly, defendant seizes upon Rogers's response that he was unaware that defendant had at one point denied being the person depicted in photographs from the hotel, alleging that this statement demonstrates Rogers's failure to investigate defendant's claims of innocence. But we can find little significance in Rogers's statement. Defendant's "denial" occurred when he was first confronted with photographs of himself and Shaniya taken from the Comfort Suites video

footage. Defendant briefly attempted to claim that the person in the videos was someone who looked just like him, had somehow stolen his I.D. and car, and had signed into the hotel with defendant's name. Defendant quickly admitted it was he in the photographs, and then tried to claim he was delivering Shaniya to an unknown third party at the direction of text messages, which were not on defendant's phone and of which there is no record. Defendant fails to explain how Rogers's ignorance of defendant's short-lived denial of a fact relating to the *kidnapping*—a fact that was plainly apparent from available evidence, to which defendant shortly thereafter admitted and to which he later stipulated at trial—demonstrates any failure by Rogers to adequately investigate issues of defendant's guilt or innocence on the issue of *murder*.

Apart from defendant's brief denial, defendant is unable to identify anything that Rogers's allegedly inadequate investigation failed to uncover and which would have had any effect on the reasonableness of his attorneys' strategic decision to make the disclosure. *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). Nor does defendant suggest precisely what other investigative avenues Rogers and Brewer should have pursued. Rogers and Brewer discussed defendant's situation with him, and Rogers testified that he had conversations with Kimble to gauge the status of the investigation as it related to defendant's involvement. From these investigations, defendant's attorneys learned that defendant had kidnapped Shaniya in the middle of the night, and taken her to a hotel where he was the last person to be seen with her, and that searchers were presently conducting a massive, ongoing attempt to locate Shaniya by combing through the areas revealed by defendant's cell phone data. We conclude that defendant's attorneys' strategic choice here to disclose where to look for Shaniya was "made after thorough investigation of law and facts relevant to plausible options." *Id.* at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. Even if defendant was able to identify some additional investigative steps his attorneys could have taken and to demonstrate that counsel engaged in a "less than complete investigation," we conclude that, given that time was a significant factor here, "reasonable professional judgments" would have "support[ed] the limitations on investigation." *Id.* at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

C. Source of Disclosure

[4] Next, defendant asserts that his attorneys erroneously advised him that they would shield his identity as the source of the information but that their method of disclosure revealed him as the source. Defendant argues that by doing so, his attorneys violated the Rules of Professional Conduct and the applicable ABA guidelines requiring a client's informed consent before lawyers may reveal information acquired during the professional relationship. *See, e.g.*, N.C. St. B. Rev. R. Prof'l Conduct r. 1.6(a) (2018 Ann. R. N.C. 1183, 1205) ("A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent . . . .").

In support of his argument, defendant points to this exchange between Terry Alford, defendant's trial attorney, and Rogers at the hearing:

> Q And so the discussion that you had with Mr. McNeill concerning the information, the authority that you had was to convey the information but not to reveal the source; is that correct?
>
> A That was certainly our intent. And my recollection was just conveying the information, not saying Mario McNeill said anything or any specific person.
>
> Q Right. And he never specifically gave you permission to be able to say the information came from him, did he?
>
> A He did not specifically say, convey the information came from me.

Defendant asserts that because they agreed not to explicitly name him as the source of the disclosure, this agreement necessarily implied that his attorneys would not allow evidence from the disclosure to be attributed to him, either directly or by inference. According to defendant, this is reflected in Finding of Fact 9 from the trial court's 16 May 2013 order, in which the trial court found that defendant "did not authorize his attorneys to make any admissions on his behalf."

The record, however, cannot support defendant's characterization of the agreement as being conditioned upon his attorneys' implicit promise that they would prevent the disclosure from being attributed to defendant, even by inference. Indeed, the entire purpose of the disclosure, to which defendant agreed, was that it be attributable to defendant

to show cooperation on his part. Immediately before the portion of the hearing relied upon by defendant, Rogers testified:

> Q That was the way it was done by Mr. Brewer is that he gave it as a recommendation. He didn't say where the information come from; is that correct?
>
> A That is correct. And that is my best recollection of what I did so as well.
>
> Q In other words, the information that you were relaying to the police was intended to be information you received from someone, but you did not want to relay who that came from; is that correct?
>
> A That's correct.
>
> Q At any time when you were talking to the authorities, did you tell them who it came from?
>
> A No. No, I didn't.
>
> Q So any belief that someone may have that information you gave them came from Mr. McNeill would be their speculation. You never specifically said where it came from, did you?
>
> A No, I didn't.
>
> Q That was because you weren't authorized by Mr. McNeill to specifically tell someone where that information came from, were you?
>
> A No, that's not true. We were authorized.
>
> Q You were authorized to do what?
>
> A We were authorized to disclose the information.
>
> Q But were you authorized to disclose the source of the information?
>
> A In our conversation prior to disclosing the information, it was decided that the information would be provided *without specifically stating the sourc*e.
>
> Q And that's the way Mr. Brewer did it, and that was your intention of doing it also, not to provide the source, correct?

> A That's correct.

(Emphasis added.) Rogers further explained that while it was agreed to convey the information without "specifically stating the source," they were also not trying to hide defendant's role in furnishing the information. As Rogers testified at the hearing:

> Q And when you're talking about getting mitigating information for the defendant, Mario McNeill, to use or to set him up down the road with having the benefit of having been helpful in providing her body, that sort of thing --
>
> A Yes.
>
> Q -- right? Being cooperative. He could be claimed to be cooperative, right?
>
> A That's correct.
>
> Q You're not hiding from Captain Kimble who you're getting the information from?
>
> A No, I'm not.
>
> Q You won't be able to claim any credit, or he won't be able to claim any credit down the road should he need it if it's a mystery as to where the information is coming from, right?
>
> A That's correct.

In light of Rogers's testimony and the agreed-upon purpose of the disclosure, the fact that defendant and his attorneys agreed not to explicitly name defendant as the source of the disclosure cannot be read as an implicit understanding that his attorneys would shield him as the source but rather must be read in the context of their conversation, in which defendant told his attorneys that he had information about Shaniya's location but did not explain how he had acquired that information, and in which defendant was "denying that he was involved in hurting [Shaniya] or killing her." The method of disclosure allowed an immediate inference of cooperation but avoided any inadvertent admission of guilt. While defendant relies heavily upon a portion of Finding of Fact 9, the trial court's full sentence from that finding states that "[t]he Defendant did not authorize his attorneys to make any admissions on his behalf, *and they did not make any admissions on his behalf.*" (Emphasis added.) Similarly, in its previous order from 17 April 2013, the trial court found that defendant "authorized Mr. Rogers to provide that specific

information to law enforcement" and that "[t]he Defendant's information . . . did not constitute *an admission to a crime*." (Emphasis added.) Thus, while the record establishes that defendant's attorneys were not authorized to make any admissions of guilt to any crimes on behalf of defendant, it does not support defendant's assertion that they advised him they would shield his identity as the source of the information.

Certainly, that the information came from defendant's attorneys allowed an inference that defendant was the source, which, while demonstrating immediate cooperation on the part of defendant, was also potentially incriminating as it suggested an inference of guilt. But this trade-off goes to the heart of the agreed-upon strategy—the mounting evidence against defendant was already highly incriminating, and providing this information to the police that could potentially be further incriminating was a strategic decision made to avoid imposition of the death penalty.

Whether defendant's attorneys *should have* advised him to adopt a different strategy that attempted to disclose the information anonymously and to shield defendant's identity as the source—perhaps until the sentencing proceeding of a capital trial—is a separate question not specifically raised by defendant, but on these facts we can see little to be gained, and more importantly, no constitutional deficiency, in failing to take such a course. Defendant's attorneys clearly believed that disclosing the information without hiding his identity was the best way to demonstrate cooperation and receive a benefit for the information while avoiding any overt suggestion of guilt on the part of defendant. Either defendant possessed an exculpatory explanation as to how he had acquired information on Shaniya's location, which he was at that point unwilling to share with his attorneys, or he did not. If he was being truthful with his attorneys in denying causing any harm to Shaniya, then he did possess such an explanation, and his attorneys' overt omission of his name in making the disclosure cleared the path for him to rebut the inference of guilt via any available evidence that an unnamed third party was the ultimate source of the information. This was the scenario defendant argued in his closing, albeit without any evidentiary support.

Ineffective Assistance of Counsel Conclusion

In sum, we conclude that defendant has failed to meet his burden under *Strickland* and we find no error in the trial court's ruling. The strategy employed by Rogers and Brewer here, to which defendant agreed, was a result of their "trying to give [defendant] the best advice [they could] to try to help save his life." Significantly, defendant agreed

with this strategy, and he received the very benefit sought by this strategy when the State later offered him a plea agreement for life in prison, which defendant twice declined. Defendant also declined to present any mitigating evidence in the sentencing proceeding of the trial, thus rejecting a further benefit contemplated by his agreed-upon strategy. Accordingly, defendant's ineffective assistance of counsel claim is overruled.

Cronic claim

[5] In addition to arguing that he received ineffective assistance of counsel under *Strickland*, defendant also argues that he received ineffective assistance under the standard set forth in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In *Strickland* the Court considered "claims of ineffective assistance based on allegations of specific errors by counsel—claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding." *Strickland*, 466 U.S. at 702, 104 S. Ct. at 2072, 80 L. Ed. 2d at 703 (Brennan, J., concurring in the opinion). On the other hand, in *Cronic* the Court considered ineffective assistance of counsel claims in the context of cases in which there is a "complete denial of counsel," "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or "the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial." *Cronic*, 466 U.S. at 659-61, 104 S. Ct. at 2047-48, 80 L. Ed. 2d at 668-69.

Defendant argues that his attorneys, by disclosing of the location of Shaniya to police without first securing any benefit in return, were essentially working for the police and that this situation resulted in a breakdown of the adversarial process under *Cronic*. We are unpersuaded. Defendant's challenge is more properly brought as an allegation of a specific error under *Strickland*, which we have already addressed. Moreover, for the reasons previously stated, we conclude that the attorneys' disclosure was a reasonable strategic decision made in the course of their representation of defendant and certainly did not amount to a "breakdown in the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution." *Id.* at 662, 104 S. Ct. at 2049, 80 L. Ed. 2d at 670.

Attorney-Client Privilege

[6] Defendant next argues that the information regarding the location of Shaniya was inadmissible by virtue of the attorney-client privilege.

"It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents." *Dobias v. White*, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954) (citations omitted). Significantly, however, "not all communications between an attorney and a client are privileged," *In re Investigation of Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (citations omitted), but rather, "[o]nly *confidential* communications are protected," *Dobias*, 240 N.C. at 684, 83 S.E.2d at 788 (emphasis added). "For example, . . . if it appears that a communication was not regarded as confidential or that the communication was made for the purpose of being conveyed by the attorney to others, the communication is not privileged." *In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786 (citing *State v. McIntosh*, 336 N.C. 517, 524, 444 S.E.2d 438, 442 (1994)).

The party asserting the privilege has the burden of establishing each of the essential elements of a privileged communication. *Id.* at 336, 584 S.E.2d at 787 (quoting 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.61, at 1–161 (2d ed. 1994) (citations omitted) ("This burden may not be met by 'mere conclusory or ipse dixit assertions,' or by a 'blanket refusal to testify.' Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.")). This Court has held that the elements of a privileged communication are:

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

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981) (citation omitted). Finally, "the responsibility of determining whether the attorney-client privilege applies belongs to the trial court." *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787 (citing *Hughes v. Boone*, 102 N.C. 137, 160, 9 S.E. 286, 292 (1889)).

Here the trial court determined that defendant failed to meet his burden of demonstrating that the information he provided to his attorneys concerning the location of Shaniya was privileged. In its order denying

defendant's Motion to Require Specific Performance or, Alternatively, to Suppress Statements and Evidence, the trial court found as fact:

> 6. During Mr. Rogers' representation, the Defendant provided specific information to Mr. Rogers as to the location of Shaniya Davis' body, and the Defendant authorized Mr. Rogers to provide that specific information to law enforcement.
>
> 7. Pursuant to the Defendant's authorization, Mr. Rogers provided to law enforcement that specific information as to the location of Shaniya Davis' body.
>
> 8. The Defendant's information regarding the location of Shaniya Davis' body did not constitute an admission to a crime.

In its second order, the trial court adopted and incorporated all of its findings from its previous order, and additionally found as fact:

> 5. During their representation of the Defendant, Mr. Brewer and Mr. Rogers talked to the Defendant while he was in jail about cooperating with the police in looking for Shaniya Davis. They discussed how the Defendant might benefit from cooperating with the police on this issue by avoiding the imposition and execution of the death penalty. During these discussions, the Defendant specifically authorized his attorneys, Brewer and Mr. Rogers, to give information to the police relating to the location of Shaniya Davis. Nothing about their discussions suggests that the Defendant involuntarily provided the information at issue to his attorneys.
>
> . . . .
>
> 9. The Defendant authorized his attorneys to communicate information to the police that would aid them in locating Shaniya Davis. The Defendant did not authorize his attorneys to make any admissions on his behalf, and they did not make any admissions on his behalf. Neither Mr. Rogers nor Mr. Brewer told Captain Kimble the specific source of the information as to the directions where to search. . . . .
>
> . . . .

15. Contrary to the Defendant's argument, the Defendant did not meet his burden of demonstrating that the statements at issue were privileged communications. The evidence shows that they do not fall within the protection of the attorney-client privilege because they were not confidential. The statements at issue were not regarded by the Defendant and his attorneys as confidential as they were made for the purpose of being conveyed by the attorney to others and were therefore not privileged.

16. Even assuming that the attorney-client privilege existed, the Defendant waived the privilege in respect to the information given to the police for the sole purpose of allowing his attorneys to share the information with the police. This information was not given in exchange for any plea deal, dismissal of charges, immunity, or any other incentive or inducement offered by the State, and this information was not given during any plea negotiations with the District Attorney or any of his staff under N.C. Gen. Stat. § 8C-1, Rule 410.

. . . .

22. The Defendant waived the attorney-client privilege in that he specifically intended the information that he gave to his attorneys about the location of Shaniya Davis be shared with the authorities for the sole purpose of locating Shaniya Davis, the Defendant authorized the limited disclosure of this information for that limited purpose, there is no evidence of any deal to disclose this information, the disclosure was not the result of plea negotiations, the disclosure was voluntary, and there is no evidence of the Defendant's motive for the disclosure other than an interest on the part of the Defendant that Shaniya Davis would be found and that he might avoid the imposition and execution of the death penalty.

23. The defendant has not waived his privilege in regard to his attorneys testifying in this case on the trial on the merits.

Based upon these findings of fact, the trial court concluded:

> 4. The Defendant waived the attorney-client privilege as to some of this information. As to the information that Mr. Brewer and Mr. Rogers supplied to Captain Kimble, the attorney-client privilege did not exist because the information was not given to the attorneys in confidence as the Defendant voluntarily gave the information to his attorneys for the purpose of his attorneys sharing it with the police, and even if the attorney-client privilege did exist, that the defendant waived the attorney-client privilege so that his attorneys could share that information with the authorities.
>
> . . . .
>
> 13. The Defendant waived the attorney-client privilege in that he specifically intended the information that he gave to his attorneys about the location of Shaniya Davis he shared with the authorities for the sole purpose of locating Shaniya Davis, the Defendant authorized the limited disclosure of this information for that limited purpose, there is no evidence of any deal to disclose this information, the disclosure was not the result of plea negotiations, the disclosure was voluntary, and there is no evidence of the Defendant's motive for the disclosure other than an interest on the part of the Defendant that Shaniya Davis would be found and that he might avoid the imposition and execution of the death penalty.
>
> 14. None of the Defendant's rights under the United States Constitution, North Carolina Constitution, or the North Carolina General Statutes were violated.

We conclude that the trial court correctly determined that the information was not protected by attorney-client privilege. Specifically, the testimony of Rogers and Brewer plainly establishes that defendant communicated the information to them with the purpose that it be relayed to law enforcement to assist in the search for Shaniya. Accordingly, the evidence establishes that defendant's communication of the information to his attorneys "was made for the purpose of being conveyed by the attorney[s] to others," and as a result, "the communication is not privileged." *In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786 (citing *McIntosh*, 336 N.C. at 524, 444 S.E.2d at 442).

Nonetheless, defendant argues on appeal that any waiver of the privilege on his part (or any intention that the information be conveyed to others) was made under the condition that he not be revealed as the source of the information. Defendant contends that his attorneys breached this condition by disclosing the information without protecting his identity as the source, rendering any waiver a nullity and leaving intact the privileged status of the information. Defendant further asserts that, at a minimum, his identity as the source of the information was privileged and should have been protected against any comment or infringement by the State. According to defendant, the trial court, by allowing evidence at trial that the information came from his attorneys and by allowing the State to argue inferences of guilt from that evidence, deliberately invaded the attorney–client relationship and violated his federal and state rights to counsel under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

Defendant's contentions, however, are again premised on the same portions of the record on which he based his previous argument that his attorneys breached their duty of confidentiality[10] and provided ineffective assistance of counsel. For instance, defendant again refers to the trial court's Finding of Fact 9, which states that defendant "did not authorize his attorneys to make any admissions on his behalf." Yet, as noted

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10. While the attorney-client privilege and the ethical duty of confidentiality are related principles, they are not synonymous, and the applicability here of the former is questionable given that the disclosure of purportedly confidential information was not made pursuant to compulsion of law over the objection of defendant, but rather was made voluntarily and out of court. *See* N.C. St. B. Rev. R. Prof'l Conduct r. 1.6(a) cmt. 3 (2018 Ann. R. N.C. at 1205) ("The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." (citation omitted)); *Dobias*, 240 N.C. at 684, 83 S.E.2d at 788 ("It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, *and the attorney cannot be compelled to testify to them unless his client consents*." (emphasis added)). In any event, for the reasons stated above, the information defendant communicated to his attorneys was not privileged.

above, this finding, in which the trial court continued by stating "and they did not make any admission on his behalf," references *admissions to a crime*. As we have previously concluded, while the record establishes that defendant's attorneys were not authorized to make any admissions of guilt to any crimes on behalf of defendant, and that they made no such admissions, the record does not support defendant's characterization of the agreement as being conditioned upon his attorneys' representation that they would prevent the disclosure from being attributed to defendant, even by inference. Defendant's arguments to the contrary are overruled.

Hearsay — Admissions by a Party-Opponent

[7] Defendant next contends that Captain Kimble's testimony that he received information on the location of Shaniya from defendant's attorneys was inadmissible hearsay and that the trial court erred in denying defendant's motion to suppress this testimony. We disagree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2017); *see also id.* Rule 801(a) (2017) (defining "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion"). "In general, hearsay evidence is not admissible." *State v. Rivera*, 350 N.C. 285, 288-89, 514 S.E.2d 720, 722 (1999) (citing *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 598 (1988)). An exception to the hearsay rule exists in Rule 801(d), which provides in pertinent part:

> (d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship[.]

N.C.G.S. § 8C-1, Rule 801(d) (2017).

Here defendant objected to the admission of Kimble's testimony about statements made to him by defendant's attorneys concerning the location of Shaniya on the basis that, *inter alia*, such testimony was inadmissible hearsay. The trial court determined that defendant's

attorneys' statements to Kimble were admissible under N.C.G.S. § 8C-1, Rule 801(d). Accordingly, the trial court ordered that:

> The State may call Assistant Chief Kimble as a witness, and he may testify pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d) about his conversations with Mr. Brewer and Mr. Rogers inasmuch as these attorneys were the Defendant's agents and were authorized by the Defendant to make the statements at issue . . . .

The trial court did not allow Kimble to testify "as to any feelings about the source of the information."

Defendant argues that because the trial court found that he "did not authorize his attorneys to make any *admissions* on his behalf," and yet admitted into evidence his attorneys' statements to Kimble pursuant to N.C.G.S. § 8C-1, Rule 801(d) under the "*Admissions* by a Party-Opponent" hearsay exception, the trial court erroneously allowed defendant's attorneys' disclosure to be admitted as defendant's own statement and to be attributed to him, resulting in prejudice and requiring a new trial. (Emphases added.) The consonance of the word "admission" may appear contradictory here at first glance, but this argument too is without merit.

As previously discussed, in Finding of Fact 9 the trial court determined that defendant did not authorize his attorneys to make any admissions of guilt *to any crimes* and, on that account, "they did not make any admissions on his behalf." As the trial court specifically found in its earlier order, defendant "authorized Mr. Rogers to provide that specific information to law enforcement" and "[t]he Defendant's information . . . did not constitute *an admission to a crime*." (Emphasis added.) It is clear that the trial court's meaning of "admission" in this respect was more akin to a "confession," which is "an acknowledgement in express[ed] words by [the] accused in a criminal case of his guilt [of] the crime charged or of some essential part of it." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986) (quoting *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970)).

In contrast, this Court has defined "admission" in the context of Rule 801(d) more broadly as "a statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (quoting *Trexler*, 316 N.C. at 531, 342 S.E.2d at 879-80); *see also State v. Chapman*, 359 N.C. 328, 355, 611 S.E.2d 794, 816 (2005) (referring to the Rule 801(d) exception when applied to a defendant's statement as the "*statement* of a party opponent" (emphasis

added)); *Trexler*, 316 N.C. at 531, 342 S.E.2d at 880 ("A confession, therefore, is a type of an admission." (citations omitted)). Under this broad definition, the "Admissions by a Party-Opponent" hearsay exception encompasses more than mere admissions of guilt. *See*, *e.g.*, *Chapman*, 359 N.C. at 355, 611 S.E.2d at 816 (concluding that the defendant's statement to a detective about a threatening telephone call he received the day after the murder of which he was accused was admissible as the statement of a party opponent); *State v. Collins*, 335 N.C. 729, 738, 440 S.E.2d 559, 564 (1994) (opining that the defendant's comments concerning his previous statements about threats he had made to his wife before her death fell within the exception for admissions by a party opponent). As a result, the trial court's admitting of defendant's attorneys' statements under Rule 801(d) did not conflict with Finding of Fact 9, which explicitly found that defendant "did not authorize his attorneys to make any admissions on his behalf, and they did not."

Because, as discussed previously, defendant authorized his attorneys to convey the information to law enforcement, the trial court did not err in admitting the evidence as "statement[s] by a person authorized by [defendant] to make a statement concerning the subject." N.C.G.S. § 8C-1, Rule 801(d)(C). Moreover, consistent with defendant's agreement with his attorneys that he not specifically be named as the source, the trial court did not permit Kimble to testify "as to any feelings about the source of the information."[11] Certainly, one could infer that defendant was the ultimate source of information that came from his attorneys. At trial, the State repeatedly argued this inference; however, as discussed above, this argument was an inevitable result of the agreed-upon strategy in making the disclosure. Defendant's arguments are overruled.

Due Process

[8] Next, defendant argues that the cumulative effect of his original attorneys' ineffective assistance of counsel, combined with the trial court's admission into evidence of testimony that his lawyers disclosed the location of Shaniya to police, as well as its admission of all evidence recovered from that location and all evidence derived from the discovery

11. Defendant argues that admission of the statements under Rule 801(d) means that they came in as defendant's own statements and were directly attributable to him. However, the jury was not informed of the manner in which this evidence was admitted—in other words, that the statements were authorized by defendant. The jury could only infer that defendant was the source from the fact that the attorneys who possessed the information represented him. As previously discussed, while inference was incriminating, it was permissible in light of the agreed-upon disclosure.

of Shaniya's body, deprived defendant of a fair trial in violation of his rights to due process of law under the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. Because we have held that defendant did not receive ineffective assistance of counsel and that the trial court did not err in any evidentiary rulings, defendant's contentions are without merit.

Improper Statements During the State's Closing Argument

[9] Defendant's next argument concerns two statements made by the State during closing arguments at the guilt-innocence proceeding of the trial. More specifically, defendant argues that because these two comments severely prejudiced him, the trial court abused its discretion in denying his repeated requests for a mistrial. We do not agree.

A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2017). The determination "as to whether substantial and irreparable prejudice has occurred lies within the sound discretion of the trial judge and . . . will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Thomas*, 350 N.C. 315, 341, 514 S.E.2d 486, 502 (1999) (citing *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422 (1998), *cert. denied*, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999)), *cert. denied*, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999); *see also State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008) ("An abuse of discretion occurs when a ruling is 'manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision.' " (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998))), *cert. denied*, 558 U.S. 851, 130 S. Ct. 129, 175 L. Ed. 2d 84 (2009). Further, "[t]he decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine the effect of any such error on the jury." *Thomas*, 350 N.C. at 341, 514 S.E.2d at 502 (citing *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996)). We also note that "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (quoting *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)).

Defendant's motions for mistrial here were based on statements made by the prosecutor in the State's closing arguments. During closing arguments "an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity

of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record." N.C.G.S. § 15A-1230(a) (2017). We have recognized, however, that prosecutors " 'are given wide latitude in the scope of their argument' and may 'argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995), *cert. denied*, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996)), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008). The trial court may ordinarily remedy improper argument with curative instructions "since it is presumed that jurors will understand and comply with the instructions of the court," *State v. Young*, 291 N.C. 562, 573, 231 S.E.2d 577, 584 (1977) (first citing *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); then citing *State v. Long*, 280 N.C. 633, 187 S.E.2d 47 (1972)), though "[s]ome transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors," *id.* at 573-74, 231 S.E.2d at 584 (citations omitted).

