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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 23, 2024

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OF

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 23 MAY 2024

ORDERS

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

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ADVERSE POSSESSION

Easement—claim by owner of dominant tenement—hostile possession—summary judgment—In a property dispute between neighbors, where a husband and wife (defendants) owned adjoining tracts of land, the first of which contained defendants' home and the second of which benefited from a 30-foot-wide easement containing a driveway and a strip of land east of the driveway leading up to plaintiffs' property, the trial court erred in denying summary judgment to defendants on their claim for adverse possession of the land between the driveway and plaintiffs' property line. Defendants' forecast of evidence—considered in the light most favorable to defendants—created a genuine issue of material fact concerning the hostility element of their adverse possession claim, with the evidence showing that: defendants mistakenly believed that they owned the disputed land; defendants made permanent improvements on the land that went beyond what the easement allowed, thereby rebutting the presumption of permissive use; and, although none of plaintiffs' predecessors in interest ever objected to defendants' use or improvement of the disputed tract, their silence did not amount to a grant of permission for such use or improvement. **Hinman v. Cornett, 62.**

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North Carolina—Fines and Forfeitures Clause—interlocal agreement—"clear proceeds"—fines from red light camera enforcement program—A local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement—which laid out a cost-sharing framework for funding the program—between the city and its county's school board did not violate the Fines and Forfeitures Clause of the North Carolina Constitution (Art. IX, section 7), where the board received all of the fines collected under the program and then reimbursed the city for two main expenses: the fee for the private company hired to install the cameras, maintain them, and process captured violations; and the salary of an officer

Prosecutor's closing statement—self-defense to murder—characterization of defendant's actions as aggressive—no misstatements of law—In defendant's trial for first-degree murder, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, there was no gross impropriety in the prosecutor's closing statement requiring the trial court's intervention where the prosecutor did not misstate the law on self-defense while characterizing certain of defendant's actions as aggressive. At no point did the prosecutor invoke the aggressor doctrine, claim that defendant had a duty to retreat within his home, or disclaim defendant's right to lawfully defend his home. **State v. Copley, 111.**

ELECTIONS

Protest—defamation claim—absolute privilege—broad scope—attaches to the proceeding—The defense of absolute privilege applies broadly to protect from civil defamation liability everyone involved in the preparation or filing of an election protest, since the privilege attaches to the proceeding in which the statements are published, and is not restricted only to those who directly participate in election-protest hearings as a party, counsel, or witness as erroneously concluded by the Court of Appeals. Therefore, plaintiffs' libel suit against defendants for preparing and filing election protests alleging that plaintiffs engaged in illegal double-voting was absolutely barred, since the challenged statements were made in the due course of a quasi-judicial proceeding and were both relevant and pertinent to its subject matter. **Bouvier v. Porter, 1.**

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Action to quiet title—equitable subrogation—applicability—genuine issues of material fact—culpable negligence—In plaintiff bank's declaratory judgment action to quiet title to a home sold under execution (which was held to satisfy a lien of judgment) to the homeowner's daughter—at which point plaintiff's lien was extinguished—where there were genuine issues of material fact regarding whether the doctrine of equitable subrogation was applicable to provide relief to plaintiff, which had a superior interest in the property to the holder of the lien of judgment, the Court of Appeals erred by concluding that defendants (the homeowner and her daughter) were entitled to summary judgment. On remand, the trial court was instructed to utilize broad discretion to obtain the necessary information to determine whether plaintiff's predecessor-in-interest was culpably negligent in agreeing to refinance the first loan on the property without exercising due diligence to discover the publicly-recorded lien of judgment, and to use all of the facts to balance the equities. **MidFirst Bank v. Brown, 103.**

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Other bad acts—child rape trial—plain error analysis—standard for determining prejudice—probable impact—In evaluating whether the admission of portions of defendant's cross-examination testimony—regarding text messages and sexual encounters with an adult girlfriend—during his trial for rape and sexual abuse of a child constituted plain error, the Supreme Court reaffirmed that the prejudice prong of the three-factor test for plain error requires an evaluation of whether there is a reasonable probability that, but for the errors complained of, the jury would have returned a different result. In this case, which hinged mostly on witness credibility,

where the victim recounted specific details of abuse perpetrated by defendant and where there were issues with defendant's credibility, defendant failed to demonstrate that a different outcome probably would have been reached if the challenged evidence was excluded; therefore, defendant did not meet the standard for showing prejudice and was not entitled to a new trial. **State v. Reber, 153.**

Rule 412—definition of "sexual behavior"—criminal prosecution—sexual offenses against child—evidence of prior sexual abuse by different perpetrator—In a prosecution for sexual offense with a child by an adult and indecent liberties with a child, the trial court properly excluded evidence of previous sexual abuse of the victim by an abuser other than defendant, where Evidence Rule 412 bars evidence of a victim's "sexual behavior," which is defined as "sexual activity other than the sexual act which is at issue in the indictment on trial." Although Rule 412 does not define "sexual activity," the Rule's plain language indicates that all evidence of a victim's sexual activity other than the sexual act at issue is inadmissible regardless of whether that activity was consensual or nonconsensual. Thus, defendant's argument that the victim's prior sexual abuse did not fall under Rule 412's definition of "sexual behavior" lacked merit. **State v. Washington, 265.**

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Instructions—murder by lying in wait—castle doctrine not properly accounted for—error cured by alternate theory of murder—In defendant's trial for first-degree murder, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, the trial court's instruction on first-degree murder by lying in wait did not properly account for the castle doctrine—a justification for defensive force, about which the jury was also instructed and, if applicable, would act as a shield from criminal culpability—where the trial court instructed the jury that if they found each element of murder by lying in wait, they must find defendant guilty, thereby impermissibly suggesting that the crime eclipses the castle doctrine. However, where the jury also found defendant guilty of first-degree murder by premeditation and deliberation, they necessarily concluded that defendant was not entitled to the castle doctrine defense; therefore, despite the error in the lying in wait instruction, defendant could not demonstrate prejudice that would entitle him to a new trial. **State v. Copley, 111.**

Jury instructions—self-defense—defense of habitation—request for aggressor doctrine language—invited error—In defendant's first-degree murder trial, in which defendant asserted that he was acting in self-defense when he fired his shotgun out through the window of his garage toward attendees of a nearby house party, killing one person, the trial court did not err in its jury instructions on the defense of habitation—the pattern jury instruction of which included a provocation exception—or self-defense. Not only did defendant not object to the instructions, but any error regarding the aggressor doctrine—which the court only included as part of the self-defense instruction—was invited error, since defendant specifically requested the aggressor doctrine language. **State v. Copley, 111.**

INDICTMENT AND INFORMATION

Second-degree rape—short-form indictment—sufficiency—effect on trial court's jurisdiction—abrogation of common law pleading rules—A short-form indictment charging defendant with second-degree rape neither contained a fatal

defect nor deprived the trial court of subject matter jurisdiction to convict defendant, even though the indictment did not allege that the defendant knew or should have known that the victim was physically helpless during the rape. The Criminal Procedure Act abrogated the common law rule that a court's subject matter jurisdiction in a criminal case depends on the sufficiency of the underlying indictment, as well as the strict common law requirement that an indictment specifically allege every element of an offense—a requirement that the legislature loosened even further by enacting short-form indictments by statute. Instead, a defective indictment only raises jurisdictional concerns when it alleges conduct that does not constitute a crime; meanwhile, indictments containing merely technical, non-jurisdictional defects will not be set aside so long as they give defendants sufficient notice of the crimes charged to prepare a defense and to protect against double jeopardy. Here, the indictment against defendant did allege an actual crime under North Carolina law while also meeting the short-form pleading requirements for second-degree rape (codified in N.C.G.S. § 15-144.1(c)). **State v. Singleton, 183.**

Sexual battery—essential elements—force implied by lack of consent—sufficiency of notice to defendant—The indictment charging defendant with sexual battery was facially valid where it contained sufficient facts to support each essential element of the charged offense, including force, since the allegation that defendant engaged in sexual conduct with the victim without her consent was sufficient to imply that the contact was committed by force, however slight, and was therefore adequate to put defendant on notice of the charge. **State v. Stewart, 237.**

JURISDICTION

Custodial law enforcement agency recordings—media request—release—initiation by petition versus complaint—legislative intent—In an action seeking the release of custodial law enforcement agency recordings (CLEAR) of a protest march pursuant to N.C.G.S. § 132-1.4A(g), media petitioners were not required to file a civil complaint rather than a petition to invoke the trial court's jurisdiction. Where the language in subsection (g) instructing anyone seeking release of CLEAR to file an "action" was not clear and unambiguous, statutory interpretation principles supported the conclusion that legislative intent allowed for such an action to be initiated by petition. **In re McClatchy Co., 77.**

Standing—taxpayer—constitutional challenge—local red light camera enforcement program—remedies permitted—After the legislature passed a local act implementing a city's red light camera enforcement program and authorizing an interlocal agreement—which laid out a cost-sharing framework for funding the program—between the city and its county's school board, two individuals (plaintiffs) who received citations and were each fined $100.00 for running red lights had taxpayer standing to challenge the local act's constitutionality. First, plaintiffs effectively sued on the school board's behalf by alleging that, under the Fines and Forfeitures Clause of the state constitution, the board was entitled to a larger share of red light penalties than what it retained under the interlocal agreement. Second, plaintiffs adequately alleged a "direct injury" where they argued that at least part of the $100.00 penalty they paid to the city was unconstitutionally rerouted away from the local school board. Third, plaintiffs sufficiently alleged a "demand" on the board to protect its interests and the board's refusal to do so by challenging plaintiffs' claims. Finally, plaintiffs' taxpayer standing permitted them to pursue injunctive and declaratory relief, but not money damages (specifically, a refund of the fines). **Fearrington v. City of Greenville, 38.**

SCHEDULE FOR HEARING APPEALS DURING 2024

NORTH CAROLINA SUPREME COURT

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

February 13, 14, 15, 20, 21, 22
April 9, 10, 11, 16, 17, 18
September 17, 18, 19, 24, 25, 26
October 22, 23, 24, 29, 30, 31

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

LOUIS M. BOUVIER, JR., KAREN ANDREA NIEHANS, SAMUEL R. NIEHANS, AND JOSEPH D. GOLDEN
v.
WILLIAM CLARK PORTER, IV, HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC, STEVE ROBERTS, ERIN CLARK, GABRIELA FALLON, STEVEN SAXE, AND THE PAT MCCRORY COMMITTEE LEGAL DEFENSE FUND

No. 403PA21

Filed 23 May 2024

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

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

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

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

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

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

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

NEWBY, Chief Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This Court reviews orders granting or denying summary judgment de novo. *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A movant is entitled to judgment as a matter of law when "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense," or when it is shown "through discovery that the opposing party cannot produce evidence to support an essential element

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REVERSED AND REMANDED.

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

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

LATOYA CANTEEN AND PAMELA PHILLIPS
v.
CHARLOTTE METRO CREDIT UNION

No. 10A23

Filed 23 May 2024

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

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

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 286 N.C. App. 539 (2022), reversing an order entered on 7 September 2021 by Judge George C. Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 21 February 2024.

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

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

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

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

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

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

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

BERGER, Justice.

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

I. Factual and Procedural Background

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

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

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

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

The Notice of Amendments provision provided:

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

The Governing Law provision stated:

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

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

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

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

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

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

A. Implied Covenant of Good Faith and Fair Dealing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Illusoriness

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

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

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

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

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

C. Mutual Assent

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

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

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

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

III. Conclusion

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

AFFIRMED.

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

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

Justice RIGGS dissenting.

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

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

I. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Conclusion

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

Justice EARLS joins in this dissenting opinion.

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

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

No. 89PA22

Filed 23 May 2024

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

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

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

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

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

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

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

Justice BERGER dissenting.

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

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

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

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

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

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

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

EARLS, Justice.

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

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

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

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

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

I. Background

A. Greenville's Red Light Camera Program

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

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

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

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

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

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

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

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

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

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

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

B. Plaintiffs' Suit

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

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

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

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

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

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

C. The Court of Appeals Opinion

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

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

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

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

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

II. Plaintiffs' Taxpayer Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Merits of Plaintiffs' Claims

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

A. Claim Under N.C.G.S. § 115C-437

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

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

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

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

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

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

Id. § 4, at 180.

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

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

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

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

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

B. Claim Under the Fines and Forfeitures Clause

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

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

Justice BERGER dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

No. 219A23

Filed 23 May 2024

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

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

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

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

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

RIGGS, Justice.

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

I. Factual and Procedural History

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

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

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

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

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

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

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

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

II. Analysis

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

A. Standard of Review

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

B. Hostile Possession

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED AND REMANDED.

IN RE K.B.

[386 N.C. 68 (2024)]

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

No. 212A23

Filed 23 May 2024

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

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

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

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

Christopher M. Watford, for respondent-appellant mother.

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

RIGGS, Justice.

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

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

I. Factual & Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Analysis

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

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

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

A. Standard of Review

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

Further, the trial court's dispositional choices are reviewed for abuse of discretion. *In re J.M.*, 384 N.C. 584, 591 (2023). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re S.R.*, 384 N.C. 516, 520 (2023) (cleaned up) (quoting *In re C.B.*, 375 N.C. 556, 560 (2020)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED.

IN RE McCLATCHY CO.

[386 N.C. 77 (2024)]

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

No. 29A23

Filed 23 May 2024

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

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

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

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

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

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

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

Justice BERGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

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

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

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

ALLEN, Justice.

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

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

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

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

I. Background

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

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

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

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

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

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

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

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

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

N.C.G.S. § 132-1.4A(a)(5).

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

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

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

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

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

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

N.C.G.S. § 132-1.4A(g).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . . .

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

Id. at 146.

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

On 23 January 2023, petitioners filed a notice of appeal based on the dissent in the Court of Appeals. At the time, N.C.G.S. § 7A-30(2) provided a right of appeal to this Court "from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges." N.C.G.S. § 7A-30(2) (2023), *repealed by* An Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions, S.L. 2023-134, § 16.21.(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf.

II. Jurisdiction

[1] In its brief to this Court, the GPD argues for the first time that the trial court lacked subject matter jurisdiction over the petition. Subject matter jurisdiction is a court's legal authority to adjudicate the kind of claim alleged. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010). Parties may raise the issue of subject matter jurisdiction at any point. *State v. Newborn*, 384 N.C. 656, 658 (2023). If the record substantiates the GPD's argument, the entire proceeding is void and we need not reach the issues that divided the Court of Appeals. *See High v. Pearce*, 220 N.C. 266, 271 (1941) ("Where there is no jurisdiction of the subject matter the whole proceeding is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose.").

"Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo." *Wing v. Goldman Sachs Tr. Co.*, 382 N.C. 288, 297 (2022) (quoting *In re A.L.L.*, 376 N.C. 99, 101 (2020)). "When reviewing a matter *de novo*, this Court 'considers the matter anew and freely substitutes its own judgment' for that of the

lower courts." *Town of Midland v. Harrell*, 385 N.C. 365, 370 (2023) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003)).

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

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001). "The process of construing a statutory provision must begin with an examination of the relevant statutory language." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547 (2018). "If the statute's plain language is clear and unambiguous, this Court applies the statute as written and does not engage in further statutory construction." *N.C. Farm Bureau Mut. Ins. Co. v. Hebert*, No. 281A22, slip op. at 9 (N.C. Mar. 22, 2024) (citing *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 188 (2021)). "[H]owever, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205 (1990)).

The plain language rule does not apply to the General Assembly's use of "action" in subsection (g) because the term is not clear and unambiguous. "All remedies in the courts of this State divide into (1) actions or (2) special proceedings." *In re Clark*, 303 N.C. 592, 598 n.3 (1981) (citing N.C.G.S. § 1-1). "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C.G.S. § 1-2 (2023). "Every other remedy is a special proceeding." N.C.G.S. § 1-3 (2023). Ordinarily,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Compliance with the CLEAR Statute

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

A. Eligibility to Initiate Subsection (g) Proceedings

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

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

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

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6. The GPD's brief to this Court includes an argument that the petition violates subsection (g) of the CLEAR statute because it fails to "identify a specific event or occurrence for which [petitioners] sought the recordings." *See* N.C.G.S. § 132-1.4A(g) ("The request for release must state the date and approximate time of the activity captured in the recording, or otherwise identify the activity with reasonable particularity sufficient to identify the recording to which the action refers."). There was no disagreement between the majority and the dissenting judge at the Court of Appeals on this matter. Accordingly, it is not properly before this Court. *See State v. McKoy*, 385 N.C. 88, 94 (2023) ("When a case comes to us under N.C.G.S. § 7A-30(2) based solely on a dissent in the Court of Appeals, the scope of review is limited to those questions on which there was division in the intermediate appellate court." (internal quotation marks and citation omitted)).

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

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

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

B. Trial Court Discretion in Subsection (g) Proceedings

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

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

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

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

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

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

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

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

IV. Conclusion

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

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Justice BERGER dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chief Justice NEWBY joins in this dissenting opinion.

IN RE SE. EYE CTR.

[386 N.C. 101 (2024)]

IN RE SOUTHEASTERN EYE CENTER

No. 192A23

Filed 23 May 2024

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

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

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order entered on 9 March 2023 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 10 April 2024.

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

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

PER CURIAM.

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

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

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

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

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

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

DISMISSED.

MIDFIRST BANK
v.
BETTY J. BROWN AND MICHELLE ANDERSON

No. 14PA23

Filed 23 May 2024

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

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

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

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

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

BARRINGER, Justice.

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

I. Factual Background

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

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

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

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

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

II. Procedural Background

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

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

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

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

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

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

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

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

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

III. Standard of Review

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

IV. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Conclusion

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

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

REVERSED AND REMANDED.

NORTH CAROLINA DEPARTMENT OF REVENUE
v.
FSC II, LLC

No. 150A23

Filed 23 May 2024

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 30 January 2023 by Judge Mark A. Davis, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 16 April 2024.

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

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

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

PER CURIAM.

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

AFFIRMED.[1]

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

STATE v. COPLEY

[386 N.C. 111 (2024)]

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY

No. 195A19-2

Filed 23 May 2024

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

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

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

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

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

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

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

Justice BARRINGER concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 276 N.C. App. 211 (2021), affirming a judgment entered on 23 February 2018 by Judge Michael J. O'Foghludha in Superior Court, Wake County. Heard in the Supreme Court on 14 February 2024.

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

Marilyn G. Ozer for defendant-appellant.

EARLS, Justice.

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

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

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

I. Background[1]

A. The Shooting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Prior Proceedings

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

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

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

C. The Court of Appeals Opinion Under Review

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

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

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

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

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

II. Failure to Intervene During Closing Arguments

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

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

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

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

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

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

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

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

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

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

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

III. Jury Instructions

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

A. Aggressor Instruction

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

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

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

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

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

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

B. First-Degree Murder by Lying in Wait

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

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

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

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

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

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

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

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

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

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

circumstances embraced by section 14.51.2, then, an occupant's use of deadly force is "justified" and "immune from civil or criminal liability." N.C.G.S. § 14-51.2(e).

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

MODIFIED AND AFFIRMED.

Justice BARRINGER concurring.

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

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

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

For these reasons, I concur with my esteemed colleagues.

STATE OF NORTH CAROLINA
v.
WALTER D. GIESE

No. 309PA22

Filed 23 May 2024

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

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

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

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

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

EARLS, Justice.

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

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

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

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

I. Facts and Procedural History

A. The Parties

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

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

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

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

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

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

B. The District Court Disqualifies the DA's Office

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

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

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

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

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

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

II. Standard of Review

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

III. Legal Standard for Disqualifying District Attorneys

A. The Interests at Play

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

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

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

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

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

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

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

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

B. *Camacho*'s Balancing Test

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

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

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

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

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

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

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

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

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

IV. Application to Mr. Giese's Case

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

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

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

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

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

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

V. Conclusion

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

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

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

VACATED AND REMANDED.

STATE OF NORTH CAROLINA
v.
DANIEL RAYMOND JONAS

No. 433PA21

Filed 23 May 2024

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

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

Chief Justice NEWBY dissenting.

Justice BERGER joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 280 N.C. App. 511 (2021), reversing and remanding an order entered on 17 December 2019 by Judge Athena Brooks in Cabarrus County Superior Court, Cabarrus County, and remanding the case. Heard in the Supreme Court on 12 September 2023.

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

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

RIGGS, Justice.

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

I. Factual & Procedural Background

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

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

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

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

II. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

AFFIRMED.

Chief Justice NEWBY, dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Justice BERGER joins in this dissenting opinion.

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

STATE v. REBER

[386 N.C. 153 (2024)]

STATE OF NORTH CAROLINA
v.
JOSHUA DAVID REBER

No. 138A23

Filed 23 May 2024

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

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

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

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

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 66 (2023), reversing a judgment entered on 9 August 2021 by Judge Forrest D. Bridges in Superior Court, Ashe County, and remanding the case. Heard in the Supreme Court on 13 February 2024.

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

Daniel M. Blau for defendant-appellee.

DIETZ, Justice.

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

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

Facts and Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reber did not object to these statements during closing argument.

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

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

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

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

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

Analysis

I. Evidentiary challenges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Q. But you couldn't figure out how to use Snapchat?
>
> A. Well, I'm not real big on pictures and stuff so I really didn't even try.
>
> Q. So you've gone from not being able to figure it out to not really trying?
>
> A. Well, I didn't — couldn't figure it out anyways, but I didn't even try to figure it out even if I wanted. I mean, there was no need to.

When investigators seized Reber's cell phone, they discovered that all of the social media applications had an installation date in May 2015, the month after K.W. alleged that the abuse ended. There was no data on the phone concerning Reber's social media use before that time.

To be sure, K.W. also had some potential credibility issues. For example, K.W. told her mother that Reber had a "straight" mole either on his pubic line or where his leg "meets the butt." Law enforcement took photographs of Reber's genital area that did not reveal a mole. But, to be fair, the officer who conducted the forensic inspection testified at trial that he did not take photographs of Reber's backside where his leg connects to his buttocks. The officer also acknowledged that he had never seen a "straight" mole before and that Reber had some dark veins on his genitals.

In addition, although K.W. testified that most of the sexual abuse with Reber occurred in the deer blind or at the picnic table in the woods behind her home, she testified that there were a few times when the abuse occurred at Reber's home. She described one instance in which she remained at home with Reber while members of his family went to church. Reber's grandmother contradicted this testimony, explaining that she could not recall any time that K.W. stayed behind with Reber while others went to church.

All of this is to say that, disregarding the challenged evidence, this was a fairly close case for the jury, based mostly on witness credibility. But a close case is not enough to prevail on the prejudice prong of plain error. The Court of Appeals majority focused on the "highly prejudicial" impact of the challenged evidence and how that evidence "made it more likely" that the jury would convict. *Reber*, 289 N.C. App. at 78.

As explained above, the question on plain error is not whether the challenged evidence increased the likelihood of the jury reaching the *same* verdict. It examines the opposite question—whether, absent that evidence, the jury probably would have returned a *different* verdict. *Lawrence*, 365 N.C. at 519. In other words, the test examines the state of all the evidence except for the challenged evidence and asks whether, in light of that remaining evidence, the jury probably would have done something different.

Reber has not met that burden here. As the Court of Appeals dissent correctly acknowledged, it is certainly *possible* that the jury would have acquitted Reber. Likewise, it is certainly *possible* that the jury would have deadlocked and been unable to return any verdict. But Reber has not shown that the jury *probably* would have done so. K.W. told a compelling account of life-altering sexual abuse. She acknowledged that there were gaps in her memory but recounted specific details of the abuse on the witness stand that matched her initial descriptions with child abuse counselors many years earlier.

Reber denied the allegations in his own testimony, but the jury may have questioned his credibility, particularly in light of his admission that he took K.W. to isolated locations late at night without telling anyone and his shifting answers concerning Snapchat.

In short, viewing all the remaining evidence, this was not a particularly strong case for the State, but it also was not a case where the jury probably would have reached a different result. Accordingly, Reber

failed to satisfy the exacting standard to show plain error, and the Court of Appeals erred by holding that he did so.[3]

II. Statements during closing argument

[2] We next turn to the prosecutor's statements during closing argument. As with Reber's evidentiary challenges, this issue was not preserved by a timely objection at trial. Thus, under the general preservation rules applicable to criminal trials, this issue is waived and cannot be raised on appeal. *See* N.C. R. App. P. 10(a)(1). Moreover, plain error review does not apply to this issue because plain error is reserved for evidentiary or instructional errors. *Lawrence*, 365 N.C. at 516. Closing arguments are not evidence. *State v. Jaynes*, 353 N.C. 534, 558 (2001).

Nevertheless, this Court created a narrow exception to the preservation rules for statements during closing argument so "grossly improper" that the trial court was compelled to intervene on its own initiative. *State v. Tart*, 372 N.C. 73, 81 (2019). This is an exceedingly high bar. It applies only when the prosecutor's statements went so far beyond the "parameters of propriety" that the trial court is forced to intervene to "protect the rights of the parties and the sanctity of the proceedings." *State v. Jones*, 355 N.C. 117, 133 (2002).

Reber argues that two separate statements during the State's closing argument satisfy this "grossly improper" standard and compelled the trial court to intervene. These arguments fail for separate reasons.

Reber first points to the prosecutor's statement that he told his ex-girlfriend Danielle that he touched her bare breasts when she was too heavily intoxicated to remember.

This statement references evidence that is the subject of Reber's plain error argument discussed above. The Court of Appeals majority held that this statement was "based on improperly admitted evidence"—a

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3. Our dissenting colleagues spend considerable time addressing why Rule 404(b) of the Rules of Evidence prohibits certain character evidence, why the challenged evidence in this case was inadmissible under Rule 404(b), and why Reber did not open the door to admission of that evidence through his own testimony on direct examination. Even Reber acknowledges in his briefing that "the Rule 404(b) question is not before this Court" because that issue "was not the basis of the dissenting opinion." Indeed, the Court of Appeals dissent expressly declined to address the Rule 404(b) issue, instead explaining that "assuming" there was an error, there was no resulting prejudice. *Reber*, 289 N.C. App. at 83 (Dillon, J., dissenting). Because this case is before us solely based on the reasoning in that dissent, we lack jurisdiction to examine issues that the dissent chose not to address. *See Cryan v. Nat'l Council of YMCA*, 384 N.C. 569, 574 (2023); *Morris v. Rodeberg*, 385 N.C. 405, 415 (2023).

conclusion that followed from the majority's earlier holding that it was plain error to admit that evidence. *Reber*, 289 N.C. App. at 82.

As explained above, we reject that determination; the admission of that cross-examination testimony was not plain error. Our holding on this issue invalidates the reasoning of the Court of Appeals. It is proper for a prosecutor during closing argument to describe testimony or other evidence that was introduced during the trial. *Jaynes*, 353 N.C. at 560–61. Having determined that the introduction of this evidence was not plain error, referring to that evidence during closing argument cannot meet the "grossly improper" standard. When evidence is introduced without objection at trial and does not meet the criteria for plain error, it is well within the "parameters of propriety" for a trial court to permit that evidence to be described in closing arguments. *See Jones*, 355 N.C. at 133.

Reber next points to statements by the prosecutor that he did not use a condom when having sex with his adult partners. Relying on this evidence, the prosecutor then told the jury: "You think about that. You think about an eight- or nine-year-old walking around pregnant. You think about an eight- or nine-year-old poking around with herpes or gonorrhea or syphilis or Aids [sic]."

The Court of Appeals majority held that this remark was a "thinly veiled attempt to appeal to the jury's emotions" and was an improper attempt to portray Reber as "sexually manipulative, promiscuous, and a carrier of sexually transmitted diseases." *Reber*, 289 N.C. App. at 82.

We agree with the Court of Appeals majority that these statements were an improper appeal to the jury's emotions, rather than an appeal to reason. If Reber had timely objected, this might be a different case. But our case law has emphasized that these sorts of inflammatory statements appealing to the jury's emotions—ones that might be reversible error if preserved—still often fail to meet the much higher standard requiring the trial court to intervene on its own.

In *State v. Hamlet*, for example, the prosecutor referred to the defendant as an "animal" who was "the baddest on the block and everybody knows it." 312 N.C. 162, 172–73 (1984). We noted that it was error for a prosecutor to make "comparisons of criminal defendants to members of the animal kingdom" but held that doing so "was not so improper as to require action by the trial court *ex mero motu* given the defendant's failure to object." *Id.* at 173.

Similarly, in *State v. Murillo*, the prosecutor discredited the defendant's expert witness by telling the jury that it is the "sad state of our

legal system, that when you need someone to say something, you can find them. You can pay them enough and they'll say it." 349 N.C. 573, 604 (1998). We cited past case law holding that this type of statement was error, but ultimately held that "we cannot conclude that the prosecutor's arguments were so grossly improper as to require the trial court to intervene *ex mero motu* when, at trial, defense counsel apparently did not believe the argument was prejudicial." *Id.* at 605–06.

Here, too, we do not condone a prosecutor's request for the jury to imagine a young child becoming pregnant or suffering from various sexually transmitted diseases when there was no evidence that any of these things occurred in this case. But this isolated statement during closing argument simply does not meet the "grossly improper" standard as it has developed in our case law. As we explained in *Murillo*, unless the challenged statements meet this high bar, we cannot fault the trial court for failing to intervene when "defense counsel apparently did not believe the argument was prejudicial." *Id.* at 606. We therefore agree with the Court of Appeals dissent that this statement during closing argument, although likely objectionable, is not so egregious that it is reversible error when unpreserved.

We conclude with an observation about Reber's arguments on appeal. Every one of these arguments—the arguments on which the Court of Appeals relied for its ruling and a number of arguments that the Court of Appeals did not address—involve issues not preserved at trial. But this is hardly a case of trial counsel asleep at the switch. Reber's counsel put on a robust defense that included witnesses who contradicted the State's evidence and testimony that cast doubt on the thoroughness of the State's investigation. Reber's counsel also made copious objections to the State's evidence. The trial court sustained many of those objections.

From the perspective of the trial court, Reber and his counsel had a strategy to obtain an acquittal and were acting on it—meaning this is precisely the sort of case where the trial court may have been particularly cautious of intervening on its own initiative when defense counsel was silent, worried that doing so may undermine the defendant's strategy at trial.

In his briefing to this Court, Reber criticized the State for pointing out that his counsel's "lack of objection may have been a strategic decision." Reber's premise is correct—whether the failure to object was part of a strategic decision is irrelevant for both plain error review and the "grossly improper" standard for unpreserved objections during closing argument.

But this highlights a crucial point about these two exceptional standards of review: the bar is set exceedingly high because whenever these claims exist on direct appeal, there will be a corresponding claim of ineffective assistance of counsel that can be pursued in a motion for appropriate relief. There are several reasons why that ineffective assistance claim will often be a better vehicle to raise these issues.

First, as explained above and as the Court of Appeals dissent correctly observed, the prejudice standard for ineffective assistance claims is lower—the defendant need only show a "reasonable probability" that absent the error the jury would have reached a different result. *Strickland*, 466 U.S. at 693, 695. This means a defendant might prevail on an ineffective assistance claim even when unable to prevail on plain error review.

Second, an ineffective assistance claim brought in a motion for appropriate relief avoids the gamesmanship concern we discussed above; it provides a forum where a fact-finder can determine whether the failure to object was indeed a reasonable strategic decision, or instead a deficiency on the part of counsel. *See*, *e.g.*, *State v. Todd*, 369 N.C. 707, 712 (2017).

The record in this case does not indicate whether Reber has pursued corresponding ineffective assistance claims in a motion for appropriate relief. Nothing in our holding today precludes him from doing so.

Conclusion

We reverse the decision of the Court of Appeals and remand for consideration of Reber's remaining arguments on appeal.

REVERSED AND REMANDED.

Justice EARLS dissenting.

This case involves the introduction of Rule 404(b) evidence in a case where there is no physical or medical evidence and the only evidence that a criminal offense occurred is the testimony of the complaining witness. The outcome of this case was based solely on the jury's perception of each witnesses' credibility, including the defendant's. While the majority neglects to mention the type of evidence at issue in this case, namely that it was 404(b) character evidence, this fact is necessary to determining whether the error in Mr. Reber's case meets North Carolina's

plain error standard. In all cases, the risk of improperly admitted 404(b) evidence is that it will diminish the defendant's credibility, inflame the passions of the jury, and lead to a verdict based on an improper basis, such as emotion. *See State v. Kimbrell*, 320 N.C. 762, 768–69 (1987). However, this risk is at its highest in cases where the jury's decision is based entirely on the perceived truthfulness of witnesses.

We recently noted in a similar case where we found prejudicial plain error in the admission of testimony bearing on a witness's credibility, "where, as here, the sole direct evidence of sexual abuse is testimony from the victim, the case necessarily 'turn[s] on the credibility of the victim.' " *State v. Clark*, 380 N.C. 204, 213 (2022) (alteration in original) (quoting *State v. Towe*, 366 N.C. 56, 63 (2012)). In *Clark*, the disputed testimony related to the victim's credibility; here, the disputed testimony relates to the defendant's credibility. But in both instances, the legal issue is the same and the legal analysis should be applied in the same way. This is not in any way to diminish the severity of the offense at issue here or to ignore the implications of a new trial for the victim. Our task is to ensure that equal justice prevails, that trials are fair, and that verdicts are untainted by improper appeals to irrelevant considerations. *See*, *e.g.*, *State v. Cain*, 175 N.C. 825, 828 (1918) ("The object of a trial expressed in the oath of a juror to '[d]o equal and impartial justice between the State and the prisoner at the bar,' . . . to acquit the innocent and to convict the guilty.").

