386 N.C.—No. 4 Pages 666-968

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MARCH 5, 2025

MAILING ADDRESS: The Judicial Department
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THE SUPREME COURT

OF

NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 13 DECEMBER 2024

ORDERS

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

HEADNOTE INDEX

APPEAL AND ERROR

Preservation of issues—constitutional rights of parent—determined by district court on its own initiative—not challenged in trial court—In a neglect proceeding resulting in the temporary placement of a juvenile with relatives, where the district court on its own initiative determined that the father had acted in a manner inconsistent with his constitutional rights as a parent but the father did not challenge that determination on constitutional grounds, that issue was not preserved for appellate review—a result in conformance with the longstanding precedent that constitutional arguments not raised in a trial court will not be considered for the first time on appeal, in part to ensure that parties have notice and an opportunity to present relevant evidence on the matter. In addition to reversing the lower appellate court's decision in the instant case, the Supreme Court expressly overruled the contrary preservation holding by the Court of Appeals in *In re B.R.W.* and its progeny. **In re K.C., 690.**

Preservation of issues—criminal defendant's right to competency hearing—statutory—waiver—In a prosecution for multiple charges arising from defendant's involvement in a scheme to throw footballs containing illegal drugs into a prison yard, where a competency evaluation was ordered for defendant but he posted bond and was released approximately two weeks later without having been evaluated, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002 by failing—over the course of several years between entry of the evaluation order and his conviction—to assert the issue at trial or beforehand by, for example, remaining in pretrial custody for the evaluation, moving to amend the evaluation order in light of his release, or checking himself into a hospital for the ordered evaluation after his pretrial release. Further, nothing in the record since entry of the evaluation order suggested any competency concerns, defendant repeatedly represented himself as competent at trial, and defendant specifically disclaimed any constitutional competency challenge on appeal. **State v. Wilkins, 923.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Full custody awarded to non-relative—statutorily required findings sufficient—Following an abuse and neglect adjudication, the district court's final permanency planning order—awarding full custody to the juvenile's foster parents (rather than placing the juvenile with a maternal grandfather) and converting the case to a civil custody proceeding—was affirmed because the written findings of fact complied with the Juvenile Code provisions cited in the mother's appeal in that: no written finding regarding placement of the juvenile with the mother within six months was required where the impossibility of such a placement was uncontested (N.C.G.S. § 7B-906.1(e)); the findings reflected the court's determination that reunification with the mother was inconsistent with the juvenile's health and safety (N.C.G.S. § 7B-906.2(b), (d)(4)); the findings, including facts in the department of social services court report incorporated by reference in the order, detailed the mother's availability to the court and the guardian ad litem (N.C.G.S. § 7B-906.2(d)(3)), as well as her participation in her case plan (N.C.G.S. § 7B-906.2(d)(2)); and the findings demonstrated the district court's consideration of the maternal grandfather as a potential placement, in conformance with the requirement of N.C.G.S. § 7B-903(a1) that it "first consider" a relative as a placement for a juvenile. **In re L.L., 706.**

CONSTITUTIONAL LAW

Capital murder trial—pretrial motion to strike death penalty—prosecutorial discretion—In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by denying defendant's pretrial motion to strike the death penalty because the decision to seek a particular sentence or to engage in plea bargaining is within the exclusive and discretionary power of the district attorney and does not impermissibly burden a defendant's constitutional rights. **State v. Gillard, 797.**

Clerk of superior court—constitutional officer—removal—authority of a replacement judge appointed by the Chief Justice—Following two trial court proceedings removing a duly elected clerk of superior court—the second of which was conducted on remand from the Court of Appeals—the Supreme Court overruled the lower appellate court's holding in the clerk's first appeal that, upon the recusal of the senior regular resident superior court judge (the official authorized to preside in such cases pursuant to Article IV, Section 17(4) of the North Carolina Constitution), a replacement judge appointed by the Chief Justice lacked authority to preside in the matter. The Chief Justice is authorized by N.C.G.S. § 7A-41.1(e) to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties, including to preside in a clerk removal proceeding. **In re Chastain, 678.**

Clerk of superior court—removal standard—The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, "misconduct"—wrongful, unlawful, dishonest, or improper conduct—rather than "willful misconduct," is the proper standard to be applied. **In re Chastain, 678.**

Clerk of superior court—removal—procedural due process—The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, due process considerations require that a clerk may be removed only for conduct identified in the charging affidavit that initiated the removal proceeding per N.C.G.S. § 7A-105. **In re Chastain, 678.**

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—capital murder trial—premature consideration on direct appeal—In a capital murder prosecution arising from the fatal shooting of two victims, where defendant's claims that his counsel provided ineffective assistance—by failing to object at numerous points throughout the trial and sentencing—could not be determined on the cold record, those claims were dismissed without prejudice to defendant's right to raise them in a subsequent proceeding. **State v. Gillard, 797.**

Eighth and Fourteenth Amendments—death penalty—method of lethal injection—substantial and imminent risk not shown—In a capital murder prosecution arising from the fatal shooting of two victims in which defendant received a sentence of death, defendant failed to meet his burden of demonstrating that the state's method of lethal injection involved a substantial risk of serious harm (severe pain over and above death itself) and that an alternative method was available that would entail significantly less risk of needless suffering. Therefore, defendant's argument that the state's method of punishment was cruel and unusual and unconstitutional under the Eighth and Fourteenth Amendments was rejected. **State v. Gillard, 797.**

CRIMINAL LAW

Capital murder trial—no error—no cumulative error—In a capital murder prosecution arising from the fatal shooting of two victims, defendant failed to show that cumulative prejudicial error deprived him of a fair trial and required reversal of his convictions and a new trial or sentencing hearing. Where the Supreme Court addressed each of defendant's substantive claims on appeal and found no error by the trial court, there could be no cumulative error. **State v. Gillard, 797.**

Capital murder trial—preservation issues—In a capital murder prosecution arising from the fatal shooting of two victims, arguments presented by defendant as preservation issues—that the death penalty should be invalidated and that the indictment was insufficient to elevate the crime of murder from second-degree to first-degree and did not allege aggravating circumstances—did not include compelling reasons to depart from well-established precedent. **State v. Gillard, 797.**

Jury instructions—capital murder trial—culpability for killing by accomplice—major participant in events leading to death—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector (a male) at a hotel by defendant and another man, there was no plain error with regard to defendant's argument that, since he was not the one who killed the male victim and therefore could not have had the requisite intent to kill for imposition of the death penalty, the trial court should have included a culpability requirement in its jury instruction pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). The instruction was not required because defendant was convicted of first-degree murder for the killing of the male victim on both theories of felony murder and premeditation and deliberation based on evidence showing that defendant was a major participant in the male victim's death by actively planning, arranging, and perpetrating an armed, violent felony that was likely to lead to a person's death. **State v. Gillard, 797.**

Jury instructions—capital murder trial—felony murder—final mandate—felony elements not repeated—In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not plainly err when, in its final mandate to the jury on first-degree murder based on felony murder, it failed to repeat

the elements for the underlying felonies—attempted first-degree rape and attempted robbery with a dangerous weapon—because the instructions, taken as a whole, included thorough and correct instructions regarding each element of those felonies and, therefore, there was no reasonable cause to suggest that the jury was misled or misinformed. **State v. Gillard, 797.**

EVIDENCE

Murder trial—gun never recovered—prior assault with a firearm—relevance—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, in which the gun defendant used to shoot one of the victims was never recovered, the trial court did not commit plain error by admitting evidence from a woman about a prior incident involving defendant making a threat to her by putting his gun up to her mouth and telling her if she didn't comply with his demands, then her blood would be on the walls. The prior incident was relevant to the question of whether defendant possessed a firearm and, even if the evidence was not relevant, defendant failed to show that the jury probably would have reached a different result absent the evidence. **State v. Gillard, 797.**

Photographs—murder victims and scene—not repetitive or cumulative—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not abuse its discretion by admitting nearly one hundred photographs of the victims and the crime scene, only nine of which defendant challenged at trial. The challenged photos were not unnecessarily repetitive and cumulative where they depicted different angles of the victims' bodies and injuries—as well as the distance between the bodies, shell casings, and bloody footprints in the context of the general layout of the room and hallway where the incident took place—and were illustrative of what officers observed when they arrived on the scene. **State v. Gillard, 797.**

Prior bad acts—murder trial—prior armed assaults and rapes—common scheme or plan—temporal proximity and similarity—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not err in admitting evidence from two women who related separate incidents that each took place less then two months before the fatal shooting in which each woman, while working as a prostitute at a hotel, was raped and robbed at gunpoint by defendant and a second man. The incidents were admissible under Evidence Rule 404(b) as evidence of defendant's identity, motive, and a common plan or scheme to rape and rob the murder victim because there was sufficient temporal proximity and similarity between those incidents and the one that gave rise to the murder charges. Given that the evidence demonstrated a common plan or scheme, its admission was not unfairly prejudicial so as to outweigh any probative value under Evidence Rule 403. Further, the trial court's limiting instruction regarding the prior incidents was not in error or, even if there was any error, it was invited error since the instruction was given at defendant's request. **State v. Gillard, 797.**

Witness testimony—background information—past experience of abuse—plain error review—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not commit plain error by admitting personal background information from two witnesses during the guilt-innocence phase of the trial and from two other witnesses during the sentencing phase, where the evidence was relevant and more probative than prejudicial.