Here, during its closing argument in the guilt-innocence proceeding of the trial, while commenting on defendant's theory of the crime, the prosecutor stated:

> Where was Shaniya's body found? Off Walker Road, past Spring Lake before you get to Sanford, exactly where the defendant's attorney said you would find the body. So that would mean that her people, her relatives that are going to take her to school that morning, they drive her right back up to Sanford, another 40 minute drive. They just happened to sexually assault her and dump her body where the cell phone analysis, *where the defendant's lawyer said he put the body*, where the metal identification says the body is and where the soil sample identification says the body is. And that's all just coincidence? The defense would have you believe that that's just coincidence.

(Emphasis added.) During the next recess, out of the presence of the jury, defendant's trial attorney objected to the prosecutor's comment and moved for a mistrial. Defendant's attorney argued to the trial court: "You made the lines. You drew the lines and that went way past the line -- way past the line. His statement was the body was found where his lawyer said he put the body." The trial court responded that it did not hear the comment and asked the court reporter to read back that portion of the State's argument. The trial court then stated, "All right. Motion for

mistrial is denied. If you want me to tell them to disregard that, I'll be glad to tell them that. I didn't catch it. I'm not sure how many of them caught it." Defendant's attorney declined, stating, "No, sir. That would just be drawing more attention to the error." The trial court then said:

> All right. Let's bring them in. I have told the jury to remember the evidence for themselves. If the lawyer says something they don't remember from the evidence, they are to disregard that and abide by their own recollection of the evidence. Based on that and in my discretion, the motion for mistrial is denied. And I will give them a cautionary instruction now -- a general cautionary instruction, not about that specifically but to -- in general, about remember the evidence, okay?

When the jury returned, the trial court instructed jurors:

> Let me remind you once again that closing arguments are not evidence. The evidence is what you heard and saw during the presentation of evidence. If, during the course of making a final argument, one or more of the attorneys attempts to restate the evidence or a portion of the evidence and your recollection of the evidence is different from the attorneys', you are to recall and remember the evidence and be guided exclusively by your own recollection of the evidence.

Later in the State's closing argument, the prosecutor asserted:

> He killed and left Shaniya on Walker Road. The cell phone analysis puts him there. The soil sample analysis puts him there. The metal identification analysis puts him there. *And his defense attorney telling law enforcement where to look for the body puts him there.*

(Emphasis added.) Defendant's attorney objected at the next recess and again moved for a mistrial based on the prosecutor's stating "his defense attorney telling law enforcement where to look for the body puts him there." The trial court responded that "I think it's the same as saying the metal and the minerals puts him there. It's an inference from what the attorney said. So your motion for mistrial is denied." Defendant's attorney renewed his motion and asserted that the combination of the two comments should result in a mistrial. The trial court ruled:

> All right. Well, I find nothing wrong with the second incident that you're complaining of. I do find that he did cross

> by saying what I told him -- not what I told him not to but would not allow testimony that the defendant provided the information to the lawyer. He improperly commented on that in the first incident. In my discretion, I denied your request for mistrial. I gave a cautionary instruction to the jury and I do not feel like the comment rises to the point where I should declare a mistrial. I think that clarifies my ruling.

The trial court denied the defense's repeated renewals of its motions for mistrial.

Defendant argues that the prosecutor's statements that Shaniya's body was found "where the defendant's lawyer said he put the body" and that "[defendant's] attorney telling law enforcement where to look for the body puts him there" contravened the trial court's pretrial rulings concerning evidence of the disclosure and were without support in the record. Defendant asserts that these statements were severely prejudicial because they called on the jury to infer that he made confessions to his attorneys, which, if made, would have been privileged and inadmissible, and also to infer that defendant concealed the body, which defendant contends amounts to evidence of malice and of premeditation and deliberation. Additionally, defendant argues that the statements were so prejudicial that the trial court's general curative instructions did nothing to cure the impermissible inferences urged by the State, nor could a more specific curative instruction have remedied the issue. As a result, defendant contends that the trial court abused its discretion in denying his motions for mistrial.

With regard to the second statement, namely, that "[defendant's] attorney telling law enforcement where to look for the body puts him there," we conclude that this statement was not improper. As discussed above, evidence that the information of Shaniya's location was conveyed to law enforcement by defendant's attorneys was properly admitted by the trial court and this evidence permitted reasonable inferences to be drawn that were incriminating to defendant. These inferences are precisely what the prosecutor argued here—that defendant was the ultimate source of the information and had been to that location. Thus, the prosecutor's statement was permissible because he was arguing "the facts in evidence, and . . . reasonable inferences drawn therefrom," *Goss*, 361 N.C. at 626, 651 S.E.2d at 877 (quoting *Alston*, 341 N.C. at 239, 461 S.E.2d at 709-10); *see also*, *e.g.*, *State v. Smith*, 294 N.C. 365, 379, 241 S.E.2d 674, 682 (1978) ("Since the evidence was properly admitted, the prosecutor was entitled to argue the full force of that evidence to

the jury."). Defendant was free to rebut these inferences with any available evidence, as he sought to do in his closing argument. But defendant's objection to the incriminating nature of these inferences is in reality a reiteration of his previous arguments that the disclosure, and the admission of evidence relating to the disclosure, violated his constitutional rights and resulted in prejudice. As we have already considered and rejected these arguments, defendant's contention here must fail as well.

On the other hand, the prosecutor's first statement that Shaniya's body was found "where the defendant's lawyer said he put the body" was improper. This statement was not couched as an inference but rather as an assertion of fact, which was not an accurate reflection of the evidence. Nonetheless, we conclude that this improper statement was not "such [a] serious impropriet[y] as would make it impossible to attain a fair and impartial verdict." *Smith*, 320 N.C. at 418, 358 S.E.2d at 337 (quoting *Stocks*, 319 N.C. at 441, 355 S.E.2d at 494). Given that the prosecutor was allowed to argue the reasonable inferences arising from the evidence of defendant's attorneys' disclosure, and did so repeatedly in his closing argument, this sole misstatement of that evidence did not run far afield of what was permissible. Had we arrived at a different conclusion with respect to defendant's previous arguments, the impropriety of this statement may have been more egregious.

Further, we note that the trial judge agreed the statement was improper once it was read back by the court reporter, but when it was originally uttered he did not notice the statement, which ultimately occupied a single line from an extensive closing argument spanning sixty-nine pages of the record. *See Young*, 291 N.C. at 573, 231 S.E.2d at 583 (noting that the prosecutor's statement at issue "comprises only a few lines from forty-one pages in the record devoted to the closing arguments for the State"). As the trial court stated when offering to give a specific curative instruction, "If you want me to tell them to disregard that, I'll be glad to tell them that. I didn't catch it. I'm not sure how many of them caught it." This excerpt supports the trial court's discretionary ruling relating to the effect the statement may have had on the jury. Moreover, in addition to offering to give a specific curative instruction, the trial court gave a general curative instruction.

Additionally, the evidence against defendant was overwhelming. *See State v. Huey*, 370 N.C. 174, 181, 804 S.E.2d 464, 470 (2017) ("When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error." (citing *State v. Sexton*, 336 N.C. 321,

363-64, 444 S.E.2d 879, 903, *cert. denied*, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), *grant of postconviction relief aff'd*, 352 N.C. 336, 532 S.E.2d 179 (2000))). This evidence included, *inter alia*: defendant's initial denial to police of knowing Shaniya or being involved in her disappearance until confronted by photos from the hotel video cameras; the eyewitness and video evidence, as well as defendant's trial stipulation, of defendant taking Shaniya from Sleepy Hollow to the Comfort Suites and leaving the hotel with her; the small blanket that was discovered in the trash can and contained feces, blood, Shaniya's hair, and defendant's pubic hair; the DNA evidence of defendant's pubic hair on the hotel comforter; the cell phone information showing that defendant was near the location where the body was found and contradicting his story of receiving anonymous instructions and taking Shaniya to the dry cleaning establishment in Fayetteville; the soil and metal fragment recovered from defendant's car that was uniquely consistent with the location where Shaniya's body was found; defendant's apparent attempt to kill himself after being confronted with the evidence against him; and the fact that the police received information on where to search for Shaniya from attorneys who were representing defendant. In light of the foregoing reasons, and affording "great deference" to the trial judge "since he is in a far better position than an appellate court to determine the effect of any such error on the jury," *Thomas*, 350 N.C. at 341, 514 S.E.2d at 502 (citing *King*, 343 N.C. at 44, 468 S.E.2d at 242), we conclude that the trial judge did not abuse his discretion in denying defendant's motions for a mistrial based upon the improper remark.

Jury Instruction for Sex Offense and (e)(5) Aggravating Circumstance

[10] Defendant next argues that the trial court erred in the guilt-innocence proceeding by instructing the jury that it could find defendant guilty of sexual offense of a child if it found either vaginal or anal penetration because the State failed to present any evidence of anal penetration and because "it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (citing *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987)). For the same reasons, defendant contends that the trial court erred in the sentencing proceeding by instructing the jury that it could find the (e)(5) aggravating circumstance that the "capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of a sexual offense with a child." We disagree.

"A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the

evidence." *State v. Sweat*, 366 N.C. 79, 89, 727 S.E.2d 691, 698 (2012) (quoting *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973)). Before a particular charge is submitted to the jury, "the trial court must find substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator of the offense." *State v. Williams*, 308 N.C. 47, 64, 301 S.E.2d 335, 346 (citing *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *cert. denied*, 464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 177 (1983). In determining whether there is sufficient evidence to support every element of the offense charged, "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117 (citations omitted). Similarly, in the sentencing proceeding, "[i]n determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom." *State v. Bell*, 359 N.C. 1, 32, 603 S.E.2d 93, 114 (2004) (quoting *State v. Anthony*, 354 N.C. 372, 434, 555 S.E.2d 557, 596 (2001), *cert. denied*, 536 U.S. 930, 122 S. Ct. 2605, 153 L. Ed. 2d 791 (2002)), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005).

Defendant asserts that the evidence of anal penetration was insufficient under our decision in *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987). There the defendant was convicted of first-degree sexual offense based upon a theory of anal penetration. *Id.* at 89-90, 352 S.E.2d at 425, 427. The only evidence of anal penetration was the seven-year-old victim's testimony that the defendant "put his penis in the back of me." *Id.* at 86, 90, 352 S.E.2d at 425, 427. Additionally, the physician who had examined the victim, when asked about evidence of "sexual intercourse anally," testified that there was "[n]one at all." *Id.* at 90, 352 S.E.2d at 427. We reversed the defendant's conviction, concluding that:

> Given the ambiguity of [the victim's] testimony as to anal intercourse, and absent corroborative evidence (such as physiological or demonstrative evidence) that anal intercourse occurred, we hold that as a matter of law the evidence was insufficient to support a verdict, and the charge of first degree sexual offense should not have been submitted to the jury.

Id. at 90, 352 S.E.2d at 427. Defendant argues that *Hicks* is controlling here because while the autopsy revealed injuries to Shaniya's vaginal

area, there was "no evidence of rectal injury;"[12] however, defendant's reliance upon *Hicks* is misplaced.

As an initial matter, we note that evidence of an apparent injury is not dispositive on the issue of penetration. *See, e.g.*, *State v. Smith*, 315 N.C. 76, 102, 337 S.E.2d 833, 850 (1985) (stating that "no medical evidence of penetration, such as bruising or tearing, is required to support" a conviction for first-degree sexual offense); *State v. Norman*, 196 N.C. App. 779, 782, 675 S.E.2d 395, 398 (in which an expert explained that the absence of anal damage does not mean sexual assault did not occur "because the anal area was meant to stretch without tearing"), *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 382 (2009). More importantly, while the autopsy revealed no apparent injury, here there was sufficient other evidence that was lacking in *Hicks*. In this case, a Kastle-Meyer or phenolphthalein test, which is a test used to give the indication of whether blood is present on an item, indicated the presence of blood in Shaniya's anus. This chemical analysis also revealed a positive indication for the presence of blood in the crotch area of Shaniya's panties, as well on the bottom rear portion of Shaniya's shirt. Additionally, there was the circumstantial evidence on the rail and steps of the trailer of feces which had not been present the previous night. Further, in a nearby trash can, police discovered a child's blanket that had previously been in the living room of the trailer and that also contained feces, as well as blood, Shaniya's hair, and defendant's pubic hair. This trash can was located across the street from the Davis residence and in close proximity to where defendant had parked his car the previous night—after he had texted multiple women and driven to the trailer park with the apparent hope of connecting with one of them. We hold that this evidence, taken in the light most favorable to the State, was sufficient to submit to the jury the issue of defendant's guilt of sexual offense, as well as the (e)(5) aggravating circumstance related to a sexual offense, based upon a theory of anal penetration. Defendant's arguments are overruled.

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12. Defendant also argues that the State's evidence failed to reveal any semen, spermatozoa, or male DNA on the rectal swabs, nor was any found on Shaniya's panties. We note that there was expert testimony from a DNA expert, stating that the absence of DNA was not unexpected because DNA begins to degrade or break down over time and that beyond a 72 hour window it becomes more and more likely that it will not be recoverable. Special Agent Hughes also testified that environmental conditions can affect how quickly DNA breaks down. Here Shaniya was missing for over six days.

Voluntariness of Defendant's Statements to Police

[11] Defendant next argues that the trial court erred in denying his motion to suppress statements he made during his interview with police on 12 November 2009.[13] This argument is without merit.

"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." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878 (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). We review conclusions of law de novo. *Id.* at 168, 712 S.E.2d at 878 (citing *McCollum*, 334 N.C. at 237, 433 S.E.2d at 160).

While defendant's primary contention in the trial court was that he was subjected to custodial interrogation without the requisite *Miranda* warnings, he has abandoned that argument on appeal and instead contends solely that his statements were not voluntarily made, rendering their admission into evidence a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. The test for voluntariness is whether, under the totality of the circumstances, "the confession [is] the product of an essentially free and unconstrained choice by its maker," in which event it is admissible, or instead whether a defendant's "will has been overborne and his capacity for self-determination critically impaired," in which event "the use of his confession offends due process." *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037, 1057-58 (1961) (citing *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S. Ct. 735, 741, 5 L. Ed. 2d 760, 768 (1961)); *see also State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("The test for voluntariness in North Carolina is the same as the federal test." (citing *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983),

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13. Defendant also argues that certain evidence of his conduct—specifically that, during a break in the interrogation, he twice put a key into a wall electrical socket—should also have been inadmissible as "fruit of the involuntary statements." Defendant, however, did not challenge the admission of this conduct in the trial court and raises this issue for the first time on appeal. Accordingly, "[d]efendant has failed to properly preserve this issue because of his failure to raise it before the trial court." *State v. Gainey*, 355 N.C. 73, 100, 558 S.E.2d 463, 480 (first citing N.C. R. App. P. 10(b)(1); then citing *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)), *cert. denied*, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002). Further, defendant has not requested plain error review of this issue. *See* N.C. R. App. P. 10(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

judgment vacated and remanded, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 133 (1987), *aff'd on remand*, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110, 109 S. Ct. 3165, 104 L. Ed. 2d 1027 (1989))).

According to defendant, despite his initial denials to police that he was involved in the disappearance of Shaniya, which demonstrated his will not to make a statement, the detectives made promises, threats, and other coercive comments that overcame defendant's will after fifty-four minutes and caused him to make certain statements, including his admission to taking Shaniya from Sleepy Hollow to the Comfort Suites as well as his story about receiving instructions on his telephone from an unnamed third party. Defendant contends that the trial court erred by finding that the investigating officers did not make any promises or threats and by concluding that his statements were voluntarily made. We need not address these contentions, however, because, as the State argues, even if defendant was able to establish any error by the trial court in admitting these statements, such error would be harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2017) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

While a confession is prejudicial because it is the "best evidence" of a defendant's guilt, *State v. Fox*, 274 N.C. 277, 289, 163 S.E.2d 492, 501 (1968), defendant did not confess to murder or sexual assault. On the contrary, even after the point at which defendant's will was purportedly overborne, he denied causing any harm to Shaniya. Defendant's sole admission was that he had taken Shaniya from Sleepy Hollow to the Comfort Suites—a fact to which he stipulated at trial and that he does not dispute on appeal.

Any prejudice caused by the admission of defendant's statements would be limited to the effect on his credibility. For example, the State was able to present evidence of defendant's phone records and cellular location data that tended to disprove defendant's story about receiving instructions on his phone from an unnamed third party to take Shaniya to a dry cleaning establishment at the corner of Country Club Drive and Ramsey Street in Fayetteville. Further, towards the end of the interview with police, defendant denied making his earlier statements, which would both contradict his earlier statements and also his stipulation at trial. Yet, this was not the only evidence tending to damage defendant's credibility. For instance, defendant's suppression argument would have no effect on the admissibility of his statements made before the point at

which he contends his will was overborne, including his various denials of being at Brenda Davis's trailer, of seeing Shaniya or even knowing her, of having Shaniya in his car, of taking her to the hotel in Sanford, and of being the person seen on video recordings checking into the hotel under defendant's name and with his identification. Similarly, there was the evidence that defendant had told both of the clerks at the Comfort Suites that he was traveling with his daughter and taking her to her mother in Virginia. Given the overwhelming evidence of defendant's guilt presented at trial, we conclude that any conceivable effect on defendant's credibility caused by the admission of his statements would be harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) ("Significantly, this Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citing *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982))).

Racial Justice Act Hearing

[12] Defendant next argues that the trial court erred in denying his motion under the Racial Justice Act to prohibit the State from seeking the death penalty without holding an evidentiary hearing.

The Racial Justice Act (RJA) became effective on 11 August 2009 and provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C.G.S. § 15A-2010 (2009); Act of Aug. 6, 2009, ch. 464, 2009 N.C. Sess. Laws 1213. The RJA implemented a hearing procedure authorizing a defendant to raise an RJA claim either at the Rule 24 pretrial conference or in postconviction proceedings. N.C.G.S. § 15A-2012 (2009); Ch. 464, sec. 1, 2009 N.C. Sess. Laws at 1214-15. The RJA provided, in pertinent part:

> (a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.
>
> (1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction

proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.

(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.

N.C.G.S. § 15A-2012; Ch. 464, sec. 1, 2009 N.C. Sess. Laws at 1214-15. The RJA was amended in 2012, *see* Act of June 21, 2012, ch. 136, secs. 3-4, 2012 N.C. Sess. Laws (Reg. Sess. 2012) 471, 471-73, and then repealed in its entirety in 2013, *see* Act of June 13, 2013, ch. 154, sec. 5, 2013 N.C. Sess. Laws 368, 372.

Defendant contends that although the RJA was amended, and ultimately repealed, the ex post facto clauses of the United States and North Carolina Constitutions, the Due Process Clause of the Fourteenth Amendment, Article I, Section 19 of the North Carolina Constitution, and North Carolina common law bar the application of the amended RJA or the repeal of the RJA to his rights under the original RJA. Further, defendant argues that despite the mandatory language of the original RJA that "[t]he court *shall* schedule a hearing on the claim and *shall* prescribe a time for the submission of evidence by both parties," N.C.G.S. § 15A-2012(a)(2) (2009) (emphases added), the trial court erroneously denied his RJA motion without holding an evidentiary hearing.

Yet, assuming *arguendo* that any version of the RJA applies to defendant, he neglects to note that he himself did not follow the language of section 15A-2012(a)(1), which mandates that "[t]he claim *shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts* or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes." *Id.* § 2012(a)(1) (2009) (emphasis added). Here defendant did not raise his RJA claim at the Rule 24 conference. Notably, at the Rule 24 conference, the trial court twice asked defendant whether he wanted to be heard, and on both occasions defendant stated that there was nothing to be offered for defendant. Defendant cannot complain of the trial court's failure to strictly adhere to the RJA's pretrial statutory procedures where he himself failed to follow those procedures.

We observe that the RJA authorized a defendant to raise an RJA claim at the Rule 24 pretrial conference "or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes." *Id.* Accordingly, while we express no opinion on the substance of any rights or claims defendant may have under any version of the RJA, our

conclusion here is without prejudice to defendant's ability to raise any such claim in postconviction proceedings in the form of a motion for appropriate relief.

Improper Remarks in Closing Arguments at Sentencing Proceeding

[13] Defendant next argues that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument in the sentencing proceeding. We disagree.

Defendant takes exception to two statements made by prosecutors during the State's closing argument which refer to his decision not to present mitigating evidence or closing arguments. First, Assistant District Attorney Cox stated:

> Do not let the actions sway or cause you to sympathize with his course of action in this sentencing phase about argument or evidence -- do not let it manipulate you into feeling sympathy for the defendant. The judge will instruct you that you're not to take that into consideration. Do not let it sway you.

Shortly afterward, District Attorney West stated:

> Now, I ask you, as Ms. Cox did -- we do not know why the defendant has conducted himself in the sentencing hearing as he has; but, I ask you to follow the law when you go through the process. It may be to invoke sympathy. It may be a simple act of defiance, or it may be some type of manipulation. Whatever the reason, I ask you to go through this process and make your decision based on the facts and the law in this particular case.

According to defendant, the remarks were grossly improper because they expressed personal opinions, based solely on speculation and without support in the record, which attributed improper motives to defendant's decision not to present mitigating evidence or give closing arguments at the sentencing proceeding. Defendant did not object on either occasion.

"Where there is no objection, 'the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial.' " *State v. Gaines*, 345 N.C. 647, 673, 483 S.E.2d 396, 412 (quoting *State v. Alford*,

339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995)), *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

We conclude that there was no gross impropriety in the prosecutors' remarks such that the trial court was required to intervene *ex mero motu*. We first note that it was not impermissible for the prosecutors here to comment on defendant's lack of mitigating evidence. *See State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370 (1994)[14] ("It is well established that although the defendant's failure to take the stand and deny the charges against him may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument." (first citing *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993); then citing *State v. Young*, 317 N.C. 396, 415, 346 S.E.2d 626, 637 (1986); then citing *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986); and then citing *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977))); *see also State v. Brown*, 320 N.C. 179, 204-06, 358 S.E.2d 1, 18-19 (1987) (finding no gross impropriety in prosecutor's arguments during capital sentencing proceeding concerning the defendant's failure to produce siblings who could testify on his behalf), *cert. denied*, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987). Further, the thrust of both prosecutors' arguments was a simple admonition to the jury to make its decision based on the facts and the law presented in the case. To the extent that there was any impropriety in the prosecutors' suggestions that defendant's decision not to present mitigating evidence or give closing arguments was an "act of defiance" or a "manipulation" to garner sympathy, we conclude that these comments were not "so prejudicial and grossly improper as to interfere with defendant's right to a fair trial." *Gaines*, 345 N.C. at 673, 483 S.E.2d at 412 (quoting *Alford*, 339 N.C. at 571, 453 S.E.2d at 516).

Preservation Issues

Defendant argues that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution, and that North Carolina's capital sentencing scheme is arbitrary, vague, and overbroad. Defendant does not characterize this assertion as a preservation issue, but "we treat the assigned error as such in light of our numerous decisions that

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14. In February 2010, a three judge panel of the North Carolina Innocence Inquiry Commission unanimously ruled that Taylor had been wrongly convicted in 1993.

have rejected a similar argument." *State v. Hurst*, 360 N.C. 181, 205, 624 S.E.2d 309, 326, *cert. denied*, 549 U.S. 875, 127 S. Ct. 186, 166 L. Ed. 2d 131 (2006). This Court has previously considered and rejected these arguments, and we decline to depart from our prior precedent. *See, e.g.*, *id.* at 205, 624 S.E.2d at 327 ("This Court has held that the North Carolina capital sentencing scheme is constitutional . . . ." (citing *State v. Powell*, 340 N.C. 674, 695, 459 S.E.2d 219, 230 (1995), *cert. denied*, 516 U.S. 1060, 116 S. Ct. 739, 133 L. Ed. 2d 688 (1996))); *see also State v. Maness*, 363 N.C. 261, 294, 677 S.E.2d 796, 816-17 (2009), *cert. denied*, 559 U.S. 1052, 130 S. Ct. 2349, 176 L. Ed. 2d 568 (2010); *State v. Duke*, 360 N.C. 110, 142, 623 S.E.2d 11, 32 (2005), *cert. denied*, 549 U.S. 855, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006); *State v. Garcia*, 358 N.C. 382, 424-25, 597 S.E.2d 724, 753 (2004), *cert. denied*, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005); *State v. Williams*, 304 N.C. 394, 409-11, 284 S.E.2d 437, 448 (1981), *cert. denied*, 456 U.S. 932, 102 S. Ct. 1985, 2 L. Ed. 2d 450 (1982); *State v. Barfield*, 298 N.C. 306, 343-54, 259 S.E.2d 510, 537-44 (1979), *cert. denied*, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137 (1980), *disavowed on other grounds*, *State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986).

Defendant raises five additional issues that he concedes have previously been decided by this Court contrary to his position: (1) the trial court erred by ordering defense counsel to defer to defendant's decision not to present mitigating evidence in the sentencing proceeding after finding an absolute impasse between defendant and defense counsel; (2) the trial court committed plain error under the Eighth and Fourteenth Amendments by instructing the jury that it could refuse to give effect to nonstatutory mitigating evidence if the jury deemed the evidence not to have mitigating value; (3) the trial court committed plain error by using the word "satisfies" in capital sentencing instructions to define defendant's burden of persuasion to prove mitigating circumstances; (4) the trial court committed plain error by instructing the jurors for Issues Three and Four that each juror "may" consider mitigating circumstances found in Issue Two; and (5) when charging the commission of murder that is punishable by death, the failure to allege aggravating circumstances in the short-form murder indictment is a jurisdictional defect under North Carolina law.