Based on our precedents, the 404(b) evidence in this case was improperly admitted and its introduction into evidence was plain error. Additionally, while Mr. Reber did not object to the prosecutor's remarks during closing arguments, those statements were based, in part, on the improperly admitted evidence and were "so grossly improper" that the trial court should have intervened *ex mero motu*. *See State v. Trull*, 349 N.C. 428, 451 (1998). By neglecting to intervene, the trial court failed to protect Mr. Reber's rights and the sanctity of the proceedings. *State v. Jones*, 355 N.C. 117, 133 (2002).

Accordingly, I dissent.

I. Background

Mr. Reber and his one-year-old daughter moved to North Carolina in 2009 to live with Mr. Reber's grandparents. After moving to the state, Mr. Reber began working in a group home where he met K.W.'s parents, Troy and Sherry. He soon began hunting with Troy and became friends with the whole family, including Troy and Sherry's five children.

In October 2015, K.W. told her mother that Mr. Reber had been "messing with her." Sherry reported the allegations to the Ashe County Sheriff's Office, and K.W. was interviewed and received a medical exam. In the interview, K.W. disclosed that Mr. Reber had been touching her sexually since she was eight years old and that the first time was one night in the deer blind after the two had been hunting. K.W. alleged that Mr. Reber abused her in multiple locations over three years: the deer blind, K.W.'s couch, K.W.'s bedroom, the bathroom in K.W.'s home, Mr. Reber's bedroom, and in the woods and a smoking spot outside Mr. Reber's home. According to K.W., the abuse ended just before her eleventh birthday in April 2015.

K.W.'s medical exam produced no physical evidence that she had been sexually abused. And while K.W. told her mother that Mr. Reber had a mole near his pubic line, no mole was found upon examination of the area by the examining nurse and Detective Lewis. Furthermore, K.W.'s allegations that she and Mr. Reber sent nude photos on Snapchat were never corroborated. Police also never found any text messages between K.W. and Mr. Reber on Mr. Reber's phone or on K.W.'s tablet.

No witness, aside from K.W., testified to any inappropriate behavior between K.W. and Mr. Reber. K.W.'s mother testified that she trusted Mr. Reber to be alone with her daughter, and Mr. Reber's grandmother, Dorothy, disputed that any abuse could have occurred in her home. Dorothy explained that she was always home when K.W. was present and the door to Mr. Reber's room always remained open when K.W. was there. Moreover, although K.W. indicated that some of the abuse occurred one morning while Mr. Reber's family was at church, Dorothy testified that this was not possible. Namely because on the day of the alleged incident, K.W. was at church with Mr. Reber's family and not home alone with Mr. Reber.

Moreover, Mr. Reber denied having any sexual contact with K.W. He testified that he only spent the night at Troy and Sherry's house when Troy invited him to and that on those nights, he slept on the couch where Troy stayed up late watching television. Mr. Reber also noted that even though he and K.W. sometimes hunted together at night, the two had never been alone in the deer blind.

II. Rule 404 of the North Carolina Rules of Evidence

Because the plain error standard is based, in part, on the prejudice a defendant suffers when evidence is improperly admitted, *State v. Lawrence*, 365 N.C. 506, 518 (2012), it is necessary to begin with

a discussion of Rule 404(b) and a review of the Rule 404(b) evidence offered in Mr. Reber's case. *See* N.C.G.S. § 8C-1, Rule 404(b) (2023).

Under Rule 404, "[e]vidence of a person's character or a trait of his character is not admissible" to show that the person "acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). However, evidence of a defendant's "other crimes, wrongs, or acts" may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b). In all cases however, the rule of relevancy applies, and the evidence sought to be introduced must be "relevant to any fact or issue other than the character of the accused." *State v. Jones*, 322 N.C. 585, 588 (1988) (cleaned up). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2023).

Any relevant evidence of a defendant's prior bad acts "must be closely scrutinized" because its introduction can "distract" the jury and "confuse their consideration of issues at trial." *Jones*, 322 N.C. at 588–89. Namely because "proof that a defendant has been guilty of another . . . equally heinous" act can prompt the jury to readily accept the "prosecution's theory that [the defendant] is guilty of the crime charged." *Id.* at 589 (cleaned up). The effect of this evidence "is to predispose the mind of the juror to believe the [defendant] is guilty, and thus effectually to strip him of the presumption of innocence." *Id.* (cleaned up).

Accordingly, Rule 404(b) evidence is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002); *see also State v. Boyd*, 321 N.C. 574, 577 (1988) ("[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial . . . ."). We have said that a prior bad act or crime is sufficiently similar when there are "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304 (1991) (quoting *State v. Green*, 321 N.C. 594, 603 (1988)). While these similarities do not need to "rise to the level of the unique and bizarre," *Green*, 321 N.C. at 604, the State must show a "common *modus operandi* or 'signature' " between the prior bad act and the crime charged, *State v. Scott*, 318 N.C. 237, 244 (1986).

In cases where an adult defendant is charged with sexually abusing a child and the State seeks to introduce evidence of the defendant's prior bad acts pursuant to Rule 404(b), our Court has required that there be a strong factual similarity between the prior bad act and the crime currently charged. For example, in *Scott*, the defendant had been charged with committing a first-degree sexual act, cunnilingus with his sister's two daughters, who were three and four years old at the time of the offense. *Id.* at 239. There, our Court determined that the evidence the State sought to introduce, alleged sexual contacts by defendant against his sister after threatening her with a knife when he was thirteen years old, was not sufficiently similar because it lacked a common "*modus operandi* or 'signature' " with the presently-charged crime. *Id.* at 244. Likewise, the Court of Appeals has also insisted on a high degree of similarity between a prior bad act and the currently charged crime in child sexual assault cases. *See State v. Doisey*, 138 N.C. App. 620, 626 (2000) (holding that evidence a defendant had recorded children in the bathroom was not admissible to prove the defendant had sexually assaulted his girlfriend's twelve-year-old daughter).

Rule 404(b)'s similarity requirement is particularly important when the prior bad act sought to be introduced involves sex acts with adults. The Court of Appeals has repeatedly found that evidence of a defendant's sexual acts with other adults is inadmissible to prove child sexual abuse. *See*, *e.g.*, *State v. Davis*, 222 N.C. App. 562, 566–70 (2012) (finding that evidence the defendant had written a story about nonconsensual anal sex with an adult woman was not admissible to prove he had anal sex with a male child); *State v. Bush*, 164 N.C. App. 254, 260–62 (2004) (holding that evidence the defendant bought and owned pornography was not admissible to prove he sexually abused a female child); *State v. Dunston*, 161 N.C. App. 468, 473 (2003) (concluding that evidence that the defendant "engaged in and liked" anal sex with his wife was not admissible to prove he had anal sex with a female child).

The challenged evidence here includes certain text messages. The first text message exchange involved a conversation between Mr. Reber and Danielle, an adult, and relates to a prior sexual encounter between the two involving alcohol. The second text message exchange referenced Mr. Reber and Danielle's discussion of their plan to meet at a motel for sex and Mr. Reber's subsequent mention of asking his daughter not to share this plan with Mr. Reber's grandparents.

While these text messages discuss sexual acts, that is where the similarities between the crimes Mr. Reber was accused of and the text messages he exchanged with Danielle, an adult woman, end. The conduct

K.W. alleges occurred over the span of three years and involved a child between the ages of eight and eleven. While the sexual act discussed in the first text message occurred after Danielle had been drinking, there is no evidence that Mr. Reber ever gave K.W. alcohol or that K.W. was impaired during the alleged offenses. Moreover, although K.W. stated the alleged abuse had occurred in the deer blind and at her home, there is no evidence that Mr. Reber and Danielle ever had sex in those places. There is also no evidence Danielle and Mr. Reber exchanged nude photos, despite K.W. alleging that she and Mr. Reber had engaged in that act. Accordingly, there is nothing similar about the abuse K.W. alleged and the acts referenced in the wrongfully admitted text messages between Mr. Reber and Danielle.

Furthermore, during its closing argument, the State all but confessed that it wanted these text messages admitted for the impermissible purpose of character evidence. In closing, the State asked the jury: "Who is Joshua Reber?" The prosecutor then attacked Mr. Reber's character, describing him as someone whose first sexual encounter with Danielle "involved taking her boobs out of her shirt and having intercourse with her" when "she was too drunk to even remember it." Yet Rule 404 expressly forbids the introduction of evidence for this reason, stating that evidence of a prior bad act is not admissible to "prov[e] that [the defendant] acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). Admission of this evidence allowed the jury to convict Mr. Reber based on the kind of person they think he is, "rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged." *Jones*, 322 N.C. at 590.

III. Door Opening

While the majority does not address whether Mr. Reber may have opened the door to the challenged evidence by testifying regarding his relationship with Danielle because it assumes that admission of the challenged evidence was erroneous, I do not read the dissent in the Court of Appeals as narrowly as the majority does. *See State v. Reber*, 289 N.C. App. 66, 83 (2023) (Dillon, J., dissenting) ("Arguably, the questioning was not error, as the defense opened the door to the questioning by asking Defendant on direct about his relationship with this adult woman."). In my view, under our precedent, it was impermissible for the prosecutor to question Mr. Reber about the details of his sexual relationship with Danielle.

"Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation

or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177 (1981) (first citing *State v. Patterson*, 284 N.C. 190 (1973), then citing *State v. Black*, 230 N.C. 448 (1949)). However, while "[s]uch cross-examination is permissible," it cannot be used "to expose an entirely new line of inquiry otherwise impermissible under [our] Rules." *State v. Lynch*, 334 N.C. 402, 412 (1993). Instead, it can "*only*" be used "to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom." *Id.* (emphasis added).

On direct examination, the evidence Mr. Reber offered was in response to the State's case-in-chief. First, K.W.'s testimony provided that she and Mr. Reber had exchanged nude photos through Snapchat. To establish that Mr. Reber was familiar with Snapchat, the State introduced text messages between Danielle and Mr. Reber that discussed the Snapchat application. In response, and to establish who Danielle was and that he was not familiar with the Snapchat application, Mr. Reber testified that Danielle was an ex-girlfriend and that he was not familiar with Snapchat, nor did he use it to communicate with K.W.

Next, Mr. Reber's testimony regarding his sexual partners and condom use was also in direct response to the State's evidence. Namely, K.W.'s testimony that Mr. Reber did not use condoms and that he used the "pull-out" method of contraception during sex. On direct examination, and to rebut K.W.'s testimony, Mr. Reber testified that he frequently used condoms. While defense counsel asked Mr. Reber if he had adult sexual partners, this questioning was used to inquire about Mr. Reber's condom use in direct response to K.W.'s testimony. Additionally, Mr. Reber was entitled to offer that evidence to rebut K.W.'s allegation that he was attracted to and engaged in sexual acts with an underage girl.

In sum, the "particular fact[s] or transaction[s]," *see Albert*, 303 N.C. at 177, that Mr. Reber testified to on direct examination were (1) that he had adult girlfriends, and (2) that he regularly used condoms. His testimony did not recount the details of his sexual relationship with Danielle or any other adult woman. Mr. Reber also did not mention whether he and Danielle had sexual relations under the influence of alcohol or before they began dating. His direct examination testimony also did not discuss whether he and Danielle had difficulty finding a location for sex or if they wanted to conceal their sexual relationship from Mr. Reber's grandparents. Importantly, Mr. Reber's testimony about having an adult girlfriend did not give the State carte blanche to ask about the details of Mr. Reber's sexual relationship with Danielle. This testimony was

both irrelevant and inadmissible. *See* N.C.G.S. § 8C-1, Rule 401; N.C.G.S. § 8C-1, Rule 404.

IV. Plain Error Standard

Under Rule 10 of the North Carolina Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). However, in cases where there are "plain errors or defects affecting substantial rights," these errors "may be noticed although they were not brought to the attention of the court." *State v. Odom*, 307 N.C. 655, 660 (1983) (cleaned up). While this standard "is normally limited to instructional and evidentiary error[s]" that are unpreserved, *Lawrence*, 365 N.C. at 516, "the term plain error" is not limited only to those errors that are "obvious or apparent," *Odom*, 307 N.C. at 660 (cleaned up).

This Court adopted the plain error standard in *Odom* and provided a comprehensive explanation of the rule's scope and purpose. There, this Court explained, that while the plain error standard's protections are only applicable in "exceptional" cases, where "it can be said . . . a fundamental error" has occurred, what constitutes a fundamental error is broad and has been defined as: (1) "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done"; or (2) "the error is grave error which amounts to a denial of a fundamental right of the accused"; or (3) "the error has resulted in" either "a miscarriage of justice or in the denial . . . of a fair trial" for the accused; or (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings"; or (5) where "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Id.* (cleaned up) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Moreover, this standard cannot be applied in isolation and requires review of "the entire record" in a case. *Id.* (quoting *McCaskill*, 676 F.2d at 1002). This Court affirmed this and the above principles first in *State v. Black*, 308 N.C. 736, 740–41 (1983), and then again in *State v. Walker*, 316 N.C. 33, 39 (1986). This mandate exists, in part, because the question a reviewing court must answer is whether "the error . . . 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." *Walker*, 316 N.C. at 39 (quoting *Black*, 308 N.C. at 741). Indeed, as both the *Black* and *Walker* Courts explained, the strength and volume of the evidence against the defendant plays a role in the plain error

analysis.[1] *Black*, 308 N.C. at 741; *Walker*, 316 N.C. at 40; *see also Maddux*, 371 N.C. at 567; *see also Lawrence*, 365 N.C at 519. Namely, when there is "overwhelming evidence against the defendant" it may "prevent[ ] the error complained of from rising to the level of 'plain error.' " *Walker*, 316 N.C. at 40. Without examining the entire record, this analysis cannot be properly achieved.

In *Lawrence*, this Court reaffirmed the "probable impact" standard from *Odom*, *Black*, and *Walker*, stating that "a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury *probably* would have returned a different verdict had the error not occurred." *Lawrence*, 365 N.C. at 507 (emphasis added). This premise was reiterated again in *Maddux*, where this Court stated that a "[d]efendant must demonstrate that absent the error, the jury probably would have reached a different result." 371 N.C. at 565 (cleaned up). Thus, while the majority's interpretation of the plain error standard in *Lawrence* makes it virtually impossible to meet, that is not what this Court intended. Instead, because the term "different result" includes a hung jury the real inquiry is whether absent the error, one juror probably would have concluded that there is reasonable doubt as to any element of the crime. *See id.* Because if one juror has reasonable doubt, the jury would be unable to reach consensus and there would be a different result in the case. *See id.*

Moreover, while it is true that in *Lawrence*, this Court clarified the plain error standard, this Court also clearly stated it was "reaffirm[ing] [its] holding in *Odom*." *Lawrence*, 365 N.C at 518. In doing so, this Court quoted directly from the *Odom* opinion to explain that (1) "[f]or error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial"; (2) "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty' "; and (3) "because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (third alteration in original) (quoting *Odom*, 307 N.C. at 660).

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1. It is important to note that while the majority cites *State v. Maddux*, 371 N.C. 558, 564 (2018), for the proposition that it is improper to consider "the strength of the State's evidence" when conducting a plain error analysis, *Maddux* does not state this. Instead, *Maddux* reiterates the directive in *Lawrence*, 365 N.C. at 519, which requires the reviewing Court to consider whether the State has presented "overwhelming and uncontroverted evidence" against the defendant. *Id.*

Later, in *State v. Towe*, 366 N.C. 56 (2012), *State v. Juarez*, 369 N.C. 351 (2016), and *Maddux*, 371 N.C. 558, this Court stated that it was following the standard first articulated in *Odom* and reaffirmed in *Lawrence*. In all three of these cases, this Court's opinions quote from and provide citations to the opinions in both *Lawrence* and *Odom*. The standard articulated in *Lawrence*, *Towe*, *Juarez*, and *Maddux*, while focusing in part on the "probable impact" of the error on the jury's finding that the defendant was guilty, also emphasizes the need to analyze an error to determine if a fundamental error exists, which is dependent on whether prejudice is established, and whether the error is one "that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518 (cleaned up); *see Towe*, 366 N.C. at 62; *Juarez*, 369 N.C. at 358; *Maddux*, 371 N.C at 564. Moreover, in *Towe*, this Court provided additional context for applying the plain error standard. There, this Court stated it was "apply[ing] the test set out in *Lawrence* and *Odom*" and explained that as part of its plain error analysis, it must consider whether the erroneously admitted testimony in Mr. Towe's case "impermissibly bolstered the victim's credibility" such that it had "the prejudicial effect necessary to establish that the error was a fundamental error." *Towe*, 366 N.C. at 62–63 (cleaned up).

The majority evades the entirety of the plain error analysis, through a type of appellate gerrymandering, which slices and dices the issues this Court may review when an appeal is based on a dissent. This is based, in part, on the majority's narrow reading of the dissent as only addressing the "prejudice prong" of plain error review. This approach is a misapplication of this Court's decision in *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569 (2023). In *Cryan*, this Court reiterated the standard set out in Rule 16 of the North Carolina Rules of Appellate Procedure, which states that when an appeal is based solely upon a dissent in the Court of Appeals, review in this Court is "limited to a consideration of those *issues* that are . . . specifically set out in the dissenting opinion as the basis for that dissent." 384 N.C. at 574 (emphasis added) (quoting N.C. R. App. P. 16(b)).

In Mr. Reber's case, the dissent at the Court of Appeals included two issues: whether "the prosecution's cross examination of Defendant" and the admission of that "testimony" and the "prosecutor's statements during closing" were "error." *Reber*, 289 N.C. App. at 83 (Dillon, J., dissenting). Accordingly, those are the two *issues* before this Court. The directive that this Court only review the issues set out in the dissenting opinion does not mandate this Court to only consider one portion of the plain error standard while ignoring all others. Moreover, the plain

error standard does not contain "prongs" that are as separate and distinct as the majority suggests. Instead, all three portions of this standard are interrelated.[2] The interrelatedness of the first two prongs is clearly articulated in *Lawrence*, which provides that

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

Lawrence, 365 N.C. at 518 (cleaned up); *see also Maddux*, 371 N.C. at 564; *Juarez*, 369 N.C. at 358. Additionally, *Juarez* focused on the interrelatedness of the last two portions of the plain error test and admonished the Court of Appeals for "fail[ing] to analyze whether [the] error [in that case] had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding." 369 N.C. at 358 (cleaned up). Importantly, this Court explained that without answering this question, a plain error analysis is "insufficient." *Id.* Thus, on appeal, the proper review requires an analysis of the entire plain error standard.

The improperly admitted text messages in this case meet the plain error standard. Rule 404(b) evidence is inherently prejudicial because it tempts the jury to convict the defendant based on what they think of his character. *Jones*, 322 N.C. at 590. Put another way, the jury might convict the defendant because they believe he is the kind of person who would commit the charged offense and not because the State has proved the defendant committed the crime beyond a reasonable doubt. *Id.* The risk of this is even greater in cases like this one where there is no medical or physical evidence and no eyewitness to the alleged abuse and thus the jury is tasked with evaluating only the credibility and truthfulness of each witness. *See Kimbrell*, 320 N.C. at 767. Accordingly, the outcome

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2. The majority mischaracterizes our plain error analysis as being a "holistic" test that disregards the plain error standard's three prongs. But what the majority fails to consider is that two things can be true. Namely, that the plain error standard is composed of three factors, and those three factors are interrelated. The majority suggests this premise sets forth a "new theory of plain error," but our precedent in *Lawrence*, *Maddux*, and *Juarez* shows the opposite is true. Indeed, our decisions in those cases exemplify the interrelatedness of the plain error test's three parts. *See Lawrence*, 365 N.C. at 518; *see also Maddux*, 371 N.C. at 564; *Juarez*, 369 N.C. at 358.

of Mr. Reber's trial "depended [only] on the jury's perception of the relative veracity of the witnesses." *Id.*

The situations in both *Black* and *Walker* stand in stark contrast to Mr. Reber's case. In *Black*, the "[e]vidence presented by the State was very convincing," 308 N.C. at 741, while the evidence against the defendant in *Walker* was said to be "overwhelming," 316 N.C. at 40. Here, the evidence against Mr. Reber only consisted of the complaining witness's testimony and there was no medical or physical evidence to corroborate those statements. Even the majority admits this "was not a particularly strong case for the State."

Additionally, in its brief to this Court, the State argues that the jury believed K.W.'s testimony over that of Mr. Reber's and that accordingly, the improperly admitted evidence cannot rise to the level of plain error. This argument overlooks the very reason 404(b) evidence is inherently prejudicial and ignores this Court's directive in *Towe*. Namely that when the alleged error challenges erroneously admitted testimony, the reviewing court must consider whether that testimony "impermissibly bolstered the victim's credibility" such that it had "the prejudicial effect necessary to establish that the error was a fundamental error." *Towe*, 366 N.C. at 62–63 (cleaned up). This is especially pertinent in Mr. Reber's case, where the only evidence against him was the testimony of the complaining witness. Consequently, the introduction of Rule 404(b) evidence, which portrayed Mr. Reber as "a sexual deviant," *see State v. Maxwell*, 96 N.C. App. 19, 25 (1989), undoubtedly "impermissibly bolstered [K.W.'s] credibility," while simultaneously destroying Mr. Reber's, *see Towe*, 366 N.C. at 62-63. Taking all of this together, the admission of the improperly admitted Rule 404(b) evidence probably impacted the jury's finding that Mr. Reber was guilty and thus meets North Carolina's plain error standard. Accordingly, Mr. Reber should be granted a new trial. *See id.* at 64.

V. Prosecutor's Statements During Closing Arguments

In *State v. Jones*, this Court "[r]egrettably" expressed its concern regarding the growing number of claims alleging that improper arguments had occurred. 355 N.C. at 127. The Court also voiced a concern that "it appear[ed] . . . that some attorneys intentionally 'push the envelope' with their jury arguments in the belief that there will be no consequences for doing so." *Id.* This is particularly concerning in criminal cases that involve the State's attorney, "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 130 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, the

United States Supreme Court has stated that while a prosecutor may "strike hard blows, he is not at liberty to strike foul ones." *Id.* (quoting *Berger*, 295 U.S. at 88). "If verdicts cannot be carried without appealing to prejudice or resorting to unwanted denunciation, they ought not to be carried at all." *State v. Tucker*, 190 N.C. 708, 714 (1925).

The State's responsibility to adhere to these mandates is a weighty one. Particularly because the "average jur[or] . . . has confidence that these obligations . . . will be faithfully observed." *State v. Smith*, 279 N.C. 163, 167 (1971) (quoting *Berger*, 295 U.S. at 88). Accordingly, "improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Id.* (quoting *Berger*, 295 U.S. at 88).

Similarly, trial judges have a responsibility as "overseers of our courts" to intervene when attorneys violate "courtroom protocol." *Jones*, 355 N.C. at 128 (citing *Couch v. Priv. Diagnostic Clinic*, 351 N.C. 92 (1999)). This is particularly true during closing arguments, where defense counsel may be reluctant to interrupt the State's closing remarks "for fear of incurring jury disfavor." *Id.* at 129. Moreover, intervention by the trial court becomes "especially proper" in cases where "the State is prosecuting one of its citizens" to ensure "the jury [will not be] unfairly prejudiced against [the defendant]." *State v. Miller*, 271 N.C. 646, 659 (1967). Accordingly, during closing arguments the trial court must "monitor vigilantly" what is said and "intervene as warranted." *Jones*, 355 N.C. at 129.

In cases where an alleged improper closing argument is not followed by a timely objection, the correct standard of review asks, "whether the [remarks were] so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *Trull*, 349 N.C. at 451. Stated differently, was the argument so improper that the trial court was required to intervene, stop the attorney from making "similar remarks," "and/or . . . instruct[ ] the jury to disregard the improper comments already made," "in order to protect the rights of the parties and the sanctity of the proceedings"? *Jones*, 355 N.C. at 133. In Mr. Reber's case, the answer to this question is, "yes."

To constitute reversible error, the prosecutor's statements must be "both improper and prejudicial." *Id.* A remark is improper if it is "calculated to lead the jury astray" and includes "references to matters outside the record and statements of personal opinion." *Id.* These statements are prejudicial "either because of individual stigma or because of the general tenor of the argument as a whole." *Id.*

In *Jones*, this Court reviewed a prosecutor's statements during closing arguments, which included name calling and were not objected to during trial. There, the prosecutor said the following about the defendant: "You got this quitter, this loser, this worthless piece of—who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly." *Id.* (alteration in original). This Court found that the prosecutor's remarks "incorporated personal conclusions," which "amounted to little more than name calling," and accordingly, the prosecutor had "exceed[ed] the boundaries of proper argument." *Id.* at 133–34. Furthermore, this Court explained that the prosecutor's tactics during trial prejudiced the defendant "by improperly leading the jury to base its decision not on the evidence relat[ed] to the issues submitted, but on misleading characterizations, crafted by counsel, that [were] intended to undermine reason in favor of visceral appeal." *Id.* at 134.

Similarly in *Miller*, the prosecutor "defiled" the character of the defendants during closing. 271 N.C. at 657. There too, this Court reviewed statements that were not objected to at trial. *Id.* These remarks "inferred" that the defendants, who were charged with breaking and entering into a jewelry store, "were habitual store[ ] breakers," had broken into buildings prior to the incident they were charged with, and were "involved in a big[-]time business" *Id.* at 653, 657. None of these statements were supported by the record. *See id.* Because "[d]efendants in criminal prosecutions should be convicted upon the evidence in the case, and not upon prejudice" created by an "abus[ive] . . . solicitor," this Court granted a new trial. *Id.* at 657, 661; *see also Smith*, 279 N.C. at 165, 167 (holding that the prosecutor's statements during closing arguments, which referred to the defendant as "lower than the bone belly of a cur dog," were prejudicial and the trial judge who "failed to intervene on his own motion[ ] was derelict in his duty").

The prosecutor's statements in Mr. Reber's case are similar to those in *Jones* and *Miller*; namely because the comments the prosecutor made relate to matters outside the record and are more properly characterized as the prosecutor's personal opinion. *See Jones*, 355 N.C. at 133. Like in *Jones*, the prosecutor in Mr. Reber's case made unsupported comments about the defendant's character. This included insinuations that Mr. Reber was the kind of man whose "first sexual encounter" with a woman would "involve[ ] taking her boobs out of her shirt and having intercourse with her . . . [when] she was too drunk to even remember it."

While the majority concludes that these statements were properly admitted evidence and thus, it was proper for the State to reference them during closing arguments, this conclusion is incorrect. First, as

explained above, this evidence was not only improperly admitted, but its admission into evidence also meets the plain error standard and thus, should be excluded. Accordingly, this evidence must be disregarded and cannot be referenced during closing arguments. Moreover, the prosecutor's only reason for making these remarks was to persuade the jury to convict Mr. Reber based on what the jury thought of Mr. Reber's character and not because the State had proved that Mr. Reber committed the crime beyond a reasonable doubt. *See Jones*, 322 N.C. at 590. This deprived Mr. Reber of a fair and impartial trial. *See Miller*, 271 N.C. at 660–61.

Moreover, like in *Miller*, the prosecutor in Mr. Reber's case also made comments that were wholly extraneous to the record. Those remarks included references to Mr. Reber's condom use and sexually transmitted diseases. While it is true that some of the improperly admitted evidence involved Mr. Reber's condom use, none of the evidence supported the prosecutor's claim that Mr. Reber contracted herpes, gonorrhea, syphilis, or AIDS. Accordingly, although the statements about Mr. Reber's condom use were improperly admitted, meet our plain error standard, and should be disregarded, the prosecutor also made statements that were not part of the record at all. These statements deprived Mr. Reber of a fair and impartial trial. *See id.*

"Arguments to a jury should be fair and based on the evidence or on that which may be properly inferred from the case." *Id.* at 659. In this case, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Smith*, 279 N.C. at 166 (quoting *Berger*, 295 U.S. at 89). This prejudice is based on both "individual stigma" and "the general tenor of the argument as a whole," which sought to portray Mr. Reber as a sexual deviant. *See Jones*, 355 N.C. at 133. Because the remarks made by the prosecutor impaired Mr. Reber's right to a "fair and impartial trial," I would affirm the Court of Appeals' holding and grant Mr. Reber a new trial "where passion and prejudice and facts not in evidence have no part." *See Miller*, 271 N.C. at 660–61.

Lastly, while the majority suggests that an ineffective assistance of counsel (IAC) claim "will often be a better vehicle to raise these issues," that is a hollow and disingenuous promise. The opposite is true. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 680–81 (2007) [hereinafter *Ineffective Assistance of Counsel Claims*]. In many cases, even defendants with meritorious claims may experience serious delays in filing an IAC claim or be precluded from bringing their

claim altogether. *Id.* For example, a defendant rarely is able to bring an IAC claim on direct appeal because the claim is not "apparent on the face of the record" and thus requires "further development of the facts." *See State v. Allen*, 360 N.C. 297, 316 (2006). This means that IAC claims will usually be brought by way of a motion for appropriate relief. By this stage in the proceedings, years may have passed between the defendant's conviction and the filing of their IAC claim, which makes it more difficult to find witnesses and gather evidence to support a claim. *See Ineffective Assistance of Counsel Claims* at 680. It is also not uncommon that a defendant has fully served their term of incarceration by the time a motion for appropriate relief can be filed. *Id.* at 680–81. Moreover, because there is no constitutional right to an attorney past a defendant's first appeal, many defendants are financially precluded from filing an IAC claim. *See id.* at 681; *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Additionally, the legal standard required to show an IAC claim is challenging to meet. To succeed on an IAC claim, "the defendant must satisfy a two-part test" (the *Strickland* test). *State v. Banks*, 367 N.C. 652, 655 (2014) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (quoting *Strickland*, 466 U.S. at 687).

The first prong of the *Strickland* test requires a showing that the attorney's conduct "fell below an objective standard of reasonableness." *State v. Oglesby*, 382 N.C. 235, 243 (2022) (quoting *Strickland*, 466 U.S. at 688). Embedded within this test is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* (quoting *Strickland*, 466 U.S. at 689). Furthermore, this Court has explained that because "counsel is given wide latitude in matters of strategy," the defendant's "burden to show that counsel's performance fell short of the required standard is a heavy one for [the] defendant to bear." *State v. McNeill*, 371 N.C. 198, 218–19 (2018) (cleaned up).

The defendant must also show that "counsel's deficient performance prejudiced the defense." *Oglesby*, 382 N.C. at 246 (cleaned up). This

requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (cleaned up). To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The majority's discussion regarding the strategic decisions Mr. Reber's counsel may have made, while based only on assumption, illustrates the difficulty of proving IAC claims. Namely, that it can be challenging for a reviewing Court to decipher if the conduct complained of was a tactical decision, where counsel has "wide latitude." *See id.* at 689; *see also State v. Fair*, 354 N.C. 131, 167 (2001) (holding that counsel's actions were "a matter of reasonable trial strategy"). While strict guidelines determining what might constitute "reasonable trial strategy," *see Fair*, 354 N.C. at 167, would be helpful to a reviewing Court, those guidelines "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions," *Strickland*, 466 U.S. at 689. Thus, while the majority focuses on the second prong of an IAC claim, the first prong, which requires a showing that "counsel's performance was deficient," *see Banks*, 367 N.C. at 655, is also a very hard prong to meet.

An IAC claim, even if available to a defendant, should not be a substitute for adjudicating claims involving prejudicial errors. Here, the circumstances of Mr. Reber's trial support that he suffered prejudice, both by the improperly admitted 404(b) evidence and the prosecutor's statements during closing. I would hold that (1) the improperly admitted 404(b) evidence meets our plain error standard, and (2) the prosecutor's challenged statements during closing "were so grossly improper" that the trial court should have intervened *ex mero motu*. Accordingly, under North Carolina law, Mr. Reber is entitled to a new trial.

Justice RIGGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHARLES SINGLETON

No. 318PA22

Filed 23 May 2024

Indictment and Information—second-degree rape—short-form indictment—sufficiency—effect on trial court's jurisdiction—abrogation of common law pleading rules

A short-form indictment charging defendant with second-degree rape neither contained a fatal defect nor deprived the trial court of subject matter jurisdiction to convict defendant, even though the indictment did not allege that the defendant knew or should have known that the victim was physically helpless during the rape. The Criminal Procedure Act abrogated the common law rule that a court's subject matter jurisdiction in a criminal case depends on the sufficiency of the underlying indictment, as well as the strict common law requirement that an indictment specifically allege every element of an offense—a requirement that the legislature loosened even further by enacting short-form indictments by statute. Instead, a defective indictment only raises jurisdictional concerns when it alleges conduct that does not constitute a crime; meanwhile, indictments containing merely technical, non-jurisdictional defects will not be set aside so long as they give defendants sufficient notice of the crimes charged to prepare a defense and to protect against double jeopardy. Here, the indictment against defendant did allege an actual crime under North Carolina law while also meeting the short-form pleading requirements for second-degree rape (codified in N.C.G.S. § 15-144.1(c)).

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 285 N.C. App. 630 (2022), holding that the indictment charging defendant with second-degree forcible rape failed to confer jurisdiction upon the trial court and vacating the portion of the judgment convicting defendant of this crime entered on 5 August 2021 by Judge Jeffery B. Foster in Superior Court, Wake County. Heard in the Supreme Court on 19 September 2023.