Testimony from the sister of one of the victims about the victim's past experience of abuse was limited in scope, provided an explanation for how the victim ended up as a prostitute, and did not constitute impermissible character testimony. Testimony from the other witness during the guilt-innocence phase detailing her abusive upbringing similarly served to provide context as to why she was working as a prostitute on the night she was attacked by defendant. For each of the two witnesses who detailed their experiences of abuse during the sentencing phase—in which less restrictive standards apply—their testimony introduced each of them to the jury and related to the aggravating circumstance of showing a course of conduct by defendant engaging in violent acts. Finally, the trial court properly instructed the jury that all of the evidence in both phases of the trial could be considered during sentencing deliberations. **State v. Gillard, 797.**

HOMICIDE

First-degree murder—acting in concert—murder committed in pursuit of a common plan—In a capital murder prosecution arising from the fatal shooting of a prostitute (a female) and her protector (a male) by defendant and another man, the State presented substantial evidence that defendant and his accomplice were acting in concert when the accomplice shot and killed the male victim. Specifically, there was sufficient evidence from which the jury could determine that the murder of the male victim occurred during the pursuit, and as a natural and probable consequence of the two men's common plan to rob and rape the female victim; therefore, the charge of first-degree murder of the male victim based on theories of premeditation and deliberation and felony murder was properly submitted to the jury. **State v. Gillard, 797.**

First-degree murder—felony murder—underlying felony—sufficiency of evidence—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence of first-degree murder based on felony murder, where the evidence—including testimony about prior rapes and robberies committed by defendant against other women, which was submitted pursuant to Evidence Rule 404(b) as evidence of a common plan or scheme—supported an inference that defendant intended to rape the female victim or rob her at gunpoint, and took overt steps to do so, before he was interrupted when his accomplice shot the other victim in the hallway outside the hotel room. **State v. Gillard, 797.**

First-degree murder—premeditation and deliberation—sufficiency of evidence—In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence from which a jury could conclude that defendant acted with premeditation and deliberation to support the first-degree murder charge regarding the female victim, including that defendant arrived at the hotel with a loaded weapon, there was no evidence of provocation by the female victim based on video surveillance, and the victim was unarmed when she was shot. Further, the two shots defendant fired at the victim, both of which hit her, constituted evidence of intent to kill. **State v. Gillard, 797.**

IDENTIFICATION OF DEFENDANTS

Capital murder trial—sentencing phase—pre-trial identification—not induced by State action—In the sentencing phase of a capital murder prosecution

arising from the fatal shooting of two victims, there was no violation of defendant's due process rights from the admission of a witness's pretrial identification of defendant as the perpetrator of a prior armed assault and robbery committed against her, where the identification did not result from any State action. Although the witness was contacted by a detective who was investigating whether a link existed between the murders and her prior reported attack, the witness did her own independent research and recognized defendant from a photograph in a news article. Any questions about the reliability of her testimony were for the jury to determine and went to the weight rather than the admissibility of the evidence. **State v. Gillard, 797.**

INSURANCE

Commercial—government-ordered pandemic restrictions—policy interpretation—viral contamination exclusion—A clothing retailer's claim for insurance coverage for loss of business as a result of government-mandated restrictions imposed during the COVID-19 pandemic was properly dismissed for failure to state a claim pursuant to Civil Procedure Rule 12(b)(6). The Supreme Court modified and affirmed the Court of Appeals' decision upholding the trial court's dismissal where, contrary to the lower appellate court's determination, plaintiff did allege a "direct physical loss of or damage to" its property—a definition which did not require a tangible alteration of property—based on the forced closure of its stores and the undertaking of significant remediation before being allowed to reopen. However, coverage was nevertheless precluded because plaintiff's "all-risk" commercial property insurance policy—which defined the scope of covered risks by its exclusions—contained an exclusion for viral contamination. **Cato Corp. v. Zurich Am. Ins. Co., 667.**

Commercial—government-ordered pandemic restrictions—temporary business closures—"direct physical loss" met—In a claim brought by numerous bars and restaurants (plaintiffs) seeking insurance coverage for their loss of business when—during the COVID-19 pandemic—government-mandated restrictions temporarily limited the use of and access to their physical properties, plaintiffs were entitled to partial summary judgment on the issue of whether their losses were covered by their "all-risk" commercial property insurance or supplemental business income policies. Under each policy, any ambiguity in the phrase "direct physical loss" was construed in favor of the policyholders, and, here, plaintiffs sufficiently alleged direct physical losses where government-issued orders rendered their properties unusable for their insured purposes, and the policies did not specifically exclude viruses or contaminants from covered risks. **N. State Deli, LLC v. Cincinnati Ins. Co., 733.**

JURY

Selection—capital murder trial—excusal for cause—views on death penalty—During jury selection for a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not abuse its discretion by excusing three prospective jurors for cause based on their answers to questions about their ability to consider imposing a penalty of death—the one who stated that he didn't think that he could vote for (or would have a hard time voting for) the penalty; a second who stated unequivocally that she did not believe in the death penalty and would not vote for it; and a third who equivocated but then agreed that he would automatically vote for life without parole. In each case, the court's determination that the prospective jurors' stated views would substantially impair the performance of their duties to impartially apply the law was not manifestly unreasonable and, further, there

WORKERS' COMPENSATION

Temporary total disability payments—"total loss of wage-earning capacity"—plain language analysis—capacity for any type of work—On discretionary review of a workers' compensation case, the Supreme Court modified a Court of Appeals decision by rejecting its interpretation of the plain language of N.C.G.S. § 97-29(c)—which ends, in most cases, temporary total disability payments after 500 weeks unless an employee has sustained a "total loss of wage-earning capacity"—instead holding that the quoted portion of the provision, both as originally drafted and after subsequent amendments that emphasized the legislature's intent, refers to the total loss of an employee's personal capacity to earn wages in any type of employment and, thus, does not share a meaning with "total disability" as that term of art is used in workers' compensation case law. However, the Court affirmed the lower appellate court's ultimate holding—which in turn affirmed the Industrial Commission's conclusions of law—that the employee, despite ongoing back pain that was sometimes severe enough to prevent him from working at all, was nevertheless capable of some part-time work and thus was subject to the cessation of temporary total disability payments after 500 weeks. **Sturdivant v. N.C. Dep't of Pub. Safety, 939.**

ZONING

Unified development ordinance—school construction—connectivity requirements—ambiguous provision—free use of land—In conducting a de novo review of a town's denial of petitioner's permit applications for the construction of a proposed charter school, the Supreme Court reversed the decision of the Court of Appeals and held that, where the town's unified development ordinance regarding the inclusion of off-premise sidewalks was ambiguous, the lower appellate court erred by adopting the town's interpretation of that provision and instead should have strictly construed the provision in favor of the free use of land per public policy. Since petitioner carried its initial burden of production by presenting competent, material, and substantial evidence tending to show that it was entitled to the issuance of permits and no evidence was presented to the contrary, the matter was remanded with instructions for the town to approve petitioner's site plan and subdivision applications. **Schooldev E., LLC v. Town of Wake Forest, 775.**

SCHEDULE FOR HEARING APPEALS DURING 2025

NORTH CAROLINA SUPREME COURT

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

February 11, 12, 13, 18, 19, 20
April 15, 16, 17, 22, 23, 24
September 9, 10, 11, 16, 17, 18
October 28, 29, 30
November 4, 5, 6

BUILDERS MUTUAL INSURANCE COMPANY
v.
DANIEL R. NEIBEL, INDIVIDUALLY AND D/B/A DAN THE MAN CONSTRUCTION

No. 98A24

Filed 13 December 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 293 N.C. App. 1 (2024), affirming a summary judgment order entered on 22 July 2022 by Judge Margaret P. Eagles in District Court, Wake County. Heard in the Supreme Court on 30 October 2024.

Stuart Law Firm, PLLC, by William A. Piner II, for plaintiff-appellee.

Buckmiller, Boyette & Frost, PLLC, by Joseph Z. Frost and Matthew W. Buckmiller, for defendant-appellant.

PER CURIAM.

AFFIRMED.