Having considered defendant's arguments, we see no reason to revisit or depart from our earlier holdings. *See State v. Grooms*, 353 N.C. 50, 84-86, 540 S.E.2d 713, 734-35 (2000) (holding that when the defendant and his counsel had reached an absolute impasse, the trial court properly ordered defense counsel to defer to defendant's wishes not to present

mitigating evidence and that this ruling did not deprive the defendant of effective assistance of counsel),[15] *cert. denied*, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001); *State v. Payne*, 337 N.C. 505, 533, 448 S.E.2d 93, 109 (1994) (finding no error in a sentencing instruction that "allowed the jury to decide that a non-statutory circumstance existed but that it had no mitigating value"), *cert. denied*, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995); *id.* at 531-33, 448 S.E.2d at 108-09 (holding that the use of the term "satisfy" to define a defendant's burden of proof for mitigating circumstances was not plain error); *State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-70 (opining that the trial court did not err in instructing the jurors for Issues Three and Four that each juror "may" consider mitigating circumstances found in Issue Two), *cert. denied*, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994); *see also State v. Wilkerson*, 363 N.C. 382, 435, 683 S.E.2d 174, 206 (2009) ("This Court has repeatedly held that short-form murder indictments satisfy the requirements of our state and federal constitutions." (citing *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003))), *cert. denied*, 559 U.S. 1074, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010).

Proportionality Review

[14] Finally, in accordance with our statutory responsibility, we consider whether the record supports the aggravating circumstances found by the jury, whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2017).

The jury found all five of the aggravating circumstances submitted for its consideration.[16] The jury found the existence of three aggravating

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15. Defendant asserts that the trial court's order prohibiting his counsel from presenting mitigating evidence deprived him of his Sixth Amendment right to effective assistance of counsel under *Cronic* in that it prevented "meaningful adversarial testing" of the State's penalty case. *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047, 80 L. Ed. 2d at 668. We note that while the Court in *Grooms* referenced *Strickland* in addressing and rejecting the ineffective assistance of counsel portion of the defendant's mitigating evidence argument, *Grooms*, 353 N.C. at 86, 540 S.E.2d at 735, the defendant there asserted violations of the Sixth Amendment right to counsel under both *Strickland* and *Cronic*.

16. Two statutory mitigating circumstances were submitted—that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6), and the catchall mitigating circumstance that any other circumstance arose from the evidence that any juror

circumstances under N.C.G.S. § 15A-2000(e)(3), namely, that in three separate instances defendant had been previously convicted of a felony involving the use of violence to another person. The jury found the existence of two additional aggravating circumstances under N.C.G.S. § 15A-2000(e)(5): first, that the capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of first degree kidnapping; and second, that the capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of a sexual offense with a child. After careful consideration, we conclude that the jury's finding of these circumstances beyond a reasonable doubt was fully supported by the evidence.

Defendant presents no argument that his sentence of death should be vacated because it "was imposed under the influence of passion, prejudice, or any other arbitrary factors," *id.* § 15A-2000(d)(2), and our careful review of the record and transcripts reveals nothing that would support such a ruling.

Last, we must determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* § 15A-2000(d)(2). "We consider all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison." *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (citing *State v. al-Bayyinah*, 359 N.C. 741, 760-61, 616 S.E.2d 500, 514 (2005), *cert. denied*, 547 U.S. 1076, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006)), *cert. denied*, 549 U.S. 960, 127 S. Ct. 396, 166 L. Ed. 2d 281 (2006). "Whether the death penalty is disproportionate 'ultimately rest[s] upon the "experienced judgments" of the members of this Court.' " *al-Bayyinah*, 359 N.C. at 761, 616 S.E.2d at 514 (alteration in original) (quoting *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994)).

This Court has held the death penalty to be disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 487-89, 573 S.E.2d 870, 897-99 (2002); *State v. Benson*, 323 N.C. 318, 328-29, 372 S.E.2d 517, 522-23

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deems to have mitigating value, *id.* § 15A-2000(f)(9)—but neither was found by the jury. At least one juror found the non-statutory mitigating circumstance that defendant's use of marijuana and or alcohol, and or cocaine affected his decision making, and at least one juror found the nonstatutory mitigating circumstance that defendant is a good father to his children and loves them. The jury found beyond a reasonable doubt that these mitigating circumstances were insufficient to outweigh the aggravating circumstances.

(1988); *State v. Stokes*, 319 N.C. 1, 19-27, 352 S.E.2d 653, 663-68 (1987); *State v. Rogers*, 316 N.C. 203, 234-37, 341 S.E.2d 713, 731-33 (1986), *overruled on other grounds by Gaines*, 345 N.C. at 676-77, 483 S.E.2d at 414, *and by State v. Vandiver*, 321 N.C. 570, 573, 364 S.E.2d 373, 375 (1988); *State v. Young*, 312 N.C. 669, 686-91, 325 S.E.2d 181, 192-94 (1985); *State v. Hill*, 311 N.C. 465, 475-79, 319 S.E.2d 163, 170-72 (1984); *State v. Bondurant*, 309 N.C. 674, 692-94, 309 S.E.2d 170, 181-83 (1983); and *State v. Jackson*, 309 N.C. 26, 45-47, 305 S.E.2d 703, 716-18 (1983). We conclude that this case is not substantially similar to any of those cases.

Here defendant kidnapped a five-year-old child from her home and sexually assaulted her before strangling her and discarding her body under a log in a remote area used for field dressing deer carcasses. We note that this Court "ha[s] never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted." *State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87 (citing *State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994), *cert. denied*, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995)), *cert. denied*, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996). Further, "[t]his Court has deemed the (e)(3) aggravating circumstance," of which the jury here found three separate instances, "standing alone, to be sufficient to sustain a sentence of death." *al-Bayyinah*, 359 N.C. at 762, 616 S.E.2d at 515 (citing *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995)). Similarly, we have held that the (e)(5) aggravating circumstance, of which the jury here found two separate instances based upon the commission, or flight after commission of, kidnapping and sex offense, to be sufficient to affirm a sentence of death. *See State v. Zuniga*, 320 N.C. 233, 274-75, 357 S.E.2d 898, 923-24, *cert. denied*, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987). Moreover, the jury found defendant guilty of both felony murder and first-degree murder committed with malice, premeditation, and deliberation. While a conviction based solely upon felony murder is punishable by a sentence of death, "a finding of premeditation and deliberation indicates a more calculated and cold-blooded crime for which the death penalty is more often appropriate." *State v. Phillips*, 365 N.C. 103, 150, 711 S.E.2d 122, 154 (2011) (quoting *Taylor*, 362 N.C. at 563, 669 S.E.2d at 276 (internal quotation marks omitted)), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012).

In comparing defendant's case with those in which this Court has found the death penalty to be proportionate, *al-Bayyinah*, 359 N.C. at 762, 616 S.E.2d at 515, we conclude that defendant's case is more

analogous to these cases. *See*, *e.g.*, *State v. Lane*, 365 N.C. 7, 39-40, 707 S.E.2d 210, 230 (holding a sentence of death proportionate when the "defendant confessed to taking advantage of a trusting five-year-old child, then raping and sodomizing her before putting her, while still alive, in a garbage bag sealed with duct tape, wrapping her in a tarp, and discarding her body in a creek"), *cert. denied*, 565 U.S. 1081, 132 S. Ct. 816, 181 L. Ed. 2d 529 (2011).

Conclusion

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

NO ERROR.

STATE OF NORTH CAROLINA
v.
JUAN ANTONIA MILLER

No. 2PA17

Filed 8 June 2018

Search and Seizure—appeal of admissibility of evidence—no motion to suppress before or at trial—complete waiver of review on direct appeal

In a case of first impression, where defendant did not move to suppress—before or at trial—evidence of cocaine found in his pocket during a traffic stop, but instead argued for the first time on appeal that the seizure of the cocaine resulted from Fourth Amendment violations, the Supreme Court held that the Court of Appeals erred by conducting plain error review and concluding that the trial court committed plain error by admitting evidence of the cocaine. Defendant's Fourth Amendment claims were not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress the evidence of the cocaine before or at trial.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d

374 (2016), ordering that defendant receive a new trial after appeal from a judgment entered on 4 December 2015 by Judge Eric C. Morgan in Superior Court, Guilford County. Heard in the Supreme Court on 7 February 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz and John G. Batherson, Special Deputy Attorneys General, for the State-appellant.

Jason Christopher Yoder for defendant-appellee.

Southern Coalition for Social Justice, by Ian A. Mance and Ivy A. Johnson, for The Beloved Community Center of Greensboro, amicus curiae.

MARTIN, Chief Justice.

During a traffic stop, Officer H.B. Harris of the Greensboro Police Department found cocaine in defendant's coat pocket. Defendant did not move to suppress evidence of the cocaine before or at trial, but instead argued for the first time on appeal that the seizure of the cocaine resulted from various Fourth Amendment violations. We hold that defendant's Fourth Amendment claims are not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress evidence of the cocaine before or at trial. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for additional proceedings.

Officer Harris pulled defendant over after a DMV records check indicated that the license plate number for the car that he was driving had been revoked due to unpaid insurance premiums. At the time of the traffic stop, Derick Sutton, the car's owner, was in the passenger's seat. After a brief conversation, Officer Harris asked Sutton and then defendant to step out of the car. Both men complied.

The parties dispute exactly what happened next, including whether defendant consented to be searched. But they do not dispute that Officer Harris ultimately searched defendant. When Officer Harris checked defendant's coat pocket, he found a bag of white powder that was later confirmed to be cocaine and presented as Exhibit 1 at trial. Officer Harris was wearing a body camera that was recording video footage during this traffic stop.

Defendant did not move in limine to suppress evidence of the cocaine, even when the trial court specifically asked if there were pretrial matters to address. Nor did defendant object to the State's use of the cocaine evidence at any point *during* his trial, either when Officer Harris testified about finding cocaine in his pocket or when the cocaine itself was introduced as evidence. Defendant argued to the Court of Appeals that the trial court "plainly erred" by "admitting the cocaine and testimony about the cocaine," and that the seizure of the cocaine resulted from various Fourth Amendment violations. Defendant also argued that his trial counsel was ineffective for not moving to suppress evidence of the cocaine.

Although the Court of Appeals acknowledged that "footage from an officer's body camera may not reveal the totality of the circumstances," *State v. Miller*, ___ N.C. App. ___, ___ n.1, 795 S.E.2d 374, 376 n.1 (2016), it nonetheless considered the evidence that was presented at trial, including Officer Harris' body camera footage, and conducted plain error review, *see id.* at ___, 795 S.E.2d at 376-79. The Court of Appeals determined that Officer Harris unconstitutionally extended the traffic stop and that, even if Officer Harris had not unlawfully extended the stop, defendant's consent to the search of his person was not valid. *Id.* at ___, 795 S.E.2d at 378-79. In the course of its analysis, the Court of Appeals made determinations about the credibility of Officer Harris' testimony. *See id.*

The Court of Appeals ultimately concluded that the trial court committed plain error by admitting evidence of the cocaine. *Id.* at ___, 795 S.E.2d at 376-79. Because the Court of Appeals ordered a new trial based on defendant's Fourth Amendment claims, it did not reach defendant's ineffective assistance of counsel claim. *Id.* at ___, 795 S.E.2d at 379. The State petitioned this Court for discretionary review of two issues: whether defendant's Fourth Amendment claims were susceptible to plain error review and, if so, whether the Court of Appeals correctly found plain error. We allowed review of both issues.

This Court adopted plain error review in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). As a general rule, "plain error review is available in criminal appeals for challenges to jury instructions and evidentiary issues." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citations omitted) (first citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378; and then citing *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660 (2001)). Even after adopting plain error review, however, we have continued to indicate that the failure to move

to suppress evidence when required by statute constitutes a waiver of those claims on appeal. *See*, *e.g.*, *State v. Hucks*, 332 N.C. 650, 652-53, 422 S.E.2d 711, 713 (1992); *State v. Maccia*, 311 N.C. 222, 227-28, 316 S.E.2d 241, 244 (1984). But we have not squarely addressed whether plain error review is available when a defendant has not moved to suppress. *See*, *e.g.*, *State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 354, *cert. denied*, 540 U.S. 971, 124 S. Ct. 442 (2003). This issue is therefore one of first impression for this Court.

For guidance, we first turn to the statutory framework that governs the suppression of unlawfully obtained evidence in our trial courts. N.C.G.S. § 15A-974(a)(1) states that, "[u]pon timely motion, evidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina." And N.C.G.S. § 15A-979(d) specifies that "[a] motion to suppress evidence made pursuant to this Article is the *exclusive* method of challenging the admissibility of evidence" on constitutional grounds. (Emphasis added.) A defendant generally "may move to suppress evidence only prior to trial," N.C.G.S. § 15A-975(a) (2017), subject to a few, narrow exceptions that permit a defendant to move during trial, *see id.* § 15A-975(b), (c) (2017).

In other words, the governing statutory framework requires a defendant to move to suppress at *some* point during the proceedings of his criminal trial. Whether he moves to suppress before trial or instead moves to suppress during trial because an exception to the pretrial motion requirement applies, a defendant cannot move to suppress for the first time *after* trial. By raising his Fourth Amendment arguments for the first time on appeal, however, that is effectively what defendant has done here. When a defendant files a motion to suppress before or at trial in a manner that is consistent with N.C.G.S. § 15A-975, that motion gives rise to a suppression hearing and hence to an evidentiary record pertaining to that defendant's suppression arguments. But when a defendant, such as defendant here, does *not* file a motion to suppress at the trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all.

To find plain error, an appellate court must determine that an error occurred at trial. *See*, *e.g.*, *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). The defendant, additionally, must demonstrate that the error was "fundamental"—meaning that the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."

State v. Grice, 367 N.C. 753, 764, 767 S.E.2d 312, 320-21 (alteration in original) (quoting *State v. Lawrence*, 365 N.C. 506, 518-19, 723 S.E.2d 326, 334-35 (2012)), *cert. denied*, 576 U.S. ___, 135 S. Ct. 2846 (2015). But here, considering the incomplete record and the nature of defendant's claims, our appellate courts cannot conduct appellate review to determine whether the Fourth Amendment required suppression. Defendant asked the Court of Appeals to review the length of an officer's stop to determine whether the officer unnecessarily prolonged it, and to review whether defendant voluntarily consented to a search that resulted in the discovery of incriminating evidence. Fact-intensive Fourth Amendment claims like these require an evidentiary record developed at a suppression hearing. Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments.

When a defendant does not move to suppress, moreover, the State does not get the opportunity to develop a record pertaining to the defendant's Fourth Amendment claims. Developing a record is one of the main purposes of a suppression hearing. At a suppression hearing, both the defendant and the State can proffer testimony and any other admissible evidence that they deem relevant to the trial court's suppression determination. In this case, though, the trial court did not conduct a suppression hearing because defendant never moved to suppress evidence of the cocaine. And because no suppression hearing took place, we do not know whether the State would have produced additional evidence at a suppression hearing, or, if the State had done so, what that evidence would have been. *Cf. Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S. Ct. 1161, 1163 (1969) ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."). To allow plain error review in a case like this one, therefore, "would 'penalize the [g]overnment for failing to introduce evidence on probable cause for arrest [or other matters bearing on the Fourth Amendment claim] when defendant's failure to raise an objection before or during trial seemed to make such a showing unnecessary.' " 6 Wayne R. LaFave, *Search and Seizure* § 11.7(e), at 584 (5th ed. 2012) (alteration in original) (quoting *United States v. Meadows*, 523 F.2d 365, 368 (5th Cir. 1975), *cert. denied*, 424 U.S. 970, 96 S. Ct. 1469 (1976)).

The Court of Appeals' decision in this case illustrates the problem with conducting plain error review on an incomplete record. Relying primarily on *Rodriguez v. United States*, 575 U.S. ___, 135 S. Ct. 1609 (2015), the Court of Appeals held that Officer Harris unconstitutionally

prolonged the traffic stop in question beyond the time needed to complete the stop's mission. *See Miller*, ___ N.C. App. at ___, 795 S.E.2d at 377-79. The Court of Appeals reviewed Officer Harris' body camera footage and then determined that Officer Harris did not have reasonable suspicion to extend the stop when he asked defendant and Sutton to get out of Sutton's car. *See id.* at ___, 795 S.E.2d at 378. To have reasonable suspicion, "an officer . . . must 'reasonably . . . conclude in light of his experience that criminal activity may be afoot,' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (ellipsis in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)), based on "specific and articulable facts" and "rational inferences from those facts," *id.* (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). But Officer Harris never testified at a suppression hearing in this case. As a result, he never gave testimony for the purpose of establishing that, among other things, he had reasonable suspicion to extend the stop. He may have observed something during the traffic stop that was not captured in his body camera footage and that he did not testify about during the guilt/innocence phase of the trial. If he had testified, his testimony may have provided a basis—assuming for the sake of argument that he did not have one otherwise—for constitutionally extending the traffic stop. We just do not know, because no suppression hearing occurred.

If the Court of Appeals or this Court were to conduct plain error review of a suppression issue on an undeveloped record when resolution of that issue required a *developed* record, moreover, a defendant could unfairly use plain error review to his tactical advantage. For instance, a defendant might determine that his chances of winning a motion to suppress before or at trial are minimal because he thinks that, once all of the facts come out, he will likely lose. But if we were to allow plain error review when no motion to suppress is filed and hence no record is created, that same defendant might wait to raise a Fourth Amendment issue until appeal and take advantage of the undeveloped record—a record in which some or all of the important facts may never have been adduced—to claim plain error. *Cf. United States v. Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir.) ("If, at trial, the government assumes that a defendant will not seek to suppress certain evidence, the government may justifiably conclude that it need not introduce the quality or quantity of evidence needed otherwise to prevail."), *cert. denied*, 522 U.S. 926, 118 S. Ct. 325 (1997).

And the State would not have a good way of defending against this tactic. On the one hand, the State could try to present evidence at trial in an attempt to prove the legality of a search or seizure even when the

defendant did not move to suppress evidence derived from the search or seizure. But if the evidence pertinent to suppression were not relevant to the question of the defendant's guilt, then the State could be thwarted by rules that prohibit the admission of evidence not relevant to issues at trial. *See, e.g.*, N.C. R. Evid. 402. And even if the State were permitted to introduce the full range of evidence that pertained to suppression, it would have to expend prosecutorial resources presenting evidence not directly relevant to a defendant's guilt—evidence that supported only the legality of a search or seizure that the defendant may or may not later challenge on appeal. On the other hand, if the State chose not to present evidence supporting an unchallenged search or seizure, it could risk reversal on an undeveloped record under the plain error standard. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 86-91, 97 S. Ct. 2497, 2506-09 (1977) (using a similar rationale to explain why the lack of a contemporaneous objection required under state law creates a procedural bar to federal habeas review). If a defendant must move to suppress to keep from forfeiting even plain error review, however, the incentive for a defendant to underhandedly put the State in this position disappears.

Defendant fails to distinguish between cases like his, on the one hand, and cases in which a defendant has moved to suppress and both sides have fully litigated the suppression issue at the trial court stage, on the other. When a case falls into the latter category but the suppression issue is not preserved for some other reason, our appellate courts may still conduct plain error review. For example, in *State v. Grice*, the defendant moved to suppress evidence of marijuana plants, and the trial court held a suppression hearing on whether the plants had been obtained through an illegal search or seizure. *See* 367 N.C. at 754-55, 764, 767 S.E.2d at 314-15, 320. We conducted plain error review, rather than harmless error review, only because the defendant did not renew his objection to the introduction of the evidence at trial. *Id.* at 755, 764, 767 S.E.2d at 315, 320.

Similarly, in *State v. Bullock*, the defendant moved to suppress evidence of heroin found in the car that he was driving, and his Fourth Amendment claim was fully litigated at the trial court stage. *See* 370 N.C. at 256-57, 805 S.E.2d at 673. So there was a complete record on the suppression issue for our appellate courts to review. *See id.* at 258-61, 805 S.E.2d at 674-76. We thus reviewed video footage from the dash cam of the officer who had stopped the defendant, along with suppression hearing testimony from that same officer, to determine whether the trial court's findings of fact were supported by competent evidence. *See id.* at 260-61, 805 S.E.2d at 675-76. In a few instances, we also used facts that

we independently gleaned from our review of that video footage in our legal analysis to clarify and supplement the trial court's findings of fact. *See id.* at 261-63, 805 S.E.2d at 676-77. In other words, we used video footage for limited purposes after a suppression hearing had occurred and a full evidentiary record had been compiled. That is very different from using video footage to *substitute* for a suppression hearing and an evidentiary record, and making determinations about witness credibility in the process, which is what the Court of Appeals did here.

In sum, because defendant did not file a motion to suppress evidence of the cocaine in question, he deprived our appellate courts of the record needed to conduct plain error review. By doing so, he completely waived appellate review of his Fourth Amendment claims. Because we hold that the Court of Appeals should not have conducted plain error review in the first place, we do not need to address (and, based on our analysis, it would not be possible for us to address) the other issue before us—namely, whether the Court of Appeals reached the right conclusion in its plain error analysis. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's ineffective assistance of counsel claim.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
MARVIN EVERETTE MILLER, JR.

No. 217PA17

Filed 8 June 2018

Constitutional Law—Confrontation Clause—statements made by deceased victim—ongoing emergency—nontestimonial

Where the trial court admitted, through the testimony of a police officer, statements made by the murder victim approximately nine months before the murder during a domestic dispute with defendant (her estranged husband), the Court of Appeals erred by holding that admission of the statements violated the Confrontation Clause of the U.S. Constitution. The statements were nontestimonial. They occurred during the course of an ongoing emergency that resulted from defendant entering the victim's apartment, detaining her there, and physically assaulting her; and they led to the officer's decision to

enter the apartment to ensure that defendant had left and no longer posed a threat to the victim.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 696 (2017), vacating judgments entered on 8 April 2016 by Judge Edwin G. Wilson, Jr., in Superior Court, Guilford County, and remanding for further proceedings. On 17 August 2017, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 13 March 2018.

Joshua H. Stein, Attorney General, by David J. Adinolfi II, Special Deputy Attorney General, for the State-appellant/appellee.

Mark Montgomery for defendant-appellee/appellant.

ERVIN, Justice.

The issue before this Court in this case is whether the Court of Appeals erred by vacating the judgments entered by the trial court based upon defendant, Marvin Everette Miller, Jr.'s convictions for first-degree murder and attempted first-degree murder on the grounds that certain evidence had been admitted in violation of defendant's constitutional right to confront the State's witnesses against him. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgments.

On 31 August 2013, Lakeshia Wells and her boyfriend, Marcus Robinson, celebrated Ms. Wells's birthday with family and friends at the Shriners nightclub in Greensboro. At some point after 2:00 a.m. on 1 September 2013, Ms. Wells and Mr. Robinson returned to Ms. Wells's apartment on Bulla Street. After the couple entered Ms. Wells's bedroom and had sexual intercourse, Ms. Wells told Mr. Robinson that she had heard something and asked Mr. Robinson to investigate the source of the noise. Upon determining that nothing was amiss on the lower floor of the apartment, Mr. Robinson returned to the upper floor, where he saw an individual, whom he later identified as defendant, standing in the hallway holding a knife.[1]

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1. Investigating officers found blood and other items containing defendant's DNA in Ms. Wells's apartment during the course of the ensuing investigation.

After being seen by Mr. Robinson, defendant, who was Ms. Wells's estranged husband, entered Ms. Wells's bedroom, where an altercation occurred. As Mr. Robinson ran back downstairs in order to retrieve his cell phone and car keys, he was followed by defendant,[2] who cut Mr. Robinson's face before Mr. Robinson escaped through the back door while wearing only a tank top. Once he managed to get outside of Ms. Wells's apartment, Mr. Robinson called the police. Following the arrival of investigating officers, Mr. Robinson was transported to the hospital, where he was treated for his injuries.

Detective Benjamin Mitchell of the Greensboro Police Department responded to a call regarding a stabbing at a Bulla Street address at 3:28 a.m. on 1 September 2013. Upon encountering Mr. Robinson, Officer Mitchell learned that someone had broken into Ms. Wells's apartment, that the intruder had begun stabbing the occupants, and that investigating officers needed to check on Ms. Wells, who was apparently still inside the apartment. As he entered the apartment, Officer Mitchell did not observe any signs of a forcible intrusion; however, he did determine that "some type of disturbance had occurred in the kitchen." For that reason, Officer Mitchell and other investigating officers began to search the apartment for both intruders and Ms. Wells. Upon making his way to the second floor, Officer Mitchell discovered the dead body of Ms. Wells at the top of the stairs.

On 10 December 2012, approximately nine months before Ms. Wells was killed, Officer E.R. Kato of the Greensboro Police Department responded to a call at Ms. Wells's Bulla Street apartment relating to a domestic dispute. According to Officer Kato, Ms. Wells stated that she had been held in her apartment against her will for a period of two hours by her estranged husband. Although Officer Kato did not recall having observed any signs that Ms. Wells had sustained a physical injury, he noticed a tear and stress marks in the cotton shirt that Ms. Wells was wearing. At that point, Officer Kato accompanied Ms. Wells to her apartment and checked the premises to make sure that defendant had not remained at that location. Subsequently, defendant was charged with and convicted of domestic criminal trespass.

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2. Although defendant admitted that he had entered Ms. Wells's apartment and that he had stabbed Mr. Robinson, he claimed to have believed that Ms. Wells would be out of town, expressed surprise that Mr. Robinson was present in Ms. Wells's apartment, stated that he was enraged that both Ms. Wells and Mr. Robinson were naked, and asserted that Ms. Wells was "fine when [he] left."