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

Danielle Blass for defendant-appellee.

BERGER, Justice.

Since 1811, the plain language and intent of the law has been to move away from common law pleading requirements in criminal cases which were overwrought with technicalities. But old habits die hard in the legal profession. More than two hundred years ago, the legislature eliminated strict common law pleading requirements for criminal indictments. But lawyers and judges continued to grasp at "shadowy nothings" that permitted criminals to escape merited punishment. *State v. Hester*, 122 N.C. 1047, 1050 (1898). Despite recognition by this Court in 1898 that "[t]he practical sense of the age demand[ed]" that technicalities should not carry the day for defendants who argue form over substance in our indictment jurisprudence, *id.*, some continued to scour pleadings for procedural niceties long after guilty pleas had been entered or jury verdicts handed down.

Just as the pragmatic spirit of the 19th century disfavored this practice, functional wisdom and legal reality is that defendants were seldom prejudiced by mistakes in pleadings. Inconsistent application of the law led again to frustration and concern by the courts and the legislature—so much so that almost fifty years ago, the people through their elected representatives once again attempted to rid the criminal justice system of any remnants of the common law as it related to criminal pleadings.

To be sure, where a criminal indictment suffers from a jurisdictional defect, courts lack the ability to act. But jurisdictional defects are rare, only arising where an indictment wholly fails to allege a crime against the laws or people of this State. Where a court has no power to act in the first instance, jurisdictional defects can be raised at any time.

A mere pleading deficiency, however, is different. The people sought to end the superficial practice of vacating convictions and arresting judgment based on non-jurisdictional pleading deficiencies when Madison was president and Napoleon was waging war in Europe. But for more than two centuries, our courts have inconsistently applied the statutory law of indictments to illusory harms.

Consistent with the federal courts and the majority of jurisdictions, we end this centuries old saga and hold that an indictment raises

jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this State.[1] Further, and in accord with directives from the General Assembly, bills of indictment that contain non-jurisdictional deficiencies will not be quashed or cast aside "by reason of any informality" when they express the crime charged "in a plain, intelligible, and explicit manner," N.C.G.S. § 15-153 (2023), such that the defendant has "notice sufficient to prepare a defense and to protect against double jeopardy." *State v. Lancaster*, 385 N.C. 459, 462 (2023) (quoting *In re J.U.*, 384 N.C. 618, 623 (2023)). Both classes of indictment defects rely on a common sense approach to the law, and we, therefore, reverse the Court of Appeals.

I. Factual and Procedural Background

On 25 November 2017, Jane, a college freshman visiting home on Thanksgiving break, spent the evening in downtown Raleigh with friends.[2] Jane consumed alcoholic beverages throughout the day, and she was significantly impaired by the early morning hours of 26 November. The last thing Jane remembered from her night out in Raleigh was "[d]ancing with [her] sister and a family friend" at a bar around 2:00 a.m.

At 2:15 a.m., Jane's father received a call from one of Jane's friends who informed him that Jane had given her phone to a friend and walked away from the group alone. Jane's parents drove downtown, retrieved Jane's phone and began searching for their daughter.

At 5:25 a.m., Jane's mother noticed a missed call from an unknown number on Jane's phone. She called the number and a "strange man" answered the phone. The man, who said his name was "Chuck," informed Jane's mother that he was "helping a girl find her phone." When Jane's mother asked to speak with Jane to ensure her safety, the man said Jane ran away and that he was looking for her.

Jane's mother then called 911, hoping that the call with "Chuck" would lead police to her daughter. Raleigh Police Officer Mark Brodd called the unknown number and spoke with "Chuck," who informed Officer Brodd that he met Jane after she left a downtown club and "asked [him] to take care of her." According to "Chuck," he and Jane

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1. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[D]efects in an indictment do not deprive a court of its power to adjudicate a case."); *see also State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect ha[s] quickly become the minority view in state and federal jurisdictions.").

2. A pseudonym is used to protect the victim's identity.

sat on a flower planter near an old post office, where Jane slept for an hour. When Jane woke up, she asked "Chuck" to help locate her phone. "Chuck" called her phone and began looking for it, and "when [he] turned [his] head, [and] looked back, she was gone."

Officer Brodd later identified "Chuck" as Charles Singleton. After "Chuck" provided a false date of birth, the increasing number of discrepancies in "Chuck's" statements led Officer Brodd to suspect that defendant had kidnapped Jane. Around 6:00 a.m., Officer Brodd began calling defendant repeatedly, but defendant did not answer.

During this time, Jane's sister received a phone call from Jane on an unknown number. Jane was at a gas station and asked her sister to pick her up. Jane's sister drove to pick up Jane, who was "[d]isheveled and in fear." Jane's "underwear was hanging out the side of her pants." Jane was taken to a police station where she reported that a man matching defendant's description had raped her.

Jane stated that she had "blacked out" after leaving her friends early that morning and woke up in defendant's vehicle with him on top of her. She told defendant to get off, and when she could not locate her phone, she ran until she found the gas station. Jane, who was suffering memory loss and nausea, underwent a physical examination during which she seemed "hazy and still intoxicated." At noon, detectives noted that Jane still seemed impaired as she was "very woozy and unsteady on her feet" and almost fell over when she got up to leave the room.

Officers subsequently located defendant based off a GPS ping of his phone and a description of his vehicle. Defendant provided officers a different version of his story, stating that he had driven up and down Capital Boulevard with Jane "in an attempt to wake her up." He told police that Jane "was very intoxicated during this time and he was trying to sober her up in order to help her." Defendant, who did not appear to be impaired in any way, stated that his DNA would not be located inside of Jane because he did not have sexual intercourse with her.

Police obtained DNA samples from defendant pursuant to a search warrant. Samples were also taken from Jane during her physical examination. Forensic testing revealed the presence of sperm on the vaginal, rectal, and external genitalia swabs, and on the tampon Jane was using that night. The DNA samples were consistent with defendant's DNA profile.

Defendant was arrested and subsequently indicted for second-degree forcible rape. On 19 March 2018, the grand jury returned a

superseding indictment against defendant for second-degree forcible rape, first-degree kidnapping, and felonious restraint. As is relevant here, the superseding indictment against defendant for second-degree forcible rape alleged

> that on or about November 26, 2017, in Wake County, the defendant named above unlawfully, willfully, and feloniously did engage in vaginal intercourse with [Jane], who was at the time, physically helpless. This act was done in violation of NCGS § 14-27.22.

Defendant did not move to quash the indictment, object at trial to the language in the indictment, or otherwise contest the trial court's jurisdiction over him or the charged offense. Further, defendant did not argue that the indictment failed to put him on notice of the crime charged or failed to protect him from double jeopardy.

At the conclusion of trial, the jury found defendant guilty of all charges, and he was sentenced to consecutive prison terms of seventy-three to one hundred forty-eight months for the second-degree forcible rape conviction and seventy-three to one hundred months for first-degree kidnapping. The trial court arrested judgment for defendant's felonious restraint conviction. Defendant timely appealed.

At the Court of Appeals, defendant argued for the first time that the superior court "lacked jurisdiction to try him" for the crime of second-degree forcible rape. *State v. Singleton*, 285 N.C. App. 630, 632 (2022).[3] Specifically, defendant contended that the trial court lacked jurisdiction because the indictment charging him with this crime failed to allege the element "that he knew or reasonably should have known that Jane was physically helpless when he engaged in sexual intercourse with her." *Id.*

The Court of Appeals noted that in most jurisdictions, "the failure to allege an essential element of a crime in the indictment is not jurisdictional and can be waived" and that treating such alleged defects "as non-jurisdictional," and therefore waivable, "appears to be the majority view." *Id.* at 633 (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002) and *State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016)). However, the Court of Appeals rejected the State's argument that the short-form indictment language was sufficient pursuant to statute and this Court's precedent, *id.*; *see also* N.C.G.S. § 15-144.1 (2021); *State v. Tart*, 372 N.C. 73, 77 (2019), and the Court of Appeals ultimately concluded that the

3. As jurisdiction is the relevant issue on appeal to this Court, we do not address additional arguments raised by defendant at the Court of Appeals.

indictment "simply fails to allege the crime" even when compared to the relevant short-form indictment language. *Singleton*, 285 N.C. App. at 634. Based on this reasoning, the Court of Appeals vacated the portion of the judgment convicting defendant of second-degree rape and dismissed the indictment charging him with that crime. *Id.* at 636.

The State filed a petition for discretionary review, which this Court allowed on 3 March 2023. The State urges us to take this opportunity to examine our indictment jurisprudence and argues that the Court of Appeals erred in concluding the indictment failed to conform to the relevant short-form indictment language.[4]

II. Analysis

A. The Common Law Jurisdictional Indictment Rule

1. The Origin of the Rule

At the time of this State's founding, "many of our laws were derived from the British common law," and "[i]ndictments were no exception; some of our earliest cases on indictments drew their rules from English common law." *State v. Rankin*, 371 N.C. 885, 906 (2018) (Martin, C.J., dissenting). Indictment cases historically "imposed rigid technical requirements on indictments" that appear inconsistent with the modern criminal justice system. *Id.* For example, in one case, judgment was arrested following a conviction for murder where the description of the

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4. Our dissenting colleague asserts that we should avoid an examination of our indictment jurisprudence and "wait for a case that presents the issue" of whether the common law jurisdictional indictment rule remains in force. In fact, this Court has already done just that by declining the State's recent invitations to address this issue in both *In re J.U.* and *State v. Lancaster*. *See* No. 263PA21, Appellant Brief p. 16; No. 240A22, Appellant Brief p. 18 and (Oral Arg. 14:20). The arguments in these cases demonstrate that issues surrounding the common law rule will not dissipate, and we choose to fulfill our duty to declare what the law is rather than allowing continued uncertainty among judges, prosecutors, and defense attorneys. After all, as we state elsewhere herein, cases in which an indictment wholly fails to charge a crime are rare, and under our dissenting colleague's reasoning, could never be reached.

Further, the State's couching of its jurisdictional argument as an alternative argument has no bearing on the force or validity of our holding on that issue. Even if the State had not presented this argument (and the defendant had not responded to it), the issue of jurisdiction can be addressed *sua sponte*—just as the Court of Appeals did in *State v. Lancaster*, 284 N.C. App. 465 (2022), *rev'd*, 385 N.C. 459 (2023). Our dissenting colleague's characterization of our analysis and holding on this issue as "largely dicta" is especially perplexing as the issue we address—the common law jurisdictional indictment rule—permits defendants to raise this jurisdictional argument at any time. As the merits of this issue have been fully briefed and argued by both parties in this case, and by others previously, we prudently undertake our duty to resolve this matter.

wound omitted the letter "a" from the word "breast." *State v. Carter*, 1 N.C. (Cam. & Nor.) 406, 407 (1801); *see also State v. Owen*, 5 N.C. (1 Mur.) 452, 461 (1810) (homicide indictment held invalid for failing to adequately describe the dimensions of the wound inflicted by defendant upon the victim).

This Court's predecessors considered these types of strict common law constraints on indictments unduly burdensome even in its earliest days but continued to enforce them, insisting that the problem could only be addressed by action of the legislative branch. *See State v. Adams*, 1 N.C. (Mart.) 56, 58 (1793) ("The niceties required in ancient times in law proceedings became a grievance and the statutes of *Jeofails* remedied the abuse in civil cases, but not in criminal."); *Harrington v. McFarland*, 1 N.C. (Cam. & Nor.) 543, 546–47 (1802) ("In penal actions precision in the charge is indispensable for the same reason that it is required in indictments; and none of the statutes of jeofail, nor even the Act of 1790 intends to them."); *Owen*, 5 N.C. (1 Mur.) at 458 ("But we must follow in the footsteps of those who have preceded us until the Legislature think fit to interfere; though we have no wish to extend the particularity further.").

This adherence to ancient common law indictment rules was necessary because the common law had not been abrogated. *See Lancaster*, 385 N.C. at 463; *see also* N.C.G.S. § 4-1 (2023). But many, including jurists, viewed objections to superficial indictment defects under the common law as "a disease of the law, and a reproach to the bench" which were "reluctantly[ ] entertained." *State v. Moses*, 13 N.C. (2 Dev.) 452, 463 (1830). Still, our courts were confined to a formalistic approach while they waited for the General Assembly to modernize indictment requirements. *See Owen*, 5 N.C. (1 Mur.) at 458.

Thus, in 1811, the General Assembly eliminated the technical common law rules of pleading that elevated form over substance in criminal cases. According to this Court, the move away from the common law may have been prompted by our decision in *Owen*. *See Moses*, 13 N.C. (2 Dev.) at 463 ("The act of 1811 [was] passed the year after Owen's case was decided, and we have reason to believe was caused by it.").

The law, entitled "An act to regulate the proceedings on presentments or indictments, in the superior courts of law of this state," proclaimed that

> Whereas exceptions, in themselves merely formal, are frequently taken against bills of indictment or presentment, and they are either quashed or judgment

> arrested; in consequence of which, the execution of justice is delayed, and many offenders escape punishment: For remedy whereof,
>
> *Be it enacted*, [t]hat from and after the first day of March next, in all criminal prosecutions, which may be had by indictment or presentment, in any of the superior courts of law, it shall be sufficient to all intents and purposes, that the bill shall contain the charge against the criminal, expressed in a plain, intelligible, and explicit manner; and that no bill of indictment or presentment shall be quashed or judgment arrested, for or by reason of any informalities or refinements, when there appears to the court sufficient in the face of the indictment to induce them to proceed to judgment.

Potter's Revisal of 1819, Laws of 1811, Ch. 809.[5]

The preamble to this new law explicitly states the problem the statute sought to address: setting aside indictments on the basis of technicalities that delayed or prevented justice. This Court understood that the new law "was certainly designed to uphold the execution of public justice, by freeing the Courts from those fetters of *form*, *technicality* and *refinement*," i.e., common law pleading requirements, "which do not concern the substance of the charge, and the proof to support it." *Moses*, 13 N.C. (2 Dev.) at 464.

In 1854, the legislature further emphasized its distaste for the common law rule's rationale and consequences by enacting another similar law, now codified as N.C.G.S. § 15-155 (2023). The law, entitled "Certain defects in indictments not to vitiate," proclaimed:

> No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the Statutes" instead of the words "against the form

5. This law remains in force over two hundred years after its enactment, with only minor changes made to bring other charging documents within its scope. *See* N.C.G.S. § 15-153 (2023).

> of the Statute," or vice versa; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offence.

Ch. 35, § 20, Revised Code of 1854.

"It is not astonishing that defendants who have no meritorious ground of exception should clutch at shadowy nothings . . . ." *Hester*, 122 N.C. at 1050. But, even in the 19th century, this Court understood that "[t]he practical sense of the age demands that . . . immaterial variances and refinements and technicalities shall not avail defendants when they are not in truth prejudiced thereby." *Id.* After all, the judicial system "favors trials upon the merits." *Id.* Indeed, allowing a criminal defendant to escape merited punishment on such technicalities "brought the administration of justice into disrepute," especially where indictments are "so explicit that the defendants could not pretend . . . that they did not know [w]hat they were charged with." *State v. Leeper*, 146 N.C. 655, 659 (1908), *overruled on other grounds by In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84 (1991).

Thus, this Court recognized that the rule's consequences, which do not benefit the public or the justice system, were offensive to such an extent that the legislature abrogated the common law's rigid technical requirements. *See Moses*, 13 N.C. (2 Dev.) at 464 ("We think the legislature meant to disallow the whole of them, and only require the substance, that is a direct averment of those facts and circumstances which constitute the crime, to be set forth."); *see also State v. Hedgecock*, 185 N.C. 714, 717 (1923) ("[T]he highly technical common–law procedure [is] . . . now almost entirely, if not altogether abolished here."); *State v. Switzer*, 187 N.C. 88, 96 (1924) ("Form, technicality, and refinement have given way to substance, and it is sufficient if the indictment contains the charge in a plain, intelligent, and explicit manner."); *State v. Linney*, 212 N.C. 739, 742 (1938) ("[E]ver since the Act of 1811 . . . informalities and refinements in the language of the bill may be properly disregarded, if the criminal offense be sufficiently described to inform the defendant of the charge against him, and to enable him to make his defense, and protect him from another prosecution for the same

criminal act."); *State v. Nugent*, 243 N.C. 100, 101 (1955) ("G.S. 15-153 has abolished the requirement that the detailed particulars of a crime must be stated in the meticulous manner prescribed by the common law . . . ."); *State v. Sturdivant*, 304 N.C. 293, 311 (1981) (holding that where the "indictment reasonably notified defendant of the crime for which he was being charged by plainly describing *who did what and when* and by indicating which statute was violated by such conduct[,] . . . it would not favor justice to allow defendant to escape merited punishment upon a minor matter of form").

The operative portion of the 1811 law impacting criminal pleadings had two main provisions. First, it contained a declaration that an indictment must charge a crime. *See* Potter's Revisal of 1819, Laws of 1811, Ch. 809 ("[I]t shall be sufficient to all intents and purposes, that the bill shall contain the charge against the criminal . . . ."); *see also* N.C.G.S. § 15-155 ("No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved . . . when the court shall appear by the indictment to have had jurisdiction *of the offense*." (emphasis added)). Thus, failure to charge a crime was a barrier to the court's ability to act. Second, however, and contrary to the common law, bills of indictment in which a crime was charged "in a plain, intelligible, and explicit manner," N.C.G.S. § 15-153, shall not be set aside for technical deficiencies if the indictment was sufficient for the court to render judgment. When read alone or *in pari materia* with N.C.G.S. § 15-155, it is plainly apparent that the formalistic practice of the common law was to end, except where no crime at all was charged.

Despite the plain directive of the General Assembly and proclamations from this Court that we were no longer bound by "the rhetorical flourish of some ancient and forgotten pleader," *State v. Kirkman*, 104 N.C. 911, 911 (1889), entrenched ideas yield reluctantly. Thus, it was clear to our predecessors that since "[c]ourts have looked with no favor upon technical objections[,] and the legislature has been moving in the same direction[,] [t]he current is all one way," *State v. Smith*, 63 N.C. 234, 236 (1869), i.e., away from the technicalities of the common law. Despite this recognition, our indictment jurisprudence was inconsistent at best.[6]

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6. This Court even observed vacillations in application of indictment statutes by the same Court. *See Kirkman*, 104 N.C. at 913 ("We are not unaware that a contrary view to ours has been held in *State v. Joyner*, 81 N.C. 534; but, in view of the broad and clear expressions of the statute, we cannot hold that case as authority, and deem the reasoning

Then Justice Clark (later Chief Justice) appeared frustrated with the contradictory application of the law in this area when he stated that

> These technicalities and refinements doubtless originated in the humanity of the courts at a time when defendants on trial for the gravest offenses were not permitted the benefit of counsel, not allowed to have witnesses sworn in their behalf. 4 Bl., 459. They are an anachronism now. Their survival and occasional reappearance, after so many statutes and so many decisions, and when the reason for them and a knowledge of their origin even has passed away, is without a parallel, unless it is in the fact that our time-pieces still mark the fourth hour with IIII, which we are told, is due to the fact that the King of France, to whom the first watch was carried, unable to understand its mechanism, criticised the IV and ordered it replaced by the letters which, with Chinese exactness of imitation, are used by us today.
>
> They do no harm. But to sustain obsolete technicalities in indictments will be to waste the time of the courts, needlessly increase their expense to the public, multiply trials, and, in some instances, would permit defendants to evade punishment who could not escape upon a trial on the merits. If it has not the last mentioned result, it is no advantage to defendants to resort to technicalities, and, if it has such effect, the courts should repress, as they do, a reliance upon them.
>
> There are cases where defects in an indictment or a civil pleading are matters of substance, and objection should be insisted on by the parties and sustained by the courts. But the letter and the spirit of legislation, both as to criminal and civil pleading, require only a plain and clear statement of the matters alleged, and when the objection to such statement is not substantial, but rests upon mere technicalities and refinements, it would be better for the party to disregard

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used and the conclusion reached in . . . *State v. Parker*, in the same volume, more consonant with the expressed will of the legislative power.").

> them, and go to trial upon the merits, if he has any to set up and rely on.

State v. Harris, 106 N.C. 682, 689–90 (1890).

The persistent focus on "obsolete technicalities," *id.*, by advocates and judges led the legislature to once again address deficient indictments, and any doubt regarding the continued application of the common law rule's technical requirements should have been dispelled by the General Assembly's enactment of the Criminal Procedure Act in 1975. *See* An Act to Amend the Laws Relating to Pretrial Criminal Procedure, ch. 1286, § 28, 1974 N.C. Sess. Laws 490, 557 ("None of the provisions of [the] [A]ct providing for repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."). The Act was the result of a legislative proposal developed by the Criminal Code Commission between 1970–73, which recognized that "the statutory language of Chapter 15 of the General Statutes had become antiquated and inappropriate through the passage of time." *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at i (1973). "The goal of the Commission [was] . . . to prepare a balanced legislative reform that would eliminate from our law, where desirable, those practices which frustrate the effective and efficient administration of justice without regard for which side might benefit from the practice in question." *Id.* at ii.

The Commission described its proposed bill as "a 'citizen oriented' bill." *Id.* at iii. The Commission specifically stated:

> We believe this bill is properly called a 'citizens bill' in that it is designed to serve the general public by saving the citizen's time as a juror, his time as a witness, and his time as a prosecuting victim even though it will require some departure from the more traditional ways of handling criminal cases in our courts.

Id.

The General Assembly thereafter left intact various provisions of Chapter 15, including sections 15-153 and 15-155, and enacted the Commission's proposed bill as the Criminal Procedure Act. *See* An Act to Amend the Laws Relating to Pretrial Criminal Procedure, ch. 1286, § 28, 1974 N.C. Sess. Laws 490. Among other things, the new Act was intended to "statutorily modernize[ ]the requirements of a valid indictment" and "shift away from the technical rules of pleading." *State v. Oldroyd*, 380 N.C. 613, 619 (2022) (cleaned up).

There can be little question that the Criminal Procedure Act removed any vestiges of the archaic, hyper-technical common law requirement that a valid indictment contain a rote recitation of elements. *See* N.C.G.S. § 15A-924(a)(5) (2023) (stating a valid indictment requires the State to "assert[ ] *facts supporting* every element of a criminal offense" (emphasis added)); *see also Lancaster*, 385 N.C. at 469 ("[A]ll that is required for a sufficient indictment are factual allegations *supporting* the elements of the crime charged, not magic words or a rote recitation of elements." (cleaned up)); *In re J.U.*, 384 N.C. at 624 ("Consistent with a proper understanding of indictment jurisprudence . . . a juvenile petition does not have to state every element . . . so long as the elements are clearly inferable from the facts, duly alleged." (cleaned up)).

The Criminal Procedure Act was itself preceded by the legislature's enactment of short-form indictments, which "relieve[d] the State of the common law requirement that every element of [certain] offense[s] be alleged," and this Court has repeatedly upheld such action because "within constitutionally mandated parameters the legislature has the power to prescribe the form of a bill of indictment." *State v. Lowe*, 295 N.C. 596, 603 (1978) (citing *State v. Harris*, 145 N.C. 456 (1907) and *State v. Holder*, 153 N.C. 606 (1910)). "This action is within the legislature's prerogative so long as the newly prescribed indictment still complies with the constitutional requirement that the defendant be informed of the accusation against him." *Id.* Put another way, pleading deficiencies in short-form indictments go to notice, not jurisdiction, because short-form indictments unquestionably charge a crime.[7]

But this Court recently commented on this subject, demonstrating a similar misunderstanding of the issue that led to the inconsistent results our predecessors lamented. *See Rankin*, 371 N.C. at 895. Although the majority in *Rankin* stated that "statutory interpretation reveals that the legislature intentionally left the common law remedy for invalid indictments intact," *id.*, this statement directly contradicts the plain language of legislative enactments dating back to 1811 and decisions from our Court cited above. At a minimum, the discussion in *Rankin* concerning our indictment jurisprudence is self-acknowledged dicta as the majority correctly noted that "discussion of this issue [was] outside the scope of

7. Contrary to our dissenting colleague's assertion that our decision today "reverses [the] course" of indictment jurisprudence, this Court stated over one hundred and fifty years ago that "[c]ourts have looked with no favor upon technical objections[,] and the legislature has been moving in the same direction[,] [t]he current is all one way." *Smith*, 63 N.C. at 236. Our holding today simply follows this current.

review applicable to this case." *Id.* Our dissenting colleague somehow misses this clear-throated pronouncement. But even if not dicta, the majority's position that we should still cling to these shadowy nothings was met with a well-reasoned and vigorous dissent, significantly diminishing its authority.[8] *See State v. Walker*, 898 S.E.2d 661, 665 (N.C. 2024) (Berger, J., concurring).

Even if the Criminal Procedure Act could be said not to directly address the jurisdictional aspect of the common law rule, it defies reason to argue that, when read together with N.C.G.S. §§ 15-153 and 15-155, a bill designed to "eliminate . . . those practices which frustrate the effective and efficient administration of justice" and "sav[e] the citizen's time as a juror, his time as a witness, and his time as a prosecuting witness" carried forward a common law rule that produces results directly contrary to these goals. *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at ii–iii (1973). Nonetheless, that is defendant's argument, which he contends is supported by our Constitution and the Criminal Procedure Act itself.

We begin with an overview of the two distinct species of indictment deficiencies, jurisdictional and non-jurisdictional, which the common law rule conflates. We then address defendant's specific constitutional and statutory arguments.

2. The Common Law Rule Conflicts with our Constitution and General Statutes

a. The Power to Decide a Case

The term "jurisdiction" refers to a "court's power to decide a case or issue a decree." *Jurisdiction*, *Black's Law Dictionary* (11th ed. 2019). Such power is granted by the people who speak through their constitutions and statutes, not by an indictment drafted by a prosecutor.

> Rules of jurisdiction are addressed, so to speak, from a position outside the court system and prescribe the authority of the courts within the system. They are to a large extent constitutional rules. The provisions of the United States Constitution specify the outer limits of the jurisdiction of the federal courts and authorize Congress, within those limits, to establish by statute the organization and jurisdiction of the

8. Unlike in this case, the parties in *Rankin* never presented arguments regarding the continued application of the common law jurisdictional indictment rule.

> federal courts. . . . Within each state, the court system is established by state constitutional provisions or by a combination of such provisions and implementing legislation, which together define the authority of the various courts within the system.

Fleming James Jr. & Geoffrey C. Hazard Jr., *Civil Procedure* § 2.1, at 55 (3d ed. 1985).

"While the federal constitution limits the federal 'judicial Power' . . . our Constitution, in contrast, has no such case or controversy limitation to the 'judicial power.' " *Comm. to Elect Dan Forest v. Emp.'s Pol. Action Comm.*, 376 N.C. 558, 591 (2021). We reference federal case law for illustrative purposes, mindful that these holdings are not binding upon this Court's consideration of the North Carolina Constitution.

The common law rule, which proclaims that a court's subject-matter jurisdiction hinges on a pleading's sufficiency, is based on an outdated and " 'expansive notion of "jurisdiction," ' . . . which was 'more a fiction than anything else.' " *U.S. v. Cotton*, 535 U.S. 625, 630 (2002) (first quoting *Custis v. United States*, 511 U.S. 485, 494 (1994), then quoting *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977)). The common law rule's "elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case.' " *Id.* (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998)).

"Jurisdiction is a matter of power, and covers wrong as well as right decisions." *Lamar v. U.S.*, 240 U.S. 60, 64 (1916). "[N]othing can be clearer than that the [trial court], which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent . . . ." *Id.* at 65 (citation omitted). Thus, in the federal courts "a ruling 'that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.' " *Cotton*, 535 U.S. at 631 (quoting *U.S. v. Williams*, 341 U.S. 58, 66 (1951)).

However, because federal courts' authority over criminal matters extends only to "offenses against the laws of the United States," *Williams*, 341 U.S. at 65–66, "if the charged conduct itself is not criminal, then an offense against the United States has not been pled and the [trial] court lacks subject matter jurisdiction." *U.S. v. Moore*, 954 F.3d 1322, 1333 (11th Cir. 2020). As the "absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal

offense against the United States," these types of indictment defects do not affect federal courts' jurisdiction. *Id.*

> The lynchpin for a defect that implicates jurisdiction is whether the indictment charged the defendant with a criminal offense against the laws of the United States. . . . In other words, when the indictment itself fails to charge a crime, the [trial] court lacks jurisdiction. However, while the omission of an element may render the indictment insufficient, it does not strip the [trial] court of jurisdiction over the case.

Id. at 1334 (cleaned up). "Since Congress has provided the [trial] courts with jurisdiction," if an indictment "charg[es] [a defendant] with violating laws of the United States, the [trial] court [is] empowered to hear the case." *Id.* at 1335 (cleaned up).

This reasoning is highly persuasive and aligns with N.C.G.S. §§ 15-153 and 15-155. In simple terms, a court's jurisdiction to decide criminal cases flows directly from the people speaking through their constitution and statutes and cannot be destroyed by other means. This concept is not unfamiliar to our courts, as we have held that where an indictment fails to charge a crime falling within the scope of the court's jurisdiction, the matter is a nullity.[9] *See State v. Beasley*, 208 N.C. 318, 320 (1935) (reversing conviction for a kidnapping charge as the crime was committed beyond "[t]he territorial jurisdiction of the superior court"); *State v. Rawls*, 203 N.C. 436, 438 (1932) (dismissing action against the defendant because the crime charged was not "within the original jurisdiction

9. Our dissenting colleague conflates this concept with the notion of personal jurisdiction, stating that if an indictment fails to allege all essential elements of a crime "there is no personal jurisdiction because . . . the defendant did not violate a criminal law." This argument goes to the merits of the case, not jurisdiction. Any person who commits a crime against the people or laws of this State within the boundaries of this State is subject to the jurisdiction of our general courts of justice. The muddying of jurisdictional waters reveals a deeper flaw in the dissent's reasoning. According to our dissenting colleague, an indictment that fails to assert the "essential elements" of a crime would fail to allege that the defendant "violate[d] a criminal law." The federal courts, most jurisdictions in this nation, and our own criminal statutes and precedents disagree. *See Moore*, 954 F.3d at 1333 (concluding that the "absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense against the United States"); *State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect ha[s] quickly become the minority view in state and federal jurisdictions"); N.C.G.S. § 15-144.1(a) ("In indictments for rape it is not necessary to allege every matter to be proved at trial"); *Lowe*, 295 N.C. at 603–04 (stating short-form statutes "relieve the State of the common law requirement that every element of the offense be alleged").

of the county court of Pitt county"). This reasoning is also consistent with N.C.G.S. § 15-153—an indictment must charge a crime to be valid, but superficial errors in the manner or form of the charge shall not impact the validity of the indictment and cannot affect the court's jurisdiction over the charged crime. *See also* N.C.G.S. § 15-155 ("No judgment upon any indictment . . . shall be stayed or reversed for [superficial errors] . . . when the court shall appear by the indictment to have had jurisdiction over the offense.").

The legislature's command that an indictment "*shall not* be quashed, nor the judgment thereon stayed" because of such errors, N.C.G.S. § 15-153 (emphasis added), is an explicit legislative statement that mere pleading deficiencies are not jurisdictional concerns. The common law rule's archaic notion of "jurisdiction" muddies the distinction between these two types of indictment defects—failure to charge a crime on the one hand, and failure to allege with sufficient precision facts and elements of a crime thereby permitting the defendant to prepare a defense and the court to render judgment on the other. "It is the allegation of criminal conduct . . . that activates a court's jurisdiction," *Bennington v. Com.*, 348 S.W.3d 613, 622 (Ky. 2011), not a recitation of elements with perfection.

With this distinction in mind, we now consider defendant's arguments that the common law rule, which treats the latter defect as if it were the former, aligns with the North Carolina Constitution and the Criminal Procedure Act.

b. Our Constitution

We begin with our Constitution, which provides that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. Defendant argues that this provision, coupled with the declaration that "every person charged with crime has the right to be informed of the accusation," N.C. Const. art. I, § 23, conclusively demonstrates that a valid indictment must allege all elements of an offense and is necessary to confer jurisdiction over criminal proceedings. We disagree.

First, it does not follow that because our Constitution guarantees criminal defendants the right to be informed of the charge against them, such right can only be vindicated by alleging all elements of a crime with precision. If that were so, we would not have sanctioned short-form indictments that "relieve the State of the *common law requirement* that every element of [certain] offense[s] be alleged," *Lowe*, 295 N.C. at 603

(emphasis added), nor could we have upheld a statute requiring indictments to "assert[ ] *facts supporting* every element of a criminal offense." N.C.G.S. § 15A-924(a)(5) (emphasis added); *see also Lancaster*, 385 N.C. at 469 ("[A]ll that is required for a sufficient indictment are factual allegations *supporting* the elements of the crime charged, not magic words or a rote recitation of elements." (cleaned up)); *In re J.U.*, 384 N.C. at 624 ("Consistent with a proper understanding of indictment jurisprudence . . . a juvenile petition does not have to state every element . . . so long as the elements are clearly inferable from the facts, duly alleged." (cleaned up)); *State v. Jordan*, 75 N.C. App. 637, 639, *cert. denied*, 314 N.C. 544 (1985) ("Contrary to defendant's contention, a criminal pleading does not have to state every element of the offense charged . . . ."). [10] Moreover, as discussed above, both N.C.G.S. §§ 15-153 and 15-155 plainly recognize that these formal shortcomings are not jurisdictional. Thus, a rote recitation of elements is not required to confer jurisdiction by our Constitution, statutes, or case law.