CATO CORPORATION, A DELAWARE CORPORATION, ET AL.
v.
ZURICH AMERICAN INSURANCE COMPANY, A NEW YORK CORPORATION

No. 353PA23

Filed 13 December 2024

Insurance—commercial—government-ordered pandemic restrictions—policy interpretation—viral contamination exclusion

A clothing retailer's claim for insurance coverage for loss of business as a result of government-mandated restrictions imposed during the COVID-19 pandemic was properly dismissed for failure to state a claim pursuant to Civil Procedure Rule 12(b)(6). The Supreme Court modified and affirmed the Court of Appeals' decision upholding the trial court's dismissal where, contrary to the lower appellate court's determination, plaintiff did allege a "direct physical loss of or damage to" its property—a definition which did not require a tangible alteration of property—based on the forced closure of its stores and the undertaking of significant remediation before being allowed to reopen. However, coverage was nevertheless precluded because plaintiff's "all-risk" commercial property insurance policy—which defined the scope of covered risks by its exclusions—contained an exclusion for viral contamination.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, No. 23-305 (N.C. Ct. App. Nov. 21, 2023) (unpublished), affirming an order entered on 10 January 2023 by Judge Forrest Donald Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 22 October 2024.

Robinson, Bradshaw & Hinson, P.A., by Matthew W. Sawchak, R. Steven DeGeorge, and Benjamin C. DeCelle; and Kozyak Tropin & Throckmorton LLP, by Benjamin J. Widlanski, pro hac vice, Dwayne A. Robinson, pro hac vice, and Gail A. McQuilkin, pro hac vice, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Gary S. Parsons and Kimberly M. Marston; Squire Patton Boggs (US) LLP, by Lauren S. Kuley, pro hac vice; and Teague Campbell Dennis & Gorham LLP, by William A. Bulfer, Megan N. Silver, and Daniel T. Strong, for defendant-appellee.

EARLS, Justice.

This is a companion case to *North State Deli, LLC v. Cincinnati Insurance Co.*, No. 225PA21-2 (N.C. Dec. 13, 2024), also announced today. There, we held that restaurant policyholders stated a claim for insurance coverage when COVID-19-related government orders caused the restaurants to suspend business operations due to the loss of use of and access to the restaurants' physical property. Such losses amounted to a "direct physical loss" under the terms of that policy, we concluded. We specifically declined to define "direct physical loss" as requiring tangible alteration of property. Here, we address a related issue: whether a clothing store retailer stated a claim for insurance coverage when it alleged that COVID-19 transformed and destroyed its property but where the policy excludes viral contamination as a covered cause of loss.

The plaintiff here, Cato Corporation, is a clothing retailer with more than 1,300 stores across North Carolina and thirty-six other states. In July 2019, it purchased an "all-risk" commercial property insurance policy from defendant Zurich American Insurance Company. That insurance policy was operative in the spring of 2020 when, as Cato alleged in its complaint, the COVID-19 virus and related government orders forced the retailer to "close, severely curtail operations, and remediate and reconfigure their spaces." Zurich refused to cover those alleged losses, and Cato sued. Among other claims, Cato sought a declaratory judgment that its policy with Zurich covered its alleged losses. The trial court dismissed Cato's claims on a Rule 12(b)(6) motion, and the Court of Appeals affirmed—both relying on the now-reversed Court of Appeals decision in *North State Deli, LLC v. Cincinnati Ins. Co.*, 284 N.C. App. 330 (2022).

On review, we agree with the Court of Appeals' ultimate decision to affirm the dismissal of Cato's claims. But we disagree with the Court of Appeals' reasoning. Under *North State Deli*, No. 225PA21-2, we conclude that Cato failed to allege facts sufficient to state a claim for insurance coverage due to direct physical loss of or damage to property because the contamination exclusion precludes coverage for direct physical losses caused by viruses. Therefore, we affirm the Court of Appeals' judgment.

I. Background

In reviewing a trial court's grant of a Rule 12(b)(6) motion, we examine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560,

572 (2021) (quoting *Bridges v. Parrish*, 366 N.C. 539, 541 (2013)). The summary below follows from the factual allegations in Cato's complaint and subsequent judicial proceedings.

A. Cato purchases an "all-risk" commercial property insurance policy from Zurich.

In July 2019, Cato purchased an "all-risk" commercial property insurance policy from Zurich American Insurance Company. That policy provides $250 million in coverage for the benefit of Cato and its named subsidiaries in exchange for substantial premiums. A copy of the policy was attached as an exhibit to Cato's initial complaint and incorporated therein by reference.

Like the policy at issue in *North State Deli*, No. 225PA21-2, Cato's policy is an "all-risk" commercial property insurance policy. That means the policy defines the scope of covered risks by its exclusions. *See N. State Deli*, No. 225PA21-2, slip op. at 5–7. Section 1.01 of the policy reads, "This Policy Insures against direct physical loss of or damage caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location . . . all subject to the terms, conditions and exclusions stated in this Policy." The bold lettering connotes a defined policy term. In turn, Covered Cause of Loss is defined as "All risks of direct physical loss of or damage from any cause unless excluded." The policy does not define "direct physical loss of or damage," or any constituent term in that phrase.

One such excluded risk is "contamination." Specifically, the policy excludes "**Contamination**, and any cost due to **Contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." In turn, "contamination" means "any condition of property due to the actual presence of any . . . virus."

The policy also provides coverage for lost business income due to direct physical loss of or damage to property. Specifically, under the "time element" coverage provision, Zurich must pay for

> the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary **Suspension** of the insured's business activities at an Insured Location. The **Suspension** must be due to direct physical loss of or damage to Property (of the type insurable under this Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the **Location** . . . .

This insurance contract was in effect when the pandemic struck in the spring of 2020.

B. Cato alleges that the COVID-19 virus caused "direct physical loss of or damage" to property.

As Cato alleges, beginning in March 2020, the COVID-19 virus "physically inundated" Cato's stores.[1] The virus's "physical impacts . . . damaged [Cato's] properties" and rendered them "uninhabitable, unfit, unsafe and unusable." Government orders forced Cato's stores to close and set limits and conditions on how they could later reopen. Cato had to "remediate and reconfigure" its physical spaces "because of the pervasiveness of the COVID Virus, including its direct physical impacts on property." Cato incurred significant revenue losses because of the virus's impairment of its property and related government mandates. It also incurred great expense in attempting to remove the virus "and otherwise remediate, reconfigure and restore the physical damage to its properties," including by altering "the physical structures to comply with governmental safety guidelines and best practices."

Cato sought coverage for losses sustained due to the virus's impairment of the safety, use, and functionality of its stores in March of 2020. Zurich neither affirmed nor denied coverage for Cato's claim, instead issuing a reservation of rights letter pointing to various policy provisions. Cato then sued before the expiration of the one-year contractual limit, seeking a declaratory judgment that its losses were covered under its policy with Zurich, and requesting damages for breach of contract as well as treble damages and attorneys' fees for violations of North Carolina's Unfair and Deceptive Trade Practices Act.

C. Court of Appeals affirms dismissal of Cato's claims.

Zurich moved to dismiss all of Cato's claims under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2023). After a hearing, the trial court concluded that the decision of the Court of Appeals in *North State Deli*, 284 N.C. App. 330, was "authoritative and warrants dismissal" of Cato's claims. In particular, it observed that "in order for a loss to be covered by the policy, the loss must have resulted from physical harm to the property of the insured." Cato's allegations that the COVID-19 virus physically damaged the covered property were "not sufficient to overcome" that caselaw.

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1. Consistent with Cato's complaint, we use "COVID-19 virus" in this opinion to refer to the SARS-CoV-2 virus which causes the COVID-19 respiratory illness.

Cato appealed, and on review, the Court of Appeals held that "tangible alteration to the property is necessary to" recover for a "direct physical loss of or damage" to property. *Cato Corp. v. Zurich Am. Ins. Co.*, No. 23-305, slip op. at 9 (N.C. Ct. App. Nov. 21, 2023) (unpublished). Cato failed to allege such losses in its complaint, the court concluded, because "the record does not indicate any 'physical transformation' of plaintiffs' property." *Id.* at 10 (citing *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883 (S.D.W. Va. 2020), *aff'd*, 27 F.4th 926 (4th Cir. 2022)). Although Cato alleged that the virus causes "tangible physical transformation of the air and surfaces" of its property, "adhered to all objects and surfaces" in the property, and "transformed Covered Properties into dangerous vectors of illness and disease . . . requir[ing] ongoing remediation," *id.* at 9–10, those allegations were, in the view of the Court of Appeals, "unwarranted deductions of fact" not entitled to the presumption of truth at the motion to dismiss stage, *id.* at 10 (quoting *Sutton v. Duke*, 277 N.C. 94, 98 (1970)). The Court of Appeals did not reach the issue of whether coverage was barred by a policy exclusion, reasoning that an insurer has no burden to prove a policy exclusion until a prima facie case of coverage is shown. *Id.* at 14 (citing *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 430 (2000)). The Court of Appeals affirmed the trial court's order dismissing Cato's complaint, and Cato again appealed. We allowed Cato's petition for discretionary review on 21 May 2024.

II. Analysis

We conclude that Cato sufficiently alleged a "direct physical loss of or damage" to property under the approach we articulated in *North State Deli*, No. 225PA21-2. However, Zurich met its burden to prove the contamination exclusion applies, and therefore, Cato's claims were properly dismissed. We address each issue in turn.