On 4 November 2013, the Guilford County grand jury returned bills of indictment charging defendant with first-degree burglary, attempted first-degree murder, and first-degree murder. The charges against defendant came on for trial before the trial court and a jury at the 4 April 2016 criminal session of the Superior Court, Guilford County. On 8 April 2016, the jury returned verdicts acquitting defendant of first-degree burglary and first-degree murder on the basis of malice, premeditation, and deliberation and convicting defendant of attempted first-degree murder and first-degree murder on the basis of the felony murder rule using either first-degree burglary, attempted murder, or assault with a deadly weapon inflicting serious injury as the predicate felony. Based upon the jury's verdicts, the trial court arrested judgment in the case in which defendant had been convicted of attempted first-degree murder and entered a judgment sentencing defendant to a term of life imprisonment without the possibility of parole based upon defendant's first-degree murder conviction. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by overruling his confrontation-based objection to the introduction of Officer Kato's testimony concerning the statements that Ms. Wells made to him on 10 December 2012. According to defendant, the statements that Ms. Wells had made to Officer Kato were testimonial in nature given the absence of any ongoing emergency at the time those statements were made, citing *State v. Bodden*, 190 N.C. App. 505, 514, 661 S.E.2d 23, 28 (2008) (explaining that "[s]tatements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events that will be relevant later in a criminal prosecution"), *appeal dismissed and disc. rev. denied*, 363 N.C. 131, 675 S.E.2d 660, *cert. denied*, 558 U.S. 865, 130 S. Ct. 175, 175 L. Ed. 2d 111 (2009). In addition, defendant argued that the forfeiture doctrine did not extinguish defendant's confrontation rights given the absence of any evidence tending to show that defendant had killed Ms. Wells for the purpose of preventing her from testifying about the domestic criminal trespass case that resulted from the 10 December 2012 incident, citing *Giles v. California*, 554 U.S. 353, 361, 128 S. Ct. 2678, 2684, 171 L. Ed. 2d 488, 497 (2008) (explaining "that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying"). Finally, defendant asserted that the trial court had erred by failing to make findings of fact or conclusions of law in support of its decision to overrule

his objection to the challenged portion of Officer Kato's testimony, (citing *State v. Silva*, 304 N.C. 122, 136, 282 S.E.2d 449, 457-58 (1981)).[3]

The State, on the other hand, argued that Officer Kato's testimony concerning the statements that Ms. Wells made at the time of the 10 December 2012 incident stemmed from an informal conversation that occurred during an ongoing emergency arising from a domestic dispute between defendant and Ms. Wells, citing *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224, 237 (2006) (explaining that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" and "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"). According to the State, the nontestimonial nature of the challenged statements was established by Officer Kato's observations concerning the damage to Ms. Wells's clothing and Officer Kato's decision to "clear" Ms. Wells's apartment. In the State's view, a reviewing court must consider the degree of "informality of the situation and the interrogation" in deciding whether to treat challenged extra-judicial statements as either testimonial or nontestimonial, quoting *Michigan v. Bryant*, 562 U.S. 344, 377, 131 S. Ct. 1143, 1166, 179 L. Ed. 2d 93, 109 (2011), with the statements at issue in this case being informal rather than formal. Moreover, even if the statements that Ms. Wells made to Officer Kato were testimonial rather than nontestimonial in nature, defendant had previously had an opportunity to cross-examine Ms. Wells concerning those statements when the 10 December 2012 domestic criminal trespass charge came on for trial, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004) (explaining that, "[w]here testimonial evidence is at issue," "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination"). Finally, the State contends that defendant had forfeited his right to confront Ms. Wells by wrongfully killing her, citing

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3. In addition, defendant argued before the Court of Appeals that (1) the trial court had erred or committed plain error by instructing the jury that it should only consider the issue of his guilt of voluntary manslaughter in the event that it found defendant not guilty of either first-degree or second-degree murder and (2) that the trial court had erred by denying defendant's request for the delivery of an instruction defining the concept of a killing in the heat of passion in a situation involving spousal infidelity. As a result of its acceptance of defendant's confrontation-based claim, the Court of Appeals did not reach either of these instructional issues.

United States v. Jackson, 706 F.3d 264, 269 (4th Cir.) (explaining that "defendants might be tempted to murder, injure, or intimidate witnesses before trial and then invoke their constitutional right to confrontation to ensure that those witnesses' statements are never heard in court"), *cert. denied*, 569 U.S. 1024, 133 S. Ct. 2782, 186 L. Ed. 2d 229 (2013), with "[d]efendant's clear intent to prevent Ms. Wells from testifying at any subsequent case [being inferable] from defendant's action of fatally stabbing her in the heart."

After noting that defendant had properly preserved this issue purposes of appellate review, *State. Miller*, ___ N.C. App. ___, ___, 801 S.E.2d 696, 698 (2017), the Court of Appeals pointed out that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness," *id.* at __, 801 S.E.2d at 698 (citing *Bodden*, 190 N.C. App. at 513, 661 S.E.2d at 28). According to the Court of Appeals, the statements that Ms. Wells made to Officer Kato on 10 December 2012 were testimonial in nature because "there was no immediate threat or ongoing emergency when the officer spoke to [Ms.] Wells" given that Ms. Wells had reached a safe location by the time that she called for assistance. *Id.* at __, 801 S.E.2d at 698 (citing *State v. Lewis*, 361 N.C. 541, 547, 648 S.E.2d 824, 828-29 (2007)). In addition, the Court of Appeals concluded that the questions that Officer Kato posed to Ms. Wells "were focused on 'what happened' rather than 'what is happening.' " *Id.* at __, 801 S.E.2d at 698 (quoting *Lewis*, 361 N.C. at 547, 648 S.E.2d at 829). The Court of Appeals rejected the State's contention that defendant had "had an opportunity to cross-examine [Ms.] Wells on these issues at an earlier trial for criminal domestic trespass," reasoning that it had no way to know if Ms. Wells "actually gave this testimony at the earlier trial because the record does not contain any transcripts or evidence from that proceeding," *id.* at ___, 801 S.E.2d at 699, and held that defendant had not forfeited his right to confront Ms. Wells despite having killed her on the theory that "forfeiture [by wrongdoing] applies 'only when the defendant engaged in conduct *designed* to prevent the witness from testifying,' " with the record being devoid of any indication that defendant killed Ms. Wells for that purpose. *Id.* at __, 801 S.E.2d at 699 (quoting *Giles*, 554 U.S. at 359, 128 S. Ct. at 2683, 171 L. Ed. 2d at 496-98). Finally, the Court of Appeals held that the State's failure to argue that the admission of the challenged statements constituted harmless error precluded it from determining that the admission of Officer Kato's testimony concerning Ms. Wells's statements was non-prejudicial. Nonetheless, the Court of Appeals observed that, in light of the presence

of overwhelming evidence of defendant's guilt, the disputed testimony "almost certainly played little if any role in the jury's decision to convict." *Id.* at ___, 801 S.E.2d at 700 (first citing N.C.G.S. § 15A-1443(b) (2017); then citing *State v. Bell*, 359 N.C. 1, 36, 603 S.E.2d 93, 116 (2004), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005)). As a result, the Court of Appeals vacated the trial court's judgments and remanded this case to the Superior Court, Guilford County for further proceedings. *Id.* at ___, 801 S.E.2d at 700. We granted requests by both the State and defendant for discretionary review.

In seeking to persuade us to overturn the Court of Appeals' decision with respect to the admissibility of the challenged portion of Officer Kato's testimony, the State argues that the Court of Appeals erred by overlooking evidence that Ms. Wells's statements were made during an "ongoing emergency" that rendered those statements nontestimonial in nature. According to the State, a reviewing court must ascertain whether challenged evidence is testimonial or nontestimonial by determining "the primary purpose of the interrogation," quoting *Bryant*, 562 U.S. at 359, 131 S. Ct. at 1156, 179 L. Ed. 2d at 107, with the "primary purpose" inquiry to be focused upon (1) whether the witness "was speaking about events as they were actually happening, rather than describ[ing] past events"; (2) whether a reasonable person, similarly situated to the witness, would have believed that the declarant was "facing an ongoing emergency"; (3) whether "the nature of what was asked and answered" "was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past"; and (4) the level of formality at which the questioning was conducted, quoting *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 240 (internal quotation marks omitted). In the State's view, a reasonable person would conclude that Officer Kato's questions to Ms. Wells were intended to ascertain defendant's current location and whether defendant posed a continuing threat to Ms. Wells on the theory that Officer Kato questioned Ms. Wells in an informal manner in the street adjacent to her apartment and then in her apartment, rather than in a police station, citing, *inter alia*, *Bell*, 359 N.C. 1, 603 S.E.2d 93. According to the State, at the time that Ms. Wells made the challenged statements to Officer Kato, neither participant in the conversation knew defendant's location; the danger that Ms. Wells faced had not obviously abated; and Ms. Wells was engaged in "the provision of information enabling officers immediately to end a threatening situation," quoting *Lewis*, 361 N.C. at 548, 648 S.E.2d at 829. Next, the State contends that the Court of Appeals' requirement that defendant have actually cross-examined Ms. Wells as a precondition for the admission of

the challenged statements reflects an overly restrictive understanding of the relevant confrontation-related jurisprudence, with an opportunity to cross-examine the absent witness being all that is required by the relevant decisions of the United States Supreme Court and this Court, first citing *Bell*, 359 N.C. at 34-35, 603 S.E.2d at 116 (providing that "the Confrontation Clause bars out-of-court testimony by a witness unless the witness was unavailable and the defendant had a prior opportunity to cross-examine him, regardless of whether the trial court deems the statements reliable"); then citing *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203 (providing, as we have already noted, that, "[w]here testimonial evidence is at issue," "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination"). As a result of the fact that Ms. Wells was present at defendant's domestic criminal trespass trial and was listed as a witness on defendant's arrest warrant, defendant had an opportunity to cross-examine Ms. Wells. Finally, the State contends that nothing in North Carolina law requires the State to make specific reference to "harmless error" in its appellate brief in order to obtain a finding of harmlessness, citing N.C.G.S. § 15A-1443(b) (2017) (providing that "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless"). In view of the fact that "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt," quoting *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citing *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982)), and the fact that the Court of Appeals acknowledged that the record contained overwhelming evidence of defendant's guilt, citing *Miller*, ___ N.C. App. at ___, 801 S.E.2d at 700, the Court of Appeals erred by failing to find that any error that the trial court might have committed by admitting the challenged portion of Officer Kato's testimony was non-prejudicial.

On the other hand, defendant argues that the Court of Appeals correctly found that the admission of Officer Kato's testimony concerning the statements that Ms. Wells made at the time of the 10 December 2012 domestic disturbance violated his confrontation rights. According to defendant, there was no ongoing emergency at the time that Ms. Wells made the challenged statements to Officer Kato. More specifically, defendant contends that, even though a statement that defendant was in Ms. Wells's apartment without permission would involve an ongoing event, her assertion that defendant had assaulted her and held her in her apartment involuntarily referred exclusively to past events that had no bearing upon Officer Kato's subsequent actions. In addition, defendant

contends that the Court of Appeals correctly determined that defendant had not had an opportunity to cross-examine Ms. Wells at defendant's domestic criminal trespass trial given the absence of any evidence that defendant had actually questioned Ms. Wells on that occasion. Finally, defendant argues that appellate courts regularly default defendants for failing to properly argue prejudice or plain error and that the State should be held to the same standard. Even if the Court elects to reach the harmless error issue, defendant contends that the evidence of his guilt of first-degree murder, as compared to voluntary manslaughter, was not overwhelming. As a result, defendant argues that the erroneous admission of Officer Kato's testimony concerning Ms. Wells's extrajudicial statements at the time of the 10 December 2012 domestic disturbance cannot be deemed harmless beyond a reasonable doubt.

Pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 23 of the Constitution of North Carolina, "a criminal defendant has the right to confront witnesses against him." *State v. Ray*, 336 N.C. 463, 468, 444 S.E.2d 918, 922 (1994). "The Confrontation Clause prohibits the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' " *State v. McKiver*, 369 N.C. 652, 655, 799 S.E.2d 851, 854 (2017) (quoting *Crawford*, 541 U.S. at 53-54, 124 S. Ct. at 1365, 158 L. Ed. 2d at 194 (2004)). "The Confrontation Clause does not, however, apply to nontestimonial statements." *Id.* at 655, 799 S.E. at 854 (citing *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 13 (2007)). As a result of the fact that " '[t]estimony' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,' " *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364, 158 L. Ed. 2d at 192 (third alteration in original) (quoting 2 N. Webster, An American Dictionary of the English Language (1828)), " 'testimonial' statements" typically include "*ex parte* in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; " 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' "; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *id.* at 51-52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193 (second ellipses in original) (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 747, 116 L. Ed. 2d 848, 865 (1992) (Thomas & Scalia, JJ., concurring in part and concurring in the judgment)). "Statements taken

by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193.

In *Davis v. Washington*, the United States Supreme Court clarified "which police interrogations produce testimony," 547 U.S. at 822, 126 S. Ct. at 2273, 165 L. Ed. 2d at 237, explaining that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," *id.* at 822, 126 S. Ct. at 2273, 165 L. Ed. 2d at 237. On the other hand, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," *id.* at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237. For that reason, "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are testimonial. *Id.* at 826, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240. In order to determine whether a particular statement is testimonial or nontestimonial in nature, the reviewing court must ascertain "the primary purpose of the interrogation." *Bryant*, 562 U.S. at 359, 131 S. Ct. at 1156, 179 L. Ed. 2d at 107 (2011) (quoting *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237).

The United States Supreme Court noted that the extrajudicial statement at issue in *Davis* was made by a declarant who "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events,' " *id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (brackets in original) (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 1990, 144 L. Ed. 2d 117, 135(1999) (plurality opinion)), while the declarant in *Crawford* was describing events that occurred hours before the challenged statements were made. In addition, the questions posed to the declarant in *Davis* were clearly intended to "elicit[ ] statements" necessary "to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240. Finally, the declarant whose statements were at issue in *Crawford* "was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of [the declarant's] answers," while the declarant whose statements were at issue in *Davis* provided "frantic answers . . . over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id.* at 827, 126 S. Ct. at 2277, 165 L. Ed. 2d at 240. According to the United States Supreme

Court, the extrajudicial statements at issue in *Crawford* were testimonial, while the extrajudicial statements at issue in *Davis* were not.

As we have previously noted, Officer Kato testified that he responded to a domestic dispute at Ms. Wells's address on 10 December 2012 and made initial contact with Ms. Wells at an unspecified location outside of her apartment. At that time, Ms. Wells told Officer Kato that she "was met by her . . . estranged husband, at approximately 12:00, 12:30, in her apartment, that he entered through an unlocked door, and that she was kept there against her will for a period of two hours." According to Officer Kato, Ms. Wells stated that, during this two-hour period, she and her estranged husband "argued" to such an extent that "[t]he argument became heated at one point," that the argument "escalated to a physical struggle as well," and that, "after [the argument] had deescalated to no longer being physical, she was able to exit the apartment and leave the area in her vehicle." After receiving this information from Ms. Wells, Officer Kato, accompanied by Ms. Wells, "entered the apartment to be sure that [defendant] was not still there, and checked the area." After discovering that defendant no longer occupied Ms. Wells's apartment, Officer Kato obtained a warrant for defendant's arrest charging him with criminal domestic trespass.

A careful review of the challenged portion of Officer Kato's testimony satisfies us that the statements that he described Ms. Wells as having made at the time of the 10 December 2012 domestic disturbance were nontestimonial, rather than testimonial, in nature.[4] As we understand the record, Ms. Wells made the challenged statements during the course of an ongoing emergency caused by defendant's entry into her apartment and defendant's decision to both detain Ms. Wells at that location and to physically assault her. Although Ms. Wells did describe certain events that had occurred before Officer Kato's arrival outside her apartment, the information that Ms. Wells provided to Officer Kato led to Officer Kato's decision to enter the apartment to ensure that defendant, whose current location was unknown, had departed and no longer posed a threat to Ms. Wells's safety. In light of that fact, the extrajudicial statements that Ms. Wells made to Officer Kato served more than

4. Although defendant asserts that the trial court also erred by failing to make findings and conclusions explaining the basis for its decision to overrule defendant's confrontation-based objection to the admission of Officer Kato's testimony concerning the extrajudicial statements that Ms. Wells made to him on 10 December 2012, he has not cited any authority requiring a trial court to make such findings and conclusions relating to an issue similar to the one before us in this case, and we know of none.

an information-gathering purpose. In addition, the discussion between Officer Kato and Ms. Wells was clearly informal and took place in an environment that cannot be reasonably described as "tranquil," *see Davis*, 547 U.S. at 827, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 240. Thus, the trial court did not err by overruling defendant's confrontation-based objection and allowing the admission of Officer Kato's testimony concerning the statements that Ms. Wells made to him at the time of the 10 December 2012 domestic disturbance.[5] As a result, we reverse the Court of Appeals' decision and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgments.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
AHMAD JAMIL NICHOLSON

No. 319A17

Filed 8 June 2018

Search and Seizure—objective, reasonable interpretation—robbery by back seat passenger

A police officer had reasonable suspicion of criminal activity to briefly detain defendant for questioning where: (1) it was 4:00 a.m.; (2) the vehicle was stopped in the road with no turn signal on; (3) there were only two people sitting in the car, one in the driver's seat and the other directly behind him in the back seat; (4) defendant (sitting behind the driver) appeared to be pulling some sort of toboggan or ski mask down over his face until he saw the officer and pushed it back up; (5) when the officer asked whether the occupants were okay, each said yes, but the driver made a hand motion at his neck area; (6) after the officer drove into the store parking lot

5. In view of the nontestimonial nature of the challenged statements, we need not address the validity of the Court of Appeals' determinations with respect whether defendant had an adequate opportunity to cross-examine Ms. Wells at his domestic criminal trespass trial or whether the Court of Appeals erred by refusing to find the admission of the challenged evidence concerning Ms. Wells's extrajudicial statements to have been harmless beyond a reasonable doubt.

and waited for an additional thirty seconds, the vehicle still did not move or display a turn signal; (7) after defendant got out of the car, the driver was edging forward and about to leave defendant, who he had just said was his brother, on the side of the road on a cold, wet night; (8) when the officer again asked whether everything was okay, the driver shook his head "no" while defendant said everything was fine; and (9) after the officer confronted defendant with the fact that the driver had shaken his head "no," the driver quickly stated that everything was okay. The Court of Appeals erroneously placed undue weight on the officer's subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would view them.

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. ___, 805 S.E.2d 348 (2017), finding prejudicial error after appeal from a judgment entered on 13 May 2016 by Judge John O. Craig III in Superior Court, Forsyth County, and granting defendant a new trial. Heard in the Supreme Court on 13 March 2018.

Joshua H. Stein, Attorney General, by John R. Green, Jr., Special Deputy Attorney General, for the State-appellant.

Narendra K. Ghosh for defendant-appellee.

HUDSON, Justice.

Here we consider whether a police officer's decision to briefly detain Defendant Ahmad Jamil Nicholson for questioning was supported by a reasonable suspicion of criminal activity. Because we conclude that it was, we reverse the decision of the Court of Appeals holding otherwise and reinstate defendant's conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

While on patrol at around 4:00 a.m. on 23 December 2015, Lieutenant Damien Marotz of the Kernersville Police Department noticed a car parked on West Mountain Street in a turn lane next to a gas station. The car had its headlights on but no turn signal blinking. As Lt. Marotz pulled his marked patrol vehicle up next to the car, he saw two men inside, one in the driver's seat and the other—later identified as defendant—in the seat directly behind the driver. The windows were down despite misting rain and a temperature in the 40s. As Lt. Marotz pulled alongside, he saw

defendant pulling down a hood or "toboggan-style mask of some kind . . . with the holes in the eyes." Defendant pulled it down to the bridge of his nose but then pushed it back up when he saw Lt. Marotz.

Lt. Marotz asked the two men whether everything was okay, and they responded that it was. The driver, Quentin Chavis, explained that the man in the back seat was his brother and they had been in an argument. Chavis said that the argument was over and that everything was okay; defendant agreed, saying, "Yes, Officer, everything's fine." Sensing that something was not quite right, however, Lt. Marotz again asked the pair whether they were okay, and they nodded to indicate that they were. Then the driver moved his hand near his neck, "scratching or doing something with his hand," but Lt. Marotz was unsure what this gesture meant.

Still feeling that something was amiss, Lt. Marotz drove into the gas station parking lot to observe the situation. After watching as Chavis's car remained immobile in the turn lane for another half a minute, Lt. Marotz got out of his patrol vehicle and started on foot toward the stopped car. Defendant then stepped out, and Chavis began to edge the car forward about two feet. Lt. Marotz asked Chavis, "Where are you going? Are you going to leave your brother just out here?" Chavis responded, "No. I'm just late for work. I've got to get to work." Lt. Marotz again asked whether everything was okay, and the two men said "yes," everything was fine. Although Chavis said "yes," he shook his head "no." This gesture prompted Lt. Marotz to say to defendant, "Well, your brother here in the driver's seat is shaking his head. He's telling me everything's not fine. Is everything fine or not? Is everything good?" Chavis quickly interjected, "No, Officer, everything's fine. I've just got to get to work." After Chavis again stressed that he was going to be late for his job, Lt. Marotz told him, "Okay. Go to work."

After Chavis drove away, defendant stated to Lt. Marotz, "The store's right here. Can I just walk to the store? Please sir?" to which Lt. Marotz responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?"[1] Defendant said that he had a knife with him that he carried for self-defense, but a frisk of his person by a backup officer who had just arrived did not reveal a weapon. After additional questioning, the officers learned defendant's identity from his ID card and told him he was "free to go."

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1. This is the point during the interaction at which the Court of Appeals assumed, without expressly deciding, that defendant was seized for Fourth Amendment purposes. *State v. Nicholson*, ___ N.C. App. ____, ___, 805 S.E.2d 348, 356.

Later that day, Chavis reported to police that defendant, who was not actually his brother, had been in the process of robbing him when Lt. Marotz pulled up. Chavis testified at trial that defendant had flagged him down while he (Chavis) was on his way to his early morning shift at FedEx and had requested a ride to the gas station. Once in the car, defendant held a knife to Chavis's throat and demanded money. Chavis handed over his debit card just before Lt. Marotz pulled up. Police later found a steak knife in the back seat of Chavis's vehicle. During a search of defendant's residence, police discovered a knife block containing steak knives that looked identical to the one found in Chavis's car, one of which was missing.

On 14 March 2016, the Forsyth County Grand Jury indicted defendant for robbery with a dangerous weapon. On 4 May 2016, defendant moved to suppress evidence obtained as a result of his seizure by Lt. Marotz, asserting that defendant had been unlawfully detained in violation of his rights under the constitutions of the United States and North Carolina.

Defendant was tried during the criminal session of Superior Court, Forsyth County, that began on 9 May 2016 before Judge John O. Craig III. At a hearing conducted that day on defendant's motion to suppress evidence related to his seizure, Lt. Marotz was the sole witness. His testimony included the facts set forth above explaining defendant's seizure on the morning of 23 December 2015. After hearing arguments from counsel, the trial court orally denied the motion to suppress without making specific findings of fact or conclusions of law. Although the trial court instructed the State to prepare an order containing findings of fact and conclusions of law, no such order can be found in the record.

The jury convicted defendant of common law robbery on 12 May 2016, and the trial court sentenced him to ten to twenty-one months of imprisonment, suspended for thirty-six months of supervised probation. Defendant appealed, and on 19 September 2017 the Court of Appeals issued a divided opinion in which it ordered a new trial after concluding that Lt. Marotz lacked reasonable suspicion to detain defendant for questioning and that the trial court committed prejudicial error by denying defendant's suppression motion. *State v. Nicholson*, ___ N.C. App. ____, ___, 805 S.E.2d 348, 358. The dissenting judge concluded that the trial court had properly denied the motion because Lt. Marotz did have reasonable suspicion that criminal activity was afoot when he seized defendant. *Id.* at ___, 805 S.E.2d at 358 (Murphy, J., dissenting). The State filed its appeal of right to this Court based on the dissent.

II. ANALYSIS

The State argues that the Court of Appeals erred in concluding that the facts established at the suppression hearing fell short of demonstrating that Lt. Marotz had a reasonable, articulable suspicion of criminal activity before he stopped defendant. Generally, the standard of review in evaluating a trial court's 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. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). In evaluating a trial court's denial of a motion to suppress when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court.[2] Accordingly, we consider whether the inferred factual findings arising from the uncontested evidence presented by Lt. Marotz at the suppression hearing support the trial court's conclusion that reasonable suspicion existed to justify defendant's seizure.

As a general matter, "[b]oth the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *Otto*, 366 N.C. at 136, 726 S.E.2d at 827 (citing U.S. Const. amend. IV and N.C. Const. art. I, § 20). The United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief

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2. The statute governing motions to suppress evidence provides that the trial court "must set forth in the record [its] findings of facts and conclusions of law." N.C.G.S. § 15A-977(f) (2017). We have noted, however, that in some situations "[a] written determination setting forth the findings and conclusions is not necessary, but it is the better practice." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citing *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012)). We explained in *Bartlett* that,

> [a]lthough the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.

Id. at 312, 776 S.E.2d at 674 (first citing *State v. Salinas*, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66 (2012); then citing *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983); and then citing *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996)).

investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968).

> The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . . The standard takes into account the totality of "the circumstances—the whole picture." Although a mere " 'hunch' " does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause.

Navarette v. California, ___ U.S. ____, ____, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680, 686 (2014) (first quoting *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981); then quoting *id.* at 417, 101 S. Ct. at 695, 66 L. Ed. 2d at 629; then quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909; and then quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989)). As this Court has explained, "[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (citing, *inter alia*, *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). "This same standard—reasonable suspicion—applies under the North Carolina Constitution." *Jackson*, 368 N.C. at 78, 772 S.E.2d at 849 (citing *Otto*, 366 N.C. at 136-37, 726 S.E.2d at 827). Therefore, when a criminal defendant files a motion to suppress challenging an investigatory stop, the trial court can deny that motion only if it concludes, after considering the totality of the circumstances known to the officer, that the officer possessed reasonable suspicion to justify the challenged seizure.