Second, presuming arguendo that failure to allege an element equates to lack of notice, it does not follow that a violation of a defendant's constitutional right to be informed of the charge against him reflexively implicates jurisdictional concerns. Criminal defendants possess many constitutional rights—such as the right to be free from unreasonable searches and seizures, the right to remain silent, the right to effective counsel, the right to a speedy trial, the right to confront the witnesses against them, the right against excessive bail—yet violations of these rights do not deprive a court of jurisdiction. *See Cotton*, 535 U.S. at 630 (concluding that such an "elastic concept of jurisdiction is not what the term 'jurisdiction' means today, i.e., the courts' statutory or constitutional *power* to adjudicate the case" (cleaned up)).

Finally, defendant's argument ignores the remainder of Article I, Section 22, which provides that "any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, *waive indictment* in noncapital cases." N.C. Const. art. I, § 22 (emphasis

10. Notably, our dissenting colleague agrees that short-form indictments are permissible despite their failure to allege every element of an offense. This is so, apparently, because short-form indictments still fulfill their constitutional purpose of providing notice *without alleging every element*. Why is it that we should measure short-form indictments against their ability to provide notice, but not engage in such an analysis of an allegedly deficient indictment just because it is not a short-form indictment? Under the dissent's reasoning, failing to allege every element is equivalent to failing to charge a crime *regardless of whether notice is provided*—but short-form indictments, which do not allege every element, properly charge a crime and provide notice.

added). Defendant's contention that Article I, Section 22's indictment requirement implicates jurisdictional concerns conflicts with the fundamental maxim that "[j]urisdiction over the subject-matter of an action cannot be waived or conferred by consent." *Dees v. Apple*, 207 N.C. 763, 766 (1935); *see also Cotton*, 535 U.S. at 630 ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); *Moore*, 954 F.3d at 1336 ("Ultimately, the law is clear: the omission of an element in an indictment does not deprive the [trial] court of subject matter jurisdiction. . . . This principle is buttressed by the fact that defendants can waive their right to indictment by a grand jury . . . . In contrast, subject matter jurisdiction can *never* be waived, and a court can raise that issue *sua sponte* at any time." (cleaned up)).[11]

Article I, Section 22 contains no language regarding jurisdiction. Yet defendant and our dissenting colleague would have this Court inject jurisdiction into a provision that is silent on the matter, and on which the legislature has spoken, while simultaneously interpreting such provision to allow waiver of jurisdiction. Flexible as the common law may be, it cannot be contorted to rewrite our Constitution, which provides the source of superior court jurisdiction over violations of North Carolina laws. "Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). Thus, defendant's contention that Article I, Section 22 supports his argument is without merit.

Our Constitution is clear. Where it discusses indictments, it does not discuss jurisdiction—where it discusses jurisdiction, it does not discuss indictments. The common law rule that indictments are jurisdictional and must allege each element of an offense with precision has no

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11. Defendant's argument, and our prior indictment jurisprudence on which both he and our dissenting colleague rely, may stand on firmer footing were our Constitution of 1868 still in force. *Compare* N.C. Const. art. I, § 22 ("Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. *But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases*." (emphasis added)); *with* N.C. Const. of 1868, art. I, § 12 ("No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment."). This subtle change has meaning which escapes our dissenting colleague's analysis, an error that is just one contributing factor to the dissent's flawed reasoning. It is fundamental that one cannot consent to jurisdiction, *see Dees*, 207 N.C. at 766 ("Jurisdiction over the subject-matter of an action cannot be waived or conferred by consent"), and a bill of information that is properly consented to by all parties and filed in the superior court division may lack jurisdiction if it fails to allege a crime against the people or laws of this State. It will not, however, fail to confer jurisdiction for mere technical deficiencies.

support in the plain text of our Constitution.[12] Nevertheless, defendant contends that even if the rule is not rooted in our Constitution, it is codified by our General Statutes. We disagree.

c. Our General Statutes

Defendant argues that multiple provisions of the Criminal Procedure Act support his contention that the Act codified, rather than abrogated, the common law rule.[13] Specifically, defendant relies on subsections 15A-924(a)(5) and (6), 15A-924(e), 15A-952(d), 15A-1442(2)(b), 15A-1446(d)(4), and 15A-1447(b). Before addressing each provision, we again point to the two-hundred-year history of legislative enactments and judicial declarations contrary to his position and note that "[g]eneral jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice." N.C.G.S. § 7A-270 (2023).

Defendant's first argument concerns the mandate in subsection 15A-924(a)(5) that a statutorily sufficient criminal pleading contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense." N.C.G.S. § 15A-924(a)(5). This Court has held that unlike the common law rule, this subsection does not require " 'magic words' or a rote recitation of elements" and that an indictment complies with this subsection if the elements of the offense are " 'clearly inferable' from the allegations in the indictment." *Lancaster*, 385 N.C. at 469 (quoting *In re J.U.*, 384 N.C. at 624). The common law rule's requirement that an indictment allege every element therefore conflicts with both subsection 15A-924(a)(5) and this Court's precedent.

Defendant also relies on subsection 15A-924(a)(6), which provides that a criminal pleading must contain "[f]or each count a citation of any

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12. Our dissenting colleague references due process concerns. However, she fails to cite an example where a due process violation robs a court of jurisdiction. Where there are legitimate due process implications due to deficiencies in indictments, as in other contexts, those issues can and should be addressed in the trial court. The failure to raise such issues, as discussed further herein, goes to the effectiveness of defendant's counsel, not jurisdiction.

13. We are not unaware of our prior case law which applied rigid adherence to the common law rule; in fact we acknowledge inconsistent application. But the precedent relied on by my dissenting colleague has less weight because "it conflicts with a pertinent statutory provision to the contrary," and we may not "by a line of erroneous decisions overrule a statutory enactment." *State v. Mobley*, 240 N.C. 476, 487 (1954). After all, "stare decisis is not an inexorable command." *State v. Hilton*, 378 N.C. 692, 730–31 (Earls, J., dissenting) (cleaned up).

applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or reversal of a conviction." N.C.G.S. § 15A-924(a)(6) (2023). We note this statute, like sections 15-153 and 15-155, is fundamentally inconsistent with the common law rule under which any errors in the charging document placed the criminal charge in jeopardy of dismissal. *See* Potter's Revisal of 1819, Laws of 1811, Ch. 809 ("Whereas exceptions, in themselves merely formal, are frequently taken against bills of indictment . . . no bill of indictment or presentment shall be quashed or judgment thereon arrested, for or by reason of any informalities or refinements . . . .").

Defendant further contends that because subsection 15A-924(a)(5) does not contain the second sentence of subsection 15A-924(a)(6), the General Assembly intended noncompliance with subsection 15A-924(a)(5) to result in dismissal of charges or reversal of a conviction. Interestingly, defendant does not assert that noncompliance with subsections 15A-924(a)(1) to (4) and (7), none of which contain the second sentence of subsection 15A-924(a)(6), should result in dismissal of charges or reversal of a conviction. Rather than read a non-existent mandate into subsections 15A-924(a)(1) to (5) and (7), we prefer to follow the words actually contained in the statute.

Specifically, we turn to subsection 15A-924(e). That provision provides:

> Upon motion of a defendant under G.S. 15A-952(b), the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.

N.C.G.S. § 15A-924(e) (2023). As this provision applies only to motions made under subsection 15A-952(b), its meaning must be determined by examining subsection 15A-952(b). That subsection provides, in relevant part:

> Except as provided in subsection (d), when the following motions are made in superior court they must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time:
>
> . . . .
>
> (6) Motions addressed to the pleadings, including:

> a. Motions to dismiss for failure to plead under G.S. 15A-924(e).

N.C.G.S. § 15A-952(b) (2023). Subsection 15A- 952(e) further provides that "[f]ailure to file the motions in subsection (b)," i.e., motions to dismiss for failure to plead under subsection 15A-924(e), "constitutes a waiver of the motion." N.C.G.S. § 15A-952(e).[14] Taken together, these statutes operate as follows.

First, the State is required to "assert[ ] facts supporting every element of a criminal offense" in the indictment.[15] N.C.G.S. § 15A-924(a)(5). Second, if the defendant believes the indictment "fails to charge . . . a crime in the manner required by subsection (a)," N.C.G.S. 15A-924(e), that is, by failing to assert facts supporting every element of the charge, the defendant may file a motion within a limited timeframe in superior court seeking to dismiss the charge. N.C.G.S. § 15A-952(b)(6)(a). If the defendant fails to timely file such motion, it is waived. N.C.G.S. § 15A-952(e). Finally, if the motion was timely filed, and if the superior court agrees with the defendant, it must dismiss the charge. N.C.G.S. § 15A-924(e). But unlike the common law rule, such a dismissal is on statutory rather than jurisdictional grounds. *See Lancaster*, 385 N.C. at 462 ("Although earlier common law principles certainly conveyed that defective indictments implicated jurisdictional concerns, . . . the Criminal Procedure Act represent[s] a sharp departure from the demands of technical pleading."); *Oldroyd*, 380 N.C. at 619 ("[T]he Criminal Procedure Act of 1975 . . . statutorily modernize[d] the requirements of a valid indictment.").

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14. This statute reinforces our precedent requiring a defendant to move for a bill of particulars prior to trial before requesting arrest of judgment after an unfavorable verdict. *See State v. Brown*, 320 N.C. 179, 192 (1987) ("[I]f, despite the sufficiency of the indictment, defendant was at a loss to determine the specific facts underlying the charges . . . , his proper recourse was to move for a bill of particulars."); *State v. Shade*, 115 N.C. 757, 758–59 (1894) ("[T]he defendant . . . may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. . . . With such safeguards thrown around prosecutions, it must be the fault of the person charged if he goes to trial without being 'informed of the accusation against him.' ").

15. This requirement is obviously relaxed where the State proceeds with a short-form indictment. *See* N.C.G.S. § 15-144.1(a) ("In indictments for rape it is not necessary to allege every matter to be proved at trial"); *see also Lowe*, 295 N.C. at 603–04 (stating short-form statutes "relieve the State of the common law requirement that every element of the offense be alleged" and advising that "a defendant who feels that he may be taken by surprise at trial may ask for a bill of particulars to obtain information in addition to that contained in the indictment which will clarify the charge against him.").

Defendant argues that "[t]here is nothing in these statutes which suggests the General Assembly . . . wants to move away from the practice of treating indictments as jurisdictional requirements." Defendant has not discussed or otherwise argued the legislative history or court commentary set forth above that is fundamentally contrary to his position. Moreover, the requirement that motions to dismiss for failure to plead under subsection 15A-924(e) be made in superior court within a certain time limit, and the directive that failure to timely move waives such motion, differentiate these motions from jurisdictional questions. Because "[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court," *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986), and because "[j]urisdiction over the subject-matter of an action cannot be waived or conferred by consent," *Dees*, 207 N.C. at 266, subsections 15A-924(e) and 15A-952(b) do not treat pleading errors as jurisdictional issues. Further, the Criminal Procedure Act's elimination of the common law's rote recitation of elements requirement, and the Act's statutory allowance of certain pleading errors, demonstrate the General Assembly's intent to untangle the sufficiency of charging documents from the courts' power to decide a case. *See* N.C.G.S. § 7A-270 ("General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice.").

Notably, subsection 15A-952(d) provides that "[m]otions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time." N.C.G.S. § 15A-952(d) (2023). Subsection 15A-952(d)'s phrase "failure of the pleading to charge an offense" is distinct from the language of subsection 15A-924(e), which concerns a failure "to charge the defendant with a crime in the manner required by subsection [15A-924](a)." *Compare* N.C.G.S. § 15A-952(d), *with* N.C.G.S. § 15A-924(e). This is also consistent with the bifurcation in N.C.G.S. §§ 15-153 and 15-155.

For example, a motion to dismiss an indictment for larceny that "fail[ed] to charge the defendant . . . in the manner required by subsection [15A-924](a)," N.C.G.S. § 15A-924(e), by failing to assert facts supporting each element of larceny, would be properly made in superior court under subsections 15A-924(e) and 15A-952(b)(6)(a) and would be subject to waiver for lack of timeliness. A motion to dismiss an indictment charging the accused with wearing a pink shirt on a Wednesday—conduct that does not constitute a criminal offense—would be properly made at any time under subsection 15A-952(d) and would not be subject to such waiver. *See Moore*, 954 F.3d at 1333 ("The absence of an element

of an offense in an indictment is not tantamount to failing to charge a criminal offense . . . . However, if the charged conduct itself is not criminal, . . . the [trial] court lacks subject matter jurisdiction."). A similar result would be had for charging a defendant with a crime committed in another state.

Nothing in the statutes discussed above indicates that the State's noncompliance with subsection 15A-924(a) could rob the superior court of jurisdiction or that the State's compliance would bestow such jurisdiction. The reason is simple; our Constitution confers jurisdiction, and the General Assembly reaffirms that principle elsewhere in our General Statutes. *See* N.C. Const. art. IV, § 12(3) ("Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State."); N.C. Const. art. IV, § 12(4) ("The General Assembly shall . . . prescribe the jurisdiction and powers of the District Courts and Magistrates."); N.C.G.S. § 7A-270 ("General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice."); N.C.G.S. § 7A-271(a) (2023) ("The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article."); N.C.G.S. § 7A-272(a) (2023) ("Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.").

Defendant next argues that section 15A-1442 supports his argument that the General Assembly has codified, rather than abrogated, the common law jurisdictional indictment rule. In relevant part, the statute provides:

> The following constitute grounds for correction of errors by the appellate division.
>
> (1) **Lack of Jurisdiction.** —
>
> a. The trial court lacked jurisdiction over the offense.
>
> b. The trial court did not have jurisdiction over the person of the defendant.
>
> (2) **Error in the Criminal Pleading.** — Failure to charge a crime, in that:
>
> a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or

> b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

N.C.G.S. § 15A-1442 (2023). Again, the General Assembly's differentiation between jurisdictional and non-jurisdictional errors in criminal pleadings cuts against defendant's argument. The General Assembly's separation of these errors indicates abrogation, not codification, of the common law rule which had entangled them. We note that subsections 15A-1442(2)(a) and (b) repeat the delineation between a pleading that fails to charge acts that do not violate criminal law and a pleading that fails to comply with subsection 15A-924(a)(5). *See Moore*, 954 F.3d at 1333 ("The absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense . . . . However, if the charged conduct itself is not criminal, . . . the [trial] court lacks subject matter jurisdiction."); *see also* N.C.G.S. § 15-153.

Next, defendant contends that subsection 15A-1446(d)(4) supports his argument because it automatically preserves pleading errors for appellate review. Subsection 15A-1446(d)(4) provides that an alleged error based upon the ground that "[t]he pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5)" is subject to appellate review "even though no objection or motion has been made in the trial division." N.C.G.S. § 15A-1446(d)(4) (2023).

Once again, defendant relies on a statute in which the General Assembly has specifically differentiated between jurisdictional and non-jurisdictional pleading errors. *See* N.C.G.S. § 15A-1446(d)(1) (2023) (providing automatic preservation of alleged errors based upon "[l]ack of jurisdiction of the trial court over the offense of which the defendant was convicted"); N.C.G.S. § 15A-1446(d)(2) (2023) (providing automatic preservation of alleged errors based upon "[l]ack of jurisdiction of the trial court over the person of the defendant"). As with the statutory provisions discussed above, subsection 15A-1446(d)'s distinction between these two species of indictment defects supports the conclusion that the General Assembly has abrogated the common law jurisdictional indictment rule.

Although not strictly necessary to the resolution of this issue, we note that this Court views subsection 15A-1446(d) with skepticism because our Constitution provides that "[t]he Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13(2). This Court exercises this constitutional authority by promulgating the Rules of Appellate Procedure and has held that to the extent provisions of subsection 15A-1446(d) conflict

with the Rules of Appellate Procedure, the Rules prevail and "the statute must fail." *State v. Bennett*, 308 N.C. 530, 535 (1983) (holding subsection 15A-1446(d)(13) unconstitutional); *see also State v. Elam*, 302 N.C. 157, 160 (1981) (holding subsection 15A-1446(d)(6) unconstitutional).

Here, there appears to be no conflict between our Rules and subsection 15A-1446(d)(4). Rule 10 of the Rules of Appellate Procedure provides in relevant part that "[a]ny such issue . . . which was deemed preserved . . . including . . . whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal." N.C. R. App. P. 10(a)(1). Thus, on this issue our Rules of Appellate Procedure align with the Criminal Procedure Act by differentiating between jurisdictional and non-jurisdictional pleading issues and by automatically preserving both for appellate review.

We note that while Rule 10 automatically preserves issues of "whether a criminal charge is sufficient in law," it does not follow that all issues related to deficient indictments are jurisdictional merely because subject matter jurisdiction may be raised at any time. If we were to accept this proposition, we would also have to accept that the issue of whether a "judgment is supported by the verdict or by the findings of fact and conclusions of law" is jurisdictional simply because it is automatically preserved by Rule 10. N.C. R. App. P. 10(a)(1). Those familiar with appellate courts will recognize the absurdity of this notion. Ultimately, both subsection 15A-1446(d) and Rule 10 weaken, rather than strengthen, defendant's argument.

Finally, defendant contends that subsection 15A-1447(b) supports his argument because it mandates reversal of the judgment and dismissal of the charge if "the facts charged in a pleading were not at the time charged a crime." N.C.G.S. § 15A-1447(b) (2023). There are two issues with defendant's contention that this subsection indicates codification, rather than abrogation, of the common law jurisdictional indictment rule.

First, it does not follow that because the remedy mandated is reversal of the judgment and dismissal of the charge, the harm compelling that remedy is jurisdictional in nature. Subsection 15A-1447(c) mandates the same remedy of reversal and dismissal if "the evidence with regard to a charge is insufficient as a matter of law," unless there is "evidence to support a lesser included offense," in which case "the court may remand for trial on the lesser offense." N.C.G.S. § 15A-1447(c) (2023). No one would seriously contend that the State's failure to present sufficient

evidence to survive a defendant's motion to dismiss amounts to a failure to cloak the trial court with jurisdiction.

Second, we are not convinced by defendant's expansive reading of subsection 15A-1447(b). Defendant appears to argue that this subsection applies to *any* pleading error, including failure to "assert[ ] facts supporting every element of a criminal offense" under subsection 15A-924(a)(5). *See* N.C.G.S. § 15A-924(a)(5). However, the plain language of subsection 15A-1447(b) contemplates circumstances in which an indictment properly alleges a violation of the laws of this State, but the alleged conduct did not violate criminal law at the time it occurred. Such circumstances would exist if the State charged a person with violating an ex post facto law, e.g., one which retroactively criminalizes conduct. Or, by way of another example, if the State charged a person with exceeding a school zone's posted speed limit despite the conduct occurring outside of the school zone's effective posted hours. In both cases, a defendant's argument would go to the merits of the case rather than jurisdiction.

In sum, a review of the Criminal Procedure Act and the history leading to its adoption does not indicate that our General Assembly has codified the common law jurisdictional indictment rule. Instead, the repeated distinction between jurisdictional and non-jurisdictional pleading errors demonstrates that the Criminal Procedure Act abrogated any remnant of the common law jurisdictional indictment rule.

"When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984). Because the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule that may have survived implementation of N.C.G.S. §§ 15-153 and 15-155, that common law rule has been supplanted and is no longer the law in this State.

Our Constitution and General Statutes, not an indictment, confer the general courts of justice with jurisdiction over criminal laws and the defendants accused of violating such laws. We join the Supreme Court of the United States and the majority of our sister states in recognizing that "defects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630; *see also State v. Dunn*, 375 P.3d 332, 355 (Kan. 2016) ("Indeed, the view that a failure to include an essential element in the charging document is a jurisdictional defect ha[s] quickly become the minority view in state and federal jurisdictions.").

3. Challenging and Reviewing an Allegedly Defective Indictment

The abrogation of the common law rule does not relieve the State of its duty to draft indictments in a manner that "satisf[ies] both statutory strictures and . . . constitutional purposes." *Lancaster*, 385 N.C. at 462 (quoting *In re J.U.*, 384 N.C. at 623). Nor does such abrogation prevent defendants from obtaining relief if the State fails to effectively discharge this duty. Our Constitution grants this Court the "exclusive authority to make rules of procedure and practice for the Appellate Division," N.C. Const. art. IV, § 13(2), and our Rules of Appellate Procedure provide that the issue of "whether a criminal charge is sufficient in law" is automatically preserved for appellate review. N.C. R. App. P. 10(a)(1). Thus, issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved despite a defendant's failure to object to the indictment at trial.

But, where non-jurisdictional deficiencies exist in criminal indictments, the better practice is for defendants to raise the issue in the trial courts. *See State v. Brown*, 320 N.C. 179, 192 (1987) ("[I]f, despite the sufficiency of the indictment, defendant was at a loss to determine the specific facts underlying the charges . . . , his proper recourse was to move for a bill of particulars."); *State v. Shade*, 115 N.C. 757, 758–59 (1894) ("[T]he defendant . . . may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal. . . . With such safeguards thrown around prosecutions, it must be the fault of the person charged if he goes to trial without being 'informed of the accusation against him.' ").

An indictment might fail to satisfy constitutional purposes by failing to provide "notice sufficient to prepare a defense and to protect against double jeopardy," *Lancaster*, 385 N.C. at 462 (quoting *In re J.U.*, 384 N.C. at 623), or it might fail to satisfy relevant statutory strictures by failing to "assert[ ] facts supporting every element of a criminal offense." N.C.G.S. § 15A-924(a)(5). However, because these deficiencies do not implicate modern jurisdictional concerns, the analytical framework that mandated reflexive vacatur of convictions and dismissal of charges if the indictment contained either a statutory or constitutional defect is inappropriate. As these species of errors in a charging document are not jurisdictional, a defendant seeking relief must demonstrate not only that such an error occurred, but also that such error was prejudicial. *See State v. Alston*, 307 N.C. 321, 339 (1983) ("The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial.").

In determining whether an error was prejudicial, the prejudicial error tests provided in section 15A-1443 are applicable.[16] Subsection 15A-1443(a) is the appropriate test for indictment errors that fail to satisfy statutory strictures, and subsection 15A-1443(b) is the appropriate test for indictment errors that fail to satisfy the constitutional purposes of indictments.[17] *See* N.C.G.S. § 15A-1443 (2023). However, it would appear that the longer a defendant waits to raise issues related to deficient criminal pleadings, the more difficult it would be to establish prejudice.[18]

B. Sufficiency of the Short-Form Indictment

Having determined that an indictment charging a defendant with violating the laws of this State is sufficient to invoke the superior court's jurisdiction without regard to an indictment's statutory or constitutional infirmities, we turn to the State's argument that the Court of Appeals erred in concluding the indictment charging defendant with second-degree rape was defective.

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16. Because a pleading error is not an evidentiary or instructional error, plain error review is not appropriate. In addition, given the availability of discovery and mechanisms such as motions for a bill of particulars, it is difficult to imagine pleading errors could satisfy the prejudice prong.

17. While our precedent on this issue may inform our judgment, we understand that whether subsection 15A-1443(c) may be relevant where, as here, the defendant fails to either object to the allegedly erroneous indictment or file a motion for a bill of particulars, is a question that will need to be addressed in future cases. A defendant who alleges that an indictment failed to provide sufficient notice to prepare a defense may have a more compelling argument that his counsel provided ineffective assistance. *See State v. Reber*, No. 138A23, slip. op. at 20 (N.C. May 23, 2024) ("[W]henever these claims exist on direct appeal, there will be a corresponding claim of ineffective assistance of counsel that can be pursued in a motion for appropriate relief. . . . [A]n ineffective assistance claim brought in a motion for appropriate relief avoids the gamesmanship concern . . .; it provides a forum where a fact-finder can determine whether the failure to object was indeed a reasonable strategic decision, or instead a deficiency on the part of counsel.").

18. Contrary to the hyperbole in the opinion of our dissenting colleague, treating alleged indictment deficiencies in the same manner as other errors does not reveal that this Court has a "thin view of justice" or an "even thinner view of due process." If requiring a defendant to demonstrate prejudice in this context is an attack on due process, why is it permissible when this Court reviews other alleged constitutional violations? Notably, and unlike alleged indictment defects, other alleged constitutional errors require a defendant to properly preserve them for appellate review—yet that concept has never been lambasted for eroding constitutional protections. In noting that a defendant faces an increasingly difficult challenge attempting to demonstrate prejudice the longer he delays raising the issue, we are offering practical guidance, not establishing a bright-line rule.

Recently, this Court unanimously noted that

> the General Assembly's adoption of the Criminal Procedure Act represented a sharp departure from the demands of technical pleading. . . .
>
> Since adoption of the Act, this Court has been consistent in retreating from the highly technical, archaic common law pleading requirements which promoted form over substance. Instead, contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice.

Lancaster, 385 N.C. at 462–63 (cleaned up).

The elements of second-degree rape that the State must prove at trial are that the defendant (1) engaged in vaginal intercourse, (2) with a victim who was mentally incapacitated or physically helpless, and (3) knew or reasonably should have known that the victim was mentally incapacitated or physically helpless. N.C.G.S. § 14-27.22 (2023). Proof necessary for conviction, however, is far different from what is required to indict a defendant, as we have discussed above.

A short-form indictment for second-degree rape of a mentally incapacitated or physically helpless individual satisfies statutory requirements if it

> allege[s] that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person . . . who was mentally incapacitated or physically helpless, nam[es] the victim, and conclude[es] as required by law.

N.C.G.S. § 15-144.1(c) (2023). Notably absent from this language is any requirement that the indictment assert the accused knew or reasonably should have known that the victim was mentally incapacitated or physically helpless. Here, the indictment charging defendant with second-degree rape alleged that defendant

> unlawfully, willfully, and feloniously did engage in vaginal intercourse with [Jane], who was at the time, physically helpless. This act was done in violation of NCGS § 14-27.22.

Defendant did not object to this indictment before or during his trial. However, he now argues that the indictment is fatally defective because

it used the phrase "did engage in vaginal intercourse with [a person]" rather than "did carnally know and abuse a person," and thereby "failed to allege one of the essential elements; namely, that [defendant] knew or reasonably should have known that Jane was physically helpless when he engaged in sexual intercourse with her." *Singleton*, 285 N.C. App. at 632.

The Court of Appeals agreed with defendant, holding that "[w]hile the phrase used in the indictment is a sufficient substitute for 'carnally know,' it is not a sufficient substitute for the word 'abuse,' " *id.* at 634, and concluding the indictment was fatally defective because "[t]he verb 'abuse' (or some equivalent) is required as a means of describing the essential element . . . that [d]efendant 'knew or reasonably should have known' that Jane was physically helpless." *Id.* This reasoning is contrary to this Court's precedent and the principle that "it would not favor justice to allow [a] defendant to escape merited punishment upon a minor matter of form." *Sturdivant*, 304 N.C. at 311. This Court has consistently affirmed the legislature's authority to "relieve the State of the common law requirement that every element of the offense be alleged," *Lowe*, 295 N.C. at 603, which is precisely how the short-form statute at issue here operates.

A plain reading of section 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim's physical helplessness. Certainly, such knowledge is an element of the offense and must be proven at trial, but the purpose of short-form indictments is to "relieve the State of the common law requirement that every element of the offense be *alleged*." *Lowe*, 295 N.C. at 603 (emphasis added). In other words, while there is a knowledge element necessary to sustain a conviction at trial, that element is not required to be alleged in the indictment. It cannot reasonably be said that this indictment deprived defendant of notice of the charge such that he could not prepare a defense, or that the court could not enter judgment. The Court of Appeals erred by concluding that the short-form indictment was deficient.

In addition to erroneously searching the indictment language for recitations not required in the short-form statute, the Court of Appeals also appears to have required that the indictment language mirror the short-form statute verbatim. Despite recognizing that this Court "has held that an indictment is not necessarily fatal if its language does not use the precise language of a statute allowing for short form indictment language," the Court of Appeals nevertheless concluded the indictment was defective because the indictment used the phrase "engaged in vaginal intercourse" rather than "carnally kn[e]w and abuse[d]." *Singleton*, 285 N.C. App. at 634.

While this Court has not yet addressed the exact language at issue in this case, our precedent demonstrates that we are loath to invalidate an indictment that communicates the information required by a short-form statute merely because it does so by employing modern language. *See State v. Newborn*, 384 N.C. 656, 661 (2023) ("Applying the principle of substance over form, it is clear that the indictment here gave defendant sufficient notice of the crimes with which he was being charged such that he was able to prepare his defense."); *State v. Tart*, 372 N.C. 73, 79 (2019) (upholding attempted first-degree murder indictment because, despite linguistic difference from relevant short-form statute, indictment nevertheless "serve[d] its functional purposes with regard to both the defendant and the court."); *State v. Wallace*, 351 N.C. 481, 505 (2000) (citing N.C.G.S. § 15-144.1) (holding that indictments "complied with the statutes authorizing short-form indictments for rape and sexual offense" despite their use of the phrases "engage[d] in vaginal intercourse" and "engage[d] in a sexual act" instead of the relevant short-form statute's phrases "ravish and carnally know" and "carnally know and abuse.").[19]

Accordingly, we conclude that the indictment at issue here was not deficient. Because no error occurred, we need not consider the issue of prejudice.

III. Conclusion

For over two hundred years, we have struggled with lingering notions that the common law controls our indictment jurisprudence. Our legislature has consistently and completely taken action to eliminate these "shadowy nothings" that impede justice and erode the public's confidence in our system. Judges and lawyers, however, have been unwilling to give up these technicalities that permit defendants to escape merited punishment.

Since 1811, the plain language and the spirit of the law has been to move away from common law pleading requirements in criminal cases that were overwrought with technicalities. As we recognized in 1898, we reiterate that "[t]he practical sense of the age demands" that technicalities should not carry the day for defendants who argue form over

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19. The few states that have addressed this specific issue have rejected any argument that the phrase "engaged in sexual intercourse" is an insufficient substitute for the phrase "carnally knew and abused." *See State v. Cunday*, 356 P.2d 609, 611 (Wash. 1960) (holding that "carnally know and abuse" should be construed as "the equivalent of 'sexual intercourse' "); *State v. Sebastian*, 69 A. 1054, 1057 (Conn. 1908) ("Unlawful carnal knowledge certainly includes what is meant by carnal abuse, if it be not synonymous with that.").

substance in our indictment jurisprudence, because defendants are seldom prejudiced by mistakes in pleadings. *See Hester*, 122 N.C. at 1050.

Courts lack the ability to act where a criminal indictment suffers from a jurisdictional defect, that is, where it wholly fails to allege a crime against the laws or people of this State. But a mere pleading deficiency in an indictment does not deprive the courts of jurisdiction. The General Assembly abrogated the archaic common law rules concerning criminal pleadings, and the indictment charging defendant with second-degree rape was not deficient.

REVERSED.

Justice EARLS concurring in part and dissenting in part.

I agree with the majority that Mr. Singleton's indictment was not fatally defective. That conclusion should end the case. Both the State and Mr. Singleton concede that reaching the jurisdictional issue is unnecessary if we find no fatal variance in the indictment.[1] We so find, and a court with any respect for judicial restraint would stop there.

The majority, however, goes further. Although every member of this Court agrees that Mr. Singleton's indictment was not defective and thus did not divest the trial court of jurisdiction, the majority opines that virtually no indictment will *ever* meet that threshold. In a sprawling ruling—largely dicta because it is unnecessary to the holding—the majority upends centuries of precedent and announces its view that constitutional and statutory defects in an indictment are non-jurisdictional.

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1. At oral argument, counsel for the State affirmed that this Court need only reach the jurisdictional issue if it concluded that Mr. Singleton's indictment was fatally defective. Oral Argument at 11:58, State v. Singleton (No. 318PA22) (Sept. 19, 2023), https://www.youtube.com/watch?v=zNCACKHqBlg&t=2279s (last visited May 17, 2024). The State framed its position as an "alternative argument," one only relevant to the merits if this Court rejected its first. *Id.* at 12:05. "If this Court were to find that this indictment as written is defective, the State would nonetheless ask that this Court affirm the judgment of the trial court, reverse [the judgment of] the Court of Appeals below, on the basis that the rule that indictments give jurisdiction is an outdated and obsolete rule." *Id.* at 12:11. Defense counsel argued the same. "Mr. Singleton argues today that the State's challenge to the jurisdictional remedy is not within the scope of review. At the Court of Appeals, the State did not raise the issue of a challenge to the jurisdictional remedy, the Court of Appeals opinion was unanimous, and so that puts us—I think—into Rule 16(a) which would require the State to raise the issue in the PDR and in the new briefs. And the State did raise the issue in the new briefs, but not in the PDR. And so I would argue that it's not properly before the Court." *Id.* at 37:24.

This is not originalism, constitutional conservatism, or respect for stare decisis. *Cf. State v. Robinson*, 375 N.C. 173, 193 (2020) (Newby, J., dissenting) ("As a monarch, King Louis XVI once famously said, '*C'est légal, parce que je le veux*' ('It is legal because it is my will.'). Today, four justices of this Court adopt the same approach to the law, violating the norms of appellate review and disregarding or distorting precedent as necessary to reach their desired result. Apparently, in their view, the law is whatever they say it is."). Rather than wait for a case that presents the issue, the majority fashions its own vehicle to rewrite law that has stood for over two centuries. *Cf. id.* at 195 ("Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there.").