A. Standard of review.

North Carolina is a notice pleading state, meaning that a complaint need only give "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442 (1988); *see also* N.C.G.S. § 1A-1, Rule 8(a)(1) (2023). It is not appropriate to dismiss a complaint unless "it appears to a certainty that [the] plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Est. of Graham v. Lambert*, 385 N.C. 644, 656 (2024) (quoting *Sutton*, 277 N.C. at 103).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim. *Id.* The motion is properly granted "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175 (1986). On a Rule 12(b)(6) motion, well-pleaded allegations of fact in the complaint are treated as true, but conclusions of law are not. *Id.* at 174–75. Factual inferences should be viewed "in the light most favorable to the nonmoving party." *See CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016) (quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682 (1987)).

"Questions concerning the meaning of contractual provisions in an insurance policy are reviewed *de novo* on appeal." *Register v. White*, 358 N.C. 691, 693 (2004). As we explained in *North State Deli*, when interpreting a contract for insurance, the plain language and ordinary meaning of the policy control unless the contract specifically defines certain terms or the context suggests otherwise. No. 225PA21-2, slip op. at 11–12. The contract "should be given that construction which a reasonable person in the position of the insured would have understood it to mean." *Id.* at 12 (quoting *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978)). Where the language of a contract is reasonably susceptible to either construction offered by the parties, the ambiguity should be construed in the policyholder's favor. *Id.* at 12–14 (citing *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295 (2020)).

B. Cato's complaint sufficiently alleged a "direct physical loss of or damage" to property.

North State Deli, No. 225PA21-2, controls here on the question of whether, absent an exclusion, the policy covers this loss. Applying that precedent, Cato did sufficiently allege a "direct physical loss of or damage" to property.

The parts of Cato's policy that grant coverage are functionally the same as the parts of North State Deli's policy that grant coverage. Both policies rely on the operative phrase "direct physical loss" without defining that term, so it must be given its ordinary meaning. *Id.* at 14–15; *see also Accardi*, 373 N.C. at 295. Both make use of the conjunctive "or," as in the phrase "direct physical loss of or damage" to property, so direct physical loss must have a distinct and possibly broader meaning than physical damage in order to give effect to both phrases. *See N. State Deli*, No. 225PA21-2, slip op. at 16–17; *C.D. Spangler Constr. Co.*

v. Indus. Crankshaft & Eng'g Co., 326 N.C. 133, 142 (1990). And both contain a set of exclusions that suggest a broader meaning of "direct physical loss" of property. *See N. State Deli*, No. 225PA21-2, slip op. at 19. Here, for example, Cato's policy excludes unexplained disappearances, seizure or other governmental destruction, the cumulative effects of dust, and "delay, loss of market, or loss of use." Those exclusions suggest the scope of "direct physical loss" of property is broader than physical tangible alteration to property, or else they need not be mentioned as exclusions to begin with.

In its complaint, Cato alleged specific facts to show that "The COVID Virus caused tangible physical transformation of the air and surfaces at the Cato's Covered Properties [sic], and rendered them dangerous transmission sources for the COVID Virus, making the Covered Properties unsafe, unfit, non-functional and uninhabitable for their intended uses." That physical destruction, "along with the government orders that recognized these physical effects, shuttered Cato's Covered Properties and caused physical loss of Cato's use of the Covered Properties."

Thus, accepting these factual allegations as true and taking factual inferences in the light most favorable to the nonmoving party, as we must at the motion to dismiss stage, Cato met its burden to show coverage due to a "direct physical loss of or damage" to property. *See Jackson*, 318 N.C. at 174–75; *CommScope Credit Union*, 369 N.C. at 51.

C. The contamination exclusion applies to Cato's alleged losses.

Once a prima facie case of coverage is shown, the insurer has the burden to prove a policy exclusion precludes coverage. *See Fortune Ins. Co.*, 351 N.C. at 430. We conclude that Zurich has met its burden here and that the contamination exclusion in Cato's policy precludes coverage for Cato's alleged losses.

To assess whether any exclusion applies, we review the full text of Cato's policy. Such a review is appropriate at the motion to dismiss stage without converting the motion to one for summary judgment, because the policy was attached as an exhibit to Cato's initial complaint and explicitly incorporated therein. *See* N.C.G.S. § 1A-1, Rule 12(b) (2023). One part of the policy explicitly excludes coverage for losses resulting from "contamination." Specifically, contamination and "any cost" associated with it, "including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy" is excluded by the policy. In turn, "contamination" is defined as "[a]ny condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or

pathogenic organism, bacteria, *virus*, disease causing or illness causing agent, Fungus, mold or mildew." (Emphasis in original omitted; italicized emphasis added.)

Viral contamination is essentially what Cato alleges. It alleges that the COVID-19 virus's "physical transformation of the air and surfaces" rendered its properties "dangerous transmission sources" and made them unsafe and non-functional for their intended uses. "[B]ecause of the pervasiveness of the COVID Virus," Cato's stores "were compelled by government orders to close, severely curtail operations, and remediate and reconfigure their spaces." A "reasonable person in the position of the insured," *see Grant*, 295 N.C. at 43, would understand such allegations to qualify as "condition[s] of property due to the actual presence of any . . . virus."[2]

Cato responds that this is not the operative definition of "contamination" or "contaminant" in its policy. Instead, it says that it alleged it paid a higher premium for a different definition of "contamination." That revised definition is located in a series of "amendatory endorsements" at the end of the policy, which appear with labels corresponding to specific states—thirty-one states, in fact. Cato argues that the "Amendatory Endorsement – Louisiana" policy provision amended Cato's coverage by deleting the definition of "contamination" listed in the main body of the policy and described above, replacing it with one that excludes viruses. Thus, it contends, viral contamination is covered.

Cato's argument that its North Carolina policy incorporates the Louisiana amendatory endorsement is unpersuasive. To start, Cato's complaint does not allege, as a factual matter, that it bargained for the Louisiana endorsement to apply to its policy covering properties not in Louisiana. The complaint makes a general allegation that not having a *virus exclusion* in an "all-risk" policy means Cato paid a higher premium for virus coverage. It specifically defines that *virus exclusion* as a standalone "Exclusion Of Loss Due To Virus or Bacteria" that it alleges is "contained in most of [Zurich's] other all risks property insurance policies."[3] Then, in a footnote, the complaint alleges that the separate

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2. Cato seems to concede as much in its brief to this Court, when it explained in a footnote how the virus physically damages surfaces: "When *contaminated* with the Covid Virus or another infectious organism, . . . the surface or object to which the virus or organism adheres is transformed into a 'fomite.' " (Emphasis added.)

3. That separate virus exclusion allegedly states that Zurich "will not pay for loss or damage caused by or resulting from any virus."

contamination exclusion does not preclude coverage for Cato's losses. But it does not explain why. Nor does it argue that it has any stores or properties in Louisiana. Absent such factual allegations, the effect of the endorsement as it appears in the policy is a question of law not entitled to a presumption of truth. *See Register*, 358 N.C. at 693.

Relying then on the insurance contract itself, Cato alternatively argues that the thirty-one state-specific amendatory endorsements contain contradictions and should therefore be strictly construed in Cato's favor. It points out that two of the thirty-one state-labeled amendatory endorsements (Connecticut and New York) specify that the endorsement "**APPLIES TO THOSE RISKS IN** [state name]." The twenty-nine other amendatory endorsements omit such limiting language, including the one labeled "Louisiana." The Louisiana amendatory endorsement also proclaims: "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**."

Certainly the amendatory endorsements would be clearer if each specified that it applied to risks only in the state corresponding to its label. But that something could be written more clearly does not necessarily make it ambiguous; rather, an ambiguity exists in an insurance contract when its language is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *See Accardi*, 373 N.C. at 295. We think these labels are reasonably susceptible to only one construction: a "reasonable person in the position of the insured" would construe an "Amendatory Endorsement – Louisiana" in the context of thirty other state-specific amendatory endorsements as having some connection to risks or losses only in Louisiana. *See Grant*, 295 N.C. at 43. Thus, it is not applicable here, where Cato does not allege any connection to Louisiana.

This reading also comports with the other interpretive principle that insurance policy provisions should be read in harmony and not to create conflicts. *See C.D. Spangler Constr. Co.*, 326 N.C. at 142. If we look only at the state-specific amendatory endorsements that do *not* have language limiting them to risks in those states (i.e., the twenty-nine other endorsements outside of Connecticut and New York), and read those to affect policies in all states, conflicts abound. For example, the Georgia amendatory endorsement requires legal action to be initiated within twenty-four months of the date of the loss, while Maryland states three years, and Missouri states ten years. The Alaska amendatory endorsement states that if the insured cancels, the refund may be subject to a cancellation fee of 7.5% of any unearned premium, while the Florida amendatory endorsement does not mention a cancellation fee

and instead provides that "the refund may be less than pro rata but no less than 90% of the pro rata unearned premium." Those two amendatory endorsements also specify different timelines by which a refund is to be mailed. Alaska states any premium refund will be mailed within forty-five days after the request for cancellation; Florida states any premium refund will be mailed within fifteen days of the cancellation taking effect. Reading the state-specific amendatory endorsements to apply only to those risks in the respective states avoids these conflicts and harmonizes the provisions consistent with the parties' intent. *See C.D. Spangler Constr. Co.*, 326 N.C. at 142.