The parties here do not dispute that defendant was seized when, after Chavis drove off, defendant stated to Lt. Marotz, "The store's right here. Can I just walk to the store? Please sir?" and Lt. Marotz responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?" As the Court of Appeals did, we assume without deciding that defendant was seized at this moment. *See Terry*, 392 U.S. at 16, 88 S. Ct. at 1877, 20 L. Ed. 2d at 903 (recognizing that a seizure can occur when an officer "restrains [a person's] freedom to walk away").

Here the State contends that the facts known to Lt. Marotz, when viewed objectively and in their totality, would lead a reasonable officer to suspect that a crime had just been committed or was in progress. The State points to the following facts, among others: (1) it was 4:00 a.m.; (2) the vehicle was stopped in the road with no turn signal on; (3) there were only two people sitting in the car, one in the driver's seat and the other directly behind him in the back seat; (4) defendant appeared to be pulling some sort of toboggan or ski mask down over his face until he saw Lt. Marotz and pushed it back up; (5) when Lt. Marotz asked whether the occupants were okay, each said yes, but Chavis made a hand motion at his neck area; (6) after Lt. Marotz drove into the store parking lot and waited for an additional thirty seconds, the vehicle still did not move or display a turn signal; (7) after defendant got out of the car, Chavis was edging forward and about to leave defendant, who he had just said was his brother, on the side of the road on a cold, wet night; (8) when Lt. Marotz again asked whether everything was okay, Chavis shook his head "no" while defendant said everything was fine; and (9) after Lt. Marotz confronted defendant with the fact that Chavis shook his head "no," Chavis quickly stated that everything was okay. All of this occurred before defendant stated that he wished to go into the store and Lt. Marotz stopped him to inquire about weapons.

We agree with the State that these circumstances established a reasonable, articulable suspicion that criminal activity was afoot. These facts strongly suggest that Chavis had been under threat from defendant, as well as the possibility that defendant was in the process of robbing Chavis. As we have recently explained,

> the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop. . . . *Terry* stops are conducted not only to investigate past crime but also to halt potentially ongoing crime, to thwart contemplated future crime, and . . . to protect the public from potentially dangerous activity.

State v. Heien, 366 N.C. 271, 279, 737 S.E.2d 351, 356-57 (2012) (citations omitted), *aff'd*, ___ U.S. ___, 35 S. Ct. 530, 190 L. Ed. 2d 475 (2014). Assessments of reasonable suspicion are often fact intensive, and courts must always view facts offered to support reasonable suspicion in their totality rather than in isolation. *See United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751, 151 L. Ed. 2d 740, 750 (2002) ("Although each of the series of acts was 'perhaps innocent in itself,' . . . taken together, they 'warranted further investigation.' " (quoting *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 907)); *State v. Williams*, 366 N.C. 110,

117, 726 S.E.2d 161, 167 (2012) ("Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer . . . , the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot . . . .").

Here, while each of the above-listed facts might not establish reasonable suspicion when viewed in isolation, when considered in their totality they could lead a reasonable officer to suspect that he had just happened upon a robbery in progress. When viewing all the facts together, innocent explanations for the events that Lt. Marotz observed seem much less likely than this scenario. If indeed these were two brothers, why would they be seated one in front of the other like a taxi or rideshare driver and customer might sit, and why would one brother leave the other on the side of the road in the middle of a cold, wet night after an argument had ended? And if everything had been resolved, why would Chavis silently shake his head "no" when asked whether everything was fine? Add to these questions defendant's suspicious behavior involving the toboggan or ski mask[3] and it is clear that reasonable suspicion existed to briefly detain defendant for questioning.[4]

We also agree with the State that the Court of Appeals majority placed undue weight on Lt. Marotz's subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would have

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3. We are not persuaded by defendant's suggestion that Lt. Marotz's uncertainty during cross-examination about whether defendant's headgear actually had eyeholes is dispositive to the present analysis. The suspicious fact—just one among other suspicious indicia—was that defendant was pulling something down over his face and abruptly pushed it back up when he saw a police officer.

4. We find the drug cases from other jurisdictions cited by defendant unpersuasive because they are not factually analogous or otherwise helpful to his case. The broader point defendant appears to make is, as the United States Court of Appeals for the Fourth Circuit put it, a

> concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. . . . [A]n officer and the Government must do more than simply label a behavior as "suspicious" to make it so. The Government must also be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011). We are satisfied that the State *is* able to articulate why the set of circumstances and behaviors here was suspicious and "likely to be indicative of some more sinister activity than may appear at first glance." *Id.*

viewed them. During cross-examination at the suppression hearing, the following exchange occurred in which defendant's counsel questioned Lt. Marotz about why he stopped defendant after permitting Chavis to leave the scene:

> Q. So you were continuing to question [defendant] about an incident that you had already released one of the parties to?
>
> A. That's correct.
>
> Q. *And you, at that point, had no evidence of any criminal activity that you were able to objectively point to. Correct?*
>
> A. *No. That's why I was continuing to investigate.*
>
> Q. So you were looking to see if you could find anything, but you hadn't yet seen anything?
>
> A. That's correct. I wanted to make sure that both your client and also the alleged victim were safe and that nothing had happened to either one of them.

(Emphases added.) The Court of Appeals majority concluded that this exchange "confirmed [Lt. Marotz] had no evidence of any criminal activity to which he could objectively point." *Nicholson*, ___ N.C. App. at ___, 805 S.E.2d at 356 (majority opinion).

It is well established, however, that "[a]n action is 'reasonable' under the Fourth Amendment, *regardless of the individual officer's state of mind*, 'as long as the circumstances, viewed *objectively*, justify [the] action.' " *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650, 658 (2006) (brackets in original and first emphasis added) (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723, 56 L. Ed. 2d 168, 178 (1978) (second emphasis added)); *see also Ashcroft v. al–Kidd*, 563 U.S. 731, 736, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149, 1155-56 (2011) ("Fourth Amendment reasonableness 'is predominantly an objective inquiry.' We ask whether 'the circumstances, viewed objectively, [justify the challenged] action.' If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials." (first quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S. Ct. 447, 457, 148 L. Ed. 2d 333, 347 (2000); then quoting *Scott*, 436 U.S. at 138, 98 S. Ct. at 1723, 56 L. Ed. 2d at 178 (bracketed language added); and then quoting *Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 1775, 135 L. Ed. 2d 89, 98 (1996))); *Terry*, 392 U.S. at 21-22, 88 S.

Ct. at 1880, 20 L. Ed. 2d at 906 ("[It] is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?").

We have highlighted this principle in several of our decisions. For instance, in *State v. Bone*, 354 N.C. 1, 550 S.E.2d 482 (2001), *cert. denied*, 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2d 231 (2002), we considered whether an officer had probable cause to arrest a defendant despite the fact that the officer stated during the suppression hearing that he did not think he had probable cause to make the arrest. *Id.* at 10, 550 S.E.2d at 488. We explained that the officer's "subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or *reasonable* grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required." *Id.* at 10, 550 S.E.2d at 488 (quoting *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641-42 (1982)); *see also State v. Riggs*, 328 N.C. 213, 218-19, 400 S.E.2d 429, 432-33 (1991) (concluding that an officer's subjective belief that an informant whose tip he used to establish probable cause for a search warrant did not meet the legal definition of a "reliable" informant "does not control" given that "the defendants' rights 'are governed by the law, rather than by the officers' misunderstanding of it' " (quoting *State v. Coffey*, 65 N.C. App. 751, 758, 310 S.E.2d 123, 128 (1984))). Accordingly, we do not consider Lt. Marotz's subjective analysis of the facts as probative of whether those facts—viewed objectively—satisfy the reasonable suspicion standard necessary to support defendant's seizure.

In a related argument, defendant contends that the Court of Appeals correctly concluded that the facts did not establish reasonable suspicion "in light of the fact Lt. Marotz already questioned both Defendant and Chavis twice and subsequently released Chavis so he could go to work after he assessed the situation and concluded '[i]t was a heated argument between two brothers.' " *Nicholson*, ___ N.C. App. at ___, 805 S.E.2d at 356. That is, defendant argues that Lt. Marotz had determined, based upon Chavis's and defendant's responses to his questions, that there was no criminal activity afoot. But again, the Court of Appeals majority and defendant focus on Lt. Marotz's subjective state of mind rather than conducting an objective inquiry. Whatever personal perspective Lt. Marotz provided on cross-examination about the stop, the facts support a reasonable inference that, rather than a recent squabble between brothers, something more sinister had been unfolding when he arrived on the scene. Moreover, a reasonable officer is not required to

accept at face value statements made during an investigation, especially in light of the other suspicious circumstances present here.

As the United State States Supreme Court has observed,

> [t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

Adams v. Williams, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 616-17 (1972) (citing *Terry*, 392 U.S. at 23, 88 S. Ct. at 1881, 20 L. Ed. 2d at 907). Lt. Marotz adopted such an approach here. Rather than shrugging his shoulders when he came upon a concerning situation, he did good police work. He saw signs—some subtle, some more overt—that something was amiss, and he investigated appropriately. We will not fault the State for the officer's subjective characterizations of the facts at the suppression hearing when, as a legal matter, the undisputed facts establish reasonable suspicion necessary to justify defendant's seizure.

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and instruct that court to reinstate the judgment entered by the trial court on 13 May 2016.

REVERSED.

STATE OF NORTH CAROLINA
v.
JUAN CARLOS RODRIGUEZ

No. 302A14

Filed 8 June 2018

1. Jury—selection—death penalty—intellectually disabled person

In a capital prosecution for first-degree murder, the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues did not constitute an abuse of discretion or render the trial fundamentally unfair. Defendant was allowed explain that intellectual disability is a defense to the death penalty and ask prospective jurors about their experience with intellectual disabilities and their ability to follow the trial court's instruction.

2. Homicide—first-degree murder—identity—sufficiency

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge for insufficient evidence of defendant's identity. The evidence contained ample support for the State's contention that defendant caused the victim's death and permitted the inference that defendant acted with premeditation and deliberation.

3. Evidence—expert witness—prior testimony for defense in another case

In a prosecution for kidnapping, rape, and murder in which the defense of intellectual disability was raised, the trial court did not err by allowing the State to elicit evidence that its expert had previously testified for a criminal defense client in another case. The testimony was relevant to the witness's lack of bias, and it could not be said that the testimony constituted impermissible prosecutorial vouching for the witness's credibility.

4. Criminal Law—intellectual disability defense—motion to set aside verdict

The trial court did not abuse its discretion by failing to set aside the jury's verdict on intellectual disability in a prosecution for kidnapping, rape, and murder. Although defendant presented evidence to support a determination that he should be deemed exempt from the death penalty on the grounds of intellectual disability, the State

presented expert testimony that supported the verdict. The relative credibility of the testimony of the various expert witnesses was a matter for the jury.

5. Sentencing—capital—mitigating circumstance—mental or emotional disturbance—intellectual disability

The trial court erred in a capital sentencing proceeding by not submitting the mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his conduct. The trial court has no discretion in determining whether to submit a mitigating circumstance when substantial evidence is submitted supporting the circumstance and the issue does not hinge on whether the defendant was under the influence of a mental or emotional disturbance at the time of the killing. In this case, the record contained ample evidence supporting the admission of the circumstance.

Chief Justice MARTIN dissenting.

Justice NEWBY joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge R. Stuart Albright on 21 March 2014 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 10 October 2016. Following the initial oral argument, this case was reargued on 9 October 2017.

Josh H. Stein, Attorney General, by Mary Carla Babb and Kimberly N. Callahan, Assistant Attorneys General, for the State.

Glenn Gerding, Appellate Defender, by Barbara S. Blackman, John F. Carella, and Kathryn L. VandenBerg, Assistant Appellate Defenders, for defendant-appellant.

ERVIN, Justice.

Defendant Juan Carlos Rodriguez was convicted of the first-degree murder of his estranged wife, Maria Magdelana Rodriguez, and sentenced to death. After careful consideration of defendant's challenges to his convictions and sentence in light of the record and the applicable law, we find no error in the proceedings leading to defendant's

conviction and the jury's rejection of his intellectual disability defense.[1] On the other hand, we conclude that the trial court erred by failing, acting *ex mero motu*, to submit the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) ("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired") to the jury at defendant's capital sentencing hearing. As a result, we vacate defendant's death sentence and remand this case to the Superior Court, Forsyth County, for a new capital sentencing hearing.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Defendant and Ms. Rodriguez became emotionally involved with each other in late 1992. The couple married when Ms. Rodriguez was thirteen years old and defendant was sixteen or seventeen years old and had their first child when Ms. Rodriguez was fourteen years old. Unfortunately, defendant became physically and emotionally abusive towards Ms. Rodriguez following their marriage. This pattern of domestic violence continued after the couple came to the United States.

On 11 October 2010, Ms. Rodriguez entered a domestic violence shelter with her three children because she could "no longer live with [her] husband" and did not "have anywhere else to go." At the time that she entered the shelter, Ms. Rodriguez noted on an intake form that defendant had threatened to kill her, controlled most of her daily activities, and was violently jealous of her. Although Ms. Rodriguez left the shelter on 19 October 2010, she returned on 29 October to retrieve certain medications that she had left at that location. During the 29 October visit to the domestic violence shelter, Ms. Rodriguez seemed "happy" and "optimistic" and told shelter personnel that, while she was "doing well" and while Mr. Rodriguez "ha[d] not tried to move back in," "she [wa]s struggling to find employment" and "need[ed] assistance with food." On the other hand, Ms. Rodriguez told her friend, Merlyn Rodriguez, on 17 November 2010, that she was afraid of defendant; that he had "told her that if they didn't get back together, he would kill her"; and that "he could get rid of her and just throw her in the river."

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1. Although the statutory provisions in effect at the time of defendant's trial spoke in terms of "mental retardation," this opinion will use the currently applicable nomenclature of "intellectual disability" in lieu of the earlier statutory expression.

On 18 November 2010, defendant came to the couple's former apartment, which was located at 1828 Trellis Lane in Winston-Salem and in which Ms. Rodriguez and the children had resided following the couple's separation, and asked Ms. Rodriguez to speak with him privately in the master bedroom. After a few minutes, the Rodriguez children, who were listening to music in the living room, heard Ms. Rodriguez cry for help. Santos Estela Rodriguez, one of the couple's children, attempted to open the door to the master bedroom but found that it was locked.[2] After failing to gain access to the master bedroom by using a knife, Santos Estela Rodriguez told defendant that she was going to call the police. Shortly thereafter, defendant emerged from the master bedroom with blood on his knuckles, feet, and clothes. As soon as Santos Estela Rodriguez entered the master bedroom and "saw her mother on the floor" "breathing really hard," defendant stated that Ms. Rodriguez had hurt herself on the furniture and that he was taking Ms. Rodriguez to the hospital. After hoisting Ms. Rodriguez over his shoulder, defendant carried her to his vehicle.

Several hours later, defendant returned to 1828 Trellis Lane without Ms. Rodriguez. Upon arriving at the apartment, defendant asked the children and the son of a neighbor to help him clean the blood stained carpeting in the master bedroom. Although Santos Estela Rodriguez called all of the nearby hospitals, she was never able to locate her mother. On the following morning, 19 November 2010, defendant took the children to the home of his boss, Henry Ramirez, who lived in Eden. During the trip to Eden, Santos Estela Rodriguez observed the presence of blood in defendant's vehicle. A subsequent examination of defendant's vehicle by investigating officers revealed the presence of vomitus on the rear floorboard on the driver's side and blood on the interior of the rear driver's side door jamb, the back portion of the rear seat, a tan shirt located upon the upper portion of the rear seat, the rear floor mat on the driver's side, and the spare tire cover in the trunk.

At the time that investigating officers searched the apartment at 1828 Trellis Lane, they noticed that the premises were in disarray and that cleaning products could be found throughout the residence. "[A] large pool of blood or a large stain of what appeared to be blood [could be seen] on [the] carpet." According to another investigating officer, the carpet in the master bedroom "was discolored a pinkish color" and

2. Defendant's son, Juan Carlos Rodriquez, gave an account of the events that occurred at the 1828 Trellis Lane apartment that closely resembled that provided by Santos Estela Rodriquez.

"frayed as though it had been scrubbed." Additional blood spatter patterns could be observed in the master bedroom as well.

At about 11:30 p.m. on 18 November 2010, Merlyn Rodriguez 's sister, Zoila Rodriguez , began receiving messages from Ms. Rodriguez's phone. The messages received from Ms. Rodriguez 's phone stated that:

> Soyla, I went with my secret boyfriend to Spain. Carlos does not know. If he calls, tell him the truth and take care of the children. I met him three months ago. Cut the phone off because it doesn't work in the airport. Good-bye. I will call you from Spain. . . . I don't have a charge anymore. Good-bye. Cut the telephone off. Later, I will fix it. I will call you from there.

Although Ms. Rodriguez knew how to spell Zoila Rodriguez's name, defendant later spelled Zoila's name as "Soyla" while conversing with investigating officers.

On 19 November 2010, Merlyn Rodriguez attempted to telephone Ms. Rodriguez on several occasions. However, each of Merlyn Rodriguez's calls went unanswered. After ascertaining that Ms. Rodriguez was not in her apartment, Merlyn Rodriguez called defendant, who initially told Merlyn Rodriguez that he did not know where Ms. Rodriguez was before stating that Ms. Rodriguez had "[s]tepped out of the house that night" and "never came back" and finally telling Merlyn Rodriguez that Ms. Rodriguez had "had an accident that night" and "was at the hospital."

Following her conversation with defendant, Merlyn Rodriguez called the police. Officer L.N. Williams of the Winston-Salem Police Department responded to Merlyn Rodriguez's missing person report, entered Ms. Rodriguez's apartment, and determined that she was not there. At that point, Officer Williams obtained defendant's phone number from Merlyn Rodriguez and called defendant for the purpose of inquiring into Ms. Rodriguez's whereabouts. Defendant told Officer Williams that Ms. Rodriguez had gone for a walk and did not return. After ascertaining that Ms. Rodriguez was not at work or at a local shelter and that the Rodriguez children were not in school, investigating officers began treating this matter as a high-risk missing person's case.

Defendant spent the night of 19 November 2010 with his pastor, David Agueda, in Martinsville, Virginia. On the following morning, while leading Saturday services, Pastor Agueda learned that investigating officers were looking for defendant and Ms. Rodriguez. Upon obtaining this information, Pastor Agueda advised defendant to turn himself in.

At approximately 7:00 p.m. on 19 November 2010, Lieutenant Steven Tollie of the Winston-Salem Police Department reclassified the case as a homicide and assigned it to Detective Stanley Nieves. After investigating officers located defendant on 21 November 2010, he was taken to Eden to be interviewed by Detective Nieves. In response to Detective Nieves's request that he describe the events that had occurred on 18 November 2010 at the 1828 Trellis Lane apartment, defendant stated that Ms. Rodriguez had told him that she was a lesbian and no longer wanted to be with him, that Ms. Rodriguez had hit her head against the dresser while lunging at him, and that Ms. Rodriguez had called for help after falling to the floor. At that point, defendant assisted Ms. Rodriguez in her efforts to get up, carried her to his car, and began to drive her to the hospital. As he did so, Ms. Rodriguez told defendant to stop, left the vehicle, and walked out of defendant's sight. Although Detective Nieves repeatedly accused defendant of having killed Ms. Rodriguez and having knowledge of the location at which Ms. Rodriguez's body could be found, defendant repeatedly denied Detective Nieves's accusations.

On the afternoon of 12 December 2010, which was a "very cold, damp" day featuring light snow and misty rain, investigating officers received a report that a decapitated body had been discovered in an area near 5020 Williamsburg Road in Winston-Salem that was "overgrown with small bushy pines" about "40 to 50 feet to the west of the asphalt area." Fingerprint information obtained from the body established that it was that of Ms. Rodriguez. On 29 May 2013, a human skull, later determined to be that of Ms. Rodriguez through the use of DNA analysis, was found in a wooded area near Belews Lake in rural Forsyth County.

According to Patrick Lantz, M.D., who autopsied the body, Ms. Rodriguez was in the early stages of decomposition at the time that her body was discovered. Dr. Lantz observed "maggot activity around the incision on the skin," incision marks around her clavicle, and a number of bruises all over her body characteristic of defensive wounds." Dr. Lantz opined that "the cause of death was manual strangulation," that Ms. Rodriguez had been decapitated after her death, and that, while there was "not exactly" "a scientific way to determine a postmortem interval," he believed, based upon information that he had received from investigating officers concerning the date upon which Ms. Rodriguez had last been seen alive and the observations that he had made during the autopsy and at the location at which the body had been discovered, that Ms. Rodriguez had died on 18 November 2010 and that the postmortem interval "was consistent with her being out there for three and a half weeks, or 24 days."

2. Defendant's Evidence

Although she acknowledged that a forensic pathologist would be better qualified than she was to make such a determination, Dr. Ann Ross, a forensic anthropologist, concluded that Ms. Rodriguez 's abdominal area showed no signs of greening, which appears early in the putrefaction process. In addition, Dr. Ross believed that the crime scene and autopsy photographs suggested that Ms. Rodriguez "was still in the fresh state" of decomposition at the time that her body was found given the absence of significant marbling or maggot masses. According to Dr. Ross, "the remains of the decedent were in a fresh state" and had "not been out in the environmental conditions before December 1." Similarly, Thomas L. Bennett, M.D., a forensic pathologist, was of the opinion that "the most probable time frame" "is that [Ms.] Rodriguez was dead between three and seven days or so prior to her body being found on December 12th."

B. Intellectual Disability

1. Defendant's Life History

Defendant was born on 11 November 1974 in the Usulutan Department of El Salvador. Defendant and his family left the Usulutan Department "somewhere between 1979 and 1982" "because of the guerillas, who were the leftist fighters in the civil war in El Salvador." Defendant's family ultimately settled in Anchila, a location that was believed to be safe, when defendant was a child. However, the guerillas "began to occupy the area across the river from Anchila" after the Rodriguez family arrived at that location.

The Rodriguez home in Anchila was a "one-room hut[ ] with dirt floors. The walls were made out of sticks and mud." Although the roof was made out of "grass or tin," "there[was] no solid wall" or "security to speak of." "[D]uring the rainy season, the floods would flood through the house," exposing the family "to all kinds of bacteria, viruses, decaying animals, [and] human waste" from a nearby outhouse.

While in Anchila, defendant "didn't have access to medical care," did not "attend school of any kind," and experienced "[c]hronic hunger [as] a way of life." Upon reaching the age of nine, defendant was sent to live with an aunt in San Salvador, which was considered to be safer and to have less fighting than Anchila. While in San Salvador, defendant began to receive medical care and entered the first grade. After successfully completing the first grade while failing the second grade, defendant returned to Anchila to help his family and repeat the second grade when he was eleven or twelve years old.

At the time that defendant returned to Anchila, "the civil war was very much raging around the family." Defendant heard "shooting at night and [remembered] the family being on the floor in terror." "It was not uncommon for [the family] to see dead bodies along the way when they were walking to school" and to "hear bomb[s] blasting[ ] and shooting." When defendant was sixteen years old, his older brother, Jose Fermin, was killed by guerillas after joining the army. Defendant was responsible for retrieving his brother's body and bringing it to the family home. While he was still sixteen and in the seventh grade, defendant dropped out of school.

After Jose Fermin's death and defendant's marriage to Ms. Rodriguez, defendant relocated to the United States. Upon arriving in this country, defendant was granted asylum on the grounds that he had been "threatened by the guerillas" and was "[l]iving in constant fear" and received authorization to work. Although defendant's son, Fermin, remained in El Salvador with defendant's father, Ms. Rodriguez joined defendant in the United States, where the couple had three more children, Santos Estela, Juan Carlos, Jr., and Jonathan.

2. Expert Testimony

a. Defendant's Evidence

Dr. Selena Sermeno, an expert in the field of clinical psychology who specializes in issues involving El Salvadoran young people, testified that the "protective and risk factors" present in a child's life, coupled with "the presence of chronic violence and trauma and adversity" and "[f]actors such as poverty, malnutrition, poor health, falls, exposure to trauma, any form of traumatic event, [and] the presence of fear," affect the child's intellectual capabilities. According to Dr. Sermeno, the civil war that occurred in El Salvador during defendant's adolescence had a significant negative effect upon his cognitive development. Among other things, Dr. Sermeno observed that defendant's memory and communication skills were impaired, which is "a very classic symptom in children who are traumatized to that degree." Defendant struggled "to recall information in any kind of chronological sequential or linear format," was confused by numerical concepts, and answered questions in a very literal manner. In addition, defendant's exposure to dangerous pesticides and contaminated water caused him to suffer from frequent illnesses, for which he never received proper medical care. Dr. Sermeno believed that the existence of these adverse environmental conditions had a significant effect upon defendant's intellectual development as well.

According to Dr. Sermeno, defendant suffered from post-traumatic stress disorder and a mild intellectual disability. In support of the second of these two diagnoses, Dr. Sermeno pointed to the fact that defendant scored 61 on the third edition of the Wechsler Adult Intelligence Scale (WAIS-III). In Dr. Sermeno's view, defendant had particular difficulties with functional academic learning and communication skills, with these deficiencies having manifested themselves before defendant reached the age of eighteen. In addition, Dr. Sermeno's intellectual disability diagnosis also rested upon defendant's exposure to extreme poverty, severe malnutrition, constant violence, pesticides, educational obstacles, and inadequate health care. Finally, Dr. Sermeno believed that defendant's post-traumatic stress disorder made it difficult for him to express strong emotions through verbal communication and body language.