An indictment "is a written accusation of an offense, preferred and presented upon oath as true by a grand jury at the suit of the government." *State v. Morris*, 104 N.C. 837, 839 (1889). In effect, an indictment is the catalyst of a criminal trial. It marks the start of the State's formal prosecution and alerts the defendant and the presiding court of the accusations. *See McClure v. State*, 267 N.C. 212 (1966).

Before today, this Court held that indictments were jurisdictional. In other words, that "a valid indictment is required for a court to retain jurisdiction." *State v. Rankin*, 371 N.C. 885, 897 (2018). That rule flowed from and recognized the important functions an indictment performs—a "valid indictment, among other things, serves to identify the offense being charged with certainty, to enable the accused to prepare for trial, and to enable the court, upon conviction, to pronounce the sentence." *Id.* at 886 (cleaned up) (quoting *State v. Saults*, 294 N.C. 722, 726 (1978)). We thus examined an indictment to ensure that it alleged the indispensable elements of the charged crime and "fulfill[ed] its constitutional purposes—to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. White*, 372 N.C. 248, 250 (2019) (cleaned up).

An indictment was fatally defective if it omitted "some essential and necessary element of the offense" or fell short of constitutionally required notice. *See State v. Ellis*, 368 N.C. 342, 344 (2015) (cleaned up). An indictment so flawed effectively failed to charge a crime, and its allegations were so amorphous that they did not protect against double jeopardy or prepare the defendant for trial. *See Rankin*, 371 N.C. at 895 ("The indictment in this case failed to allege each element of the crime of littering, thereby depriving defendant of sufficient notice."). Because

an indictment initiates a criminal trial, a defective indictment yields defective proceedings. Any resulting conviction or sentence was viewed by this Court as premised on and poisoned by that original sin. *Id.* at 886–87; *see also State v. Campbell*, 368 N.C. 83, 86 (2015).

Faced with a fatally flawed charging instrument, the remedy was to vacate any conviction born of it. *See Campbell*, 368 N.C. at 86 ("A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated."). Because the State cannot punish its citizens but through proper legal course, the courts—exercising the State's sovereign judicial authority—cannot try, convict, and sentence a defendant but through lawful process. Thus, when an indictment failed to charge a crime or breached basic tenets of due process, we declined to grant legal force to the fruits of that procedural failure. *See Rankin*, 371 N.C. at 895. In the eyes of the law, the court imposing that judgment lacked the power to do so in contravention of the defendant's rights. *See State v. Whedbee*, 152 N.C. 770, 776 (1910) ("It will not do to say in this land of freedom, where the rights of every citizen are carefully guarded and preserved, that a man should be convicted. He must be convicted, if at all, according to the law, and in that way only.").

That rule—drawn from the common law—declared indictments "jurisdictional." *See, e.g.*, *State v. Simpson*, 302 N.C. 613, 616 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony."); *State v. Mostafavi*, 370 N.C. 681, 684 (2018) (observing that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony" (quoting *State v. Sturdivant*, 304 N.C. 293, 308 (1981))). We did not vacate convictions for minor technical hitches, as the majority frames it. Instead, we reserved that relief for indictments with fatal constitutional or statutory flaws, documents missing "indispensable allegation[s] of the charge" or failing of their constitutional purposes. *See Rankin*, 317 N.C. at 887 (quoting *State v. Russell*, 282 N.C. 240, 245 (1972)). In those cases—rare indeed—we declined to honor the legal force of the conviction because it was premised on fatally defective process.

Under today's ruling, however, a constitutionally or statutorily defective indictment is not enough to merit relief. A defendant must also show prejudice—that is, harm *on top of* the State's procedural violation. Or to be exact, a defendant can allege prejudice; as the majority makes clear, that hurdle promises to be all-but-insurmountable.

I think that decision is profoundly misguided. On the law, the majority is wrong—time and again, this Court has rooted the remedy for a

defective indictment in fundamental constitutional protections and the statutory provisions realizing them. On logic, there is little—the majority reaches its result by blurring lines and cutting corners. Most regrettably, today's decision rests on a thin view of justice and an even thinner view of due process. Flawed indictments, the majority insists, are mere technicalities used by guilty defendants to escape merited punishment.

I take a different view. Requiring the State to properly charge a citizen with a crime before marshalling its immense power against them is "properly characterized as [a] constitutional procedural due process protection[ ]." *See In re J.U.*, 384 N.C. 618, 630 (2023) (Earls, J., dissenting). When the State fails to indict a defendant in line with constitutional and statutory guardrails, vacating that conviction is the only remedy that vindicates those legal safeguards and the precious values they protect. Because the majority removes those principled due process restraints on State power, I dissent.

I. The Nexus Between Indictments and Jurisdiction

At its most basic, "jurisdiction" refers to the "legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *See In re T.R.P.*, 360 N.C. 588, 590 (2006) (quoting *Judicial Jurisdiction*, *Black's Law Dictionary* (7th ed. 1999)). To act, a court must have jurisdiction over the parties before it and the subject matter involved. *See id.* As we have explained, jurisdiction is the "indispensable foundation upon which valid judicial decisions rest." *Id.* Without it, a court "has no power to act." *Id.* And when a court proceeds without jurisdiction—when it lacks the power to decide the case before it—any decision it renders is, in the eyes of the law, a nullity. *See id.*; *see also Burgess v. Gibbs*, 262 N.C. 462, 465 (1964) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity."). It has no binding effect or legal force. *See In re T.R.P.*, 360 N.C. at 590. No legal "rights are acquired or divested by it." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90 (1956) (quoting *Stafford v. Gallops*, 123 N.C. 19, 21 (1898)). And all "proceedings founded upon it are worthless." *Id.* (quoting *Stafford*, 123 N.C. at 22).

Jurisdiction is not just an abstract concept—it is integral to procedural due process. *See State v. Smith*, 265 N.C. 173, 180 (1965). Procedural due process is, in essence, a "guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). It means "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal *having jurisdiction of the cause*." *Simeon v. Hardin*, 339 N.C. 358, 377 (1994) (cleaned up) (emphasis added). In other words, due process

restricts the State from depriving a person of life, liberty, and property except through duly authorized judicial proceedings by a court with the authority to act.

In criminal cases, this Court has long linked indictments to jurisdiction. *See State v. Whedbee*, 152 N.C. 770 (1910); *State v. Snipes*, 185 N.C. 743 (1923); *State v. Nugent*, 243 N.C. 100 (1955). That nexus, we have explained, flows from North Carolina's Constitution itself. *See, e.g.*, *State v. Snyder*, 343 N.C. 61, 65 (1996) ("Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution."). Before the State may deploy its immense power to strip a person of their freedom, it must, at a minimum, properly charge and notify him of his alleged crimes. To do so, the "public prosecuting attorney" must draw up "a written accusation of a crime"—the indictment. *State v. Thomas*, 236 N.C. 454, 457–58 (1952). That document must allege "lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Greer*, 238 N.C. 325, 327 (1953). Once the indictment is "submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill," the State may bring the case before a criminal court. *Thomas*, 236 N.C. at 457.

Our precedent has labelled a valid indictment an "essential of jurisdiction." *See State v. McBane*, 276 N.C. 60, 65 (1969). As the majority notes, the word "jurisdiction" has sparked some confusion, as the common law terminology is not coincident with modern notions of that term. "Jurisdictional remedy" supplies a better descriptor of the common law rule. *See Rankin*, 371 N.C. at 895 (discussing the "common law rule that a defective indictment deprives a criminal court of jurisdiction" interchangeably with the "common law remedy for invalid indictments"). It captures the idea that a conviction secured at the expense of procedural protections should, on review, be divested of legal force. Our precedent has indeed embraced that principle, casting the jurisdictional remedy as a recognition that tainted criminal judgments must yield to the safeguards afforded to the accused. *See, e.g.*, *McClure v. State*, 267 N.C. 212, 215 (1966) ("There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." (cleaned up)).

A. Proper Exercise of Judicial Power

On one level, the jurisdictional remedy reflects bedrock ideas of the proper role and function of courts. A criminal court—just like any other

court—cannot act without a proper invocation of its rightful authority. *See In re T.R.P.*, 360 N.C. at 590. The indictment serves that function in criminal cases, much like service of process in civil suits. When the State indicts a defendant for a crime, it equips the court to adjudicate specific allegations of criminal conduct within the contours of the adversarial system. *See State v. Albarty*, 238 N.C. 130, 131 (1953) ("The first rule of good pleading in criminal cases is that the indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed.").

It is thus vital that the State charge a defendant with the essential elements of a crime—or at the very least, "provide[ ] such certainty in the statement of the accusation as would identify the offense with which defendant was charged" and "enable[ ] defendant to prepare for trial." *State v. Tart*, 372 N.C. 73, 79 (2019) (citing *Greer*, 238 N.C. at 327). If an indictment falls short of statutory or constitutional benchmarks, the presiding court lacks jurisdiction over the defendant's case. The State's failure to properly notify the defendant of the accusations means that the court cannot, in compliance with due process, "bring [him] into its adjudicative process." *See In re T.R.P.*, 360 N.C. at 590 (cleaned up); *see State v. Phelps*, 65 N.C. 450, 451–52 (1871) ("The indictment must show on its face that it has been found by competent authority, in accordance with the requirements of law and that a particular person mentioned therein[ ] has done within the jurisdiction of the indictors such and such specific acts, at a specific time, which acts, so done, constitute what the Court can see, as a question of law, to be a crime." (cleaned up)). And an indictment that omits essential elements of an offense or is too vague to "apprise the defendant with reasonable certainty" of the accusation does not, in effect, charge a crime. *See White*, 372 N.C. at 251 (cleaned up). That shortcoming goes to subject-matter jurisdiction, as a court presented with such a threadbare charging instrument has no criminal conduct that it may properly adjudicate. *See State v. Ballangee*, 191 N.C. 700, 702 (1926) (explaining that a court "cannot properly give judgment unless it appears in the record that an offense is sufficiently charged" (quoting *State v. Watkins*, 101 N.C. 702, 703 (1888))); *State v. Hathcock*, 29 N.C. (7 Ired.) 52, 54 (1846) ("[I]n order to bring a trespass within the criminal jurisdiction of the court it must appear on the face of the indictment to amount to a violation of the criminal law.").

For that reason, a defective indictment divests a criminal court of the power to act—it jeopardizes the court's legal authority to bind the parties to its judgment and resolve the case before it. *See Albarty*, 283 N.C. at 133. And so if that court tries, convicts, and sentences a defendant,

its actions are void because they stray outside the court's lawful power. *See State v. Yoes*, 271 N.C. 616, 630 (1969) ("It is axiomatic that a trial of an accused person in a court which has no jurisdiction of the matter cannot result in a valid determination of his guilt or innocence of the offense with which he is charged. Consequently, a judgment rendered by such court is void and, upon appeal, must be vacated irrespective of the sufficiency of the evidence presented in the trial court to establish the guilt of the accused.").

B. Constitutional Guarantee and Bulwark of Due Process

But valid indictments are jurisdictional for still more fundamental reasons. For one, they are inscribed in our Constitution—proceedings built on invalid indictments are thus built on a deprivation of constitutional rights. From the first, our Constitution has guaranteed that "no person shall be put to answer any criminal charge but by indictment." N.C. Const. art. I, § 22. So, too, does it afford "every person charged with crime" the right "to be informed of the accusation" against him. N.C. Const. art. I, § 23. That "constitutional guarantee is a substantial redeclaration of the common law rule" requiring the State to include in an indictment the key elements of the alleged offense. *Nugent*, 243 N.C. at 101. Though simple in language, those constitutional protections are profound in meaning. They reflect the framers' distrust of untrammeled State power and their intentional construction of procedural guardrails. *Thomas*, 236 N.C. at 457. When they met "at Halifax in 1776 to frame a [C]onstitution for the newly born state" of North Carolina, the framers "knew how grossly the English Crown had abused its legal power to prosecute its subjects upon informations preferred by its prosecuting attorneys without the intervention of a grand jury." *Id.* The constitutional right to an indictment sprang from the framers' desire to "forestall like abuses of criminal accusations in the infant commonwealth." *Id.*

That safeguard, alongside the guarantee of notice, is "one of the chief glories of the administration of the criminal law in our courts." *State v. Barnes*, 253 N.C. 711, 714 (1961). As we have explained, those protections "are in strict accord with our inherited and traditional notions of fair play and substantial justice." *Id.* (cleaned up). They are "dear to every free man," we have continued—they serve as "his shield and buckler against wrong and oppression." *Snipes*, 185 N.C. at 748 (quoting *State v. Moss*, 47 N.C. (2 Jones) 66, 68 (1854)). And again, those protections are "fundamental," and they "lie at the foundation of civil liberty." *Moss*, 47 N.C. (2 Jones) at 68. To vigorously protect them is "nothing but right and just." *Whedbee*, 152 N.C. at 774. A rule straying from them "would be clearly oppressive, if not cruel, in its operation." *Id.* For that

reason, we have labelled that safeguard as "a substantial right that may not be ignored, and not a mere technical or formal right." *Nugent*, 243 N.C. at 101. Since defendants have a constitutionally enshrined right to a valid indictment, the absence of that safeguard disempowers the presiding court, as proceedings and judgments rendered in contravention of that right must yield to constitutional guarantees.

Not only is the right to an indictment a freestanding constitutional protection, but it is also integral to due process. As this Court has explained, a valid indictment breathes life into the other protections afforded to the accused and is vital to fair and accurate proceedings. The indictment is the mechanism through which a defendant is "informed of the accusation" against him. *See Sturdivant*, 304 N.C. at 309 (explaining that "notice of the nature of a criminal accusation is a necessary corollary to the jurisdictional requirement of an indictment in capital cases" and explaining that "[t]his constitutional mandate" grants "a defendant the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense"). Only by learning of the charges brought by the State can a defendant and his counsel meaningfully respond. *See Rankin*, 371 N.C. at 886. Lucid allegations in an indictment are thus "required to enable the defendant to meet the charge and prepare for his defense." *State v. Gallimore*, 272 N.C. 528, 533 (1968) (quoting *State v. Van Pelt*, 136 N.C. 633, 639 (1904)). On a strategic level, too, they equip a defendant to identify and challenge legal flaws in the State's case. *See State v. Tisdale*, 145 N.C. 422 (1907). A valid indictment is also vital to a defendant's decision about *how* to proceed—whether he elects to plead or take the case to trial. *See Van Pelt*, 136 N.C. at 640 ("The accused has therefore the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment." (cleaned up)); *accord State v. Faucett*, 20 N.C. (4 Dev. & Bat.) 239 (1838).

In the same vein, an indictment allows the presiding court to examine and ensure that the State has charged the defendant for an actual crime. *See Whedbee*, 152 N.C. at 774 ("The indictment must be so drawn and the facts so stated therein that this Court can see upon its face that an offense has been committed, if the evidence corresponds with and supports the allegations of the bill."). And though indictments are returned before trial, they bear on the trial itself. Requiring an indictment to contain "reasonably definite and certain" charges furnishes a "necessary safeguard to the accused against surprise, misconception and error in conducting his defense." *Van Pelt*, 136 N.C. at 640 (cleaned

up); *accord Faucett*, 20 N.C. (4 Dev. & Bat.) at 239. It also provides a guardrail on the scope of potential criminal liability, as "a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376 (1940).

If a defendant is adjudged guilty, the indictment also shapes his punishment. It "enable[s] the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *Greer*, 238 N.C. at 327; *see also State v. Jesse*, 19 N.C. (2 Dev. & Bat.) 297, 300 (1937) (explaining that the indictment needed to properly charge a felony, as that necessary language "determines the privileges of the accused on his trial, and the degree and consequences of the punishment"); s*ee also State v. Battle*, 130 N.C. 655 (1902); *Nugent*, 243 N.C. at 101 ("[R]equiring the charge against the defendant to be set out in the warrant or indictment with such exactness . . . can enable the court, on conviction, to pronounce sentence according to law."); *Apprendi v. New Jersey*, 530 U.S. 466, 478–80 (2000) (explaining historical linkage between indictments and criminal punishment and stating that "after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, 'the court must pronounce that judgment, which the law hath annexed to the crime' " (quoting 4 Blackstone 369–70)).

An indictment even retains legal import after proceedings end. In "case of an acquittal or conviction," the indictment allows a defendant "to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense." *Gallimore*, 272 N.C. at 533 (quoting *Van Pelt*, 136 N.C. at 639). An indictment thus goes hand in hand with another constitutional guarantee: that "no person may be twice put in jeopardy of life or limb for the same offense." *State v. Rambert*, 341 N.C. 173, 175 (1995). That "fundamental feature of our legal system"—commonly known as double jeopardy—protects defendants by "providing repose," "eliminating unwarranted embarrassment, expense, and anxiety," and "limiting the potential for government harassment." *State v. Brunson*, 327 N.C. 244, 249 (1990).

And so when an indictment is fatally defective—when it fails of its essential and constitutionally prescribed purposes—that defect defangs the legal weight of any criminal judgment imposed by the court. *See Nugent*, 243 N.C. at 101. Whatever semantic murkiness over the term "jurisdiction," the guiding intuition of the common law remedy was clear: When the State ignores constitutional protections and sidesteps due process, any resultant conviction flows from a breach of the defendant's constitutional rights. *See Rankin*, 371 N.C. at 895. That judgment should not be given legal force.

II. Flaws in the Majority's Reasoning

Until today, that was where our law stood. But the majority now reverses course. It announces that when the State fails to properly indict a defendant for a crime, that error does not affect a court's power to try, convict, and sentence that defendant. Statutory and constitutional errors in the foundational charging instrument are, according to the majority, mere superficial problems with little practical impact. That holding defies core principles of due process and centuries of precedent. It is also analytically and legally flawed.

A. Merging Separate Elements of the Common Law

To reach its result, the majority starts by collapsing discrete facets of the common law into a monolithic boogeyman. To be exact, the majority conflates the common law's exacting requirements for a valid indictment with the remedy for a defective indictment. Those are distinct issues. Just as diagnosing a disease is different than treating it, defining a defective indictment is different than remedying a concededly faulty one.

This Court has taken separate paths on those discrete spheres of the common law. On the substantive requirements of a valid indictment, we have retreated from the stringent common law standard. *See, e.g.*, *Campbell*, 368 N.C. at 86; *accord State v. Wallace*, 351 N.C. 481, 507 (2000). We have thus allowed the General Assembly to enact short form indictments by statute. *State v. Randolph*, 312 N.C. 198, 210 (1984); *State v. Lowe*, 295 N.C. 596, 604 (1978). And we have disclaimed the need for an indictment to contain "magic words," focusing instead on whether the substance of the document tracks the essential elements of the charged offense. *See, e.g.*, *State v. Hunter*, 299 N.C. 29, 41 (1980) ("[T]here is no requirement that an indictment must follow the precise language of the statute provided that the pleading charges facts which are sufficient to enable the indictment to fulfill its essential purposes.") So in recent years—unlike at common law—an indictment need not be flawless to pass muster. *See Rankin*, 371 N.C. at 887 ("The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed."). Instead, a defective charging instrument imperils a court's jurisdiction only if it is "fatally defective"—that is, if it omits an "essential element" or "indispensable allegation" of the charged offense. *See id.* at 886–87.

But the remedy for an indictment adjudged invalid is a different issue. Though we have adjusted our rubric for identifying when an

indictment is defective, we have retained the remedy when an indictment satisfies that test. *See id.* Put another way, though we have altered how we diagnose a disease, once identified, the cure for that ailment has stayed the same. Even under the more lax modern approach, we recognized that a "fatally defective" indictment effectively failed to charge a crime and fell short of its constitutional aims. *See, e.g.*, *State v. Wagner*, 356 N.C. 599, 601 (2002) (per curiam). The remedy prescribed by the common law—and until today employed by this Court—was to vacate the conviction and treat it as beyond the court's lawful authority. *See State v. Vestal*, 281 N.C. 517, 520 (1972). Put simply, we declined to grant legal force to a conviction built on such a faulty foundation. *See McClure*, 267 N.C. at 215–16.

The majority, however, swaps analytical precision for a soaring condemnation of the "common law" as a whole. It collapses the common law's substantive requirements with the remedy employed for defective indictments, functionally treating the common law as a singular mass without disaggregating its discrete doctrinal parts.

B. Misguided Forray Through History

Building on that analytical error, the majority retrofits history and precedent to align with its preferred result. It seems to argue that the legislature abolished the common law remedy—probably in 1811, almost assuredly by 1853, and without question by 1975. That would come as a surprise to the scores of cases and dozens of jurists who have interpreted the same statutes as the majority but reached the opposite result. For we now learn that the majority's position has actually been the law for over 200 years! This Court's decisions have apparently been wrong—for two centuries, no less. The majority's analysis, however, does not justify its sweeping denunciation of its predecessors.

Take for instance, the majority's invocation of N.C.G.S. § 15-153. That provision—first enacted in 1811 and still in effect, though with minor tweaks—disclaims courts from setting aside a conviction based on "informalities or refinements" in an indictment, so long as its substantive allegations are enough to "induce [the court] to proceed to judgment." *See* Potter's Revisal of 1819, Laws of 1811, Ch. 809. According to the majority, section 15-153—"[w]hen read alone or in *pari materia* with N.C.G.S. 15-155"—ended the "formalistic practice of the common law," "except where no crime at all was charged." In one sense, the majority is right. Section 15-153, as this Court has explained, "abolished the requirement that the detailed particulars of a crime must be stated in the meticulous manner prescribed by the common law." *Nugent*, 243

N.C. at 101. Even so, "the requirement remains that in every prosecution by warrant or indictment the defendant shall be informed of the accusation against him, and this accusation must be set forth with sufficient certainty for the purposes" embedded in the Constitution. *Id.*

In other words, though the statute loosened the common law requirements for what a valid indictment must allege, it still retained a substantive baseline. *See State v. Tarlton*, 208 N.C. 734, 736–37 (1935); *State v. Gibbs*, 234 N.C. 259, 261 (1951) ("We have not overlooked G.S. 15-153, which provides that an indictment shall not be quashed by reason of a mere 'informality or refinement.' This statute, however, does not dispense with the requirement that the essential elements of an offense must be charged, and many decisions of this Court have so held."). Most importantly, the statute did not jettison the remedy for an indictment that fell below its already-relaxed standard. After section 15-153's enactment—as before—this Court vacated a conviction based on an indictment that lacked a "distinct averment of any fact or circumstance which is an essential constituent of the offense charged." *State v. Cole*, 202 N.C. 592, 598 (1932); *see also McBane*, 276 N.C. at 65 (vacating conviction because indictment was defective and explaining that "[n]othing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the essential elements of the offense must be charged").

The majority's analysis of other statutes is equally unconvincing. It next cites N.C.G.S. § 15-155, another provision that patched technical defects in an indictment. By its text, however, that statute cuts against the majority's conclusion—it disclaims quashing of indictments if "the court shall appear by the indictment to have had *jurisdiction of the offense*." N.C.G.S. § 15-155 (2023). If the legislature intended to uproot all traces of the common law jurisdictional rule, as the majority holds, it is odd indeed to enact a statute reifying the link between indictments and jurisdiction. Unsurprisingly then, this Court has previously read the provision differently than does the majority, "confin[ing]" section 15-155 "to formal objections." *State v. Wise*, 66 N.C. 120, 124 (1872). The statute, we have explained, was "intended only to cure formal defects, after conviction, so that the guilty should not go 'unwhipt of justice,' and evade punishment on technical objections." *Id.* It did not, however, excuse indictments with "a vital defect" which "could not be cured, unless the Court is to give judgment in the dark." *Id.* So yet again, the majority wrings from a statute a far different—and far broader—rule than our precedent prescribes.

Lastly, the majority clings to the Criminal Procedure Act of 1975 (CPA)—a broad-based statutory reform that retooled many facets of

criminal procedure in our state. If there is "any doubt regarding the continued application of the common law's technical requirements," the majority insists, then the CPA dispelled them. Through that statute, the majority continues, the legislature "removed any vestiges of the archaic, hyper-technical common law requirement that a valid indictment contain a rote recitation of elements." Again, that claim is partially right—this Court has read that statute to further relax the stringent common law standards for a valid indictment. *See State v. Palmer*, 293 N.C. 633, 638 (1977). But again, the majority stretches the CPA past its breaking point, reading it to displace not just the common law pleading requirements for an indictment, but also the common law remedy for an invalid indictment.

We rejected that very result in *Rankin*, discerning "no unsettled question of whether the common law remedy for invalid indictments was abrogated by the [CPA]." *Rankin*, 371 N.C. at 898. In that case, we canvassed the history, context, and purpose of the statute. *Id.* at 896–98. And we concluded that when it adopted the statutory reforms, the General Assembly neither intended nor acted to supplant the "common law remedy." *Id.* Just the opposite. The legislature "acknowledged and approved" of the common law rule. *Id.* at 897. Its "comprehensive reform" and "detailed commentary included with the codified statutes" showed its careful examination of current criminal procedures. *Id.* The official commentary cited our decisions vacating convictions based on defective indictments and "explicitly endorsed" the "common law remedy for invalid indictments." *Id.* at 898. By its text, too, the CPA barred a court from continuing "criminal prosecution if the indictment fails to charge the defendant with a crime." *Id.* at 897. And "in the decades since the enactment of the [CPA], the common law remedy for invalid indictments has been applied time and again by the appellate courts," with no further intervention by the legislature. *Id.* at 898. We thus held that the "General Assembly, no doubt aware of this practice, has never acted to abrogate this common law rule." *Id.*

The majority tacitly overrules *Rankin*, though its reasoning is murky. It begins by applauding the correctness of its conclusions reached mere paragraphs before. Because *Rankin* took a different view, the majority deduces, it must necessarily be wrong. That argument only holds if, in fact, the majority's readings of history and precedent are correct. They are not. And repeating those flawed statements does not make them true, any more than insisting that the sky is red makes it anything but blue. We are next told that the dissent in *Rankin* was so "well-reasoned and vigorous" that it displaced the decision of the Court.

But in a curious twist, that same dissent disclaimed the historical and legal postulates excavated by the majority today. *See id.* at 909 (Martin, C.J., dissenting) ("Despite its comprehensive nature, though, the [CPA] did not directly address whether indictments that do not meet the Act's statutory standards fail to confer jurisdiction on the court; there is no single provision that explicitly adopts or rejects the common law jurisdictional rule. Compounding this omission is a dearth of cases analyzing whether the [CPA] carried forward or abrogated the common law jurisdictional rule.").

Any confusion is soon resolved, though, as the majority lays bare its real disagreement with *Rankin*. The CPA was geared towards eliminating practices that "frustrate the effective and efficient administration of justice," a goal that—in the majority's view—is "directly contrary" to the common law remedy. Missing, of course, is the legislative evidence that the General Assembly considered and kept that very remedy. *See Rankin*, 371 N.C. at 896–98. But even if the majority is right and the CPA elevates efficiency above all else, a statute cannot buy expedience at the price of constitutional rights. *See Lowe*, 295 N.C. at 603 (affirming the legislature's "prerogative" to enact statutory short-form indictments "so long as the newly prescribed indictment still complies with the constitutional requirement that the defendant be informed of the accusation against him"). So the General Assembly's efforts to modernize criminal pleadings did not—and cannot—dispense with constitutional guarantees. *State v. Harris*, 145 N.C. 456, 457–58 (1907); *see also State v. Moore*, 104 N.C. 743, 750–51 (1890).

In short, the majority's historical analysis is a masterclass in shadowboxing. It attacks one aspect of the common law rule—its rigid pleading requirements—as grounds to invalidate a different facet of the common law—the proper remedy when a court finds an indictment invalid. It contends that its rule has always been the right one, as proven by this Court's "inconsistent" application of statutory law. But what the majority paints as "vacillations" and "inconsistencies" were, in truth, this Court's efforts to interpret the law with nuance and care. In some cases, we found the indictment sufficient in substance to sustain the conviction. *See, e.g.*, *State v. Murrell*, 370 N.C. 187, 196 (2017); *see also State v. Sossamon*, 259 N.C. 374 (1963). In others, we reached the opposite conclusion. *See, e.g.*, *Palmer*, 293 N.C. 633. But in each case, this Court tread gingerly, respecting the precious rights hanging in the balance and the accreted wisdom of precedent. That caution and restraint find no home in today's decision.

C. Unworkable and Ill-Founded Distinctions

In its next analytical twist, the majority splits defective indictments into two camps. An indictment implicates jurisdiction only if it "wholly fails to allege a crime against the laws or people of this State." By contrast, an indictment raises no jurisdictional concerns if it fails "to allege with sufficient precision facts and elements of a crime thereby permitting the defendant to prepare a defense and the court to render judgment." The majority classifies the latter category as "superficial errors" and "mere pleading deficiencies." Those technical hiccups, the majority concludes, have no bearing on a court's power to try, convict, and sentence a defendant.

That artificial bifurcation is riddled with problems. Consider what the Court labels a mere pleading deficiency: the State's failure to charge an essential element of the crime or to provide constitutionally required notice of its accusations against a defendant. In my view, those flaws are far from "superficial"—they are the very reasons why the framers included a constitutional guarantee of indictments. *See State v. Ray*, 92 N.C. 810 (1885) ("The very purpose of the indictment is to inform the accused with certainty and in an intelligent manner, of the offense charged against him. The justice of the law not only requires that he shall be thus informed, but it requires as well, that he shall have reasonable opportunity to prepare to defend himself against the charge."). Forcing the State to apprise citizens of their alleged crimes before arraying its vast power against them is a basic tenet of due process. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge . . . ."); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] conviction upon a charge not made . . . constitutes a denial of due process."). If the State does not properly charge a defendant with a crime—strafing its indictment with piecemeal or amorphous allegations—that deficiency taints the rest of the proceedings, imperiling not just the reliability of the result, but the integrity of the process underlying it. *See State v. Banks*, 263 N.C. 784 (1965); *see also State v. Morgan*, 226 N.C. 414, 415 (1946).

Logically, too, the majority's two-tier regime of jurisdictional defects is difficult to understand. Especially because the majority cites cases recognizing that "where an indictment fails to charge a crime falling within the scope of the court's jurisdiction, the matter is a nullity." In *Rawls*, for instance, we invoked the constitutional guarantee of an indictment in holding that a county court with original jurisdiction over "petty misdemeanors" lacked authority to try the defendant for other

types of offenses. *See State v. Rawls*, 203 N.C. 436, 438 (1932). We reached similar decisions in other cases, too. *See*, *e.g.*, *State v. Wilkes*, 233 N.C. 645, 646–47 (1951) (affirming the quashing of an indictment because the court lacked jurisdiction to try the charged crime); *State v. Harrison*, 126 N.C. 1049, 1049–50 (1900) (same). In each of those cases, the State indicted the defendant for a criminal offense. Under the majority's newly fashioned rule, then, the indictments could not have raised jurisdictional concerns because they did not "wholly fail[ ] to allege a crime against the laws or people of this State." But in each of those cases, as the majority acknowledges, we held that the presiding court lacked the power to try the defendant and bind him to its judgment. *See Rawls*, 203 N.C. at 438; *Wilkes*, 233 N.C. at 646–47; *Harrison*, 126 N.C. at 1050. That was because the indictments clashed with external legal restraints on the court's power to adjudicate and enforce criminal law. *See Rawls*, 203 N.C. at 438; *Wilkes*, 233 N.C. at 647; *Harrison*, 126 N.C. at 1050. If a court lacks jurisdiction when an indictment charges a crime outside of its sphere of authority, why should a different rule apply when an indictment omits the core elements of a criminal offense or fails to provide constitutionally required notice? In the latter case—just like the former—defects in the charging instrument place the proceedings, from the start, in conflict with legal guardrails and beyond the court's duly vested power. The majority's purported distinction between jurisdictional and non-jurisdictional flaws makes no effort to square its rule with the very precedent it cites.

Finally, the majority's ritual incantation of federal precedent is misplaced. Federal doctrine, unlike state law, is suffused with and guided by federalism concerns and the distribution of authority between the national and state governments. *See United States v. Cotton*, 535 U.S. 625, 629-30 (2002) (tying federal doctrine on indictments to the Supreme Court's evolving federal statutory authority to review criminal convictions and the gradual incorporation of federal constitutional rights). More basically, in North Carolina, the right to an indictment springs from our State Constitution, *see Snyder* 343 N.C. at 65—whatever the federal courts have to say on the topic flows from different analytical and doctrinal roots.

D. Dislodging Indictments from their Constitutional Footing

With its two-track conception of indictments in place, the majority decouples indictments from their constitutional mooring. It says that our Constitution offers no support for the "common law rule that

indictments are jurisdictional and must allege each element of an offense with precision."[2] The majority makes three arguments on that score.