Cato makes the final point that a different provision of the policy instructs that "The titles of the various paragraphs *and endorsements* are solely for reference and shall not in any way affect the provisions to which they relate." (Emphasis added.) This limitation must mean that the "Amendatory Endorsement – Louisiana" provision cannot be read in a manner that affects the scope of Cato's coverage, it asserts. But if that were right, the titles of each endorsement would become superfluous. That again contradicts our obligation to give effect to each policy provision. *See C.D. Spangler Constr. Co.*, 326 N.C. at 142. The more harmonious reading is that the titles do serve as a reference to understand *where* coverage applies, but do not change the underlying substance of the applicable policy.

In sum, a "reasonable person in the position of the insured" would understand the viral contamination exclusion in Cato's policy to exclude Cato's alleged losses. *See Grant*, 295 N.C. at 43. That exclusion bars coverage for Cato's alleged losses here.

III. Conclusion

For the foregoing reasons, we conclude that Cato's alleged losses are barred by the viral contamination exclusion in its commercial property insurance policy with Zurich. We modify the Court of Appeals decision below but affirm its judgment dismissing Cato's claims.

MODIFIED AND AFFIRMED.

DIECKHAUS v. BD. OF GOVERNORS OF THE UNIV. OF N.C.

[386 N.C. 677 (2024)]

DEENA DIECKHAUS, GINA MCALLISTER, BRADY WAYNE ALLEN, JACORIA STANLEY, NICHOLAS SPOONEY, AND VIVIAN HOOD, EACH INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA

No. 105PA23

Filed 13 December 2024

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 287 N.C. App. 396 (2023), affirming the trial court's dismissal of plaintiffs' claims on 17 June 2021 by Judge Edwin G. Wilson Jr. in Superior Court, Orange County. Heard in the Supreme Court on 22 October 2024.

Eric M. Poulin for plaintiff-appellants.

Dowling PLLC, by Craig D. Schauer and Troy D. Shelton; Joshua H. Stein, Attorney General, by Laura McHenry, Special Deputy Attorney General, and Lindsay Vance Smith, Deputy Solicitor General; and Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips Jr., Jennifer K. Van Zant, and Katarina Wong, for defendant-appellee.

Ellis & Winters LLP, by Steven A. Scoggan, Kyle A. Medin, and Tyler C. Jameson, for North Carolina Chamber Legal Institute, amicus curiae.

PER CURIAM.

Justice BARRINGER did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g.*, *Batson v. Coastal Res. Comm'n*, 385 N.C. 328, 892 S.E.2d 589 (2023) (per curiam) (affirming by an equally divided vote a Court of Appeals decision leaving it as law of the case without further precedential value).

AFFIRMED.

IN RE CHASTAIN

[386 N.C. 678 (2024)]

IN THE MATTER OF PATRICIA BURNETTE CHASTAIN

No. 283A22-2

Filed 13 December 2024

1. Constitutional Law—clerk of superior court—constitutional officer—removal—authority of a replacement judge appointed by the Chief Justice

Following two trial court proceedings removing a duly elected clerk of superior court—the second of which was conducted on remand from the Court of Appeals—the Supreme Court overruled the lower appellate court's holding in the clerk's first appeal that, upon the recusal of the senior regular resident superior court judge (the official authorized to preside in such cases pursuant to Article IV, Section 17(4) of the North Carolina Constitution), a replacement judge appointed by the Chief Justice lacked authority to preside in the matter. The Chief Justice is authorized by N.C.G.S. § 7A-41.1(e) to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties, including to preside in a clerk removal proceeding.

2. Constitutional Law—clerk of superior court—removal—procedural due process

The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, due process considerations require that a clerk may be removed only for conduct identified in the charging affidavit that initiated the removal proceeding per N.C.G.S. § 7A-105.

3. Constitutional Law—clerk of superior court—removal standard

The Supreme Court clarified that, in a proceeding to remove a duly elected clerk of superior court pursuant to Article IV, Section 17(4) of the North Carolina Constitution, "misconduct"—wrongful, unlawful, dishonest, or improper conduct—rather than "willful misconduct," is the proper standard to be applied.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 271 (2023), affirming an order entered on 5 April 2022 by Judge Thomas H. Lock in Superior Court, Franklin County. On 15 December 2023, the Supreme Court allowed petitioner's and respondent's petitions for

discretionary review as to additional issues. Heard in the Supreme Court on 19 September 2024.

Fox Rothschild LLP, by Kip D. Nelson and Elizabeth Brooks Scherer; and Davis, Sturges & Tomlinson, PLLC, by Conrad B. Sturges III, for petitioner-appellee.

Zaytoun & Ballew, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and Zachary R. Kaplan, for respondent-appellant.

RIGGS, Justice.

Clerks of the superior court are constitutional officers elected by qualified voters in the county where they serve. N.C. Const. art. IV, § 9(3). The North Carolina Constitution allows for removal of a duly-elected clerk "for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county." N.C. Const. art. IV, § 17(4).

In this case, we consider the proper procedure for removal of a clerk in accordance with Article IV of the North Carolina Constitution. We hold that when the senior regular resident superior court judge is recused from the case and a replacement judge is commissioned to serve in that position for the removal proceeding, the replacement judge, serving in the official role of senior regular resident superior court judge in that matter, has the authority to remove the clerk. Further, we hold that procedural due process requires that the clerk only be subject to removal for conduct identified in the sworn affidavit that initiates the removal proceeding under N.C.G.S. § 7A-105. Lastly, we hold that removal of a clerk under Article IV is on the basis of the misconduct standard set forth in the plain language of Article IV, Section 17(4) of the North Carolina Constitution, not under the willful misconduct standard articulated in N.C.G.S. § 7A-105.

For these reasons, we vacate the decision of the Court of Appeals in *In re Chastain* (*Chastain II*), 289 N.C. App. 271 (2023), overrule the holding of *In re Chastain* (*Chastain I*), 281 N.C. App. 520 (2022), and remand the case for reconsideration of removal under Article IV not inconsistent with the standards established in this opinion.

I. Facts & Procedural Background

In May 2013, Patricia Burnette Chastain was appointed to the position of clerk of superior court in Franklin County. In the November 2013

election, the voters in Franklin County elected her to a four-year term as clerk. She was reelected to a second term in 2017.

On 13 July 2020, Jeffrey Thompson, an attorney in Franklin County, requested "an inquiry be commenced by the Senior Resident Judge of the Ninth Judicial District to determine if it is appropriate to remove Ms. Chastain as Clerk of the Franklin County Superior Court."Mr. Thompson filed an affidavit pursuant to N.C.G.S. § 7A-105 (Charging Affidavit) identifying the specific incidents that motivated his desire for an inquiry. The Charging Affidavit accused Ms. Chastain of willful misconduct, willful and persistent failure to perform her duties, habitual intemperance, and conduct prejudicial to the administration of justice. Mr. Thompson alleged[1] in the Charging Affidavit that Ms. Chastain, acting in her official capacity as clerk: (1) distributed gift certificates for smoothies to jurors in a criminal case; (2) allowed a judicial candidate to address a jury venire[2]; (3) acted unprofessionally with correctional officers at the Franklin County Detention Center and demanded access to detainees; (4) injected herself in a property dispute without proper authority and attempted to mediate the dispute outside the presence of the parties' attorneys; (5) attempted to mediate a child custody dispute that she did not have jurisdiction over; (6) requested medical records on official judicial letterhead without authority to request the records; (7) failed to timely and accurately reconcile bank records and report on financial matters within the clerk's office; (8) made inappropriate comments about the chief magistrate to members of the public; and (9) kept irregular work hours and acted erratically while at work.

On the day the Charging Affidavit was filed, Judge John M. Dunlow, Franklin County's senior resident superior court judge, entered an order suspending Ms. Chastain and set the matter for a hearing on 6 August 2020. Ms. Chastain filed a motion to recuse Judge Dunlow and the only other Franklin County superior court judge, Cindy Sturges, from presiding over the removal inquiry because of their involvement in one of the incidents in the Charging Affidavit. Special Superior Court Judge J. Stanley Carmical granted the motion of recusal. Based upon the recusal of these judges, the Chief Justice of the Supreme Court of North

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1. Mr. Thompson acknowledged in his affidavit that he did not have first-hand knowledge of all the allegations; he clarified that the information in the affidavit was based upon information gained in his professional role, from his review of documents, and from information told to him by others.