Moira Artigues, M.D., a general and forensic psychiatrist, testified that she had evaluated defendant's "developmental history and the impact that that may have had on him, as well as . . . his affect and demeanor, his face and his manner, and to form opinions about that as well." Dr. Artigues analyzes whether a person has an intellectual disability by examining that person's "background information, in terms of poverty, malnutrition, deprivation, education resources, and medical resources," "[b]ecause lack in any of those can affect intellectual development in children." According to Dr. Artigues, severe trauma, like that associated with "growing up in a civil war, very poor, and malnourished, causes the brain to wire in a way that's not optimal, and it can certainly affect your IQ as a result of the faulty wiring." As a child in El Salvador, defendant lacked access to medical care, experienced nutritional deprivation, and had no educational stimulation until he reached the age of ten, all of which can affect an individual's brain development and contribute to the development of a low intelligence quotient. Moreover, the experience of growing up during a civil war can result in accumulated trauma over time which can, in turn, lead to the development of post-traumatic stress disorder. In Dr. Artigues's view, a child's attempts to cope "with this chronic trauma and extreme stress" can affect the child's brain development and intelligence quotient.

In Dr. Artigues's opinion, defendant was mildly intellectually disabled. In support of this assertion, Dr. Artigues considered the fact that defendant had to make six different attempts to pass his driver's license test after reaching the United States. In addition, Dr. Artiques noted that, while interviewing defendant, he failed to grasp abstract concepts and had difficulty relaying information in chronological order, both of which conditions, in Dr. Artigues's opinion, reflect the existence

of an intellectual disability. Dr. Artigues testified that defendant learned how to be a brick mason by being shown measurements marked permanently on a yardstick rather than by utilizing mathematics, with this type of learning limitation being typical of persons suffering from a mild intellectual disability. According to Dr. Artigues, intellectually disabled individuals have the ability to drive motor vehicles, work, marry, and have children. Dr. Artigues believed that defendant's intellectual disability manifested itself before he turned eighteen years of age in light of defendant's school records, intelligence quotient test scores, the results achieved during defendant's psychological evaluations, and defendant's exposure to malnutrition, severe trauma, and poverty. In Dr. Artigues's view, defendant was significantly deficient in functional academics and communication skills. Finally, Dr. Artigues determined that defendant suffered from post-traumatic stress disorder given that he had been exposed to significant trauma during his life, reported having had intrusive thoughts about the traumatic events that he had experienced, and experienced certain specific triggering events.

Dr. Antonio Puente, a clinical neuropsychologist and professor of psychology at the University of North Carolina at Wilmington, conducted a neuropsychological evaluation of defendant. Dr. Puente testified that the fact that defendant had a full scale score of 61 on the Central American, Spanish language version of the WAIS-III placed defendant in the bottom one percentile of the population. In addition, Dr. Puente administered the Beta Test, Third Edition; the Comprehensive Test of Nonverbal Intelligence, Second Edition; and the Bateria Test, Third Edition, to defendant. According to Dr. Puente, the Beta test was developed to measure the intellectual abilities of individuals who lack a formal education. Defendant had a score of 65 on the Beta Test, a result that placed him in the bottom one percent of the population. Similarly, Dr. Puente testified that defendant's full-scale score of 53 on the Comprehensive Test of Nonverbal Intelligence placed him in the bottom percentile. Although the Bateria test does not produce an intelligence quotient score, it does generate an intellectual abilities number. Defendant's intellectual abilities score placed him in the second percentile from the bottom. According to Dr. Puente, mild intellectual disability involves an intelligence quotient of between 50 and 70.

Another sign of mild intellectual disability, in Dr. Puente's view, is the presence of only some of the skills that allow an individual to function in society. Dr. Puente undertook this portion of his analysis by examining defendant's school records, driving tests, and the opinions of knowledgeable persons concerning defendant's functional capabilities.

In addition, Dr. Puente administered sixteen additional neuropsychological tests to defendant, three of which were used to assess the reliability of defendant's responses and the adequacy of defendant's efforts during the testing process. According to Dr. Puente, defendant's test results did not reflect malingering and accurately demonstrated the extent of defendant's abilities. As a result, Dr. Puente testified that defendant has significant sub-average intellectual functioning; has deficient cognitive, social, and practical skills; and is significantly impaired in the areas of functional academics and communication skills, with all of these diagnostic criteria having manifested themselves before defendant attained the age of eighteen.

b. State's Evidence

Stephen Kramer, M.D., a forensic neuropsychiatrist and professor of psychiatry at Wake Forest Baptist Medical Center, testified on behalf of the State that the El Salvadoran school system, which is much less rigorous than the United States school system, grades students on a scale from one to ten, with five being the lowest passing score. According to Dr. Kramer, most of defendant's grades were in the six to seven range, a set of results that is inconsistent with the presence of mild intellectual disability. In addition, Dr. Kramer noted that defendant could perform the chores expected of similarly aged children, another fact that suggests that defendant did not suffer from mild intellectual disability. In a similar vein, Dr. Kramer noted that defendant had been able to find employment in the United States that paid more than the minimum wage and that he had been known to "motivate" his co-workers, with these facts also being inconsistent with a contention that defendant suffers from a mild intellectual disability. According to Dr. Kramer, other activities in which defendant engaged, including the payment of taxes, the maintenance of his immigration status, and his ability to obtain a driver's license, "show[ed that defendant had] a level of adaptive functioning beyond that [expected] for the deficits requisite for a diagnosis of" intellectual disability.

Dr. Kramer testified that Detective Nieves had described defendant's Spanish as grammatically correct and that defendant had used an appropriate volume when speaking with the detective. Dr. Kramer noted that defendant had received a number of visitors since the date of his incarceration, a fact that tends to suggest that defendant has a social network and demonstrates his adaptive abilities. Dr. Kramer considered defendant's request for a Spanish-to-English dictionary, a Bible, and a Spanish textbook while in pretrial detention to indicate that defendant has the apparent ability to read and desired to engage in

that activity, with those attributes further tending to show that defendant has adaptive capabilities. On the other hand, Dr. Kramer, like Dr. Artigues, believed that defendant has difficulty understanding abstract concepts like confidentiality or privacy.

According to Dr. Kramer, Dr. Puente mischaracterized the results of defendant's Dot Counting Test, an instrument used to detect malingering, because defendant "did worse the second time he did the test and was way over the threshold for suspecting not giving full effort." Dr. Kramer noted that defendant was "overtly cooperative," had a normal mood range, spoke Spanish in a clear and distinct manner while exhibiting a regular rate and rhythm, and had no difficulty with the comprehension portion of the exam. In addition, while defendant could not identify the year, month, day of the week, or season, he was able to perform complex commands without difficulty. The fact that defendant could not name the months of the year was "astonishing" to Dr. Kramer given his belief that even a person with mild intellectual disability should be able to perform that task.

Dr. Kramer administered a variety of tests for the purpose of assessing defendant's mathematical abilities, visual and verbal memory, neurological functioning, and motor skills. According to Dr. Kramer, defendant's math skills were "horrible" and included "very bizarre" responses. While completing a "literal cancellation test," which required defendant to find all of the As on a page while subject to certain time constraints, defendant missed some As and worked very slowly, with the physical restraints to which defendant was subject and visual deficits which defendant experienced accounting for this aspect of his performance. Dr. Kramer determined that defendant has a score of less than one on the National Stressful Events Survey PTSD Short Scale Test, which indicated, according to Dr. Kramer, that the severity of defendant's reaction to stress was, at most, mild. Even so, Dr. Kramer diagnosed defendant as suffering from dysthymic disorder, which is a form of chronic depression, and post-traumatic stress disorder.

Dr. Kramer questioned whether defendant exhibited symptoms of significant sub-average intellectual functioning. Although the fact that defendant had lived in severe poverty and suffered from malnutrition might adversely affect his intelligence quotient scores, those factors do not appear to have actually impaired his intellectual capacity. In addition, Dr. Kramer testified that defendant's "school grades were not consistent with [those of] someone with mild intellectual disability." According to Dr. Kramer, defendant's only adaptive functioning deficiency involved functional academics. As a result, for all of these reasons, Dr. Kramer

disagreed with Dr. Puente's diagnosis that defendant suffered from an intellectual disability.

c. Defendant's Rebuttal Evidence

Dr. John Olley, a professor at the University of North Carolina at Chapel Hill and a psychologist at the Carolina Institute for Developmental Disabilities, testified that, since a person with an intelligence quotient of between 55 and 70 can appropriately be diagnosed as mildly intellectually disabled and since defendant had a score of 61 on the WAIS-III, his intelligence quotient falls within the mildly intellectually disabled range. In Dr. Olley's view, approximately one-third of mildly intellectually disabled persons are able to obtain a driver's license or learner's permit. Dr. Olley asserted that "a person's accomplishments" cannot "rule out" the existence of an intellectual disability given that such a "diagnosis is based on identifying deficits, not identifying strengths," and revolves around "a pattern of lifelong limitations." In addition, Dr. Olley stated that the American Association of Intellectual and Development Disabilities (AAIDD), which was formerly known as the American Association of Mental Retardation, believes that socioeconomic factors, such as malnutrition, poverty, and lack of access to early childhood education, are "causative or at least high-risk factors in the diagnosis of" intellectual disabilities. According to Dr. Olley, the AAIDD attributes intellectual disabilities to biological, behavioral, social, and educational factors, with the biological factor being present in only the more severe cases of intellectual disabilities and with the other factors contributing to less severe cases. In Dr. Olley's view, poverty can contribute to a diagnosis of intellectual disability.

3. Capital Sentencing

a. State's Evidence

According to Lieutenant Tollie, the Rodriguez children had initially been placed in foster care before going to live with Ms. Rodriguez 's father, who resides in Boston. Friends Anna and Merlyn Rodriguez described Ms. Rodriguez as a very loving and caring mother who took good care of her children and had been excited to begin a new job at McDonald's.

b. Defendant's Evidence

Defendant had not been cited for any disciplinary infractions during the period of time in which he was held in pretrial confinement. Defendant's father, Manuel Romero, who was handicapped, loves his son very much and needs his financial support. Similarly, defendant's

sister, Ana Julia Romero, testified that she loves her brother very much, that defendant denied having done anything to Ms. Rodriguez, and that Ms. Rodriguez was a very nice person who loved defendant and had been a good wife. Juan Carlos Rodriguez and Estela Santos Rodriguez expressed the desire to continue to have a relationship with their father, stated that they loved and missed him, and described Ms. Rodriguez as a loving mother.

B. Procedural History

On 2 July 2012, the Forsyth County grand jury returned a bill of indictment charging defendant with assault with a deadly weapon inflicting serious injury and first-degree kidnapping. On 16 July 2012, the Forsyth County grand jury returned superseding indictments charging defendant with first-degree murder, assault with a deadly weapon inflicting serious injury, and first-degree kidnapping. The charges against defendant came on for trial before the trial court and a jury at the 3 February 2014 criminal session of the Superior Court, Forsyth County.

On 10 March 2014, the jury returned verdicts finding defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and the felony murder rule using first-degree kidnapping as the predicate felony, assault with a deadly weapon inflicting serious injury, and first-degree kidnapping. After accepting the jury's verdict, the trial court convened a separate proceeding for the purpose of determining whether defendant is intellectually disabled as that term is currently used in N.C.G.S. § 15A-2005. On 14 March 2014, the jury returned a verdict finding that defendant was not exempt from the imposition of the death penalty based upon intellectual disability-related grounds. On 17 March 2014, defendant unsuccessfully moved to set aside the jury verdict with respect to the intellectual disability issue. On the same day, the sentencing phase of defendant's trial commenced.

On 21 March 2014, the jury returned a verdict determining that defendant had killed Ms. Rodriguez while engaged in the commission of a first-degree kidnapping. The jury did not find as mitigating circumstances that defendant lacked a significant history of prior criminal conduct, N.C.G.S. § 15A-2000(f)(1), or that defendant had murdered Ms. Rodriguez while under the influence of a mental or emotional disturbance, *id.* § 15A-2000(f)(2). In addition, the jury rejected all proposed nonstatutory mitigating circumstances and found that no other mitigating circumstances existed, *id.* 15A-2000(f)(9). Finally, the jury found that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty. Based upon the jury's

verdicts, the trial court arrested judgment with respect to defendant's first-degree kidnapping conviction and entered judgments sentencing defendant to death based upon his first-degree murder conviction and to a concurrent term of twenty-five to thirty-nine months imprisonment based upon his conviction for assault with a deadly weapon inflicting serious injury. Defendant noted an appeal to this Court from the trial court's judgments.[3]

II. Legal Analysis

A. Jury Selection

[1] In his initial challenge to the trial court's judgments, defendant contends that the trial court deprived him of his state and federal constitutional right to a trial by a fair and impartial jury by prohibiting his trial counsel from questioning prospective jurors concerning their ability to follow the applicable law prohibiting the imposition of the death penalty upon an intellectually disabled person. More specifically, defendant contends that "[i]t was critically important that each juror be free of any bias regarding the exemption of [intellectually disabled] offenders from capital punishment that would prevent that juror from deciding the question of [intellectual disability] based on the clinical evidence in accordance with § 15A-2005," which provides that "no defendant who is [intellectually disabled] shall be sentenced to death." N.C.G.S. § 15A-2005 (2014). According to defendant, the jurors empaneled to hear and decide this case "were not made aware until the sentencing phase that they would need to make a determination of [intellectual disability] that could take the death penalty off the table" or questioned concerning their ability to follow the law governing the extent to which an intellectually disabled person is eligible for the imposition of the death penalty in violation of defendant's Sixth Amendment right "to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried," quoting *Conners v. United States*, 158 U.S. 408, 413, 15 S. Ct. 951, 953, 39 L. Ed. 1033, 1035 (1895), and citing *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 2228-29, 119 L. Ed. 2d 494, 502 (1992).

The State contends, on the other hand, that the trial court did not abuse its discretion during the jury selection process by sustaining the State's objection to defendant's attempts to question prospective

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3. The record does not reflect that defendant filed a motion to bypass the Court of Appeals with respect to the trial court's judgment in the case in which defendant was convicted of and sentenced for assault with a deadly weapon inflicting serious injury. We grant a motion to bypass the Court of Appeals in that case on our own motion.

jurors concerning intellectual disability issues. Contrary to defendant's assertions, the trial court simply prohibited defendant from prefacing the questions that he sought to pose to prospective jurors concerning intellectual disability issues with general legal statements. In addition, the State contends that defendant was able to elicit the information that he sought to obtain by posing these questions based upon prospective jurors' answers to other questions that the trial court allowed defendant to pursue and statements that the trial court allowed defendant's trial counsel to make. Finally, the State notes that the trial court properly instructed the jury concerning the effect of a finding of intellectual disability upon the jury's ability to make a binding recommendation that defendant be sentenced to death at an appropriate point in the proceedings.

During the jury selection process, defendant's trial counsel told the trial court that defendant's "intent was to ask these jurors can they follow the law with regard to mental retardation" and that, in order to make an adequate inquiry into this subject, he would be required "to tell them a little bit about what the law is." In response, the trial judge stated that defendant would be allowed to inquire into jurors' ability to follow the applicable law and stated:

> THE COURT: Just don't give editorial comments. I certainly understand you're going to be entitled—you can preface it as, "There may be a defense or evidence of alleged mental retardation in this case. Will you be able to fairly consider it in this case?"
>
> Is that—does that not get you what you want? . . .
>
> [DEFENSE COUNSEL]: It does. What I would like to say is that North Carolina does not allow . . . . for a defendant to get the death penalty if they're mentally retarded; does anybody on the panel have any issues with that law.
>
> . . . .
>
> THE COURT: Does the State object to that line of questioning?
>
> [PROSECUTOR]: Yes, Your Honor. We object to him prefacing it with what the state of the law is until the jury is instructed. . . . Because we would contend it's going to be in dispute.

> . . . .
>
> THE COURT: When we get to the jury instructions, I'll give them the law that applies to this particular case. You're going to be entitled to ask questions about any –
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> [DEFENSE COUNSEL]: And mental retardation is not a mitigating circumstance that decides, yes or no, death penalty. That's the weighing part of it. I don't want the jury confused that this is just another mitigating circumstance. It's the law that they have to first decide before they even get to that [procedure.]
>
> THE COURT: I'm not inclined –
>
> . . . .
>
> THE COURT: — to allow the defendant just to state general propositions of the law. You're absolutely going to be entitled to ask jurors questions, as we've already discussed, with regard to any alleged mental retardation evidence. . . .
>
> . . . .
>
> THE COURT: . . . You can ask them if they can follow the law that the Court will give you with regard to mental retardation and the effect it may have as to any decisions in the case. "Can you follow the law fairly and impartially that the Judge will give you with regard to the law on mental retardation?"
>
> . . . But I've told everybody that neither attorney should question the jurors about the law except to ask whether they will follow the law as given to you by the Court.

After the prospective jurors returned to the courtroom at the conclusion of this colloquy between the trial court and counsel for the parties, defendant's trial counsel stated, without objection, that "[m]ental retardation is a defense to the death penalty" and that "[m]ental retardation is defined, among other things, as having a low IQ" and, along with the prosecutor, asked prospective jurors numerous questions related to intellectual disability issues.

"The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and

impartial verdict." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992) (citation omitted). "Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge." *State v. Fullwood*, 343 N.C. 725, 732, 472 S.E.2d 883, 886-87 (1996) (citing N.C.G.S. § 15A-1214(c) (1988), *cert. denied*, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997)). As part of the jury selection process, the trial court must allow counsel an opportunity "to inquire into the ability of the prospective jurors to follow the law," with "questions designed to measure prospective jurors' ability to follow the law [being] within the [proper] context of *voir dire*." *State v. Wiley*, 355 N.C. 592, 617, 565 S.E.2d 22, 40 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882, 154 L. Ed. 2d 795 (2003). On the other hand, "[t]he trial judge has broad discretion to regulate jury *voir dire*." *Fullwood*, 343 N.C. at 732, 472 S.E.2d at 887 (citing *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994)); *see also State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998) (explaining that "the extent and manner of the inquiry [allowed to counsel] rests within the trial court's discretion"), *cert. denied*, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999). "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *Lee*, 335 N.C. at 268, 439 S.E.2d at 559 (citations omitted). As a result, "the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning" must "render[ ] the trial fundamentally unfair" in order for the defendant to be entitled to obtain relief on appeal to this Court. *Fullwood*, 343 N.C. at 732-33, 472 S.E.2d at 887 (citing, *inter alia*, *Morgan*, 504 U.S. at 730 n.5, 112 S. Ct. at 2230 n.5, 119 L. Ed. 2d at 503 n.5).

Although the trial court did inform defendant's trial counsel that they should limit their questioning of prospective jurors with respect to intellectual disability issues to inquiring whether the members of the jury "can follow the law as given to you by the Court," defendant was allowed, without any objection from the State, to explain to two different jury panels at a time when all of the prospective jurors were present that "[m]ental retardation is a defense to the death penalty." In addition, defendant's trial counsel asked prospective jurors about their prior experiences with intellectually disabled individuals, the extent of their familiarity with intelligence testing and adaptive skills functioning issues, their willingness to consider expert mental health testimony, and their willingness to follow the applicable law as embodied in the trial

court's instructions. When considered in conjunction with the fact that defendant's trial counsel was allowed to tell the prospective jurors that "[m]ental retardation is a defense to the death penalty" and the common sense understanding of a "defense" as something that precludes a finding of guilt or the imposition of a particular punishment, the questions that defendant's trial counsel were allowed to pose to prospective jurors concerning their ability to follow the law with respect to the intellectual disability issue sufficed to permit defendant's trial counsel to determine whether specific jurors could fairly consider and follow the trial court's instructions concerning the issue of whether defendant should be exempted from the imposition of the death penalty on the basis of any intellectual disabilities from which he suffered. On the other hand, the specific question that defendant sought permission to pose to prospective jurors would have done little more than elicit the prospective jurors' opinions concerning the validity of the undisputed legal principle barring the imposition of the death penalty upon intellectually disabled individuals. As a result, we do not believe that the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues constituted an abuse of discretion or "render[ed] the trial fundamentally unfair." *Fullwood*, 343 N.C. at 732-33, 472 S.E.2d at 887.

B. Guilt-Innocence Proceeding Issues

1. Sufficiency of the Evidence

[2] Secondly, defendant contends that the trial court erred by denying his motion to dismiss the first-degree murder charge that had been lodged against him because the State failed to present sufficient evidence to establish his identity as the perpetrator of Ms. Rodriguez's murder. In support of this contention, defendant asserts that, when a State's case is wholly dependent upon circumstantial evidence, reviewing courts examine the record evidence for "proof of motive, opportunity, capability, and identity" in order "to show that a particular person committed a particular crime," quoting *State v. Bell*, 65 N.C App. 234, 238, 309 S.E.2d 464, 467 (1983), *aff'd*, 311 N.C. 299, 316 S.E.2d 72 (1984). Although defendant acknowledges that the record contains sufficient evidence to permit a rational juror to find that he had the capability and motive to commit first-degree murder, he contends that the State failed to elicit sufficient evidence to establish the necessary opportunity and identity. More specifically, defendant points to the expert testimony contained in the record suggesting that Ms. Rodriguez died much later than 18 November 2010 and argues that "the State lacked any eyewitness testimony or physical evidence establishing where and when the

homicide occurred," with such evidence being "critical to establishing opportunity," citing *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 416-17 (1979). In response, the State contends that the evidence more than sufficed to establish that defendant murdered Ms. Rodriguez, with defendant's argument resting upon an interpretation of the evidence that is favorable to himself rather than to the State.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citation omitted), *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 154 L. Ed. 2d 403 (2002). "As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence." *Id.* at 301, 560 S.E.2d at 781.

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted). On the other hand, in the event that the evidence merely raises "a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citations omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

First-degree murder "is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation and deliberation 'are not ordinarily subject to proof by direct evidence, but must generally be proved . . . by circumstantial evidence.' " *State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994) (alteration in original) (quoting *State v. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 349, *cert. denied*,

464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 177 (1983)).[4] "Circumstances tending to prove that the killing was premeditated and deliberate include, but are not limited to:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. at 607, 447 S.E.2d at 367 (quoting *Williams*, 308 N.C. at 69, 301 S.E.2d at 349); *see also State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 178, 192 (1998) (concluding that the defendant's actions in destroying evidence and attempting to cover up his involvement in the murder "permit the inference that defendant acted with premeditation and deliberation"), *cert. denied*, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999); *State v. Scott*, 343 N.C. 313, 341, 471 S.E.2d 605, 622 (1996) (concluding that evidence tending to show, among other things, that the "[d]efendant lied to everyone about [the decedent's] whereabouts and did not call the police or emergency medical personnel" "was sufficient to show premeditation and deliberation"); *State v. Richardson*, 328 N.C. 505, 513, 402 S.E.2d 401, 406 (1991) (concluding that evidence that the defendant strangled the victim sufficed to show premeditation and deliberation).

The evidence elicited by the State at trial tended to show that defendant had a history of abusing Ms. Rodriguez, that defendant had threatened to kill Ms. Rodriguez and to dispose of her body, that defendant violently attacked Ms. Rodriguez on 18 November 2010, that defendant was the last person to see Ms. Rodriguez alive, that defendant had been seen in the general area in which Ms. Rodriguez's body had been discovered, that defendant had attempted to clean up the location at which he assaulted Ms. Rodriguez, that defendant sent text messages from Ms. Rodriguez's phone to Merlyn Rodriguez in an attempt to establish that Ms. Rodriguez had voluntarily left the area, that Ms. Rodriguez's clothing and blood were found in defendant's vehicle, that defendant made conflicting statements concerning the circumstances surrounding

4. In February 2010, a three-judge panel of the North Carolina Innocence Commission unanimously ruled that Taylor had been wrongly convicted in 1993.

Ms. Rodriguez's disappearance to various people, and that the autopsy performed upon Ms. Rodriguez's body indicated, consistently with other evidence tending to show that blood was emanating from Ms. Rodriguez's nose as Mr. Rodriguez carried her away, that Ms. Rodriguez had aspirated blood prior to her death. Aside from the fact that the evidence contains ample support for the State's contention that defendant caused Ms. Rodriguez's death, "[t]hese facts permit the inference that defendant acted with premeditation and deliberation." *Trull*, 349 N.C. at 448, 509 S.E.2d at 192. As a result, the trial court did not err by denying defendant's motion to dismiss the first-degree murder charge for insufficiency of the evidence.

2. Admission of Evidence Concerning Dr. Kramer's Former Employment

[3] Thirdly, defendant contends that the trial court erred by allowing the State to elicit, over objection, evidence that one of defendant's trial counsel had previously hired Dr. Kramer to testify on behalf of another client. In defendant's view, "[t]he State improperly vouched for Dr. Kramer's credibility by eliciting testimony that Dr. Kramer had been hired by Robert Campbell, one of Mr. Rodriguez's attorneys, to testify on behalf of a criminal defense client in another case and in highlighting the prior employment in its closing argument," with this error having been particularly prejudicial given that the State's opposition to defendant's claim to be exempt from the imposition of the death penalty on intellectual disability grounds rested solely upon the credibility of Dr. Kramer's opinion that defendant was not intellectually disabled. In response to defendant's assertion, the State contends that the challenged testimony was relevant to the issue of Dr. Kramer's lack of bias and that the trial court did not err by allowing its admission.