First, if the jurisdictional remedy flows from defendants' constitutional right to an indictment and notice, *See* N.C. Const. art. I, §§ 22-23, the majority reasons, then short-form indictments must fail. That result, the majority continues, is belied by the legislature's longstanding provision of short-form indictments for select felonies. *See State v. Hunt*, 357 N.C. 257, 267–69 (2003); N.C.G.S. § 15-144 (2023) (homicide); N.C.G.S. § 15-144.1 (2023) (rape); N.C.G.S. § 15-144.2 (2023) (statutory sex offenses). This Court has approved those abbreviated indictments, even though they "relieve the State of the common law requirement" that it detail each element of the specified offense. *See State v. Avery*, 315 N.C. 1, 13–14 (1985) (upholding legality of short-form indictment for homicide); *Lowe*, 295 N.C. at 603 (same for rape); *State v. Edwards*, 305 N.C. 378, 380 (1982) (same for sex offenses). According to the majority, those decisions could not exist if the jurisdictional rule is of constitutional berth.

Omitted from that flat syllogism is *why* our cases have sustained short-form indictments. It is true, as the majority notes, that short-form indictments are a qualified exception to the rule that an indictment must include a "plain and concise factual statement asserting facts supporting every element of a criminal offense and the defendant's commission thereof." *Rankin*, 371 N.C. at 886 (cleaned up); *Hunt*, 357 N.C. at 273. But that is because the substantive allegations that the State must include in short-form indictments brings those charging instruments "within constitutionally mandated parameters." *See Lowe*, 295 N.C. at 603. The State must name "[w]ith certainty both the defendant and victim" and allege the offense in "words having precise legal import." *Id.* at 604; *see also*

2. Note again the majority's commingling of discrete facets of the common law. As explained above, the common law is not a monolith—relevant to this case, its approach to indictments has two moving parts. On one hand is the question of content. That is, the substantive allegations required for a valid indictment. On the other hand is the issue of remedy—the proper relief when a court determines that an indictment falls below substantive baselines. Again, those are separate concepts with different track records. Though the law has *retreated* from the exacting common law requirements for the content alleged in indictments, it has *retained* the common law remedy for concededly defective indictments. *See*, *e.g.*, *Rankin*, 371 N.C. at 896-98; *Nugent*, 243 N.C. at 101; *Greer*, 238 N.C. at 326-27; *Cole*, 202 N.C. at 596. The jurisdictional remedy—long employed by this Court—has firm constitutional roots. *See*, *e.g.*, *Harris*, 145 N.C. at 458; *State v. Bissette*, 250 N.C. 514, 517-18 (1959); *McClure*, 267 N.C. at 215; *Simpson*, 302 N.C. at 616. But in its constitutional discussion, the majority continues its grave analytical error of treating the common law as a singular mass without constituent parts. At the threshold, that methodological flaw undermines the soundness of the majority's conclusion.

White, 372 N.C. at 249 (holding that short-form indictment for child sex offense "was facially defective, and thus failed to establish jurisdiction in the trial court, because it identified the alleged victim only as 'Victim #1' " in violation of section 15-144.2's "statutory requirement that the indictment name the victim"). The indictments thus "charge[ ] the substance of the crime and put[ ] the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated." *Lowe*, 295 N.C. at 604; *see also State v. Tart*, 372 N.C. 73, 76–78 (2019) (analyzing substantive requirements for short-form homicide indictment).[3] For that reason, short-form indictments that include the statutorily required allegations "show on their face facts that give the court jurisdiction." *Lowe*, 295 N.C. at 604. This Court has thus approved that species of indictments only because—and only so long as—they "complie[d] with the constitutional requirement that the defendant be informed of the accusation against him." *Id.* Thus, under our precedent—and contrary to the majority's stilted reading—short-form indictments are tethered to and measured against their constitutional purpose. *See id.*; *see also White*, 372 N.C. at 251.[4]

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3. *Tart* offered specific guidance on the content required for a short-form homicide indictment to charge murder versus manslaughter. *See* 372 N.C. at 76–77, 79 ("[T]here are two express differences in the terminology utilized by the General Assembly to establish short-form indictments for the offenses of murder and manslaughter that are critical to the case at bar: (1) the reference in manslaughter offenses that the named defendant did slay an individual, compared with the reference in murder offenses that the defendant did 'murder' an individual; and (2) the mandated inclusion in an indictment for a murder offense of the essential element of 'malice aforethought,' while the allegation of 'malice aforethought' is not required to charge manslaughter. The critical and dispositive difference between short-form indictments for murder offenses and manslaughter offenses is the substantive allegation of the element of 'malice aforethought' in murder offense short-form indictments . . . . The prosecution's proper and necessary inclusion of the legal element 'malice aforethought' in the present indictment's charge of attempted first-degree murder substantively and constitutionally distinguishes this charge from an alleged manslaughter offense[.]" (cleaned up)).

4. In criticizing this argument, the majority poses a simplistic question: why should we evaluate short-form indictments "against their ability to provide notice, but not engage in such an analysis of an allegedly defective indictment just because it is not a short-form indictment?" A singular standard for all indictments overlooks the differences between short-form and regular indictments. As this Court has made clear, short-form indictments are "special instrument[s], statutorily distinguished from other indictments." *See Hunt*, 357 N.C. at 270. Refined over the long arc of their use, they are the product of a lengthy dialogue between courts and the legislature. *See, e.g.*, *Avery*, 315 N.C at 13–14 (cataloguing cases dealing with the substance of short-form homicide indictments). Short-form indictments serve to streamline and standardize charges for a narrow compass of offenses, while adhering to the constitutional requirement that the State "apprise the defendant of the charge against him with enough certainty to enable him to prepare his defense and

The majority's next argument is no stronger. Constitutionally defective indictments cannot be jurisdictional, it deduces, because violations of other constitutional rights are not jurisdictional. But the rights the majority cites—like the right to remain silent, to counsel, to a speedy trial, and to confront witnesses—are different in kind and function than the right to a valid indictment. That is because an indictment is the touchstone of a criminal trial—it forces the State to specify, and a grand jury to approve, specific criminal charges against a specific criminal defendant. *See White*, 372 N.C. at 251. Each of the rights cited by the majority, however, spring into legal force during the criminal proceedings. *See, e.g.*, *Carpenter v. United States*, 585 U.S. 296, 317 (2018) (right to be free from unreasonable searches and seizures); *Miranda v. Arizona*, 384 U. S. 436, 474 (1966) (right to remain silent); *State v. Tucker*, 331 N.C. 12, 33 (1992) (right to counsel); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (right to confront witnesses); *State v. McCoy*, 303 N.C. 1, 7 (1981) (right to speedy trial). They are thus downstream of and dependent on the validity of the indictment itself.

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to protect him from subsequent prosecution for the same offense." *See Lowe*, 295 N.C. at 603 (cleaned up). Put differently, short-form indictments were legislatively created and have been judicially upheld *because* they meet "the relevant constitutional and statutory requirements for valid [ ] offense indictments and serve[ ] [their] functional purposes with regard to both the defendant and the court." *See Tart*, 372 N.C. at 79; *see also State v. Holden*, 321 N.C. 125, 154 (1987) ("The notice provided by [N.C.G.S. § 15-144] is sufficient to satisfy the constitutional requirements of due process."); *State v. Young*, 312 N.C. 669, 675 (1985) (holding that the statutory notice provided by section 15A-2000(e) is sufficient to satisfy constitutional requirements of due process).

Given their careful calibration, the substance of the offense is "encompassed within the [statutorily prescribed] language of the short-form indictment," thus notifying the defendant of the State's accusations and equipping him to mount a meaningful defense at trial. *See State v. Braxton*, 352 N.C. 158, 175 (2000). The same cannot be said of offenses not chargeable by short-form indictment. So when the State indicts a defendant for one such offense, but omits an essential element, that defect is of unique legal and practical magnitude. For that very reason, this Court has scrutinized short-form indictments differently than other types of indictments. *See Hunt*, 357 N.C. at 273 ("The legislature has [ ] made it clear that murder and other crimes for which it has authorized the use of short-form indictments are to be treated differently in the application of N.C.G.S. § 15A-924."); *see also id.* at 276; *State v. Jerrett*, 309 N.C. 239, 259 (1983). Applying the same analysis to short-form and regular indictments, as the majority seems to suggest, would ignore the former's intentional formulation as a device that meets constitutional standards and satisfies the dictates of due process.

In all events, the majority's argument might have more force but for its ultimate holding in this case. Under today's decision, both statutory *and* constitutional defects stand on the same non-jurisdictional footing. The State's failure to indict a defendant in line with already-relaxed standards is further insulated behind the majority's newly minted prejudice hurdle—regardless of whether the error is of statutory or constitutional stature. For all the argument about what standard to apply to what type of defect, the practical effect of the majority's decision is to make all species of defects harder to remedy.

Significant, too, the efficacy of those rights is anchored to the sufficiency of the indictment. The representation afforded by counsel, challenges to seized evidence or self-incriminating statements, the length of trial delays, and the questions posed to witnesses depend on the charges brought by the State and laid out in the indictment. *See Gallimore*, 272 N.C. at 533; *see also White*, 372 N.C. at 250–51; *Greer*, 238 N.C. at 327. A violation of those rights differs from a defective indictment in the same way that a flat tire halfway through a road trip differs from setting off with the wrong map. In both examples, one error happens once the proceedings are in motion; the other skews the journey from the start. In distinguishing indictments from other constitutional rights, then, the majority simply underscores their unique status and centrality to other procedural protections.

Finally, the majority notes that the right to an indictment is waivable in noncapital cases. If a valid indictment is essential for jurisdiction, it continues, then a defendant could not waive that requirement and, in effect, consent to jurisdiction. That analysis deploys the same rigidity for which the majority faults the common law. As explained above, the common law's conception of "jurisdiction" is not a carbon copy of modern doctrine. But the central intuition of the common law remedy was that a conviction premised on a defective indictment should not enjoy legal force because it was purchased at the price of due process. *See Whedbee*, 152 N.C at 776. When a noncapital defendant represented by counsel knowingly and voluntarily waives their right to an indictment, the due process guarantees protected by the procedural requirement are satisfied. *See Thomas*, 236 N.C. at 460–61 (examining the protections afforded to an accused who waives the right to an indictment). So a defendant waiving an indictment does not "consent" to jurisdiction, as the majority puts it, but verifies the accomplishment of the goals secured by that constitutional safeguard.

At bottom, the majority strips the jurisdictional remedy of constitutional stature because, in its view, "a court's jurisdiction to decide criminal cases flows directly from the people speaking through their constitution and statutes and cannot be destroyed by other means." That sentiment is difficult to square with the majority's bottom line. Professed adherence to constitutional directives rings hollow from a decision that cheapens the Constitution's guarantees of an indictment and adequate notice by burying those rights behind a functionally impenetrable prejudice standard. The majority also ignores case after case in which this Court has rooted the jurisdictional remedy for defective indictments in the Constitution itself. *See*, *e.g.*, *State v. Stevens*, 264 N.C. 364, 365

(1965); *State v. Jenkins*, 238 N.C. 396, 397–98 (1953); *Nugent*, 243 N.C. at 101; *Harris*, 145 N.C. at 458; *Greer*, 238 N.C. at 326–27; *Cole*, 202 N.C. at 596; *Hunter*, 299 N.C. at 41; *McClure*, 267 N.C. at 215; *Simpson*, 302 N.C. at 616. I would hold—as this Court had long affirmed—that vacating a conviction based on a fatally defective indictment honors the people's choices on how to allocate power and curb its abuse.

E. Examination of Current Statutes

Pivoting from history to modern statutes, the majority holds that the General Assembly did not codify the jurisdictional remedy into statutory law. Its analysis, however, is a result in search of a rationale. Though this Court has read the same statutory provisions to track the common law remedy, the majority, unsurprisingly discards that precedent, importing its new jurisdictional/non-jurisdictional dichotomy into the legislature's language. *See*, *e.g.*, *State v. Oldroyd*, 380 N.C. 613, 617 (2022) ("Subsection 15A-924(a)(5) is a codification of the common law rule that an indictment must allege all of the essential elements of the offense charged." (cleaned up)); *State v. Freeman*, 314 N.C. 432, 435 (1985) (holding that section 15A-924(a)(5) "incorporates the view expressed in prior holdings of this Court that an indictment must allege all of the essential elements of the offense charged" and "also incorporates our long held view that the purposes of an indictment include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense"); *Mostafavi*, 370 N.C. at 685–86 (explaining that the CPA "sought to eliminate the technical pleading requirements previously recognized for criminal pleadings" but referencing that statute in tandem with rule that indictment "must allege all the essential elements of the offense endeavored to be charged" (cleaned up)); *Rambert*, 341 N.C. at 176.

But even conceding the force of the majority's statutory interpretation, the legislature cannot dictate standards below the constitutional baseline. *See State v. Brice*, 370 N.C. 244, 249 (2017) (citing the CPA before noting that "[t]o be sufficient under our Constitution, an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " (quoting *Hunt*, 357 N.C. at 267)). The majority only stitches together its statutory reading by first severing indictments from their constitutional anchorage—a result I believe is misaligned with precedent and principles.

III. Conclusion

Ultimately, the majority's ruling flows from a hollow notion of justice. Justice is achieved, the majority intimates, when the State secures a "guilty" verdict—a defendant's challenges to the criminal proceedings are simply attempts to escape his just desserts. After all, the majority insinuates, a defendant would not be punished if he did not deserve punishment. That intuition is misguided. It ignores how procedural protections like indictments boost reliability "by enhancing the possibility that truth will emerge from the confrontation of opposing versions of events and conflicting data." *In re J.U.*, 384 N.C. at 631 (Earls, J., dissenting) (cleaned up) (quoting *In re Gault*, 387 U.S. 1, 21 (1967)); *see also Cole*, 202 N.C. at 599 ("[W]ant of the requisite precision and certainty which may at one time postpone or ward off punishment of the guilty may, at another, present itself as the last hope and only asylum of persecuted innocence." (cleaned up)).

More important, the majority lets slip its cramped vision of rights. Due process, by its nature, "serves to define the rights of the individual while also delimiting the powers which the state may exercise." *In re J.U.*, 384 N.C. at 630 (Earls, J., dissenting) (cleaned up). It has etched into our "basic law the requirement" that "the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed." *Chambers v. Florida*, 309 U.S. 227, 237 (1940). That constitutional promise reaches the guilty and innocent alike. *See id.* at 241 ("[A]ll people must stand on an equality before the bar of justice in every American court."). And when the dictates of due process are most fervently tested—when the allure of expedience is at its strongest—the courts must redouble their commitment to protecting the Constitution's guarantees. *See id.*

There are higher values than stoking the churn of criminal prosecutions. Due process is one of them. For two centuries, this Court elevated procedural integrity over bare expedience. But the majority today upsets that balance. Because the Court erodes yet another constitutional safeguard, I dissent.

Justice RIGGS joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA
v.
ERIC PIERRE STEWART

No. 23PA22

Filed 23 May 2024

Indictment and Information—sexual battery—essential elements—force implied by lack of consent—sufficiency of notice to defendant

The indictment charging defendant with sexual battery was facially valid where it contained sufficient facts to support each essential element of the charged offense, including force, since the allegation that defendant engaged in sexual conduct with the victim without her consent was sufficient to imply that the contact was committed by force, however slight, and was therefore adequate to put defendant on notice of the charge.

Justice EARLS concurring in the result.

Justice RIGGS joins in this concurring in result opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the unpublished decision of a unanimous panel of the Court of Appeals, No. COA21-101, (N.C. Ct. App. Jan. 4, 2022), vacating a judgment entered on 16 May 2019 by Judge George Cooper Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 8 November 2023.

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

Glenn Gerding, *Appellate Defender*, *by Sterling Rozear*, *Assistant Appellate Defender*, *for defendant-appellee.*

NEWBY, Chief Justice.

In this case we decide whether an indictment charging defendant with sexual battery is fatally flawed because it failed to expressly allege that defendant engaged in sexual contact with another person "by force." An indictment is valid if it alleges facts to support the essential elements of the crime with which a defendant is charged, such that the defendant

has sufficient notice to prepare his defense. The indictment here asserts that defendant unlawfully and willfully engaged in sexual contact with the victim "without her consent" but does not include the words "by force." Because this language implies the use of force and gives defendant adequate notice of the charge against him, the indictment is facially valid. Therefore, we reverse the decision of the Court of Appeals.

The evidence at trial tended to show the following. On 17 January 2016, the victim celebrated her birthday with two friends in Charlotte. The trio went to brunch before driving together to Zen Massage, where the victim was scheduled for a deep-tissue massage. Upon arrival, defendant, a massage therapist employed by Zen Massage, met the victim in the lobby and led her to a massage room located in a separate building. After a brief conversation with defendant, the victim undressed to her underwear and laid face-down on the massage table, covering herself with a sheet. Defendant subsequently began massaging the victim's back and shoulders.

After massaging the victim's back, defendant asked the victim to turn over so that he could massage the tops of her legs. The victim remained covered by the top sheet after turning over. As defendant massaged the victim's legs, she warned defendant that she had several cysts located on the inside of her right thigh. Defendant offered to massage the area near the cysts, to which the victim agreed.

As defendant massaged the inside of her thigh, the victim felt his pinky finger "kind of graze the fabric of [her] panties." The victim said nothing, believing it was an accident. Moments later, however, defendant digitally penetrated the victim's vagina three times. The victim did not consent to the penetrations, nor did defendant say anything. The victim testified that she was shocked by the incident and described herself as "frozen" in the moments after the incident occurred. Defendant acted as though nothing happened and began massaging the victim's arms, telling her, "I wouldn't want to do anything that would make you uncomfortable."

Defendant completed the victim's massage and instructed her to get dressed prior to leaving the room. Before the victim could finish dressing, defendant stuck his head back into the room without knocking and asked if the victim was "good in [t]here." The victim testified that she found this behavior strange and that it added to her discomfort. The victim finished dressing and left Zen Massage with her friends without reporting the incident to the staff because she "really just wanted to get out of there."

After getting into the car with her friends, the victim told them about the incident during her massage. The trio then went to the home of one of the friends, where they searched for and found defendant's Facebook profile. The victim called the police and reported the incident the following day, 18 January 2016. Later that day, the victim went to the police station and made an official statement where she recounted the incident in writing. Police conducted a recorded follow-up interview with the victim about the incident on 26 January 2016.

On 27 January 2016, police contacted Zen Massage seeking defendant's contact information. Police informed the staff at Zen Massage that they planned to obtain a warrant for defendant's arrest in connection with a criminal assault. Police obtained a warrant for defendant's arrest on 28 January 2016. Defendant contacted the police officers investigating his case and met with them for an interview on 2 February 2016. Prior to the interview, defendant looked himself up on the Mecklenburg County Sheriff's Department online warrant repository and confirmed that an arrest warrant had been sworn out against him for felonious sexual assault.

On 2 February 2016, following his interview with police, defendant was arrested in connection with the incident. On 11 April 2016, defendant was indicted on one count of second-degree forcible sexual offense under N.C.G.S. § 14-27.27 and one count of sexual battery under N.C.G.S. § 14-27.5A.[1] Regarding the sexual battery offense, the indictment expressly cited the pertinent statute and read as follows:

> [O]n or about the 17th day of January, 2016, in Mecklenburg County, [defendant], did unlawfully and willfully for the purpose of sexual arousal, engage in sexual contact with another person, [the victim], without her consent.

Defendant pled not guilty. Defendant did not request a bill of particulars, nor did he object to the language of the indictment at trial. At no time did defendant challenge the trial court's jurisdiction or argue that the indictment failed to put him on notice of the charged offense or protect him from double jeopardy.

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1. The General Assembly recodified the crime of sexual battery as N.C.G.S. § 14-27.33 effective 1 December 2015, and applicable to offenses committed on or after that date. Act of Aug. 5, 2015. S.L, 2015-181, § 15, 2015 N.C. Sess. Laws 460, 464. No argument was raised that the citation to section 14-27.5A failed to put defendant on adequate notice.

On 16 May 2019, a jury found defendant guilty of sexual battery and not guilty of second-degree forcible sexual offense. The trial court entered judgment accordingly and sentenced defendant to sixty days in the custody of the Mecklenburg County Sheriff. The trial court suspended the sentence and placed defendant on twenty-four months of supervised probation. The trial court also ordered defendant to surrender his massage therapist license and register as a sex offender. Defendant appealed.

On appeal, defendant argued that the trial court lacked subject matter jurisdiction over the sexual battery charge because the indictment omitted an essential element of the offense. *State v. Stewart*, No. COA21-101, slip op. at 2 (N.C. Ct. App. Jan. 4, 2022) (unpublished). Specifically, defendant argued that the indictment omitted that the act was committed "by force." *Id.* The Court of Appeals concluded that the plain language of N.C.G.S. § 14-27.33 requires that an indictment for sexual battery "allege *both* that the act was committed by force *and* against the will of the other person," and that the indictment in this case failed to do so. *Id.* at 4. Because the indictment only expressly mentioned one of these essential elements, the Court of Appeals concluded that it was invalid. *Id.*; *see State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (holding that a valid indictment must contain the "essential elements of the offense" to confer subject matter jurisdiction); *In re J.U.*, No. COA20-812, slip op. at 6 (N.C. Ct. App. Jul. 6, 2021) (unpublished) (holding that "force" is an essential element of sexual battery), *rev'd on other grounds*, 384 N.C. 618, 887 S.E.2d 859 (2023).

On 7 February 2022, the State filed a petition for discretionary review asking this Court to review the decision of the Court of Appeals. The State argued that the sexual battery indictment was sufficient. This Court allowed the State's petition on 4 May 2022.

In another opinion filed today by this Court, we hold that so long as a crime against the laws and people of this State has been alleged, defects in indictments do not deprive the trial court of jurisdiction. *See State v. Singleton*, No. 318PA22, slip op. at 40 (N.C. May 23, 2024). A defendant challenging an indictment as defective must show that the indictment contained a statutory or constitutional defect and that such error was prejudicial. *See id.* at 42. Therefore, we consider whether the indictment here, which failed to allege the act was committed "by force," is flawed so as to constitute error. This Court reviews the sufficiency of an indictment de novo. *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019).

"An 'indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more

criminal offenses.' " *State v. Lancaster*, 385 N.C. 459, 462, 895 S.E.2d 337, 340 (2023) (quoting N.C.G.S. § 15A-641(a) (2021)). Generally, the purposes of an indictment "are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). An indictment is valid and

> sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C.G.S. § 15-153 (2023).

Furthermore, "[i]t is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984). Indictments, therefore, do not "bind the hands of the State with technical rules of pleading" as "it would not favor justice to allow [a] defendant to escape merited punishment upon a minor matter of form." *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731. Rather, "contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice." *Lancaster*, 385 N.C. at 462–63, 895 S.E.2d at 340 (quoting *In re J.U.*, 384 N.C. 618, 623, 887 S.E.2d 859, 863 (2023)). Taken together with the purpose of an indictment "to put the defendant on notice of the crime being charged and to protect the defendant from double jeopardy," a test for indictment validity becomes "whether the indictment alleges facts supporting the essential elements of the offense to be charged." *State v. Newborn*, 384 N.C. 656, 659, 887 S.E.2d 868, 871 (2023); *see also* N.C.G.S. § 15A-924(a)(5) (2023).

Section 14-27.33 states that "[a] person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.33(a) (2023). Recently, this Court considered a similar issue in *In re J.U.*: whether force, as required in a sexual battery under N.C.G.S. § 14-27.33, could be implied from language that the act was nonconsensual. *In re J.U.*, 384 N.C. at 625, 887 S.E.2d at 864. In *In re J.U.*, a juvenile petition

"alleg[ed] that [the juvenile] touched [the victim's] vaginal area without her consent." *Id.* at 625–26, 887 S.E.2d at 864–65. This Court held that although the petition did not allege that the act was committed by force, because the petition alleged that the act was committed without the victim's consent, "the petition asserted a fact from which the element of force was, at the very least, 'clearly inferable' such that 'a person of common understanding may know what [wa]s intended.' " *Id.* (quoting *Coker*, 312 N.C. at 435, 323 S.E.2d at 346). This Court explained that "one cannot engage in nonconsensual sexual contact with another person without the application of some 'force,' however slight." *Id.* at 625, 887 S.E.2d at 864.

Here the indictment charged that defendant "did unlawfully and willfully for the purpose of sexual arousal, engage in sexual contact with another person, [the victim], without her consent." Implicit in this language is the fact that defendant committed sexual acts upon the victim by force, however slight. Nonconsensual sexual contact necessarily implies that the contact was committed by the use of some degree of force and against the will of the victim. The element of force is inferable from the language of the indictment such that a person of common understanding might know what was intended. Additionally, the indictment states the charge against defendant in a plain, intelligible, and explicit manner, citing the statute under which defendant was charged. Defendant was placed on notice of the charge levied against him, allowing him to prepare for trial and protecting him from double jeopardy. Moreover, defendant never objected to the language of the indictment or alleged that it failed to put him on notice of the charged offense.

Defendant's argument here represents a regression to the era of technical pleading rules from which this State's jurisprudence has long since departed. As this Court has written time and again, such rules tend to emphasize form over substance, undermining justice. We hold that the indictment here is facially valid, having sufficiently alleged facts to place defendant on notice of the charge against him. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

Justice EARLS concurring in the result.

If this Court were addressing as a matter of first impression whether an allegation of force is a necessary element of sexual battery under N.C.G.S. § 14-27.33, I would dissent from the Court's decision and

recommend affirming the Court of Appeals for the reasons given in my dissenting opinion in *In re J.U.*, 384 N.C. 618, 626–31 (2023) (Earls, J., dissenting). As I explained in that dissent, "our legislature has determined that force is required to commit sexual battery." *Id.* at 626. Applying that analysis here, Mr. Stewart's indictment for sexual battery needed to specifically assert that he engaged in sexual contact with another person "by force." *See id.* at 626–30. In *In re J.U.*, however, a majority of this Court held that the State need not expressly allege force so long as the "element of force [is] clearly inferable from the facts alleged in the" charging document. *Id.* at 626 (majority opinion). Because Mr. Stewart's indictment meets the standard articulated in *In re J.U.*, and because that decision is the binding law of this State until overruled, I concur in the Court's decision on whether the indictment needed to explicitly allege the use of force.

On the question of whether Mr. Stewart's indictment was fatally defective so as to deprive the trial court of jurisdiction, I would dissent if this Court were addressing the issue in the first instance. As explained in my dissent in *State v. Singleton*, No. 318PA22 (N.C. May 23, 2024) (Earls, J., dissenting), I would hold that defective indictments are jurisdictional and require vacatur of a conviction premised on a fatally flawed charging instrument. As with *In re J.U.*, however, a majority of the Court has taken a different view and holds today that constitutional and statutory defects in an indictment are non-jurisdictional. *See State v. Singleton*, No. 318PA22 (N.C. May 23, 2024) (majority opinion). Until that decision is reversed, it remains the law to which I am bound. For that reason, I concur in the result reached by the Court.

Justice RIGGS joins in this concurring opinion.

STATE v. VANN

[386 N.C. 244 (2024)]

STATE OF NORTH CAROLINA
v.
TEVIN DEMETRIUS VANN

No. 157PA22

Filed 23 May 2024

1. Appeal and Error—preservation of issues—criminal trial—judge's failure to follow statutory mandate—no preliminary prejudice analysis required

The Court of Appeals properly reviewed defendant's appeal from his convictions for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon after concluding that his main argument—that the trial court failed to exercise its discretion under N.C.G.S. § 15A-1233 when it denied the jury's request to review partial transcripts of witness testimony—was preserved for appellate review despite defendant's failure to raise the issue at trial. The statutory mandate placed upon the trial court in section 15A-1233 automatically preserved defendant's argument, and the Court of Appeals was not required to condition appellate review on a showing that the trial court's alleged error was prejudicial—a step that would require reviewing the issue on the merits before determining whether it was even preserved.

2. Jury—request for transcript of witness testimony—trial court's discretion—ambiguous language by court—evidence in record

At a trial for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon, the trial court did not abuse its discretion by denying the jury's request for partial transcripts of testimony—from defendant, the lead investigator in the case, and the medical examiner—after stating that "[w]e're not—we can't provide a transcript as to that." Defendant had the burden on appeal to show that the court misunderstood and failed to exercise its discretion under N.C.G.S. § 15A-1233(a) to grant the jury's request, since the court's language of "we're not" juxtaposed with "we can't" was ambiguous and therefore insufficient to overcome the "presumption of regularity" afforded to trial courts on appellate review. Defendant failed to meet this burden where the record showed that the court: granted the jury's other requests to review evidence, even partially granting the request at issue by allowing the jury to see the medical examiner's report; provided other evidence that the jury did not

request but that the court believed would be helpful; and, when denying the request for the transcripts, stated that it was the jury's duty to recall the testimony.

Justice RIGGS concurring in result only.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 from an unpublished decision of the Court of Appeals, No. COA20-907 (N.C. Ct. App. May 3, 2022) (unpublished), finding error and granting defendant a new trial after appeal from a judgment finding defendant guilty of first-degree murder, felony murder of an unborn child, and robbery with a dangerous weapon entered on 16 December 2019 by Judge Henry Stevens in Superior Court, New Hanover County. Heard in the Supreme Court on 1 November 2023.

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

James R. Glover, for defendant.[1]

BERGER, Justice.

Prior to finding defendant guilty of first-degree murder, murder of an unborn child, and robbery with a dangerous weapon, a New Hanover County jury made multiple requests to review evidence admitted during defendant's trial. The trial court allowed the jury to review some of the requested exhibits but denied the jury's attempts to obtain partial transcripts of testimony from the lead detective, the medical examiner, and defendant. The Court of Appeals granted a new trial after it concluded that the trial court failed to exercise its discretion pursuant to N.C.G.S. § 15A-1233 when it denied the jury's request to review the partial transcripts. We reverse.

I. Factual and Procedural Background

On 12 August 2016, officers with the Wilmington Police Department responded to a call regarding an unconscious female at a local hotel.

1. Mr. Glover withdrew as counsel for defendant following the filing of the brief.

Upon arrival, the officers found Ashley Ann McLean cold to the touch and lying beside a blood-soaked pillow. The officers observed extensive swelling and bruising on the victim's face and puncture wounds on her chin and cheeks.

Dr. John Almeida Jr. performed the autopsy on Ms. McLean, and he concluded that McLean died from blunt force trauma which caused rupturing of her liver and intraperitoneal hemorrhaging. Dr. Almeida confirmed at trial that McLean's ruptured liver was "consistent with being stomped or kicked," and testified that the severity of the injuries the victim suffered were more akin to what is typically observed "in motorcycle or aircraft accidents." The autopsy showed that the victim also had bruising and swelling on the right side of her face, an abrasion on the face consistent with being stomped, three superficial incised wounds to the right side of the face, linear abrasions of the neck, bruising of the left upper shoulder, a subarachnoid hemorrhage in the brain, and a fractured rib. McLean was eight weeks pregnant at the time of her death.

In the hotel room where McLean's body was found, officers discovered items that led them to believe that the hotel room was used to facilitate prostitution. Officers also noticed a purse lying on the floor, with its contents dumped out and strewn across the room. One officer observed that there was a phone charger and an empty phone case lying close to McLean, which suggested that her phone was missing. With the assistance of the cell service provider and the victim's boyfriend, officers located McLean's phone in a nearby ditch.

The officers accessed McLean's phone and discovered missed calls and text messages between her and a number that was later determined to belong to defendant. At 5:21 a.m. on 12 August 2016, defendant began texting McLean, and she responded with fees and the hotel address. At 9:13 a.m., defendant texted the victim, stating that he was attempting to locate her at the hotel. McLean responded that he was at the correct location and that she would let him in the hotel. An extraction report of the victim's phone generated by the Wilmington Police Department showed that at 9:30 a.m. that morning, the victim ceased all outgoing communications on her phone despite numerous incoming messages and calls.

Officers confirmed defendant's presence at the location with hotel surveillance footage showing defendant arriving at the hotel on a bicycle around 9:29 a.m. He parked his bicycle and walked towards the back entrance of the hotel. At 9:49 a.m., defendant was shown exiting the hotel, pulling a hood over his head, and leaving on his bicycle.

On 16 August 2016, defendant was arrested at his place of work pursuant to an outstanding warrant on an unrelated matter. Once at the police station, detectives Lee Odham and David Short informed defendant of his *Miranda* rights and then interviewed defendant regarding his association with the victim around the time of her death. Defendant initially denied being at the hotel but later admitted to the officers that he was the individual in the hotel surveillance footage. Defendant told the officers that he went to the hotel "[f]or a back massage and stuff," but he left because the woman never came down to meet him.

However, as the interview continued, defendant admitted to entering McLean's room for sexual services. In addition, defendant confessed to assaulting McLean, telling detectives that he hit her multiple times in the face and ribs. Defendant explained that he hit McLean after she demanded additional money, threatened to accuse him of sexually assaulting her, and then threatened him with a knife. Defendant repeatedly denied killing McLean stating, "all I did was knock her out." According to defendant, McLean was snoring on the bed when he left the room.

Defendant also admitted to taking the victim's phone, the money he paid her, and the knife he claimed the victim used. In addition, defendant told the officers that he burned the shirt and shoes he was wearing when he was with McLean and stated that he threw the knife down a drain near the hotel.

Defendant was subsequently indicted for first-degree murder, murder of an unborn child, and robbery with a dangerous weapon. At trial, defendant testified that he visited McLean at the hotel for sexual services and that she was alive when he left the hotel. However, defendant denied taking the victim's phone, the money he had given her, or anything else from out of the room, and he denied burning his shirt and shoes. Defendant testified that he did not hit McLean and that he only told the police he had hit the victim because he "didn't want to be charged with murder." Defendant asserted that part of the story he initially told officers was not true because "[t]hey wouldn't listen to the answers" he was giving.