2. Prior to the removal hearing, District Attorney Michael D. Waters sent a letter to Ms. Chastain advising her of the impropriety of her actions and requesting that she refrain from any contact with jury venires.

Carolina commissioned Superior Court Judge Thomas H. Lock to preside over the removal inquiry.

Judge Lock held an evidentiary hearing on 28 through 30 September 2020. After considering the evidence, Judge Lock entered an order on 16 October 2020 (2020 Removal Order), permanently removing Ms. Chastain from her elected position as clerk based upon the removal procedures found in N.C. Const. art. IV, § 17(4) and N.C.G.S. § 7A-105. In the 2020 Removal Order, Judge Lock made findings of fact regarding the allegations in the Charging Affidavit. Additionally, Judge Lock made findings of fact about two allegations that were not included in the Charging Affidavit. The additional allegations were: (1) Ms. Chastain frequently approached District Attorney Michael D. Waters on "behalf of citizens charged with traffic and minor criminal offenses and ask[ed] him to reduce or dismiss their charges"; and (2) Ms. Chastain frequently asked Chief District Court Judge W. Davis to strike orders for arrest. Judge Lock concluded that "[e]ven if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct" and "warrant[ed] her permanent removal from the office" of Franklin County Clerk of Superior Court. Ms. Chastain appealed.

The Court of Appeals concluded that Article IV "confers on a single individual[ ], the authority to remove the elected Clerk in a county; namely, the senior regular resident Superior Court Judge in that same county." *Chastain I*, 281 N.C. App. at 523. For this reason, the Court of Appeals held that the replacement judge, Judge Lock, lacked authority to consider Ms. Chastain's removal under Article IV. *Id.* at 524. The Court of Appeals then considered "the other constitutional avenue by which a sitting Clerk may be removed," concluding that Ms. Chastain could "be removed from her current term as a consequence of being disqualified from holding any office under Article VI [if] she is adjudged guilty of corruption or malpractice in any office." *Id.* at 524–25 (cleaned up). The court went on to define "corruption and malpractice," ultimately holding that "acts of willful misconduct which are egregious in nature" constitute "corruption or malpractice" under Article VI. *Id.* at 528 (citing *In re Peoples*, 296 N.C. 109 (1978)). The Court of Appeals vacated the order and remanded for reconsideration of whether Ms. Chastain's conduct rose to the level of corruption or malpractice under Article VI. *Id.* at 530.

On remand, Judge Lock entered a new order on 5 April 2022 (2022 Removal Order), concluding Ms. Chastain was "permanently disqualified from serving in the Office as Clerk of Superior Court of Franklin County."

Judge Lock concluded that "[e]ven if Respondent's acts of misconduct viewed in isolation do not constitute willful misconduct, her knowing and persistently repeated conduct prejudicial to the administration of justice itself rises to the level of willful misconduct [and] is equivalent to corruption or malpractice under Article VI of the Constitution of North Carolina and warrants permanent disqualification from office." Ms. Chastain again appealed to the Court of Appeals.

During the second appeal, a divided panel at the Court of Appeals affirmed the 2022 Removal Order, holding that the findings of fact supported the conclusion that Ms. Chastain's conduct rose to the level of corruption or malpractice. *Chastain II*, 289 N.C. App. at 291. The majority, however, went on to note its disagreement with the holding in *Chastain I*. *Id.* at 292. Specifically, the majority in *Chastain II* opined that Article VI, Section 8, "concerns disqualification for office, not removal from office," *id.* at 292, and thus the *Chastain II* majority did not believe removal from office would be proper under Article VI, *id.* at 294. Instead, the majority in *Chastain II* believed that the Court of Appeals in *Chastain I* should have remanded the matter for further proceedings by Judge Dunlow under Article IV. *Id.* 294–95. Notwithstanding that disagreement, the *Chastain II* majority proceeded, consistent with *In re Civil Penalty*, 324 N.C. 373, 384 (1989), and followed the *Chastain I* decision on Article VI. *Id.*

Judge Wood dissented from the holding that Ms. Chastain's conduct rose to the level of corruption or malpractice. *Id.* at 300 (Wood, J., dissenting). In her view, Ms. Chastain's conduct was "not *egregious* as to merit her disqualification and removal from the elected office of Clerk of Superior Court" under Article VI. *Id.*

Ms. Chastain appealed to this Court based on Judge Wood's dissent. We also allowed Ms. Chastain's petition for discretionary review as to additional issues and Mr. Thompson's petition for discretionary review as to additional issues.

II. Analysis

This case addresses the proper procedure for the removal of a duly-elected clerk of superior court. At the outset, we acknowledge that the Court of Appeals in *Chastain II* was bound to consider whether Ms. Chastain's removal was proper under Article VI based upon the earlier Court of Appeals' decision in *Chastain I*, as opposed to revisiting the decision about Article IV removal. *Chastain II*, 289 N.C. App. at 274; *see also In re Civ. Penalty*, 324 N.C. at 384 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a

subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

However, we do not agree with the Court of Appeals' holding in *Chastain I* that the "only individual" with authority under Article IV to remove Ms. Chastain was Judge Dunlow, Franklin County's senior regular resident superior court judge. *Chastain I*, 281 N.C. App. at 523. The Constitution designates the senior regular resident superior court judge as the judicial officer with the authority to preside over a removal proceeding when charges are brought against a clerk. N.C. Const. art. IV, § 17(4). Because that proceeding is judicial in nature, when the senior resident superior court judge has a conflict of interest and cannot fairly conduct that proceeding, the judicial branch may designate another superior court judge to preside. Therefore, when Judge Dunlow was recused from the matter and Judge Lock was commissioned to replace him, Judge Lock had the constitutional authority under Article IV to preside over the removal hearing.

Next, in both *Chastain I* and *Chastain II*, the Court of Appeals recognized that removal of a clerk is only proper based upon allegations put forth in the affidavit that initiates the proceeding. *Chastain I*, 281 N.C. App. at 528–29; *Chastain II*, 289 N.C. at 277–78. We affirm the determination that removal under Article IV is only properly based upon allegations identified in the affidavit that initiates the removal process per N.C.G.S. § 7A-105.

Lastly, neither *Chastain I* nor *Chastain II* laid out the proper standard for removal under Article IV. We clarify that the proper standard for the removal of a clerk under Article IV is misconduct—as stated in the Constitution—rather than the willful misconduct standard identified in N.C.G.S. § 7A-105. *See* N.C.G.S. § 7A-105 (2023). On remand, Judge Lock should consider whether removal is proper based upon the standard for misconduct described below.

A. Article IV Removal Hearing

[1] A clerk of superior court is an elected constitutional and judicial officer with "jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable to every county of the State." N.C. Const. art. IV, §§ 9(3), 12(3). The Constitution also sets forth conditions under which an elected clerk may be removed from office; clerks "may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county." N.C. Const. art. IV, § 17(4).

In *Chastain I*, the Court of Appeals interpreted the language in Section 17(4) to "confer on a single individual[ ], the authority to remove the elected Clerk in a county" and "no other judge may be conferred with jurisdiction over the subject matter of removing a Clerk for misconduct under Article IV." *Chastain I*, 281 N.C. App. at 523. However, "issues concerning the proper construction and application of . . . the Constitution of North Carolina can only be answered with finality by this Court." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989). In interpreting our Constitution, where the meaning is clear from the words, there is no need to search for meaning elsewhere. *Id.* When interpreting the "clemency power" granted to the Governor under Article III, Section 5(6) of the Constitution, this Court held that only the Governor, and no other executive branch official, can exercise the power of clemency. *Bacon v. Lee*, 353 N.C. 696, 718 (2001). In *Bacon*, a death row inmate sought to have the Governor—who was involved in prosecuting the inmate's criminal case—delegate the clemency power to the Lieutenant Governor, who had no potential conflict of interest. *Id.* In rejecting this request, this Court held that "only the Governor . . . may exercise the clemency authority established by the people of North Carolina in their Constitution." *Id.*

Following this reasoning, the Court of Appeals in *Chastain I* held that only the senior regular resident superior court judge serving Franklin County could conduct the removal proceeding in this case and, if that judicial official could not do so, no other judge could replace him. However, examining Article IV, Section 17(4), within the structure of Article IV as a whole explains why the analogy to the executive's clemency power does not answer the question here.

The position of "senior regular resident Superior Court Judge"[3] appears three times in Article IV. *See* N.C. Const. art. IV, §§ 9(3), 10, 17(4). The first two provisions grant the senior regular resident superior court judge the power to appoint other public officials: allowing appointment of a temporary clerk, *id.* art. IV, § 9(3); and allowing appointments of magistrates, *id.* art. IV, § 10. The third provision—removal of a clerk of superior court—is at issue in this case. *Id.* art. IV, § 17(4).