When conducting a cross-examination, a prosecutor may not "inject into questions 'his own knowledge, beliefs, and personal opinions not supported by the evidence.' " *State v. Sanderson*, 336 N.C. 1, 14, 442 S.E.2d 33, 41 (1994) (quoting *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975)); *see also State v. Phillips*, 240 N.C. 516, 527, 82 S.E.2d 762, 770 (1954) (opining that prosecuting attorneys cannot "place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence"). A prosecutor does not improperly vouch for the credibility of a State's witness, or otherwise "inject" "his own knowledge, beliefs, and personal opinions" into questioning, *Sanderson*, 336 N.C. at 14, 442 S.E.2d at 41, by merely explaining why the jury should find a State's witness to be

credible. *State v. Bunning*, 338 N.C. 483, 488-89, 450 S.E.2d 462, 464 (1994). "A witness may be [questioned concerning] any matter relevant to any issue in the case, including credibility." *State v. Lewis*, 365 N.C. 488, 494, 724 S.E.2d 492, 497 (2012) (quoting N.C.G.S. § 8C-1, Rule 611(b) (2011)). "We have long held that evidence of bias is logically relevant to a witness' credibility . . . ." *Id.* at 494, 724 S.E.2d 497; *see also State v. Atkins*, 349 N.C. 62, 83, 505 S.E.2d 97, 110 (1998) (concluding that "the State appropriately attempted to illustrate a potential source of witness bias, as revealed by the expert witness's own *curriculum vitae*"), *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999). If the record at trial "reveals significant discrepancies between the diagnosis made by defendant's . . . expert and the diagnosis reached by the State's expert," "it [is] entirely proper to elicit testimony indicative of potential witness bias." *Atkins*, 349 N.C. at 83, 505 S.E.2d at 111. A prosecutor's decision to elicit evidence tending to show a lack of bias on the part of a State's witness does not constitute impermissible prosecutorial vouching. *See Bunning*, 338 N.C. at 489, 450 S.E.2d at 464 (concluding that "statements by the prosecuting attorney were more in the nature of giving reason why the jury should believe the State's evidence than that the prosecuting attorney was vouching for the credibility of the State's witnesses or for his own credibility").

As we have already noted, Dr. Kramer testified that he disagreed with Dr. Puente's determination that defendant suffers from a mild intellectual disability. In view of the "significant discrepancies between the diagnosis made by defendant's . . . expert and the diagnosis reached by the State's expert," "it [is] entirely proper to elicit testimony indicative of potential witness bias," or the lack thereof. *Atkins*, 349 N.C. at 83, 505 S.E.2d at 111. The prosecutor's decision to elicit evidence to the effect that Dr. Kramer had previously performed work for one of defendant's trial counsel did not "inject" the prosecutor's personal opinions into defendant's intellectual capabilities. On the contrary, the evidence elicited in response to the relevant prosecutorial questions tended to show a lack of bias on the part of Dr. Kramer by demonstrating that he had previously worked on behalf of both the State and criminal defendants. Although the trial court might have been better advised to have exercised its discretionary authority pursuant to N.C.G.S. § 8C-1, Rule 403, to limit the scope of the prosecutor's inquiry to whether Dr. Kramer had previously worked for counsel representing criminal defendants in general rather than specifically identifying one of defendant's trial counsel as an attorney to whom Dr. Kramer had provided expert assistance, we are unable to say, given the record before us in this case, that the challenged testimony constituted impermissible prosecutorial vouching

for Dr. Kramer's credibility or that the trial court erred by refusing to preclude the admission of the challenged testimony.

C. Intellectual Disability Proceeding

[4] Next, defendant contends that he demonstrated that he suffers from an intellectual disability by a preponderance of the evidence and that the trial court erred by denying his motion to set aside the jury's verdict in the State's favor with respect to this issue. As defendant notes, he was required to prove that he had "significantly subaverage general intellectual functioning" and "significant limitations in adaptive functioning" that "was manifested before the age of 18," quoting N.C.G.S. § 15A-2005(a)(2), by a preponderance of the evidence in order to be found to be exempt from the imposition of the death penalty upon intellectual disability grounds, citing *id.* § 15A-2005(f). Defendant claims to have satisfied his burden of proof with respect to this issue given that three of his intelligence quotient scores were below 70, that three separate expert witnesses testified that he had significant limitations in at least two of the statutorily enumerated areas of adaptive functioning, and that each of defendant's experts testified that defendant's mild intellectual disability manifested itself before he reached the age of eighteen. According to defendant, the State's expert did little more than challenge the evidence tending to show that defendant exhibited subaverage intellectual functioning as "questionable" and agreed that defendant had an adaptive deficit in the area of functional academics. In response, the State contends that a reviewing court should not disturb a jury determination with respect to the issue of intellectual disability in the event that there is any competent evidence reasonably tending to support it and that the record provided ample support for the jury's determination that defendant had failed to establish that he should be exempt from the imposition of the death penalty on intellectual disability grounds.

A trial court's ruling with respect to a motion to set aside a jury verdict "will not be disturbed on appeal absent an abuse of discretion." *State v. Batts*, 303 N.C. 155, 162, 277 S.E.2d 385, 389 (1981) (citations omitted) (upholding the denial of a motion to set aside a verdict after finding that "[t]here was sufficient evidence to warrant submission of the case to the jury and to support its verdict"). According to well-established North Carolina law, "[t]he credibility of the witnesses, the weight of the testimony, and conflicts in the evidence are matters for the jury to consider and pass upon," *State v. Alford*, 329 N.C. 755, 761, 407 S.E.2d 519, 524 (1991) (citations omitted), with the reviewing court lacking any responsibility for "pass[ing] on the credibility of witnesses or to weigh[ing] the testimony," *State v. Hanes*, 268 N.C 335, 339, 150

S.E.2d 489, 492 (1966). Defendant's assertion that we should conduct a de novo review of the trial court's decision to refrain from setting aside the jury's verdict with respect to the intellectual disability issue amounts to a request that we reweigh the evidence and make our own factual findings on appeal, a task for which an appellate court like this one is not well suited. Although defendant did present sufficient evidence to support a determination that he should be deemed exempt from the imposition of the death penalty on intellectual disability grounds, the State presented expert testimony from Dr. Kramer tending to support a contrary determination. The relative credibility of the testimony offered by the various expert witnesses concerning the nature and extent of defendant's intellectual limitations was a matter for the jury rather than for this Court, particularly given that the burden of proof with respect to the intellectual disability issue rested upon defendant. In light of the fact that the record reveals the existence of a conflict in the evidence concerning the extent to which defendant was intellectually disabled for purposes of N.C.G.S. § 15A-2005, we are unable to conclude that the trial court abused its discretion by failing to set aside the jury's verdict in the State's favor with respect to that issue.[5]

D. Capital Sentencing Proceeding

[5] Finally, defendant asserts that the trial court erred at defendant's capital sentencing proceeding by failing to instruct the jury with respect to the statutory mitigating factor enumerated in N.C.G.S. § 15A-2000(f)(6), which addresses the extent to which defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. According to defendant, the trial court must instruct the jury concerning whether a particular mitigating circumstance exists in the event that the record contains sufficient evidence to establish the

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5. In his supplemental brief, defendant contends that he is entitled to relief from the trial court's intellectual disability determination on the basis of the United States Supreme Court's decision in *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017). In support of this contention, defendant reiterates his argument, which we have already rejected, that this Court is required to undertake a de novo review of the merits of the intellectual disability issue and contends that a portion of the evidence that the State elicited and the arguments that the State advanced during the intellectual disability proceeding conflict with the logic that the United States Supreme Court utilized in *Moore*. However, given defendant's failure to bring a challenge to the admission of the challenged evidence or the making of the challenged arguments forward for our consideration and defendant's failure to contend that the trial court's intellectual disability instructions conflicted with *Moore* in any way, we are not persuaded that defendant's *Moore*-based arguments are properly before us or that *Moore* has any bearing on the intellectual disability issue that defendant has actually raised, which is whether the trial court abused its discretion by refusing to set the jury's verdict with respect to the intellectual disability issue aside.

existence of that mitigating circumstance, citing *State v. Hurst*, 360 N.C. 181, 197, 624 S.E.2d 309, 322, *cert. denied*, 549 U.S. 875, 127 S. Ct. 186, 166 L. Ed. 2d 131 (2006). According to defendant, the record contained ample evidence tending to show that that defendant's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," quoting N.C.G.S. § 15A-2000(f)(6), with the jury being entitled to find the existence of the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) "even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to the know the nature and quality of the act," quoting *State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979). More specifically, defendant contends that the record contains substantial evidence tending to show that defendant is intellectually disabled and suffers from post-traumatic stress disorder or another mental condition and that defendant killed Ms. Rodriguez in the course of a marital crisis characterized by emotional turmoil. Defendant asserts that "[t]he combination of subnormal intelligence, psychological disorders, and/or a breakdown in a relationship has often been held to support submission of both the (f)(2) and the (f)(6) statutory mitigating circumstances," citing, *inter alia*, *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991) (concluding that the record contained substantial evidence tending to show the existence of the (f)(6) statutory mitigating circumstance given that an expert psychologist had testified that defendant had limited verbal abilities and suffered from low self-esteem); *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated*, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991) (concluding that the record contained sufficient evidence to support the submission of the (f)(6) statutory mitigating circumstance given that the defendant exhibited symptoms of paranoid schizophrenia and delusional thinking); *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983) (holding that the record contained sufficient evidence to support the submission of the (f)(6) statutory mitigating circumstance given the presence of evidence tending to show that the defendant had an intelligence quotient of 63, poor reading skills, an antisocial disorder, and a history of mental health problems).

In seeking to persuade us to reach a different result, the State argues that this Court has noted that the (f)(6) statutory mitigating circumstance

> has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or

> narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions.

State v. Kemmerlin, 356 N.C. 446, 479, 481, 573 S.E.2d 870, 893, 894 (2002) (concluding the trial court did not err by failing to submit the (f)(6) statutory mitigating circumstance even though a defense mental health expert diagnosed defendant with borderline personality disorder and major depressive disorder on the grounds that the expert also testified that these conditions "did not prevent defendant from appreciating the criminality of her conduct and controlling her conduct as required by law"). Moreover, the State asserts that this Court has concluded that a defendant's conduct in the time leading up to and following the murder "may demonstrate that he was aware that his acts were criminal." *State v. Polke*, 361 N.C. 65, 72, 638 S.E.2d 189, 194 (2006), *cert. denied*, 552 U.S. 836, 128 S. Ct. 70, 169 L. Ed. 2d 55 (2007). Although the record did contain evidence tending to show that defendant has subaverage intellectual functioning, suffers from post-traumatic stress disorder and chronic depression, and was in the midst of a marital crisis, the State argues that the record was devoid of any evidence that these conditions impaired his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," quoting N.C.G.S. § 15A-2000(f)(6), at the time that he murdered Ms. Rodriguez. On the contrary, according to the State, the evidence concerning defendant's conduct before and after the murder of Ms. Rodriguez demonstrated defendant's awareness that "his acts were criminal," quoting *Polke*, 361 N.C. at 72, 638 S.E.2d at 194. Finally, the State contends that any error that the trial court might have committed by failing to instruct the jury concerning the (f)(6) statutory mitigating circumstance was harmless given that "any such error did not prevent any juror from considering and giving weight to the mitigating evidence," quoting *State v. Ward*, 338 N.C. 64, 113, 449 S.E.2d 709, 736-37 (1994), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

According to N.C.G.S. § 15A-2000(b), a trial judge is required to instruct the jury to consider any aggravating or mitigating circumstances which have adequate evidentiary support. N.C.G.S. § 15A-2000(b) (2017). For that reason, "a trial court has no discretion in determining whether to submit a mitigating circumstance when 'substantial evidence' in support of the circumstance has been presented." *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (quoting *State v. Fletcher*, 354 N.C. 455, 477, 555 S.E.2d 534, 547 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184, 154 L. Ed. 2d 73 (2002)), *cert. denied*, 541 U.S. 944, 124 S. Ct. 1673, 158 L. Ed. 2d 370 (2004); *see also State v. Williams*, 350 N.C. 1, 10-11, 510

S.E.2d 626, 633 (explaining that "the trial court has no discretion" and that "the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant," if the "evidence will support a rational jury finding" concerning the existence of the mitigating circumstance) (quoting *State v. Smith*, 347 N.C. 453, 469,496 S.E.2d 357, 366, *cert. denied*, 525 U.S. 845, 119 S. Ct. 113, 142 L. Ed. 2d 91 (1998)), *cert. denied*, 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999). "The test for determining if the evidence is 'substantial evidence' " to support an instruction for a statutory mitigating circumstance, "is 'whether a juror could reasonably find that the circumstance exists based on the evidence.' " *Watts*, 357 N.C. at 377, 584 S.E.2d at 748 (quoting *Kemmerlin*, 356 N.C. at 478, 573 S.E.2d at 892 (internal quotation marks omitted)). As a result, "[e]ven if the defendant does not request the submission of the [statutory] mitigator or objects to its submission, the trial court must submit the circumstance when it is supported by sufficient evidence," *State v. Cummings*, 361 N.C. 438, 471, 648 S.E.2d 788, 808 (2007) (citations omitted), *cert. denied*, 552 U.S. 1319, 128 S. Ct. 1888, 170 L. Ed. 2d. 760 (2008), with "any reasonable doubt regarding the submission of a statutory or requested mitigating factor [to] be resolved in favor of the defendant," *State v. Phillips*, 365 N.C. 103, 146, 711 S.E.2d 122, 152 (2011) (quoting *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 825 (1985), *cert. denied*, 476 U.S. 1164, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012). In other words, the actual fact-finding decision must, under the procedures outlined in North Carolina's capital sentencing statues, be made by the jury rather than the trial or a reviewing court. "[F]ailure to submit a statutory mitigating circumstance that is supported by sufficient evidence is prejudicial error unless the State can demonstrate that the error was harmless beyond a reasonable doubt." *Hurst*, 360 N.C. at 194, 624 S.E.2d at 320 (citation omitted).

N.C.G.S. § 15A-2000(f)(6) creates a statutory mitigating circumstance applicable to situations in which "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6) (2017). The (f)(6) statutory mitigating circumstance

> may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully

> sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

Johnson, 298 N.C at 375, 259 S.E.2d at 764. Evidence, "expert or lay, of some mental disorder, disease, or defect . . . to the degree that it affected the defendant's ability to understand and control his actions" supports submission of the (f)(6) statutory mitigating circumstance. *Kemmerlin*, 356 N.C. at 479, 573 S.E.2d at 893 (quoting *State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43, *cert. denied*, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993)). Even "[i]f the jury determines that the defendant does not have an intellectual disability as defined by [N.C.G.S. § 15A-2005], the jury may consider any evidence of intellectual disability presented during the sentencing hearing when determining aggravating or mitigating factors and the defendant's sentence." N.C.G.S. § 15A-2005(g) (2017), *see also Bobby v. Bies*, 556 U.S. 825, 829, 129 S. Ct. 2145, 2149, 173 L. Ed. 2d 1173, 1178-79 (2009) (explaining that "mental retardation for purposes of *Atkins*[*v. Virginia*], and mental retardation as one mitigator to be weighed against aggravators, are discrete issues").

In *Fullwood*, this Court found that the record contained "substantial evidence to support [the (f)(6)] statutory mitigating circumstance," including expert testimony tending to show that the defendant's intelligence was between "low normal" and "retarded," that the defendant "suffered from very low feelings of self-esteem and 'inadequate personality,' " that the defendant's "ability to understand and be understood through words was severely limited," and that the defendant was suffering from emotional anguish at the time that he committed the murder at issue in that case. 329 N.C. at 237, 404 S.E.2d at 844. Among other things, the expert witness upon whose testimony we relied in concluding that the record supported the submission of the (f)(6) statutory mitigating circumstance in *Fullwood* stated that "the stress from [the defendant's] poor relationship with his lover and child affected the defendant's limited intellectual resources to the extent that the defendant's judgment was very poor at the moment of the crime." *Id.* at 237, 404 S.E.2d at 844. Similarly, we have also stated that the record contained sufficient evidence to support the submission of the (f)(6) statutory mitigating circumstance to the jury in light of the existence of evidence concerning the defendant's "impoverished skills," "chronic substance abuse," "poor impulse control," and "diminished capacity" resulting in the defendant's "failure to understand the consequences of his actions." *State v. Hooks*,

353 N.C. 629, 641-42, 548 S.E.2d 501, 510 (2001), *cert. denied*, 534 U.S. 1155, 122S. Ct. 1126, 151 L. Ed. 2d 1018 (2002).

The issue of whether the trial court should submit the (f)(6) statutory mitigating circumstance to the jury does not hinge upon the presence or absence of evidence tending to show that the defendant "was under the influence of a mental or emotional disorder or disturbance" "at the time of the killing." *State v. Geddie*, 345 N.C. 73, 102-03, 478 S.E.2d 146, 161 (1996) (ellipses in original) (finding that "[t]he use of the word 'disturbance' in the (f)(2) circumstance shows the General Assembly intended something more . . . than mental impairment which is found in [the (f)(6)] mitigating circumstance' "), *cert. denied*, 522 U.S. 825, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997) (quoting *State v. Spruill*, 320 N.C. 688, 696, 360 S.E.2d 667, 671 (1987), *cert. denied*, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988)). For example, in *State v. Stokes*, this Court held that evidence tending to show that the defendant had a lengthy history of "mental problems," was "mildly retarded," and suffered from an "antisocial disorder," 308 N.C. at 655, 304 S.E.2d at 197, sufficed to support a jury determination "that defendant's capacity to fully comprehend the wrongfulness of his conduct was impaired or diminished" so as to require the trial court to "submit[ ] the mitigating circumstance set forth in G.S. 15A-2000(f)(6) to the sentencing jury," *id.* at 656, 304 S.E.2d at 197, even though the record also contained evidence tending to show that the defendant "was capable of distinguishing right from wrong at the time of the offenses were committed," *id.* at 654, 304 S.E.2d at 197.

The record before us in this case contains ample support for the submission of the (f)(6) statutory mitigating circumstance. As an initial matter, we note that the record contains considerable evidence tending to show that defendant suffered from an intellectual disability, with the relevant evidence including expert testimony that defendant had an average intelligence quotient score of 61, that this intelligence quotient score placed defendant in the lowest two percent of the population, that defendant's intellectual disability initially manifested itself before defendant reached the age of eighteen, and that defendant's intelligence level will remain constant throughout his life. In addition, the record contains ample evidence that defendant suffers from multiple deficiencies in adaptive functioning and that defendant's exposure to extreme poverty, severe malnutrition, constant violence, and harmful pesticides, coupled with his lack of formal education and access to meaningful health care, make it more likely that defendant suffers from an intellectual disability. As Dr. Puente noted, a defendant's diminished intellectual capabilities impair his or her reasoning capabilities. Secondly, the expert testimony

contained in the present record contains near-unanimous support for the proposition that defendant suffers from an emotional disorder, such as dysthymic disorder (chronic depression) or post-traumatic stress disorder, and that defendant killed Ms. Rodriguez during a time of marital turmoil. As this Court indicated in *State v. Greene*, 329 N.C. 771, 777, 408 S.E.2d 185, 188 (1991), "an abnormally susceptible defendant" can be motivated "to commit murder" by emotional turmoil despite the fact that "a person of normal mental and emotional stability would likely have resolved [the situation] without such disastrous results." The evidence of defendant's mental limitations and disturbed and overwrought thinking supports a rational inference that defendant's ability to fully comprehend the wrongfulness of his conduct and to conform his conduct to the requirements of the law was adversely affected at the time that he murdered Ms. Rodriguez. Thus, the evidence contained in the record developed in this case, like the evidence that this Court considered in cases such as *Stokes* and *Fullwood*, more than suffices to permit a rational juror to conclude that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time that he murdered Ms. Rodgriquez was impaired, so that the trial court erred by failing to submit the (f)(6) statutory mitigating circumstance to the jury.

The State's contention that the actions in which defendant engaged following the murder of Ms. Rodriguez establish defendant's awareness that his actions were wrongful rests upon a misapprehension of the nature and effect of the relevant statutory mitigating circumstance and the standard that the trial court should utilize in determining whether a particular mitigating circumstance should be submitted to the jury. In essence, the State's argument assumes that any recognition of the wrongfulness of his conduct on defendant's part suffices to preclude the necessity for the submission of the (f)(6) statutory mitigating circumstance. Aside from the fact that this aspect of the State's argument might be understood to require us to make a factual, rather than a sufficiency of the evidence, determination, a rational juror is entitled, as this Court recognized in *Johnson*, to find the existence of the (f)(6) statutory mitigating circumstance even if the defendant knew "right from wrong," understood "the nature and quality of [the] act," and "appreciate[d] . . . the criminality" of the act at the time of the commission of the murder for which he or she is being sentenced. 298 N.C. at 375, 259 S.E.2d at 764. Although intellectually disabled and emotionally disturbed and overwrought individuals "frequently know the difference between right and wrong," "they have diminished capacities to understand and process information, to communicate, to abstract from mistakes, and learn

from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" "[b]ecause of their impairments." *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242, 2250, 153 L. Ed. 2d 335, 348 (2002). As a result, even though the record in this case certainly contains evidence tending to suggest that, at some level, defendant understood the criminality of his conduct and attempted to undertake actions that were intended to avoid the consequences of his wrongful conduct, that fact does not obviate the necessity for the submission of the (f)(6) statutory mitigating circumstance given that the relevant legal test does not treat any recognition of wrongful conduct on the part of a defendant as sufficient to support the non-submission of the statutory mitigating circumstance in question.

The State's suggestion that defendant's failure to present explicit evidence that the mental and emotional conditions from which he suffered existed and affected his conduct at the time that he murdered Ms. Rodriguez is equally misplaced. As an initial matter, we note that, while such evidence is necessary to support a finding that the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(2) exists, the same is not true with respect to the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6). *See Geddie*, 345 N.C. at 102, 478 S.E.2d at 161. Aside from the fact that Dr. Puente testified that defendant's intellectual limitations adversely affected his judgment at the time that he murdered Ms. Rodriguez, the evidence tending to show that defendant's intellectual disability had manifested itself before the time that defendant turned eighteen and the evidence tending to show that defendant's post-traumatic stress disorder had its origins in the impoverished and violent circumstances surrounding his childhood provide ample support for an inference that the conditions that tend to suggest the appropriateness of submitting the (f)(6) statutory mitigating circumstance existed and affected defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time that he killed his estranged wife. As a result, given that "any reasonable doubt regarding the submission of a statutory or requested mitigating factor [must] be resolved in favor of the defendant," *Phillips*, 365 N.C. at 146, 711 S.E.2d at 152 (alteration in original) (quoting *State v. Brown*, 315 N.C. at 62, 337 S.E.2d at 825), and given that this Court has never required that the record contain explicit expert or lay testimony couched in the language set out in N.C.G.S. § 15A-2000(f)(6) as a precondition for the submission of the (f)(6) statutory mitigating circumstance to the jury, we conclude that the trial court erred by failing to submit the (f)(6) statutory mitigating circumstance to the jury at defendant's capital sentencing hearing.

Finally, we are unable to hold that the trial court's failure to instruct the jury concerning the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) was harmless beyond a reasonable doubt. The State's argument to the contrary notwithstanding, this Court has held that an erroneous failure to submit a statutory mitigating circumstance to the jury at a capital sentencing hearing is not cured by the submission of other statutory and non-statutory mitigating circumstances given that "[e]ach mitigating circumstance is a discrete circumstance" with "its own meaning and effect." *Greene*, 329 N.C. at 776, 408 S.E.2d at 187. For that reason, the submission of other statutory and non-statutory mitigating circumstances and the catch-all mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(9) did not provide the jury with an adequate opportunity to consider the extensive evidence tending to show that defendant's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." In addition, given the nature and extent of the evidence contained in the present record concerning defendant's intellectual limitations, mental health diagnoses, and emotional turmoil, we are unable to conclude beyond a reasonable doubt that no juror would have found the existence of the (f)(6) statutory mitigating circumstance and given it substantial weight in the jury's ultimate decision had the (f))(6) statutory mitigating circumstance been submitted to the jury at defendant's capital sentencing hearing. As a result, defendant is entitled to a new capital sentencing hearing.[6]

III. Conclusion

Thus, for the reasons set out above, we hold that the guilt-innocence and intellectual disability proceedings conducted before the trial court were free from error and that the outcomes reached in those proceedings should remain undisturbed. We further conclude, however, that the trial court committed prejudicial error by failing to submit the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) to the jury at defendant's capital sentencing hearing. As a result, defendant's death sentence is vacated and this case is remanded to the Superior Court, Forsyth County for a new capital sentencing hearing.

NO ERROR IN GUILT-INNOCENCE PROCEEDING; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

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6. In view of our decision that defendant is entitled to a new capital sentencing hearing, we need not address defendant's remaining challenges to his death sentence.

Chief Justice MARTIN dissenting.

Defendant beat and abducted his wife, Maria Rodriguez, before strangling her to death. After defendant strangled Maria, he decapitated her and hid her head and the rest of her body in two separate places. Maria's skull was not found for two and a half years.

A Forsyth County jury unanimously sentenced defendant to death for this premeditated and deliberate murder. Rather than respecting the jury's carefully considered sentencing verdict, the majority tries mightily to apply the facts of this case to the statutory mitigating circumstance found in N.C.G.S. § 15A-2000(f)(6). In doing so, the majority overlooks the complete lack of evidence linking defendant's purported intellectual impairment, mental disorders, and marital strife to his homicidal conduct. The majority also ignores the evidence showing that defendant's actions were carefully premeditated and that he took many steps to conceal his identity as the perpetrator, evidence that would clearly prevent any reasonable juror from finding the existence of the (f)(6) mitigating circumstance. For those reasons, the majority's holding is unsupported by the relevant sentencing statute and is inconsistent with the vast majority of our decisions interpreting it. I therefore respectfully dissent.