During deliberations, the jury made multiple requests to review evidence. The jury first asked the court to provide a transcript of the interview of defendant by detectives Odham and Short and the phone extraction report for McLean's cell phone. The trial court discussed this request with the State and defendant, summoned the jury into the courtroom, and provided the interview transcript and extraction report to the

jury. In addition, the trial court chose to provide additional reports to the jury at this time, including the victim's phone records from 10 August 2016 to 12 August 2016.

The jury subsequently asked the court for "Defendant's Exhibit No. 3," which was a map of the route defendant took entering and leaving the hotel. The trial court granted this request after consulting with the State and defendant.

The jury later sent a note to the court requesting the testimony of detective Odham, defendant, the medical examiner, and the medical examiner's report. The trial court discussed this request with the State and defendant:

> THE COURT: Do we – do we know what exhibit the medical[ ] examiner's report is?
>
> [THE STATE]: Judge, I pulled out the three exhibits, State's Exhibit 121, 122, and 123. It includes Dr. Almeida's report; the – Dr. Nicks, the medical – the local coroner; and the toxicology report.
>
> THE COURT: Okay. And I think that's what they're asking.
>
> Ms. Harjo, do you want to check it?
>
> [DEFENSE]: May I see? May I approach?
>
> THE COURT: Yes.
>
> THE COURT: Are you okay with that?
>
> [DEFENSE]: Yes, sir.
>
> . . . .
>
> [THE STATE]: And – are you going to bring them in and tell them that, regarding their other requests, that it's their duty to recall testimony?
>
> THE COURT: Yes.
>
> [THE STATE]: Okay. Thank you.

After this discussion, the trial court summoned the jury back to the courtroom and addressed the request, stating:

> I have received a request from the jury that we have entered into evidence as Court's Exhibit No. 7 in

> which the jury is requesting Detective Odham's testimony when he was on the stand specific to Reed and Hamby; second, Vann's testimony when he was on the stand; third, the medical examiner – examiner's testimony and his report.
>
> The testimony of the detective, Mr. Vann, and the medical – medical examiner from the stand, it's your duty to recall their testimony. So you will have to remember that. We're not – we can't provide a transcript as to that.
>
> With regards to the medical examiner's report, we are going to provide what was admitted into evidence as State's Exhibit 121, 122, and 123, which are the reports from the medical examiner.

Defendant did not object to the trial court's denial of the jury's request for the transcripts.

That afternoon, the jury returned a unanimous verdict finding defendant guilty of first-degree murder, murder of an unborn child, and robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole and timely appealed.

At the Court of Appeals, defendant argued that the trial court failed to exercise discretion pursuant to N.C.G.S. § 15A-1233(a) when it did not allow the jury to review the requested transcripts. According to defendant, the trial court's language that "[w]e're not – we can't provide a transcript as to that" indicated a failure to exercise discretion. Defendant asserted that because there was a "reasonable possibility that, had the error not been committed, a different result would have been reached," he was entitled to a new trial.

In an unpublished opinion, the Court of Appeals determined that the trial court's language "we can't provide a transcript" demanded "a finding . . . that the trial court did not exercise the required discretion." *State v. Vann*, No. COA20-907, 2022 WL 1313956, *3 (N.C. Ct. App. May 3, 2023) (unpublished). The Court of Appeals opined that this purported error was prejudicial because "whether the jury believed defendant's recant of his confession [was] determinative to the jury's verdict," and defendant's recantation naturally involved "an issue of some confusion or contradiction such that a jury would want to review the evidence to fully understand it." *Id.* (cleaned up).

The State's petition for discretionary review was allowed by this Court on 3 March 2023. The State argues that the Court of Appeals erred: (1) by determining this issue was preserved for appeal prior to determining whether defendant was prejudiced; (2) by determining that the trial court failed to exercise its discretion without considering the entirety of the record; and (3) by ordering defendant a new trial without first requiring him to make a showing of prejudicial error under N.C.G.S. § 15A-1443(a).

II. Analysis

Subsection 15A-1233(a) of the North Carolina General Statutes provides that

> [i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C.G.S. § 15A-1233(a) (2023).

"A trial court's ruling in response to a request by the jury to review testimony or other evidence is a discretionary decision, ordinarily reviewable only for an abuse thereof." *State v. Perez*, 135 N.C. App. 543, 554 (1999) (citing *State v. Hough*, 299 N.C. 245 (1980)). However, a trial court errs when it fails "to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *State v. Starr*, 365 N.C. 314, 317 (2011) (quoting *State v. Barrow*, 350 N.C. 640, 646 (1999)). A defendant is entitled to relief only when such an error is prejudicial. *See State v. Johnson*, 346 N.C. 119, 126 (1997).

Whether a trial court failed to exercise discretion, and in turn, whether this error was prejudicial to a defendant, are questions of law reviewed de novo. *See State v. Lang*, 301 N.C. 508 (1980).

A. Preservation

[1] It is undisputed that defendant failed to contemporaneously object to the trial court's denial of the jury's request for the trial transcripts.

Ordinarily, such a failure waives the right to appellate review. *See State v. Nobles*, 350 N.C. 483, 498 (1999) ("[T]he rule is that when [a] defendant fails to object during trial, he has waived his right to complain further on appeal."). However, "[a] statute will automatically preserve an issue for appellate review if the statute either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial." *State v. Austin*, 378 N.C. 272, 276 (2021) (cleaned up). We have stated that N.C.G.S. § 15A-1233(a) contains a statutory mandate for which preservation is automatic. *See State v. Ashe*, 314 N.C. 28, 39 (1985); *State v. Lang*, 301 N.C. 508, 510 (1980).

But the State argues that in addition to the traditional statutory mandate analysis, *Ashe* conditioned appellate review on a showing of prejudice as well. *See Ashe*, 314 N.C. at 39 ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is *prejudiced thereby*, the right to appeal the court's action is preserved . . . .") (emphasis added). Essentially, the State asserts that an appellate court must engage in a prejudice analysis before determining whether the issue is preserved.

However, in subsequent cases, this Court has not imposed an *ex ante* prejudice analysis. Addressing the same issue in *State v. Lawrence*, this Court held that "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." 352 N.C. 1, 13 (2000). More recently in *State v. Starr*, this Court explicitly held that,

> [w]hen a trial court violates this statutory mandate by denying the jury's request to review the transcript upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable, and the alleged error is preserved by law even when the defendant fails to object.

Starr, 365 N.C. at 317 (cleaned up). Both *Lawrence* and *Starr* concerned preservation in the absence of an objection in relation to N.C.G.S. § 15A-1233(a).

While the State is correct that a fair reading of *Ashe* would require such a showing of prejudice, it would be illogical to require an appellate court to engage in a full analysis on the merits prior to determining whether the issue is actually preserved for appeal. Therefore, despite defendant's failure to object to this issue at trial, the alleged error under N.C.G.S. § 15A-1233(a) is preserved on appeal.

B. Exercising Discretion Under N.C.G.S. § 15A-1233(a)

[2] Subsection 15A-1233(a) set out above "imposes two duties upon the trial court when it receives a request from the jury to review evidence." *Ashe*, 314 N.C. at 34. First, the statute requires that the court bring all jurors into the courtroom. Second, and at issue here, "the trial court must exercise its discretion in determining whether to permit requested evidence to be read or examined by the jury." *Id.* at 34. "There is error when the trial court refuses to exercise its discretion in the erroneous belief that is has no discretion as to the question presented." *Starr*, 365 N.C. at 317 (cleaned up). Ultimately, it is the defendant's burden to show "that the trial court abused its discretion under N.C.G.S. § 15A-1233(a)." *State v. Guevara*, 349 N.C. 243, 252 (1998).

"This Court has held that a trial court does not commit reversible error by denying a jury request to review testimony . . . when it is clear from the record that the trial court was aware of its authority to exercise its discretion." *Id.* at 252. Thus, even where a trial court gives specific reasons for its determination under N.C.G.S. § 15A-1233(a), an appellate court must review this reasoning in context with the entire record. *See State v. Buckner*, 342 N.C. 198, 232 (1995) ("Nothing in the record indicates the trial judge was acting under the misapprehension of the limits of his discretion when he made his decision."); *State v. Lee*, 335 N.C. 244, 290 (1994) ("It is clear from this record that the trial court was aware of its authority to exercise its discretion."). Review of the entire record is vital, as it would be difficult for an appellate court to properly determine whether discretion was used on the basis of one word or sentence in a transcript.[2]

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2. We recognize that in some cases, the jury request raised on appeal may be the only request within the record which pertains to the discretionary power afforded under N.C.G.S. § 15A-1233(a). Thus, in those circumstances, review of the single instance would constitute review of the entire record. Here, however, the record contains multiple jury requests which the trial court dealt with pursuant to N.C.G.S. § 15A-1233(a), and as such we must review these for context.

Our dissenting colleague, however, would have us review this case through the lens of four prior cases, each of which only dealt with a single, isolated request in the record. *See State v. Ford*, 297 N.C. 28, 30 (1979); *Starr*, 365 N.C. at 317; *Barrow*, 350 N.C. at 646–47; *State v. Hatfield*, 225 N.C. App. 765, 767 (2013). While helpful, these cases are different from the case *sub judice* in that they did not contain a record replete with other jury requests that could be used to give context to the request at issue. Further, it must also be pointed out that our dissenting colleague only found these cases to mirror the case at hand after entirely rewriting the words used by the trial court. Such an approach demonstrates the speculative leaps that must be taken to find that the case at hand "fit[s] comfortably" with our case law, as it does not.

When reviewing the record, our case law highlights certain circumstances which may indicate a failure on the part of a trial court to exercise discretion. For example, a statement made by a trial court that it "doesn't have the ability," *State v. Barrow*, 350 N.C. 640, 647 (1999), or "that it is unable to provide the transcript to the jury" may indicate the failure to use discretion. *Starr*, 356 N.C. at 318. (emphasis omitted). Similarly, unambiguous language such as "we will not be able to," *Johnson*, 346 N.C. at 124, "the transcript is not available to the jury," *Lang*, 301 N.C. at 510–11, or "there is no transcript available at this time," *State v. Hudson*, 331 N.C. 122, 144 (1992), has likewise been interpreted as a failure to exercise discretion when read in context with the entirety of the record.

On the other hand, a "trial court's instruction that the jurors rely upon their individual and collective memory of the testimony is indicative of further exercise of its discretion." *State v. Harden*, 344 N.C. 542, 563 (1996). Moreover, a trial court that receives multiple requests from the jury demonstrates that it has used discretion when it "allow[s] one and denie[s] the other." *State v. Lewis*, 321 N.C. 42, 51 (1987).[3]

All of this considered, it is presumed that a trial court acted correctly until "statements of the trial court show that the trial court did not exercise discretion." *Starr*, 365 N.C. at 318 (quoting *Johnson*, 346 N.C. at 126); *see also State v. Thomas*, 344 N.C. 639, 646 (1996); *State v. Sanders*, 280 N.C. 67, 72 (1971). Further, when there are "ambiguous statement[s] capable of multiple interpretations, the 'presumption of regularity' is not overcome." *State v. Pickens*, 385 N.C. 351, 364 (2023).

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3. The dissent cites *Johnson* for the proposition that "[i]f the trial court contrasts 'what it cannot do' against 'what it can do,' that juxtaposition of determinations suggests that it did not believe it had discretion to grant the request." 346 N.C. 119. However, the language used by the trial court in *Johnson* is starkly different than the language used by the trial court in the case at hand. In *Johnson*, the trial court said, "we will not be able to replay or review the testimony for you [but] I *can* review further instructions . . . ." *Id.* at 123 (emphasis added). The use of the words "I can" in this sentence connotes that the trial court weighed what it believed it *could* and could *not* do. Whereas here, the trial court stated "[w]e're not – we can't," followed by "we are going to provide . . . State's Exhibits 121, 122, 123." Because the trial court's decision to provide the State's Exhibits was not based on what it believed it was permitted to do, we see no such "juxtaposition" as our dissenting colleague believes there is. Instead, the language used by the trial court demonstrated a decision being made, not a distinction between what was and was not permitted. Therefore, given these key differences, we believe *Lewis* to be the more appropriate comparative case law. 321 N.C. at 51 ("[The trial court] told the jurors that they could examine the photographs or other exhibits [and] then gave a negative answer to review of the transcript. . . . It thus appears that the trial judge did exercise discretion. He considered both requests and . . . allowed one and denied the other.").

This presumption "dictates that appellate courts should presume that the trial judge did not commit error absent affirmative evidence to the contrary." *LePage v. People*, 320 P.3d 348, 354 (Colo. 2014); *see also State v. Neely*, 26 N.C. App. 707, 709 (1975) ("Absent some specific, affirmative showing by the defendant that error was committed, we will uphold the conviction because of the presumption of regularity in a trial."); *State v. Rasmussen*, 404 P.3d 719, 722 (Mont. 2017) ("The defendant has the burden to overcome the presumption of regularity by producing affirmative evidence . . . ." (cleaned up)); *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983) ("[D]ecisions of the trial court are cloaked with a strong presumption in their favor and . . . to overcome this presumption of regularity requires an affirmative showing of abuse . . . ."(cleaned up)).

Here, the court's language of "[w]e're not – we can't provide a transcript" is, at best, ambiguous. While the word "can't," if read alone, could be indicative of a lack of discretion, the phrase "we're not" indicates the exercise of discretion. This inconsistent language creates ambiguity. Because "ambiguous statement[s] capable of multiple interpretations" do not overcome the presumption of regularity, *Pickens*, 385 N.C. at 364, defendant still bears the burden of providing affirmative evidence that the trial court misunderstood its discretion under N.C.G.S. § 15A-1233(a).

Both defendant and the Court of Appeals ignored the "[w]e're not" portion of the transcript, focusing solely on the "we can't" language. This is not enough to overcome the presumption. While the Court of Appeals acknowledged that "[o]n several occasions during deliberations the jury asked to review evidence from the trial," the Court of Appeals failed to properly consider these other requests. *Vann*, 2022 WL 1313956, at *1.

A thorough inspection of the record demonstrates that the trial court was fully aware of and appropriately exercised its discretion. The jury request at issue was not the first jury request of the trial. Rather, the jury had previously submitted two requests to the court. Defendant does not argue that the trial court abused or was otherwise unaware of its discretion in these prior requests, but review of the trial court's responses to these requests is necessary to determine whether the trial court was aware of its discretion for the denial at issue. *See Lee*, 335 N.C. at 290.

First, the jury requested the transcript of defendant's interview with detectives Odham and Short, as well as the full phone extraction report. The court summoned the jury and informed them that they would be provided with both the transcript and the full extraction report, as well as other reports which the jury did not specifically request, but that the court believed would be helpful. The trial court's action here highlights

the degree to which it understood and exercised its discretion. *See* N.C.G.S. § 15A-1233(a) ("In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.").

Second, the jury requested Defendant's Exhibit No. 3, which the trial court discussed with the State and defendant, noting that it was defendant's exhibit with "handwritten notes on it." The court received consent from both parties, and ultimately provided the exhibit to the jury. Once again, the record shows that the trial court understood and exercised its discretion to allow the jury to examine this evidence. *See* N.C.G.S. § 15A-1233(a) ("The judge in his discretion . . . may permit the jury to reexamine . . . the requested materials admitted into evidence.").

Finally, and at issue before us, the jury requested transcripts of the trial testimony given by detective Odham, defendant, and the medical examiner. Upon receiving the request, the trial court conferred with the State and defendant, answering affirmatively when the State asked, "are you going to bring them in and tell them that, regarding their other requests, that it's their duty to recall the testimony?" The trial court then informed the jury that it was their "duty to recall the[ ] testimony," which is indicative of the use of discretion. *See Harden*, 344 N.C. at 563. Further, while denying the jury's request for the transcripts of trial testimony, the trial court still granted the request in part by permitting the jury to review the medical examiner's report, which is likewise indicative of an exercise of discretion. *See Lewis*, 321 N.C. at 51. Finally, when viewed in context with the prior requests in the record, the fact the trial court followed a similar pattern when considering all the jury requests is likewise indicative of discretion.

Thus, based upon a review of the entire record, "the trial court was aware of its authority to exercise its discretion," *Lee*, 335 N.C. at 290, and defendant has failed to provide affirmative evidence to the contrary.[4] Because the record indicates that the trial court understood and properly exercised its discretion under N.C.G.S. § 15A-1233(a), there

4. The dissent cites to *Hudson*, 331 N.C. at 144, to support its assertion that a court's grant of "the jury's request for some evidence does not cure the erroneous denial of the other." However, in *Hudson*, the trial court unambiguously stated, "the transcript is not available to the jury," while proceeding to grant other requests which it believed it was permitted to do. *Id.* It makes sense then in that situation that the trial court's grant of some evidence did not cure its error in denying other evidence. Here, however, the trial court's statement (unless completely rewritten in the way the dissent believes it should be) is ambiguous. Thus, review of the entire record is necessary and provides clarity for determining whether the trial court understood its discretion under N.C.G.S. § 15A-1233(a).

can be no finding of prejudicial error.[5] *See Johnson*, 346 N.C. at 126. Accordingly, the Court of Appeals' decision is reversed.

REVERSED.

Justice RIGGS concurring in result only.

I agree with the majority that the Court of Appeals erred in granting Mr. Vann a new trial, but I differ on the rationale. Consistent with my dissenting colleague's well-reasoned analysis, I would hold that the trial court erred in its resolution of the jury's request to review testimony transcripts. Even so, because I believe that error was not prejudicial, I concur in the majority's decision to reverse the Court of Appeals.

To receive a new trial, Mr. Vann "bears the burden of showing that he has been prejudiced by the trial court's error in not exercising discretion in accordance with N.C.G.S. § 15A-1233(a)." *State v. Starr*, 365 N.C. 314, 319 (2011). The error is sufficiently prejudicial to require a new trial where there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* (quoting N.C.G.S. § 15A-1443(a)). While the materiality of the testimony and any contradictions arising therefrom are part of this holistic determination, so too is the presence of other evidence corroborating the defendant's guilt. *Id.* at 320.

I believe the other evidence presented to the jury in this case is sufficient to preclude a showing of prejudice in the trial court's error. That evidence includes:

- Mr. Vann admitted in his interrogation and on the stand that he was with the victim before her death.
- Her cellphone logs and the motel surveillance video placed his arrival and departure at 9:30 a.m. and 9:49 a.m. that morning, respectively.
- Her body—cold to the touch—was found by housekeeping at 12:30 p.m., indicating a significant passage of time between her death and the discovery of her body.

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5. It appears the Court of Appeals failed to analyze prejudice in accordance with the standard set forth in N.C.G.S. § 15A-1443(a) (2023), which requires the defendant to demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." However, since we find no error, we do not reach the issue of prejudice.

- Her cellphone logs further indicate that she made no further contact with anyone else after Mr. Vann left her motel room, which was inconsistent with her general practice.
- In his testimony, Mr. Vann admitted to carrying a knife everywhere, though he maintained that he had lied during his interrogation about struggling over a knife with the victim because "[t]hey said something about she was stabbed. So now I'm trying to make the situation look like, as far as the stabbings, being accidental." But a review of his interrogation transcript shows that Mr. Vann described the presence of a knife well *before* investigators mentioned any stab wounds.
- And Mr. Vann acknowledged on both occasions that he and the victim could not agree on the price for her services. In sum, there was sufficient corroborating evidence of his guilt to conclude, looking holistically and focused on the facts of this case solely, that had the jury been provided the requested transcript, there was not a reasonable probability that the jury would have reached a different conclusion.

Turning to Mr. Vann's testimony itself, the thrust of his denials on the witness stand appears to have been to suggest that the victim's admitted slaying was caused by a third person in the room; although that person's presence was entirely absent from his recounting of events on direct examination, he alternatingly testified on cross examination that he "was the only one involved" in what transpired in the victim's motel room, and that "I wasn't the only person . . . in that room. . . . Y'all didn't fully investigate." In fact, the bulk of his representations to that effect appeared in his interrogation transcript—a copy of which the jury *did* receive and review during deliberations. In short, Mr. Vann's testimony did not contradict the circumstantial evidence recounted above showing his guilt, particularly when his testimony did not present an alibi defense, plausibly demonstrate that someone else perpetrated the murder, and the jury was freely able to assess his credibility when it heard his testimony live. Under these circumstances, I do not believe there is a reasonable possibility that the jury would have reached a different result had it received a transcript of his testimony.

Justice EARLS dissenting.

In my view, the trial court failed to exercise its discretion on the jury's request for testimony transcripts. Because the court violated

N.C.G.S. § 15A-1233(a) (2023), and that error prejudiced Mr. Vann, I would affirm the Court of Appeals and award a new trial.

I. Exercise of Discretion Under Section 15A-1233(a)

Section 15A-1233(a) allows a jury to request review of testimony or other evidence after retiring for deliberation. As this Court has explained, the statute levies a duty: when the jury asks to review evidence, the trial court *must* exercise its discretion to resolve that request. *State v. Lang*, 301 N.C. 508, 510 (1980); *see also State v. Ashe*, 314 N.C. 28, 34 (1985).

Under section 15A-1233(a), a court does not err in denying a jury request if "it is clear from the record that the court was aware of its authority to exercise its discretion and allow the jury to review" the sought evidence. *State v. Guevara*, 349 N.C. 243, 252 (1998) (cleaned up). On the other hand, a trial court errs if it "misunderstood its authority to allow review of a witness'[s] testimony," *id.*, or if it "erroneously informed the jury that there was no procedure which permitted them to review testimony," *State v. Weddington*, 329 N.C. 202, 208 (1991). Put simply, a trial court violates section 15A-1233(a) if it refuses to exercise its discretion in the mistaken belief that it has none to exercise. *State v. Starr*, 365 N.C. 314, 318 (2011). This Court has thus consistently found a statutory breach when a court believed that it could not grant the jury's request. *See, e.g.*, *id.*; *see also State v. Barrow*, 350 N.C. 640 (1999). Our cases have thus distilled a general rule: a trial court's "response indicating the inability to provide a transcript constitutes erroneous failure to exercise discretion." *Starr*, 365 N.C. at 318.

In gauging whether a trial court "misunderstood its authority," this Court examines the "precise words chosen by the trial court." *State v. Johnson*, 346 N.C. 119, 124 (1997). When the court disclaims its ability, "power, skill, resources, or qualifications" to grant a jury's request, it violates section 15A-1233(a). *See id.* at 125. This Court also considers context. If the trial court contrasts "what it cannot do" against "what it can do," that "juxtaposition of determinations" suggests that "it did not believe it had discretion to grant the request." *Id.*

This Court explored that "juxtaposition" in *Johnson*. In that case, like this one, jurors asked to revisit a witness's testimony. *Id.* The trial court first told jurors that it "*will not be able* to replay or review the testimony." *Id.* at 124. But right after disavowing its capacity to provide testimony, the court told the jury that it "*can* review further instructions." *Id.* at 125. Based on those contrasting comments, this Court concluded that the trial court knew that its authority had limits—it simply misunderstood where to draw the line. *Id.* And coupled "with the

subsequent admonishment that it is the jurors' duty to consider the evidence as they recall it," we explained, the trial court apparently believed "that it was not empowered to let the jurors review the testimony at issue." *Id.* (cleaned up).

The trial court made a similar error here. On the first day of deliberations—a Friday—the jury asked to see a transcript of Mr. Vann's police interrogation and Ms. McLean's phone records. The trial court assented and furnished each juror with a personal copy of those documents. The jury did not reach a verdict, so the trial court recessed for the weekend.

When jurors resumed deliberations the next Monday, they asked for transcripts of the testimony of Mr. Vann, Detective Odham, and the medical examiner. The jury also asked for Ms. McLean's autopsy report. The trial court provided the report but withheld the transcripts, explaining:

> The testimony of the detective, Mr. Vann, and the medical—medical examiner from the stand, it's your duty to recall their testimony. So you will have to remember that. *We're not—we can't provide a transcript as to that.*

(Emphasis added.)

Left with Mr. Vann's interrogation transcript, Ms. McLean's phone records, and the autopsy report, the jury continued deliberating. It soon convicted Mr. Vann on each charge against him.

The "precise words chosen by the court" betray its misunderstanding of—and failure to exercise—its discretion on the jury's request. *Johnson*, 346 N.C. at 124. The trial court first said, "we're not," before pausing and clarifying, "we *can't* provide a transcript as to that." (Emphasis added.) Among other things, "can't" or "cannot" means "to be unable to do otherwise than." *Can't/Cannot*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). Rephrased in those terms, the court effectively told jurors, "We're not—we are unable to do otherwise than withhold a transcript as to that." *Cf. Starr*, 365 N.C. at 318 ("A trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." (citing *Barrow*, 350 N.C. at 646)).

Those remarks thus fit comfortably with our well-settled rule: A "court does not exercise its discretion when, as evidenced by its response, it believes it cannot" comply with the jury's request. *Starr*, 365 N.C. at 318. Unsurprisingly, then, the trial court's comments mirrors others found violative of section 15A-1233:

- "[W]e're not allowed to go back in . . . we really *can't* help you with that particular matter," *State v. Ford*, 297 N.C. 28, 30 (1979) (emphasis added);
- "We don't have that . . . [*w*]*e don't have the capability* of real-time transcripts so we *cannot* provide you with that," *Starr*, 365 N.C. at 317 (emphasis altered);
- "The Court *doesn't have the ability* to now present to you the transcription of what was said during the course of the trial," *Barrow*, 350 N.C. at 647 (emphasis altered);
- "[W]e *can't* do that," *State v. Hatfield*, 225 N.C. App. 765, 767 (2013) (emphasis added).

The Court of Appeals drew those parallels. In granting Mr. Vann a new trial, the court canvassed our caselaw. *See State v. Vann*, No. COA20-907, slip op. at 4–6 (N.C. Ct. App. 2022) (unpublished). From that precedent, it gathered that "[l]anguage from the trial court that a transcript can't be provided, is not available, or is not allowed to be reviewed" shows that the court "did not exercise the required discretion in considering whether to grant the jury's request." *Id.* at 6. It then applied that rule to the trial court's words, concluding that the court misapprehended its authority to furnish jurors with the testimony transcripts. *Id.*

The majority here, however, conjures up ambiguity in the trial court's statements. It concedes that "the word 'can't,' if read alone, could be indicative of a lack of discretion." But that reading somehow evaporates because the "phrase 'we're not' indicates the exercise of discretion." I think that argument reshuffles the trial court's remarks. True, the court first told jurors "we're not" providing the transcripts. But even if that phrase connotes discretion—a strained interpretation in its own right—the trial court did not stop there—it paused and corrected course, telling jurors that "we can't" furnish the transcripts. In my view, that remark is ambiguous in the same way that water is dry. And any murkiness in the phrase "we're not" was readily displaced by the categorical "we can't." Because the "precise words chosen by the court" disclaimed its ability to grant the jury's request, we could end our section 15A-1233(a) analysis with the court's plain language. *Johnson*, 346 N.C. at 124.

The majority offers two reasons why the trial court exercised its discretion. First, the majority maintains, the court understood and wielded its authority because it reminded jurors of their "duty to recall

the[ ] testimony." Second, since the trial court exercised its discretion on other jury requests, the majority contends that it did the same for the testimony transcripts.

I find neither argument persuasive. For one, this Court has already rejected the idea that a trial court cures its failure to exercise discretion by simply telling jurors to recall the testimony. In *Starr*, for instance, we expressly held that if "the trial court's statement indicates its belief that it does not have discretion" to consider the jury's request, then "the court's additional instruction that the jurors rely on their memory will not render the response discretionary." *Starr*, 365 N.C. at 318–19. We have also applied that rule in practice. Take our decision in *Ford*. There, as here, the trial court reminded the jury "[i]t is your duty . . . to recall all of the evidence." *Ford*, 297 N.C. at 30. Yet this Court still held that the trial court failed to exercise its discretion when, in response to a request for evidence, it told jurors, "we really can't help you with that," a remark strikingly similar to this case. *Id.*; *see also State v. Hudson*, 331 N.C. 122, 144 (1992) (holding that trial court failed to exercise discretion even though it instructed jury to recall testimony). In fact, when a court disclaims its ability to grant the jury's request and then "admonish[es] that it is the jurors' duty to consider the evidence as they recall it," that "juxtaposition of determinations" suggests a failure to exercise discretion. *Johnson*, 346 N.C. at 125 (cleaned up). Here, then, the trial court's reminder that jurors recall the testimony does not remedy its statutory breach. Quite the opposite. Under our precedent, that instruction merely underscored the court's misapprehension of its authority. *See id.*

Next, the majority points out that the trial court allowed the jury's requests for other pieces of evidence, including Mr. Vann's interrogation transcript, Ms. McLean's phone records, and the medical examiner's report. Because the court knew of and exercised its discretion for other jury requests, the majority reasons, it did the same for the testimony transcripts.

That syllogism, however, requires an unjustified logical leap. A court may understand its discretion over some types of evidence but misapprehend its authority over others, just as a driver who knows how to make a three-point turn may not understand how to parallel park. Recall that the trial court provided jurors with non-testimonial written evidence while categorically withholding transcripts of witness testimony. That conspicuously divergent treatment suggests that the trial court meant what it said—that it "couldn't" furnish jurors with the requested testimony transcripts.

This Court confronted a similar situation in *Hudson*, 331 N.C. 122. There, we held that a trial court failed to exercise its discretion when it granted part of the jury's request but erroneously refused to allow jurors to review a category of evidence that it thought it could not provide. *See id.* at 143–44. In that case, the jury asked to revisit the "written reports of expert witnesses who testified to defendant's mental capacity." *Id.* at 143. One expert witness—Dr. Rollins—"had not prepared a written report, so no such report was introduced into evidence or available to the jury." *Id.* As an alternative, the jury requested a transcript of Dr. Rollins' testimony. *Id.* There—as here—the trial court granted a portion of the jury's request; it allowed jurors "to review the available written reports" of the expert witnesses. *Id.* But there—as here—the court "refused to permit the jury to examine a transcript of the Rollins testimony." *Id.* In response to the jury, the court stated:

> Now, with respect to any request for a transcript of any portions of the testimony, I would say to you *that there is no transcript available at this time* of any of the testimony. I would further say to you, as I did during my earlier instructions to you, that you are to rely on your recollection of the evidence as it was presented during the course of the trial during your deliberations.

Id. at 144.

According to this Court, the trial judge erroneously denied the request for Dr. Rollin's testimony on the grounds that "the transcript was 'not available.' " *Id.* By labelling that evidence off limits—without exercising its judgment on the merits of the request—the trial court violated section 15A-1233. *See id.* That was so even though the court furnished some of the evidence sought by jurors.

The same reasoning applies to Mr. Vann's case. Here—as in *Hudson*—the trial court granted the jury's request for prepared written documents while denying the bid for witness transcripts. That was because here—as in *Hudson*—the trial court believed that it lacked the power to grant the jury's request for a particular species of evidence. And so here—as in *Hudson*—allowing the jury's request for some evidence does not cure the erroneous denial of other evidence.

Because the trial court believed that it could not provide the jury with transcripts of Mr. Vann's testimony, it failed to exercise its discretion. It thus violated section 15A-1233.

II. Prejudice

I would also hold that the trial court's error prejudiced Mr. Vann—but for the court's mistake, there is a "reasonable possibility" of a different result. *Starr*, 365 N.C. at 319 (quoting N.C.G.S. § 15A-1443(a)). In section 15A-1233 cases, this Court has found prejudice when the jury's full understanding of the requested testimony was "material to the determination of defendant's guilt or innocence." *Id.* (cleaned up); *see also Ashe*, 314 N.C. at 38; *Lang*, 301 N.C. at 511. The more "central" the testimony to the case, the more likely the trial court's error was prejudicial.[1] *See Johnson*, 346 N.C. at 126; *see also Ashe*, 314 N.C. at 37 ("The heart of this case . . . is the testimony concerning defendant's alibi, both that offered by defendant tending to support it and that offered by the state tending to rebut it."). In that vein, we have deemed an error prejudicial when the evidence withheld was the "only evidence directly linking defendant to the alleged crimes." *Johnson*, 346 N.C. at 126.

Mr. Vann has shown prejudice warranting a new trial. Because his testimony was the "heart of the case," *Ashe*, 314 N.C. at 37, erroneously withholding that evidence could have made all the difference. For one, Mr. Vann's account was "central" to the jury's verdict. *Johnson*, 346 N.C. at 126; *see also Ashe*, 314 N.C. at 37. Put simply, the State *needed* Mr. Vann's confession to convict him—as the Court of Appeals recognized, no other evidence "directly link[ed] him to the killing." *Vann*, slip op. at 7 (quoting *Johnson*, 346 N.C. at 126). True, other evidence "placed [Mr. Vann] in the victim's hotel room." *Id.* But it did not tie him to the felony robbery (the predicate for his felony murder charges), Ms. McLean's fatal injuries, or the death of her unborn child.

In other words, Mr. Vann's confession was the sole evidence for at least one essential element of each charge against him. Begin with the felony robbery. Because the State charged Mr. Vann with *felony* murder, it first had to prove that he committed a predicate felony—here, robbery with a dangerous weapon. Among other key elements, the State needed to show that Mr. Vann: (1) unlawfully took "personal property from [Ms. McLean] or in the presence of another" (2) by "use or threatened use" of a dangerous weapon. *State v. McLymore*, 380 N.C. 185, 199 n.3 (2022) (cleaned up).