In each provision, the constitution provides the senior resident superior court judge with special authority that would not function unless only one person could wield it at any given time. *See id.* But unlike the

3. In Section 17, the position is styled as senior regular resident Superior Court Judge. In Sections 9 and 10, the position is styled as senior regular resident Judge of the Superior Court.

other two provisions—which grant appointment power—the removal proceeding in Section 17(4) of Article IV requires the judge to preside over a hearing and enter a judgment according to law. *Id.* In other words, it requires the judge to wield the judicial power. When adjudicating cases, all superior court judges are judicial officers of the Superior Court Division of our General Court of Justice. *See id.* art. IV, § 2. Thus, in this context, the senior regular resident superior court judge has no unique constitutional power greater than other judges of the superior court. *See also* N.C.G.S. § 7A-41.1(c) (2023) ("Senior resident superior court judges and regular resident superior court judges possess equal judicial jurisdiction, power, authority and status[.]").

Article IV, Section 17 of the Constitution does not limit the authority to preside over a clerk's removal proceeding to a single judge in the same way that Article III, Section 5 limits the clemency power solely to the Governor. Instead, Section 17 of Article IV identified the position of senior regular resident superior court judge serving the county as the default judicial officer who must adjudicate charges brought against a clerk of superior court under Article IV. *Id.* art. IV, § 17(4). But in a circumstance where that superior court judge has a conflict of interest and cannot fairly hear the case, the judicial branch may substitute another superior court judge of the General Court of Justice to preside over the proceeding and enter the judgment of the trial division. *See* N.C. Const. art. IV, § 9(1) (granting the General Assembly the authority to provide by general law for the selection or appointment of special or emergency Superior Court Judges); *see also* N.C.G.S. § 7A-41.1(e) (providing the Chief Justice the authority to appoint an acting senior resident superior court judge when the regular senior resident superior court judge is unable to perform their duties).

That is the scenario in this case. When Judge Dunlow was recused from this case, the Chief Justice exercised her authority to appoint Judge Lock as the superior court judge authorized to preside over the matter. Accordingly, we hold that Judge Lock properly had the constitutional authority to preside over the Article IV removal proceeding in this case.

The Court of Appeals went on to acknowledge that where the disqualification of a judge "would result in a denial of a litigant's constitutional right to have a question properly presented" to a court of last resort, then the Rule of Necessity operates to allow a judge to hear a matter notwithstanding that their participation may violate a judicial ethical canon. *Chastain I*, 281 N.C. App. at 523 (quoting *Lake v. State Health Plan for Tchrs. & State Emps.*, 376 N.C. 661, 664 (2021)). But here Judge Dunlow's recusal would not deny Ms. Chastain her constitutional right

to have the removal question presented to the court. The Chief Justice has authority to appoint a judge to step into the position of senior regular resident superior court judge to preside over the removal hearing. Because Judge Dunlow was recused and Judge Lock was properly appointed, Judge Lock had jurisdiction to preside over the Article IV removal proceeding.

B. Due Process for the Removal Proceeding

[2] Having concluded that Judge Lock had subject matter jurisdiction over the Article IV removal proceeding, we turn our attention to the question of whether removal under Article IV can only be based upon acts identified in the affidavit used to initiate the proceeding. *See* N.C.G.S. § 7A-105 (mandating that "the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides"). A proceeding resulting in the removal of an elected public official must afford the individual all the benefits of due process of law. *In re Spivey*, 345 N.C. 404, 413–14 (1997) (concluding that the North Carolina Constitution does not prohibit the General Assembly from enacting a statutory method of removal so long as the removal process provides due process of law). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *McLean v. McLean*, 233 N.C. 139, 146 (1951) (quoting *Mullane v. Cent. Hanover Bank & Tr., Co.*, 339 U.S. 306, 314 (1950)).

Because a removal proceeding is neither a civil nor criminal proceeding, the only notice a respondent receives of the removal proceeding is the affidavit that initiates the process. *See* N.C.G.S. § 7A-105 (outlining the procedures for removal of a clerk and incorporating by reference the requirements for removal of a district attorney under N.C.G.S. § 7A-66); *see also* N.C.G.S. § 7A-66 (2023) (outlining the procedures for removal of district attorneys). The statutory process designates that the affidavit which initiates the proceeding must state the grounds for removal. N.C.G.S. § 7A-66 ("A proceeding . . . is commenced by filing . . . a sworn affidavit charging . . . one or more grounds for removal."). Additionally, the General Assembly requires "immediate written notice of the proceedings and a true copy of the charges" and that "the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter." *Id.* So long as the statutory language does not conflict with the Constitution, we presume that the procedure set forth in the statute is valid. *See State ex rel. Martin*, 325 N.C. at 448–49 ("All power which is not expressly

limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.").

Ms. Chastain argues that the 2020 and the 2022 Removal Orders relied upon acts not identified in the Charging Affidavit as some partial basis for removal. The Court of Appeals in *Chastain I* agreed with Ms. Chastain as to the 2020 Removal Order and concluded that reliance on "acts that were not alleged in [the Charging Affidavit] violated Ms. Chastain's due process rights." *Chastain I*, 281 N.C. App. at 529. The Charging Affidavit contained a long list of alleged misconduct, including nine specific incidents where Mr. Thompson asserted that Ms. Chastain acted in a manner constituting willful misconduct, willful and persistent failure to perform her duties, habitual intemperance, and conduct prejudicial to the administration of justice. As part of the removal proceeding, Judge Lock made more than thirty findings of fact about the allegations identified in the Charging Affidavit.[4]

However, during the removal hearing, Judge Lock also heard testimony and made findings about two additional allegations of misconduct that were not identified in the Charging Affidavit. Those allegations were that Ms. Chastain asked the district attorney to reduce or dismiss charges for traffic and minor criminal offenses and that Ms. Chastain asked the chief district court judge to strike orders for arrest. Relying on allegations not proffered in the Charging Affidavit does not comport with the procedures for removal of a clerk set forth by the General Assembly; specifically, our statutes require that the grounds for removal are identified in the sworn affidavit that initiates the removal proceeding. *See* N.C.G.S. §§ 7A-105, -66.

In a removal proceeding, which by statute must commence within thirty days after the filing of the affidavit, respondents must have notice of all allegations in the affidavit so that they can mount a defense against those allegations. Therefore, on remand, Judge Lock may only consider the allegations in the Charging Affidavit as grounds for removal under Article IV.

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4. The trial court noted in the order that the affiant expressly abandoned the allegation of irregular work hours and intemperance and that the affiant did not provide any evidence in support of the allegations of "interference in a child custody case" and "unauthorized demands for medical records." Therefore, those allegations were not considered as bases for the removal.

C. Standard for Removal Under Article IV

[3] Lastly, we consider the standard for the removal of a clerk of superior court under Article IV. Section 17(4) of Article IV states that a clerk "may be removed from office for *misconduct* or mental or physical incapacity." N.C. Const. art. IV, § 17(4) (emphasis added). Notably, subsection four does not use the "willful misconduct" standard which is used in Section 17(2) of Article IV, addressing removal of judges and justices. *See* N.C. Const. art. IV, § 17(2). The statutory procedure for removal or suspension of a clerk, though, identifies that higher standard for removal—willful misconduct—as the applicable standard. N.C.G.S. § 7A-105. However, when "there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *City of Asheville v. State*, 369 N.C. 80, 88 (2016) (quoting *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690 (1978)). The constitutional language controls and, therefore, removal of a clerk under N.C. Const. art. IV, § 17(4) and N.C.G.S. § 7A-105 may be based upon misconduct, even if that conduct would not rise to the level of willful misconduct.

Nevertheless, this Court has not defined "misconduct" in the context of removal of a clerk under Article IV. The Court of Appeals, in the context of the Crime Victims Compensation Act, looking at whether a claimant's own misconduct was a proximate cause of his or her injury, recognized that misconduct is conduct "not within the accepted norm or standard of proper behavior." *Evans v. N.C. Dep't of Crime Control & Pub. Safety*, 101 N.C. App. 108, 117 (1990). "While misconduct includes unlawful conduct as a matter of law, it may be something less than unlawful conduct, though more than an act done in poor taste." *Id.* In the context of the removal of a prosecutor, this Court recognized that misconduct includes the "official doing of a wrongful act, or the official neglect to do an act which ought to have been done" even without a corrupt or malicious motive. *State ex. rel. Hyatt v. Hamme*, 180 N.C. 684, 688 (1920). These definitions align with the definition of misconduct found in Black's Law Dictionary: "dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." *Misconduct*, Black's Law Dictionary (12th ed. 2024). Applying these standards to the constitutional office of clerk of superior court, we conclude that misconduct for a clerk is wrongful, unlawful, dishonest, or improper conduct performed under the color of authority for the clerk of superior court as identified in N.C.G.S. § 7A-103. *See* N.C.G.S. § 7A-103 (2023) (outlining the authority of clerk of superior court).