During the sentencing phase of a capital case, the trial court must submit a statutory mitigating circumstance to the jury if the defendant has presented "substantial evidence" of that circumstance. *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (quoting *State v. Fletcher*, 354 N.C. 455, 477, 555 S.E.2d 534, 547 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184 (2002)), *cert. denied*, 541 U.S. 944, 124 S. Ct. 1673 (2004). Evidence of a statutory mitigating circumstance is "substantial" only if "a juror could reasonably find that the circumstance exists based on the evidence." *Id.* (quoting *State v. Kemmerlin*, 356 N.C. 446, 478, 573 S.E.2d 870, 892 (2002)). The burden of producing substantial evidence to support the submission of a mitigating circumstance rests with the defendant. *Id.*

The (f)(6) mitigating circumstance states: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6) (2017). It therefore "embraces two types of disability, one diminishing a person's ability to appreciate the criminal nature of his conduct, and the other diminishing a person's ability to control himself." *State v. Price*, 331 N.C. 620, 630-31, 418 S.E.2d 169, 175 (1992), *judgment vacated on other grounds*, 506 U.S. 1043, 113 S. Ct. 955 (1993). But in both of these instances, a defendant must produce evidence that

his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law *was impaired*." N.C.G.S. § 15A-2000(f)(6) (emphasis added). In other words, the (f)(6) mitigating circumstance does not encompass every instance in which a defendant presents evidence of an intellectual impairment or mental disorder. *See State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43 ("[The (f)(6) mitigating] circumstance has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, . . . *to the degree that it affected the defendant's ability to understand and control his actions*." (emphasis added)), *cert. denied*, 510 U.S. 948, 114 S. Ct. 392 (1993). Instead, a defendant's intellectual impairment or mental disorder must have *actually impaired* his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law—and the burden is on the defendant to produce evidence establishing this link.

Even assuming for the sake of argument that defendant did, in fact, have an intellectual impairment, as well as two mental disorders (namely, posttraumatic stress disorder and chronic depression), and that he was experiencing marital problems with Maria at the time of the murder, the mere presence of those conditions, without more, does not require submission of the (f)(6) mitigating circumstance. *See id.* Despite the clear requirement to do so, defendant did not present any evidence demonstrating a link between those conditions, on the one hand, and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, on the other. To support its conclusion that the trial court should have submitted the (f)(6) mitigating circumstance, the majority conspicuously forgoes any substantive analysis of *how* or *to what extent* defendant's purported intellectual impairment, mental disorders, or marital strife affected his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. And this is for good reason: the record contains no evidence that would support an analysis linking defendant's purported conditions to his homicidal conduct.

At trial, Judge Albright recognized the evidentiary inadequacy of defendant's request for submission of the (f)(6) mitigating circumstance, noting that defendant had failed to present "any testimony to support" that instruction. Despite Judge Albright's astute handling of this issue, the majority tries to justify its holding by pointing to the testimony of Dr. Antonio Puente, one of defendant's expert witnesses, who testified that defendant had a very poor ability to "reason and think." But this testimony, without more, does not show that defendant's ability

to appreciate the criminality of his conduct was impaired. Nor does this testimony, without more, suggest that defendant had an impaired ability to conform his conduct to the requirements of the law. Poor reasoning skills do not necessarily impair one's ability to control his actions or to know what the law requires. Requiring the submission of the (f)(6) mitigating circumstance in every instance in which a defendant has poor reasoning skills, moreover, would likely mean that the mitigating circumstance would need to be submitted in every case in which the defendant has an intellectual impairment—an approach that this Court has clearly rejected and that would be inconsistent with the limits that the statutory text of subsection (f)(6) itself imposes.

Notably, the only testimony *directly* relating to defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law weighs in favor of the trial court's decision *not* to submit the (f)(6) mitigating circumstance to the jury. Dr. Selena Sermeño, another one of defendant's experts, testified that defendant generally seemed to be able to discern right from wrong. This was evident, Dr. Sermeño testified, by defendant's refusal to accept a gun that a soldier offered to him during the El Salvadorian civil war, when defendant was eleven years old. This testimony likely would not, by itself, be enough to foreclose submission of the (f)(6) mitigating circumstance to the jury, *see State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979), at least when a defendant shows a causal nexus between his intellectual impairment and his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. But here, as the trial court recognized, defendant did not present evidence linking his purported intellectual impairment to his homicidal conduct.

Defendant similarly failed to present any evidence that linked his alleged posttraumatic stress disorder to his homicidal conduct. Two of defendant's own experts—Dr. Sermeño and Dr. Moira Artigues—testified that defendant's posttraumatic stress disorder did not manifest itself through irritability or violent outbursts. Rather, it manifested itself through defendant's impaired ability to express strong emotions verbally or through body language, as well as poor sleep, flashbacks, difficulty with smells and sudden noises, and difficulty with memories. None of these symptoms have anything to do with defendant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. And the record is similarly devoid of any explanation as to how defendant's ongoing marital problems or purported chronic depression impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Because evidence of any of these links was lacking, a jury would have had to go beyond the evidence presented and speculate in order to conclude that the (f)(6) mitigating circumstance may have applied here. And when the evidence is such that a jury would have to base its finding of a mitigating circumstance "solely upon speculation and conjecture, not upon substantial evidence," submission of the instruction to the jury is "unreasonable as a matter of law." *State v. Anderson*, 350 N.C. 152, 183, 513 S.E.2d 296, 315 (quoting *State v. Daniels*, 337 N.C. 243, 273, 446 S.E.2d 298, 316-17 (1994), *cert. denied*, 513 U.S. 1135, 115 S. Ct. 953 (1995)), *cert. denied*, 528 U.S. 973, 120 S. Ct. 417 (1999).

Even assuming for the sake of argument that defendant *had* produced evidence linking his purported intellectual impairment, mental disorders, and marital problems to his homicidal conduct, the record contains ample evidence that would rebut any reasonable inference that defendant had an impaired ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. As noted earlier, a statutory mitigating circumstance must be submitted only if a juror could reasonably find its existence based on the evidence. *Watts*, 357 N.C. at 377, 584 S.E.2d at 748 (quoting *Kemmerlin*, 356 N.C. at 478, 573 S.E.2d at 892). The majority correctly recites this standard but then misapplies it. Although the majority's analysis seems to suggest otherwise, nowhere in our precedents have we required our trial courts to view all evidence pertaining to the submission of the (f)(6) mitigating circumstance in the light most favorable to the defendant, resolving ambiguities and inconsistencies in his favor. And we have never, until today, directed our trial courts to ignore the presence of overwhelming evidence that refutes any suggestion that a defendant had an impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

In fact, our precedents clearly show the opposite. We have repeatedly recognized that a trial court may, in its determination of whether to submit the (f)(6) mitigating circumstance, consider evidence rebutting a defendant's argument that the instruction should be submitted to the jury. For instance, we have held that a trial court properly did not submit the (f)(6) mitigating circumstance when a defendant's academic performance and operation of a gambling business while in prison were inconsistent with his argument that he had an impaired ability to "understand and control his actions." *State v. Braxton*, 352 N.C. 158, 215, 531 S.E.2d 428, 461 (2000), *cert. denied*, 531 U.S. 1130, 121 S. Ct. 890 (2001); *see also State v. Strickland*, 346 N.C. 443, 464, 488 S.E.2d 194, 206 (1997) ("There was no evidence that consumption of this alcohol so impaired

defendant as to . . . affect[ ] his ability to control his actions. In fact, there was direct evidence to the contrary."), *cert. denied*, 522 U.S. 1078, 118 S. Ct. 858 (1998).

In a line of recent cases, this Court has placed particular emphasis on whether a defendant's acts "demonstrate that [he] was aware that his acts were criminal," therefore negating any suggestion that the defendant's capacity to appreciate the criminality of his conduct was impaired. *See State v. Polke*, 361 N.C. 65, 72, 638 S.E.2d 189, 194 (2006), *cert. denied*, 552 U.S. 836, 128 S. Ct. 70 (2007). For instance, we have held that the trial court properly declined to submit the (f)(6) mitigating circumstance to the jury when the evidence showed that the defendant lured the victim to the scene of the murder, disposed of the murder weapon, and had false identification when he was apprehended. *State v. Gainey*, 355 N.C. 73, 104, 558 S.E.2d 463, 483, *cert. denied*, 537 U.S. 896, 123 S. Ct. 182 (2002). Based on this evidence, the Court reasoned that the defendant "fully underst[ood] that his acts were criminal." *Id.* at 104, 558 S.E.2d at 483. In another case, this Court held that the trial court properly did not submit the (f)(6) mitigating circumstance when a "defendant's initial lies to police about his involvement in the murder and his washing and disposal of the murder weapon . . . tend[ed] to show that [the] defendant fully appreciated the criminality of his conduct." *State v. Badgett*, 361 N.C. 234, 258, 644 S.E.2d 206, 220 (citing *State v. Golphin*, 352 N.C. 364, 476, 533 S.E.2d 168, 240 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1380 (2001)), *cert. denied*, 552 U.S. 997, 128 S. Ct. 502 (2007).

Here, defendant's conduct surrounding the murder of Maria demonstrates that he had a full grasp of the gravity and criminality of his actions. And this same evidence showing a careful, deliberate course of action indicates that defendant's mental faculties were not impaired during the course of the murder. While the majority recognizes the brutal nature of this murder, it utterly fails to recognize the legal significance of all of the preemptive steps that defendant took to conceal his identity as the perpetrator.

Defendant's actions when he came to Maria's apartment shortly before the murder provide ample evidence of defendant's meticulous attempts to conceal his crime. When defendant started arguing with Maria inside her bedroom and Maria called for help, the children found that the bedroom door was closed and locked. He also told the children not to call the police and took Maria's cell phone away so that they could not call for help after he assaulted their mother. After ending the argument with Maria by incapacitating her, defendant transported Maria

from the apartment to his car by carrying her over his shoulder, all the while covering her face with her work uniform so that the children could not see the condition of their mother's face. At that time, defendant told the children that Maria had hurt herself on some furniture and that he was going to take her to the hospital. He told a concerned neighbor a similar story and added that the children were not allowed to visit Maria.

Defendant, moreover, took a number of additional steps to avoid being identified as the perpetrator. For instance, defendant returned to Maria's apartment and attempted to clean up a pool of Maria's blood that had soaked into the carpet. He lied to their children, to his friend, and to investigating officers about what had happened during his encounter with Maria in the bedroom. Soon after the murder, when defendant was with the children, one of them attempted to check the trunk of defendant's car to see if Maria was there. When that child saw Maria's work uniform in defendant's trunk, defendant quickly ran over and closed the trunk to try to prevent his children from investigating further. Defendant told his children that Maria's uniform was there because the doctor had given it to him. The evidence also suggests that defendant sent three text messages from Maria's cell phone trying to convince one of Maria's friends that she had run away with a new boyfriend to Spain.

Most notably, however, defendant severed Maria's head from her body after the murder and hid Maria's remains in two separate, heavily wooded areas. Maria's skull was not found for another two and a half years after the rest of her body was discovered. The authorities never recovered Maria's phone, the clothing that she wore on the night of the murder, or the object used to remove her head, suggesting that defendant carefully hid them in his effort to thwart a future prosecution.

Defendant's actions before, during, and after the murder indicate careful deliberation and an attempt to evade punishment, rebutting any reasonable inference that defendant had an impaired capacity to appreciate the criminality of his conduct. And these same actions—especially those leading up to the murder—bear no resemblance to the frenzied, hectic behavior expected of a person with an impaired capacity to conform his conduct to the requirements of the law. Nor are they consistent with a "child-like thought process[ ]" or a "limited ability to think and reason beyond the immediate moment," as defendant argues. And despite what the majority suggests, defendant's actions demonstrate far, far more than a mere "recognition of the wrongfulness of his conduct."

Rather than acknowledging the legal significance of defendant's acts surrounding the murder and the lack of evidence linking defendant's

purported mental conditions to his homicidal conduct, the majority instead focuses its analysis on two cases that are inconsistent with the language of the (f)(6) mitigating circumstance, and which, as a result, have become outliers in our jurisprudence. Specifically, the majority rests the crux of its argument on *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), and *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991), which, according to the majority, dispel any requirement that a defendant present evidence of a nexus between a defendant's mental condition and the defendant's homicidal conduct.

To begin with, it is worth noting that *Stokes* and *Fullwood* are inconsistent with cases that were decided before they were. In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), this Court held that if a defendant was intoxicated at the time of the murder, but not to a degree that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired, the (f)(6) mitigating circumstance should not be submitted to the jury. *Id.* at 32-33, 257 S.E.2d at 589. This Court reaffirmed that principle in a similar case decided three years later, *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 103 S. Ct. 474 (1982). In *Williams*, this Court held that evidence showing that the defendant drank alcohol on the night of a murder, without evidence showing "that [the defendant's] capacity to appreciate the criminality of his conduct was impaired by [that] alcohol," was insufficient to support submission of the (f)(6) mitigating circumstance. *Id.* at 687, 292 S.E.2d at 262. These cases show that a defendant must present evidence of a link to require submission of the (f)(6) factor to a jury and therefore show that *Stokes* and *Fullwood* have been outliers in our jurisprudence ever since they were decided.

More recent cases, moreover, have implicitly overruled *Stokes* and *Fullwood* (or, alternatively, have confirmed that they were wrongly decided under preexisting caselaw when they were handed down). In *State v. Hill*, 347 N.C. 275, 493 S.E.2d 264 (1997), *cert. denied*, 523 U.S. 1142, 118 S. Ct. 1850 (1998), we considered a case in which the defendant exhibited personality traits of "emotional and social alienation," "mild depression," "poor impulse control," and "subaverage intelligence." *Id.* at 301-02, 493 S.E.2d at 279. But we held that the trial court was correct not to submit the (f)(6) mitigating circumstance to the jury because "the testimony *did not establish* that [the] defendant's personality characteristics *affected his ability to understand and control his actions*." *Id.* at 302, 493 S.E.2d at 280 (emphases added). Similarly, in *State v. Gainey*, expert testimony established that the defendant suffered from "moderately severe to severe mixed personality disorder . . . , with paranoid and

schizoid features which tended to make him restless and impulsive." 355 N.C. at 103-04, 558 S.E.2d at 483. But, consistent with our holding in *Hill*, we held that this testimony, standing alone, did not amount to evidence that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired. *See id.*

The list goes on. In *State v. Kemmerlin*, the defendant presented evidence that she had "borderline personality disorder" and "major depressive disorder." 356 N.C. at 480, 573 S.E.2d at 893. The defendant was additionally concerned that her stepson was going to sexually abuse her daughter, and, because of the defendant's own experiences suffering sexual abuse, she was "exquisitely and overly attuned to sexual issues." *Id.* at 479, 573 S.E.2d at 893. But this evidence was insufficient to support submission of the (f)(6) mitigating circumstance to the jury because the defendant's suffering, according to her own expert witness, "was not to the level of impairing her ability to appreciate the wrongfulness" of her conduct. *Id.* at 481, 573 S.E.2d at 893.

To highlight the distinction between this case and cases in which the trial court *properly* instructed the jury on the (f)(6) mitigating circumstance, we need to look no further than the majority's own citations. In *State v. Hooks*, 353 N.C. 629, 548 S.E.2d 501 (2001), *cert. denied*, 534 U.S. 1155, 122 S. Ct. 1126 (2002), the defendant suffered from chronic substance abuse and underdeveloped skills for "emotional expression, social connection, and adult functioning." *Id.* at 640, 548 S.E.2d at 509. Although it was not squarely reviewing the propriety of the trial court's submission of the (f)(6) mitigating circumstance,[1] this Court emphasized the testimony of the defendant's expert witness: "[The defendant's] substance dependence and the impoverished skills for adult functioning combined such that his *ability to think through his behavior*, to *consider the consequences of his actions*, to reasonably plan or to understand and *appreciate the connection between his actions and consequent events* would have been impaired at the time of the offense." *Id.* (emphases added). In other words, as this Court recognized, the evidence indicated

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1. The discussion of the (f)(6) mitigating circumstance in *Hooks* was dictum; the Court discussed the (f)(6) mitigating circumstance, which the trial court *did* submit to the jury, only to contrast the trial court's decision *not* to submit a different mitigating circumstance. *Id.* at 639-41, 548 S.E.2d at 508-09. Even though the Court's discussion of the (f)(6) mitigating circumstance was brief and not directly relevant to its holding, however, it is still helpful to show how the defendant in that case presented evidence linking his mental conditions to his homicidal conduct—which therefore justified the trial court's submission of the (f)(6) mitigating circumstance to the jury.

much more than the mere presence of a mental impairment; rather, expert testimony directly established a nexus between the defendant's impairments and how they manifested themselves, and therefore, a jury could find that the defendant was not able to fully appreciate the criminality of his conduct. *See id.*

As this Court has repeatedly recognized, then, evidence that a defendant merely *has* an intellectual impairment or mental disorder is not enough to require the trial court to submit the (f)(6) mitigating circumstance to the jury. Instead, the defendant has the burden of linking his intellectual impairment or mental disorder to his homicidal conduct. If a defendant does not produce evidence of this link, the jury will not be able to infer the presence of the (f)(6) mitigating circumstance. When it cannot, the trial court should not submit that instruction to it.

In sum, the language of the (f)(6) mitigating circumstance and the weight of this Court's caselaw interpreting that statutory provision require a causal nexus between a defendant's mental condition and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Here, defendant presented no evidence of any such link. And by selectively relying on *Stokes* and *Fullwood*—which are clear outliers in our jurisprudence—the majority is dictating a change in law that has been relatively well settled for decades. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991) (noting that the "consistent development of legal principles . . . contributes to the actual and perceived integrity of the judicial process"). In any event, defendant's conduct surrounding the murder dispels any doubt that defendant freely chose not to conform his conduct to the law and fully appreciated the criminality of his conduct. I therefore respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

KEN WALKER, TED P. PEARCE, MARK STREET, AND WARREN C. BICKERS
v.
DRIVEN HOLDINGS, LLC

No. 395A17

Filed 8 June 2018

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and order dated 7 August 2017 entered by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 15 May 2018 in session in the Henderson County Historic Courthouse in the City of Hendersonville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Milazzo Webb Law, PLLC, by David C. Boggs and Colin R. Stockton, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Jackson Wyatt Moore, Jr.; and White & Case LLP, by Glenn M. Kurtz, pro hac vice, and Kimberly A. Haviv, pro hac vice, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

7 JUNE 2018

002PA17	State v. Juan Antonia Miller	1. Def's Motion to Strike Transcript of State's Exhibit 2 and All References from the State's Brief 2. State's Motion to Amend the Record	1. Dismissed as moot 2. Dismissed as moot
025P18	State v. Michael Bernard Perry	Def's PDR Under N.C.G.S. § 7A-31 (COA17-223)	Denied
035A02-3	State v. Frank Junior Chambers (DEATH)	Def's *Pro Se* Motion to Appoint Counsel	Dismissed **Ervin, J., recused**
042P18	State v. Jamarick Yamon Horton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-460) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
047P09-3	State v. Keith D. Wilson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-55) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
047P18	Joe Wallace Powell, Jr. v. Robert Kent and Cynthia Young	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-708)	Denied
048P18	State v. Armond Devega	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-1302) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
049P18	Crazie Overstock Promotions, LLC v. James McVicker, in his personal and official capacity as Sheriff for Bladen County North Carolina; Jeffery Tyler, in his personal and official capacity as a Captain in the Bladen County Sheriff's Department	Defs' PDR Under N.C.G.S. § 7A-31 (COA16-932-2)	Denied

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058P18	State v. Trevor Wilks Forte	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-513) 2. Def's Motion to Deem PDR Timely Filed and Served 3. Def's Conditional Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Denied
069P18-2	State v. Nell Monette Baldwin	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-225)	Denied **Beasley, J., recused** **Morgan, J., recused**
070P18	State v. Stephanie Bridges	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-579) 2. State's Motion to Deem Its Response as Timely Filed	1. Denied 2. Allowed
074P18	State v. Stephen Kwame Gates	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-772) 2. Def's PDR 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
075P18	Anthony Butler v. Scotland County Board of Education	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-501)	Denied
076P18	Perrin Q. Henderson v. Mary Ward Henderson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-72-2)	Denied
078P18	State v. Jermaine Jackson Goins	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-458) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
080P18-2	Darron J. Jones v. Mr. Cranford	1. Plt's *Pro Se* Motion for Objection 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion for Order to Show Cause for Preliminary Injunction and Temporary Restraining Order	1. Dismissed 2. Allowed 3. Dismissed
090P18	State v. Willoughby Henerey Mumma	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA17-481)	Allowed

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092P18	Souad Dass v. Fabien Anthony Dass	Def's PDR Under N.C.G.S. § 7A-31 (COA17-702)	Denied
095P18	State v. Michael Teon Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA17-209)	Denied
096P18	State v. Steven J. Clark	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for Writ of Certiorari	1. Dismissed 2. Dismissed
099P18	Durham County, on behalf of Terrance Adams v. Alma Adams	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-929) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt's Amended PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
100P18	David A. Perez v. Laurie S. Perez	1. Plt's *Pro Se* Motion for Temporary Stay (COA17-572) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Allowed **04/05/2018** Dissolved **06/07/2018** 2. Denied 3. Denied
102P18	State v. George E. Harrison	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-805) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
107P18	State v. Jamal M. Watson	1. Def's Motion for Temporary Stay (COA17-253) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **04/10/2018** Dissolved **06/07/2018** 2. Dismissed as moot 3. Dismissed 4. Dismissed as moot

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120P18	IO Moonwalkers, Inc., and American Coins & Gold, Inc., Plaintiffs v. Banc of America Merchant Services, LLC, Bank of America Corporation, Bank of America, N.A. and First Data Merchant Services, LLC, Defendants v. Rilwan Hassan, Third-Party Defendant	Plts' and Third-Party Def's PDR Under N.C.G.S. § 7A-31 (COA17-703)	Denied
122P18	Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, Alba-Justina Secrist a/k/a A-J Secrist and R. Douglas Harmon	1. Verified Motion for Leave to File Amended Notice of Appeal 2. Plt's Petition for *Writ of Certiorari* to Review Decision of N.C. Business Court 3. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	1. 2. 3. Allowed **05/21/2018**
123P18	State v. Joseph Matthew Zinna	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1028)	Denied
125P18	In the Matter of E.D.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-693) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied
129P18	Brandy Renee Flowers v. Pitt County District Court Judge Wendy Hazelton	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
130P18	State v. James Maurice Wilson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	Denied
132P18	Beth Desmond v. The News and Observer Publishing Company, and Mandy Locke	1. Defs' PDR Prior to a Determination of the COA 2. Professor William Van Alystyne's Motion for Leave to File Amicus Brief in Support of PDR	1. Denied 2. Denied
140P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-888) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/17/2018** 2.

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141P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-1051) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/17/2018** 2.
142P18	DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; The Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	1. Defs' Motion for Temporary Stay (COA17-871) 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **05/17/2018** 2.
143P18	State v. Ramelle Milek Lofton	1. State's Motion for Temporary Stay (COA17-716) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/21/2018** 2. 3.
155P18	David Wayne Ewart v. Mike Slagel (Superintendent)	Petitioner's *Pro Se* Motion for Notice of Appeal (COAP18-295)	Denied **05/23/2018**
160P18	State v. James Harold Courtney, III	1. State's Motion for Temporary Stay (COA17-1095) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/01/2018** 2.
161A18	State v. Mollie Elizabeth B. McDaniel	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/01/2018** 2.

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165P18	Latwang Janell Reid El Bey *ex rel.* Latwang Janell Reid v. State of North Carolina, et al.; Erik A. Hooks, Secretary of the North Carolina Department of Public Safety, et al.	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-253)	Denied **06/05/2018**
166P18	Diandra N. Webb v. Donnie Harrison, Wake County Jail	Plt's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **06/05/2018**
197P17-2	Brian Keith Blackwell v. Erik A. Hooks, Secretary of Prisons, Cynthia O. Thornton, Administrator I	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **05/22/2018** **Ervin, J., recused**
241P17	Christine N. Brewington v. N.C. Department of Public Safety, State Bureau of Investigation	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-913) Denied	
252PA14-3	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-3) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **02/16/2018** 2. Allowed 3. --- 4. Allowed
298P17	State v. Rashand Nicholas Fitts	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1106)	Denied
302A14	State v. Juan Carlos Rodriguez (DEATH)	1. State's Motion to Strike Defendant's Supplemental Brief 2. State's Motion in the Alternative for Leave to File State's Supplemental Brief	1. Denied 2. Allowed **09/26/2017**
302A14	State v. Juan Carlos Rodriguez (DEATH)	Def's Motion Requesting Court to Take Judicial Notice	Dismissed as moot
302A14	State v. Juan Carlos Rodriguez (DEATH)	Def's Motion Requesting Court to Take Judicial Notice	Dismissed as moot

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316P17	State v. Kathryn Rolland	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-168) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion for Addition to Record on Appeal	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
332P17	Joris Haarhuis, Administrator of the Estate of Julie Haarhuis v. Emily Cheek	1. Def's Motion for Temporary Stay (COA16-961) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. Plt's Motion to Dismiss Appeal	1. Dismissed w/o prejudice **10/06/2017** 2. Denied 3. --- 4. Denied 5. Allowed
365A16-2	State v. David Michael Reed	1. State's Motion for Temporary Stay (COA16-33-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **02/02/2018** --- 2. Allowed 3. --- 4. Denied
406P17-2	State v. Daniel Luna	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/25/2018**
411P16-2	Union County v. Town of Marshville	Def's PDR Under N.C.G.S. § 7A-31 (COA17-37)	Denied **Ervin, J., recused**
449P11-19	In re Charles Everette Hinton	Petitioner's *Pro Se* Motion for Pardon and Discharge from Imprisonment	Dismissed **Ervin, J., recused**
505P96-3	State v. Melvin Lee White, Jr. (DEATH)	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Craven County	Denied
526A13-2	State v. Timothy Glen Mills	1. State's Motion for Temporary Stay (COA17-747) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/30/2018** 2. Allowed **05/30/2018** 3. ---

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