Mr. Vann's confession was the only evidence on both scores. Only Mr. Vann linked himself to a "dangerous weapon"—i.e., Ms. McLean's

1. It is assumed for the prejudice analysis that, if the trial court properly exercised its discretion, it would have provided jurors with the requested evidence. There is no reason here to assume otherwise.

knife. And only Mr. Vann implicated himself in the theft of Ms. McLean's phone, money, and knife. Though police later found the phone and lifted prints from it, none matched Mr. Vann. And the State never found the money or knife. In fact, there might have never been a knife at all—later in Mr. Vann's interrogation, he backtracked on his original account and stated that Ms. McLean did not have a knife, but another object that he was not able to identify.

The jury *had* to rely on Mr. Vann's confession to convict him of felony robbery—no other evidence showed that he used a dangerous weapon or took Ms. McLean's belongings. And since that robbery was the predicate for the felony murder of Ms. McLean and her unborn child, Mr. Vann's statements were foundational to those charges, too.

Likewise, Mr. Vann's confession was the only evidence tying him to the killing of Ms. McLean and her unborn child. During his interrogation, Mr. Vann admitted to officers that he repeatedly struck Ms. McLean, landing at least one punch to her "ribs." That was the fatal blow; according to Ms. McLean's autopsy, it ruptured her liver and caused internal bleeding. And when Ms. McLean died, her unborn child did, too. But nothing besides Mr. Vann's own words "link[ed] him to the actual killing." *Vann*, slip op. at 7. Though police discovered unidentified male DNA on Ms. McLean's underwear and her body, they did not find Mr. Vann's DNA anywhere in the motel room, on her clothes, or on her person. Likewise, there were no eyewitnesses to the alleged crimes. No forensic or circumstantial evidence proved that "his actions cause[d] or directly contribute[d] to the death of the victim[s]." *See State v. Collins*, 334 N.C. 54, 60–61 (1993). Mr. Vann's confession was thus the only evidence that he proximately caused the fatal injuries—an essential element for his murder convictions. *See id.* at 60 (citing *State v. Brock*, 305 N.C. 532 (1982)).

Without Mr. Vann's statements to officers, the charges against him fall apart. For similar reasons, Mr. Vann's trial testimony was the "heart of the case." *Ashe*, 314 N.C. at 37. When he took the stand, he recanted his confession and retracted the statements implicating him in the robbery and killings. He told jurors that he never argued with or assaulted Ms. McLean. He stated that when he left the motel, Ms. McLean was unharmed and alive. And he averred that he did not take any of her property, much less use a dangerous weapon to do so.

Mr. Vann's admissions to officers were the building blocks of the predicate felony and murder charges, and so his testimony gave jurors a stark choice: credit his interrogation statements or believe his

recantation at trial. Only if jurors trusted his confession and discounted his testimony could they properly convict him of the robbery and murders. Because the content and credibility of Mr. Vann's trial testimony was "crucial"—indeed "central"—to the case against him, *Johnson*, 346 N.C. at 126, it was material to the "determination of [his] guilt or innocence," *Starr*, 365 N.C. at 319. Since his testimony recanted his earlier confession, jurors needed to review and examine that testimony when deciding his guilt. Had the trial court not erred and duly exercised its discretion to allow Mr. Vann's pivotal testimony, there is a "reasonable possibility" that the jury would have "reached a different result." *Id.* (quoting N.C.G.S. § 15A-1443(a)). Because I would find that the trial court failed to exercise its discretion and prejudiced Mr. Vann, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
MACK WASHINGTON

No. 34PA22

Filed 23 May 2024

Evidence—Rule 412—definition of "sexual behavior"—criminal prosecution—sexual offenses against child—evidence of prior sexual abuse by different perpetrator

In a prosecution for sexual offense with a child by an adult and indecent liberties with a child, the trial court properly excluded evidence of previous sexual abuse of the victim by an abuser other than defendant, where Evidence Rule 412 bars evidence of a victim's "sexual behavior," which is defined as "sexual activity other than the sexual act which is at issue in the indictment on trial." Although Rule 412 does not define "sexual activity," the Rule's plain language indicates that all evidence of a victim's sexual activity other than the sexual act at issue is inadmissible regardless of whether that activity was consensual or nonconsensual. Thus, defendant's argument that the victim's prior sexual abuse did not fall under Rule 412's definition of "sexual behavior" lacked merit.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the unpublished decision of a unanimous panel of the Court of Appeals, No. COA20-448 (N.C. Ct. App. Dec. 21, 2021), affirming a judgment entered

on 11 October 2019 by Judge Andrew T. Heath in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2024.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Daniel K. Shatz, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

In this case we determine whether evidence of previous instances of sexual abuse, or nonconsensual sex, constitutes "sexual behavior" under Rule 412 of the North Carolina Rules of Evidence and should therefore be excluded. Under the rule, the term "sexual behavior" is defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a) (2023). While sexual activity is not defined in Rule 412 and has not previously been defined by this Court, the language of Rule 412 is clear and unambiguous and necessarily includes evidence of actions of the complainant having to do with or involving sex other than the sexual act at issue in the indictment on trial. The rule does not distinguish between consensual and nonconsensual sexual activity. Because the evidence here falls squarely within this definition of sexual activity, we give effect to Rule 412's plain language excluding the evidence of prior sexual abuse and affirm the decision of the Court of Appeals.

On 22 October 2018, N.M., who was twelve years old at the time, told her mother that defendant, her stepfather, sexually abused her on several occasions while her mother worked in the evenings. N.M. detailed a variety of sex acts defendant performed with her against her will in their home. N.M. corroborated her claims by identifying defendant's distinct skin disease located on his genitalia. Her mother then took N.M. to the police station. Over the course of the next several weeks, N.M. discussed defendant's acts of sexual abuse with several individuals, including medical professionals, law enforcement, and a SAFEChild social worker, Tiffany Hampton.

During a recorded conversation between N.M. and Hampton, Hampton asked N.M. whether "anyone other than [defendant] ever did something like this to [her] before." N.M. responded affirmatively, describing the additional abuser as a fifteen-year-old teenager. N.M.

largely refused to answer questions about the additional abuser, fearful that this person "might do something crazy" and that others might believe she welcomed this behavior. Hampton asked several additional questions about the fifteen-year-old to no avail.

On 10 December 2018, defendant was indicted on two counts of sexual offense with a child by an adult and six counts of indecent liberties with a child. Defendant pled not guilty. Although Rule 412 generally bars evidence of prior "sexual behavior," defendant moved in limine to admit the portion of N.M.'s SAFEChild interview in which she discussed the additional abuser. *See* N.C.G.S. § 8C-1, Rule 412(a), (b) (2023) (excluding evidence of the sexual behavior of a complainant "other than the sexual act which is at issue" in a sex offense case as generally irrelevant and therefore inadmissible). Specifically, defendant argued, *inter alia*, that the interview did not fall under Rule 412's definition of "sexual behavior" because it did not discuss "any specific sex acts."[1] The trial court denied the motion and excluded the evidence under Rules 401, 402, and 412 of the North Carolina Rules of Evidence.

Prior to closing arguments, the trial court granted defendant's motion to dismiss one of the two counts of sexual offense with a child by an adult. Defendant was found guilty of all remaining charges and sentenced to 332 to 478 months imprisonment. Defendant appealed.

On appeal, defendant argued, in relevant part, that the trial court prejudicially erred in excluding the SAFEChild interview "because sexual abuse does not fall within the definition of 'sexual behavior' " under Rule 412. *State v. Washington*, No. COA20-448, slip op. at 9 (N.C. Ct. App. Dec. 21, 2021) (unpublished). Specifically, defendant argued that Rule 412 only bars evidence of consensual sexual activity but allows admission of prior nonconsensual sexual activity. *Id.* The Court of Appeals disagreed and held that "[t]he plain language of Rule 412 . . . does not speak to a consensual requirement." *Id.* at 11. Thus, it held that the trial court did not err in excluding the interview because evidence

1. Defendant raised several additional arguments at the trial court regarding the admissibility of the interview. He contended that the interview fell within an exception to Rule 412, and he also sought to admit the interview as evidence of an explanation for N.M.'s psychological trauma and self-harm. The trial court, however, denied defendant's requests to admit the interview on these grounds, and defendant does not raise those arguments on appeal to this Court.

of sexual abuse by an abuser other than defendant is exactly the sort of evidence Rule 412 was designed to exclude.[2] *Id.*

On 25 January 2022, defendant filed a petition for discretionary review with this Court seeking review of the Court of Appeals' decision. This Court allowed defendant's petition on 4 November 2022.

Here we consider whether the trial court erred in excluding the SAFEChild interview pursuant to Rule 412. As he did at the Court of Appeals, defendant argues that Rule 412 does not exclude the evidence of N.M.'s prior sexual abuse because the language of the rule only bars evidence of prior consensual sex but allows admission of prior nonconsensual sex. Accordingly, we must determine whether evidence of nonconsensual sex acts constitutes sexual behavior under Rule 412. Conclusions of law, such as issues of statutory interpretation, are reviewed de novo by this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2023). All relevant evidence is admissible unless "otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by [the Rules of Evidence]." N.C.G.S. § 8C-1, Rule 402 (2023). Irrelevant evidence is inadmissible. *Id.* Rule 412 of the North Carolina Rules of Evidence, commonly known as the rape shield statute, states that "[n]otwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution" and is therefore inadmissible unless the behavior falls within one of the statutorily provided exceptions. N.C.G.S. § 8C-1, Rule 412(b). Rule 412 defines "sexual behavior" as "sexual activity of

2. The Court of Appeals further held that the evidence did not fall into the alternate suspect exception under Rule 412(b)(2). *Id.* at 13. *See generally* N.C.G.S. § 8C-1, Rule 412(b)(2) (2023). Defendant did not raise this issue in his petition to this Court; therefore, we do not consider that issue here. The only issue before this Court is the scope of "sexual activity" in Rule 412.

the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a). Sexual activity, however, is not defined in Rule 412 or elsewhere in the North Carolina Rules of Evidence. *See id.* Thus, we now look to whether the plain meaning of sexual activity is clear and unambiguous.

"Activity" is defined by Webster's Dictionary as "the quality or state of being active; action." *Activity*, W*ebster's New World College Dictionary* (5th ed. 2014). The same defines "sexual" as "of, characteristic of, or involving sex." *Sexual*, *Webster's New World College Dictionary* (5th ed. 2014). Taken together, sexual activity refers to actions characteristic of or involving sex and does not distinguish between consensual and nonconsensual sex.

Similarly, looking to the full definition of "sexual behavior" in Rule 412(b), it is plain that, contrary to what defendant argues, the definition does not differentiate between consensual and nonconsensual sex acts, nor does it tend to exclude nonconsensual sex. Rather, the language of Rule 412(a) distinguishes between the sexual act at issue and *all* other sexual activity: "the term 'sexual behavior' means sexual activity of the complainant *other than the sexual act which is at issue in the indictment on trial.*" N.C.G.S. § 8C-1, Rule 412(a) (emphasis added). Thus, the plain language of Rule 412 is clear and unambiguous.[3]

Given this plain meaning, the trial court did not err in excluding N.M.'s SAFEchild interview. The interview consisted of N.M.'s statement that someone other than defendant committed similar sexual abuse against her in the past. These statements are not related to the acts complained of in the present case and thus, fall squarely within the type of evidence that Rule 412 is specifically designed to exclude. *See State v. Fortney*, 301 N.C. 31, 44–45, 269 S.E.2d 110, 117 (1980) (holding that evidence of sexual behavior that is not probative of the victim's consent to the acts complained of "is precisely the kind of evidence the [rape shield] statute was designed to keep out because it is irrelevant and tends to prejudice the jury"). Accordingly, N.M.'s statements about the

3. In *State v. Bass*, the Court of Appeals considered a nearly identical issue: whether evidence of a minor victim's previous sexual abuse by someone other than the defendant was properly excluded under Rule 412. 121 N.C. App. 306, 309, 465 S.E.2d 334, 336 (1996). In a single sentence, the Court of Appeals held that such prior abuse fell within the definition of sexual behavior under Rule 412 and was properly excluded. *Id.* at 309–10, 465 S.E.2d at 336. The efficiency with which the Court of Appeals decided the question in that case speaks to the clarity of the language at issue here.

additional abuser in the SAFEChild interview were properly excluded as evidence of sexual behavior.

In sum, the language of Rule 412 is clear that, generally, *all* evidence of a complainant's sexual behavior, other than the sexual act at issue, is irrelevant regardless of whether that sexual behavior was consensual or nonconsensual. N.M.'s statements about the additional abuser in her SAFEChild interview constitute evidence of sexual behavior "other than the sexual act" committed by defendant in this case. N.C.G.S. § 8C-1, Rule 412(a). Therefore, that evidence is irrelevant, and the trial court properly excluded it. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

HAPPEL v. GUILFORD CNTY. BD. OF EDUC.

[386 N.C. 271 (2024)]

EMILY HAPPEL; INDIVIDUALLY, TANNER SMITH, A MINOR AND EMILY HAPPEL ON BEHALF OF TANNER SMITH AS HIS MOTHER

v.

GUILFORD COUNTY BOARD OF EDUCATION AND OLD NORTH STATE MEDICAL SOCIETY, INC.

From N.C. Court of Appeals
23-487

From Guilford
22CVS7024

No. 86P24

ORDER

The petition for discretionary review as to additional issues filed by plaintiffs on 5 April 2024 is allowed as to the first issue only.

By order of the Court in Conference, this the 21st day of May 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. ROGERS

[386 N.C. 272 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 21-707
v.	
MARTY DOUGLAS ROGERS	From New Hanover 19CRS56950 19CRS56952

No. 377P22

ORDER

This matter is before this Court on the State's petition for discretionary review of a decision of the Court of Appeals holding that no probable cause existed to support the collection of defendant's historical cell-site data and ordering a new trial. This petition is (1) allowed to review whether the good-faith exception under N.C.G.S. § 15A-974 applies; and (2) denied as to all remaining issues.

By order of the Court in Conference, this the 21st day of May 2024.

/s/ Riggs, J.
For the Court

Dietz, J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

UNIVERSAL LIFE INS. CO. v. LINDBERG

[386 N.C. 273 (2024)]

UNIVERSAL LIFE INSURANCE COMPANY	From N.C. Court of Appeals 23-274
v.	From Durham 22CVS2507
GREG E. LINDBERG	

No. 344P23

ORDER

This matter is before this Court on plaintiff's petition for discretionary review of a decision of the Court of Appeals vacating an injunction and reversing in part a charging order entered by the trial court against defendant. This petition is allowed to determine (1) whether Article 31 proceedings require the return of an unexecuted writ before a trial court has the jurisdiction to act and to address the conflicting line of cases at the Court of Appeals, and (2) whether the Court of Appeals erred by reviewing this interlocutory order as an appeal of right under N.C.G.S. § 7A-27(b)(3)(b). The petition is denied as to all remaining arguments.

By order of the Court in Conference, this the 21st day of May 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of May 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

23 MAY 2024

3P23-6	State of North Carolina v. Joseph Edwards Teague, III	Def's Pro Se Motion for PCR Post Conviction Relief and Vacate the Conviction, Dismiss All Charges, and Find Def Legally and Factually Innocent (COA21-10)	Dismissed
8P24	Apryl N. Davis v. Future Realty LLC (Bridge SFR IV Acquisitions LLC), Bank of America N.A./ BAC, Brock & Scott PLLC, Trustee Services of Carolina LLC, United States Inc, United States	1. Plt's Pro Se Motion for Petition 2. Plt's Pro Se Motion for Appeal 3. Plt's Pro Se Motion for Complaint 4. Plt's Pro Se Motion for Injunction 5. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 6. Plt's Pro Se Motion to Seal Documents 7. Plt's Pro Se Motion for Summary Judgment	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed
18P24	State v. Charles A. Hodge	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
24P23-3	SCGVIII-Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's Pro Se Motion to Set Aside Recent Dismissal Amid Pending Forensic Verification of the Transcript (COA21-690 21-740) 2. Def's Pro Se Motion for Petition to Acquaint and for a Guideline and Thorough Review of this Case Amid Crucially Changed Circumstances	1. Dismissed 2. Dismissed **Dietz, J., recused**
25P23-3	Kalishwar Das v. SCGVIII-Lakepointe, LLC in c/o Mr. John F. Morgan, Jr.	Plt's Pro Se Motion for Detailed Order Copy Dated March 20th, 2024 and Leave to Refile Petition for Writ of Certiorari with Appellate Court (COA21-806)	Dismissed **Dietz, J., recused**
32PA24	James H.Q. Davis Trust and William R.Q. Davis Trust v. JHD Properties, LLC, Berry Hill Properties, LLC, and Charles B.Q. Davis Trust	1. Def's (Charles B.Q. Davis Trust) Petition for Writ of Certiorari from Business Court 2. Def's (Charles B.Q. Davis Trust) Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Def's (Charles B.Q. Davis Trust) Motion for Temporary Stay 4. Def's (Charles B.Q. Davis Trust) Petition for Writ of Supersedeas	1. Allowed **04/12/2024** 2. Dismissed as moot **04/12/2024** 3. Dismissed as moot **04/12/2024** 4. Allowed **04/12/2024**

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

23 MAY 2024

43P24	State v. Horace Hamid Kersey	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP17-546)	Dismissed
47P24	In the Matter of M.M., E.M., J.M., S.M., C.M.	1. Respondent-Father's Pro Se Motion for Extension of Time to File PDR (COA23-114) 2. Respondent-Father's Pro Se PDR Under N.C.G.S. § 7A-31 3. Respondent-Father's Pro Se Motion to Vacate Orders	1. Dismissed 2. Denied 3. Dismissed
48P24	State v. Barry Devontae Richardson	Def's Pro Se Motion for Relief (COA18-696 22-342)	Dismissed
50P00-4	State v. Albert Lee Stevenson, Jr.	1. Def's Pro Se Supplemental Petition for Writ of Certiorari to Review Order of the COA (COAP23-353) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
50P24	Capital One, N.A. v. Charles L. Roberson	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Stokes County 2. Def's Pro Se Motion for Notice of Appeal 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Stokes County 4. Def's Pro Se Motion to Remedy Docket Sheet 5. Def's Pro Se Motion for Court Wager 6. Def's Pro Se Motion for Clarification on Surety of Debts 7. Def's Motion for Notice of Right to Appeal and Motion for Function 8. Def's Pro Se Motion to Expedite 9. Def's Pro Se Motion to Seal 10. Def's Pro Se Motion to Include Exhibits 11. Def's Pro Se Corrected Motion to Include Exhibits	1. Denied 2. Dismissed *ex mero motu* 3. Denied 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed 8. Dismissed 9. Allowed 10. Dismissed as moot 11. Dismissed as moot
51P24	State v. Michael Hamilton Threadgill	Def's Pro Se Petition for Writ of Mandamus	Dismissed

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

23 MAY 2024

55P24	State v. Nicholas Ryan Buchanan	Def's PDR Under N.C.G.S. § 7A-31 (COA23-517)	Denied
58P24	State v. Willie Kenneth McKinnon	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-813) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
59P24	State v. Andreas Peter Bastas	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COAP23-738) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
66P24	State v. Vincent Leonard Roebuck	Def's PDR Under N.C.G.S. § 7A-31 (COA23-335)	Denied
71P24	Doris Griffin Land and Elliott Land v. Kori B. Whitley, M.D., Physicians East, P.A. d/b/a Greenville OB/GYN, Pitt County Memorial Hospital, Inc. d/b/a Vidant Medical Center, and Pitt County Memorial Hospital, Inc. d/b/a Vidant SurgiCenter	Defs' PDR Under N.C.G.S. § 7A-31 (COA23-250)	Allowed
72P24	State v. Michael Contrez Jones	1. Def's Pro Se Motion for Notice of Appeal (COAP23-284) 2. Def's Pro Se Motion for PDR	1. Dismissed 2. Dismissed **Riggs, J., recused**
73P24	Gerald Edward Benson v. Roy Cooper	Plt's Pro Se Motion for Notice of Liability and Claim for Damages Original Action	Dismissed
77P24	State v. Chad Norman Collins	Def's Pro Se Motion for PDR (COAP23-786)	Dismissed
80P24	State v. Anthony Jerome Walker	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-585)	Denied

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

23 MAY 2024

84P24	State v. Henry Walker	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-681)	Denied
85P24	Paul Yongo Odindo v. Mary Terry Kanyi	1. Plt's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA23-437) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Plt's Pro Se Motion to File Supplement Documents 4. Def's Motion for Sanctions 5. Plt's Pro Se Motion to Strike	1. Denied 2. Denied 3. Allowed 4. Denied 5. Dismissed as moot
86A02-2	State v. Bryan Christopher Bell	Def's Motion to Continue	Denied **04/01/2024**
86P24	Emily Happel, individually, Tanner Smith, a Minor and Emily Happel on behalf of Tanner Smith as his mother v. Guilford County Board of Education and Old North State Medical Society, Inc.	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA23-487) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's (Guilford County Board of Education) Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
88P24	Amy Delene Kean v. Warren Paul Kean	1. Def's Motion for Temporary Stay (COA23-46) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **04/09/2024** 2. 3. 4.
89P24	State v. Dwight Douglas Smith	1. Def's Pro Se Motion for Temporary Stay (COA23-645) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied **04/10/2024** 2. Dismissed as moot **04/10/2024** 3. Denied **04/10/2024**
91P14-10	State v. Salim Abdu Gould	Def's Pro Se Petition for Writ of Mandamus (COA18-425)	Denied **Dietz, J., recused** **Riggs, J., recused**

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

23 MAY 2024

92P23-2	State v. Deon Patrick Bobbitt	1. Def's Pro Se Motion for Notice of Appeal (COA22-510) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion for Voluntary Dismissal Without Prejudice	1. --- 2. --- 3. Allowed
96P24	State v. Jaron Monte Cornwell	1. State's Motion for Temporary Stay (COA23-36) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2024** 2. 3.
97P24	State v. Anthony Lavon Hancock	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-758)	Denied
102P13-8	State v. Charles Anthony Ball	Def's Pro Se Motion for Permission to Apply to Trial Court for Writ of Error *Coram Nobis* (COA12-610)	Denied
102P19-7	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **04/11/2024**
102P19-8	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **04/22/2024**
102P19-9	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **04/24/2024**
102P19-10	State v. Christopher Lee Neal	1. Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537) 2. Def's Pro Se Motion for Appropriate Relief	1. Denied **05/02/2024** 2. Dismissed **05/02/2024**
102P19-11	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus (COAP17-537)	Denied **05/16/2024**
104P24	State v. Ali Tariq Khabir Wiggins	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **05/07/2024**
108P24	In the Matter of L.C.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA23-759) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner's and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/07/2024** 2. 3.

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

23 MAY 2024

114P24	In re Rutz	1. Petitioner's Pro Se Motion for Urgent and Emergency Notice, Criminal and Civil Claims, and Writ for Remedy and Reparations 2. Petitioner's Pro Se Motion for Emergency Injunction and Writ Commanding Arrest, Indictment, and Disbarment	1. Dismissed **05/08/2024** 2. Dismissed **05/08/2024**
119P24	State v. Ronald Wayne Vaughn, Jr.	1. State's Motion for Temporary Stay (COA23-337) 2. State's Petition for Writ of Supersedeas	1. Allowed **05/16/2024** 2.
131P16-31	State v. Somchai Noonsab	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Petition for Writ of Mandamus	1. Dismissed 2. Dismissed
135P16-2	State v. Robert Antwain Stanback	Def's Pro Se Motion for an Order Authorizing Evidentiary Hearing (COA02-114)	Dismissed
151PA18-3	Ramar Dion Benjamin Crump v. Shanticia Hawkins	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COA17-488)	Denied **05/02/2024**
158P23	Maurice Devalle v. North Carolina Sheriffs' Education and Training Standards Commission	Respondent's PDR Under N.C.G.S. § 7A-31 (COA22-256)	Allowed
165P16-5	State v. Simaron Demetrius Hill	Def's Pro Se Motion Seeking $2,500 from Trey Allen for Refusal to Grant Writ (COAP22-408)	Denied
167PA22	John Doe 1K v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	1. Plt's Petition For Discretionary Review Under N.C.G.S. § 7A-31 (COA21-254) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Consolidate with Doe v. Roman Catholic Diocese of Charlotte, NC, No. 168PA22 4. Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	1. Allowed **03/21/2024** 2. Allowed **03/21/2024** 3. Allowed **04/12/2024** 4.

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

23 MAY 2024

168PA22	John Doe v. Roman Catholic Diocese of Charlotte a/k/a Roman Catholic Diocese of Charlotte, NC	1. Plt's Petition For Discretionary Review Under N.C.G.S. § 7A-31 (COA21-255) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Consolidate with Doe 1K v. Roman Catholic Diocese of Charlotte, NC, No. 167PA22 4. Def's Motion to Hold Oral Argument Contemporaneously with McKinney v. Gaston County Board of Education, No. 109PA22-2	1. Allowed **03/21/2024** 2. Allowed **03/21/2024** 3. Allowed **04/12/2024** 4.
191P23	State v. Wang Meng Moua	1. State's Motion for Temporary Stay (COA22-839) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Expedite Consideration of the State's PDR	1. Allowed **08/07/2023** Dissolved 2. Denied 3. Denied 4. Dismissed as moot **Riggs, J., recused**
202PA22	State v. Kenneth Louis Walker	Def's Motion to Take Judicial Notice (COA21-535)	Allowed **03/22/2024**
205P23-3	Travis Wayne Baxter v. North Carolina State Highway Patrol Troop F District V, et al.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-605) 2. Plt's Pro Se Motion for Extension of Time to File Brief	1. Dismissed *ex mero motu* 2. Dismissed as moot
232P23	Abbott, et al. v. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay (COA22-901) 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' (Rodney and Lynne Worthington) PDR Under N.C.G.S. § 7A-31	1. Allowed **09/15/2023** Dissolved 2. Denied 3. Denied
237P23	State v. John Louis Spera	Def's PDR Under N.C.G.S. § 7A-31 (COA22-814)	Denied **Riggs, J., recused**
250P23	John Scott McMurray v. Deborah Joann McMurray	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-904)	Denied

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

23 MAY 2024

258P23	State v. Eric Wayne Wright	1. State's Motion for Temporary Stay (COA22-996) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **10/04/2023** 2. Allowed 3. Allowed 4. Denied **Riggs, J., recused**
263P22-5	David Anthony Harris v. Todd E. Ishee	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP21-541)	Denied **05/01/2024** **Riggs, J., recused**
269P23	Gary Gantt d/b/a Gantt Construction Co. v. City of Hickory	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-767-2)	Denied
280P23-3	Brandon Williams v. State of North Carolina, County of Cabarrus, et al.	1. Plt's Pro Se Motion for Notice of Appeal (COAP24-59) 2. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Plt's Pro Se Motion for Leave to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
281P06-17	Joseph E. Teague, Jr., P.E., C.M. v. NC Department of Transportation, J.E. Boyette, Secretary	Plt's Pro Se Motion for Review (COA05-522)	Dismissed
281A22	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Matthew Bryan Hebert	Def's Petition for Rehearing (COA22-82)	Denied **05/21/2024** **Dietz, J., recused**

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285A23	Pinnacle Health Services of North Carolina LLC d/b/a Cardinal Points Imaging of the Carolinas Wake Forest and Outpatient Imaging Affiliates LLC, Petitioner v. NC Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section, Respondent and Duke University Health System Inc., Respondent-Intervenor	1. Respondent-Intervenor's Notice of Appeal Based Upon a Dissent (COA22-1042) 2. Respondent's Notice of Appeal Based Upon a Dissent 3. Petitioner's Petition to Brief Additional Issues that Provide Alternative Bases for Affirming the Court of Appeals' Decision	1. --- 2. --- 3. Allowed **05/21/2024**
288P23	Onnipauper LLC v. Eugene Dunston	1. Def's Motion for Temporary Stay (COA23-151) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/25/2023** Dissolved 2. Denied 3. Denied
297P23-2	Shannon Steger/T. Steger v. NCDHHS/ State Robeson County DSS/County of Robeson	1. Petitioner's Pro Se Motion to Reconsider/Vacate Dismissal of Appellant's Notice of Appeal (COAP23-662) 2. Petitioner's Pro Se Motion to Proceed as Indigent 3. Petitioner's Pro Se Motion to Seal 4. Petitioner's Pro Se Motion for Judicial Notice 5. Petitioner's Pro Se Motion to Participate in Appellate Pro Bono Program 6. Petitioner's Pro Se Motion for a Jury Trial 7. Petitioner's Pro Se Motion to Reconsider and/or Vacate Order 8. Petitioner's Pro Se Motion for Declaratory Judgment 9. Petitioner's Pro Se Motion to Clarify	1. Dismissed **03/20/2024** 2. Allowed **03/20/2024** 3. Dismissed 4. Dismissed 5. Denied 6. Dismissed 7. Dismissed 8. Dismissed 9. Dismissed

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		10. Petitioner's Pro Se Motion for Discovery and/or Production of Documents 11. Petitioner's Pro Se Motion to Consolidate Actions 12. Petitioner's Pro Se Motion for Joinder 13. Petitioner's Pro Se Motion for Judgment as a Matter of Law 14. Petitioner's Pro Se Motion for Extension of Time 15. Petitioner's Pro Se Motion for Waiver of Rules 16. Petitioner's Pro Se Petition for Writ of Certiorari	10. Dismissed 11. Dismissed as moot 12. Dismissed as moot 13. Dismissed 14. Dismissed as moot 15. Dismissed as moot 16. Denied
299P22-3	Shaunesi DeBerry v. Tinita DeBerry, Reginald DeBerry, Larry DeBerry Jr. as Administrator of the Estate of Larry DeBerry Sr.	Petitioner's Pro Se Motion for Appeal (COA22-872 22-969 22-974 22-998)	Dismissed **Riggs, J., recused**
309A23	JDG Environmental, LLC d/b/a Advantaclean of OKC v. BJ & Associates, Inc. d/b/a G.A. Jones Construction and the Coves at Newport II, Association, Inc.	1. Plt's Motion to Dismiss Appeal (COA21-692) 2. Parties' Joint Motion for Withdrawal of Appeal	1. Denied **03/21/2024** 2. Allowed **04/15/2024**
319P23	State v. Wayne Hansen Hsiung	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-801)	Dismissed
327P22-2	Stephen Lawing and Donna Lawing v. Chadwick P. Miller, C.P. Miller, Inc., Danny Edward Eaton, II, and Danny Eaton Plumbing, LLC	1. Plts' Pro Se Motion to Stay All Other Proceedings in this Action (COA22-99) 2. Plts' Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied **05/01/2024** 2.
339P23	Hunter Lee Smith, (now Known as Hunter Smith Willette) v. Reid Alan Dressler	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-909)	Denied

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344P23	Universal Life Insurance Company v. Greg E. Lindberg	1. Plt's Motion for Temporary Stay (COA23-274) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2023** 2. Allowed 3. Special Order
348P23	State v. Donat Caleb Porter	1. Def's Motion for Temporary Stay (COA22-516) 2. Def's Petition for Writ of Supersedeas 3. Def's Pro Se PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw Appellate Counsel	1. Allowed **01/03/2024** Dissolved 2. Denied 3. Denied 4. Allowed
349P20-3	State v. Clorey Eugene France	Def's Pro Se Motion for Notice of Appeal (COA12-50)	Dismissed
353P23	Cato Corporation, a Delaware Corporation, et al. v. Zurich American Insurance Company, a New York Corporation	Plts' PDR Under N.C.G.S. § 7A-31 (COA23-305)	Allowed
360A09	State v. Hasson Jamaal Bacote	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Petition for Writ of Certiorari to Review Order of Superior Court, Johnston County 4. State's Motion for Expedited Consideration	1. Denied **02/01/2024** 2. Denied 3. Denied 4. Dismissed as moot
377P22	State v. Marty Douglas Rogers	1. State's Motion for Temporary Stay (COA21-707) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2022** 2. Allowed 3. Special Order **Dietz, J., recused**

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381P22-5	Matthew Safrit v. Todd Ishee	1. Petitioner's Pro Se Motion for PDR (COAP22-495 P23-314 P23-545) 2. Petitioner's Pro Se Motion for Indigency Status	1. Dismissed 2. Allowed **Dietz, J., recused** **Riggs, J., recused**
425P15-3	State v. Dawayne David Knolton	Def's Pro Se Motion for Discretionary Review (COA16-671)	Dismissed
433PA21	State v. Daniel Raymond Jonas	Def's Motion to Strike (COA20-712)	Dismissed as moot
475P20-2	State v. Solomon Nimrod Butler	Def's Pro Se Petition for Writ of Mandamus (COAP18-746)	Dismissed
536P00-13	Terrance L. James v. N.C. Department of Public Safety, et al.	Petitioner's Pro Se Motion for Petition for Writ of Right (COAP09-835 P11-273 P13-598 P15-995 P24-88)	Dismissed
592P97-3	Denver W. Blevins v. Timothy Maynor, April Parker, and State of North Carolina	1. Petitioner's Pro Se Petition for Writ of Mandamus (COAP20-420 P23-746 P94-398) 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed **05/15/2024** 2. Allowed **05/15/2024**

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