Because the 2020 Removal Order is not before us, we do not simply reinstate that order. Nor do we suggest that the 2020 Removal Order, without factual findings on acts not identified in the Charging Affidavit, is necessarily inconsistent with this opinion. Thus, we remand this case to the Court of Appeals for further remand to Judge Lock to consider, consistent with this opinion, whether the findings of fact demonstrate misconduct sufficient to justify removal.

D. Disqualification of a Clerk Under Article VI

In his petition for discretionary review, Mr. Thompson asked this Court to outline the governing legal and procedural standard for removal under Article IV, Section 17(4), and disqualification under Article VI, Section 8, for a clerk of superior court. *See* N.C. Const. art. IV, § 17(4); N.C. Const. art. VI, § 8. Because we hold that Judge Lock has the authority to consider removal under Article IV, we do not need to consider the question of the proper legal and procedural standard for disqualification of a clerk under Article VI. We decline to reach that question until it is properly presented to this Court. Accordingly, we conclude that the petition for discretionary review as to the issue of the proper procedure for disqualification under N.C. Const. art. VI, § 8, was improvidently allowed.

III. Conclusion

In sum, we hold that after Judge Lock was commissioned to oversee the removal proceeding, he assumed the position of senior regular resident superior court judge for Article IV, Section 17(4) purposes and therefore, had authority to consider the removal of Ms. Chastain under N.C. Const. art. IV, § 17(4). Furthermore, procedural due process requires that removal only be based upon incidents identified in the sworn affidavit that initiates the removal procedure pursuant to N.C.G.S. § 7A-105. Lastly, we affirm that the standard for removal of a clerk under Article IV as set forth in the Constitution is misconduct. For these reasons, we overrule the holding in *Chastain I*, 281 N.C. App. 520, that Judge Lock did not have jurisdiction to remove Ms. Chastain under N.C. Const. art. IV, § 17(4). Additionally, we vacate the Court of Appeals' decision in *Chastain II*, 289 N.C. App. 271.

We remand the case to the Court of Appeals with instructions to further remand to Judge Lock for consideration of whether removal is proper under N.C. Const. art. IV, § 17(4) based upon the incidents identified in the Charging Affidavit and the standard for removal set forth in this opinion. Judge Lock retains the discretion to determine whether an additional hearing is necessary on this matter. Lastly, we note that

discretionary review was improvidently allowed as to the proper procedure and guidelines for disqualification of a clerk of superior court under N.C. Const. art. VI, § 8.

VACATED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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

IN THE MATTER OF K.C.

No. 142A23

Filed 13 December 2024

Appeal and Error—preservation of issues—constitutional rights of parent—determined by district court on its own initiative—not challenged in trial court

In a neglect proceeding resulting in the temporary placement of a juvenile with relatives, where the district court on its own initiative determined that the father had acted in a manner inconsistent with his constitutional rights as a parent but the father did not challenge that determination on constitutional grounds, that issue was not preserved for appellate review—a result in conformance with the longstanding precedent that constitutional arguments not raised in a trial court will not be considered for the first time on appeal, in part to ensure that parties have notice and an opportunity to present relevant evidence on the matter. In addition to reversing the lower appellate court's decision in the instant case, the Supreme Court expressly overruled the contrary preservation holding by the Court of Appeals in *In re B.R.W.* and its progeny.

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, 288 N.C. App. 543 (2023), vacating and remanding an order entered on 8 February 2022 by Judge Doretta L. Walker in District Court, Durham County. On 1 September 2023, the

Supreme Court allowed petitioner's petition for discretionary review as to additional issues. Heard in the Supreme Court on 20 February 2024.

Patrick A. Kuchyt for petitioner-appellant Durham County Department of Social Services.

Alston & Bird LLP, by Kelsey L. Kingsbery for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellee father.

DIETZ, Justice.

Parents have a constitutional right to care for their children and guide their upbringing. Sadly, there are times when the State's own compelling interest in protecting children forces the State to step in and remove children from their parents.

In our juvenile system, a complex series of statutes governs the removal of children from their parents' care. *See* N.C.G.S. § 7B-100 *et seq*. These statutes, known as the Juvenile Code, are designed to ensure that the rights of both parents and children are protected, while also prioritizing the children's need for a safe, permanent home during childhood.

In most juvenile cases, these statutory safeguards also ensure that the State's actions do not violate the parents' constitutional rights. But there can be rare cases in which—although the provisions of the Juvenile Code are satisfied—removing a child from the parent's care would violate the parent's constitutionally protected status. Put another way, there can be rare cases in which, as applied to a particular parent, the Juvenile Code is unconstitutional because its protections of a parent's interests are not strong enough. *See generally In re B.R.W.*, 381 N.C. 61, 77 (2022).

Importantly, this constitutional claim must be preserved for appellate review like any other. *See In re J.N.*, 381 N.C. 131, 133 (2022). To do so, a parent must inform the trial court and the opposing parties that the parent is asserting a challenge *on constitutional grounds* and articulate the basis for that constitutional claim. *Id*. at 133–34. If the parent fails to do so, the claim cannot be reviewed on appeal.

This waiver principle applies even if the trial court addresses the issue on its own initiative in its order. In that circumstance, waiver is compelled not only by the principles articulated in cases such as *In re*

J.N., but also from the doctrinal requirement that trial courts base their rulings on the evidence in the record. If a parent does not raise this constitutional claim, the opposing parties will not have notice that they must present evidence to rebut it—evidence that, by its nature, may be different from what is needed to satisfy the statutory criteria in the Juvenile Code.

In this case, the trial court examined and rejected the constitutional issue on its own initiative in its order. But respondent concedes that he did not raise this constitutional claim in the trial court. Because this unpreserved constitutional issue was the sole basis for respondent's appeal, the Court of Appeals erred by addressing it. We reverse the decision of the Court of Appeals.

Facts and Procedural History

I. Petition, Adjudication, and Disposition

Respondent is the father of four-year-old Katy.[1] Respondent and Katy's mother do not live together and Katy's mother had physical custody of the child, although respondent visited Katy at various times after she was born.

Shortly after Katy was born, the Alamance County Department of Social Services received a report that Katy tested positive for marijuana. During the investigation, Katy's mother also admitted to using cocaine while pregnant. Katy's mother later moved to Durham to reside with Katy's maternal grandmother. The Durham County Department of Social Services then took over the case. DSS attempted to offer services to Katy's mother to address her mental health, drug abuse, and anger management issues, but the mother declined to participate.

While Katy was still an infant, her mother caused an automobile accident while under the influence of alcohol and fled the scene. Following that incident, DSS established a safety plan for Katy and placed Katy with respondent. Several days later, DSS filed a petition alleging that Katy was a neglected juvenile. At the time, DSS believed respondent was a suitable placement for Katy and saw no issue with respondent caring for Katy.

Social workers handling the matter later learned that respondent had a lengthy criminal history which included convictions for driving

1. Pursuant to N.C. R. App. P. 42(b), the parties stipulated to use of this pseudonym to refer to the juvenile.

while license revoked, assault on a female, possession of marijuana, and possession of a firearm.

Before the initial disposition hearing, respondent was arrested again, this time for assault on a female. The assault allegedly occurred outside respondent's home while Katy was nearby. After learning of this arrest, DSS changed its dispositional recommendation and requested that Katy be placed with her paternal aunt and uncle.

The trial court held a disposition hearing and, after hearing evidence, ordered that Katy be placed with her paternal aunt and uncle, with a review hearing scheduled for two weeks later.

In its disposition order, the trial court found that respondent had a "significant criminal history," including charges of assault on a female, and that he had a pending charge for assaulting his ex-girlfriend. The court also found that respondent's "description and downplay of the domestic violence incident" that led to his most recent arrest was not credible. The court further found that a video the trial court viewed of the interior of respondent's home raised concerns about respondent's living environment. The court also found that respondent "would tote his daughter around in the car while delivering his product for his business" in a manner that was "inappropriate" for a child of that age.

Based on these findings, the trial court determined that it was in Katy's best interest to be placed temporarily with the paternal aunt and uncle, at least until the review hearing scheduled for two weeks later.

The trial court's disposition order also contained a statement that both respondent and Katy's mother "acted inconsistent with their constitutional rights as parents." It is undisputed on appeal that neither respondent nor Katy's mother ever asserted a claim on constitutional grounds in the trial court.

II. Court of Appeals review

On appeal to the Court of Appeals, respondent challenged the trial court's determination that he acted inconsistent with his constitutionally protected parental status. In a divided opinion, the Court of Appeals reversed the disposition order and remanded for a new hearing. The Court of Appeals majority reviewed the findings of fact in the disposition order and concluded that there "were no allegations in the petition or findings in the adjudication order that Respondent, the non-offending parent, has neglected the child, is unfit, or has acted inconsistently with his paramount constitutional right to custody of his child." *In re K.C.*, 288 N.C. App. 543, 551 (2023). The majority therefore held that the trial

court lacked authority to place Katy with anyone other than respondent. *Id.* at 550–51.

The majority also held that this issue was properly preserved for appellate review because respondent "opposed DSS's recommendation" to place Katy with the paternal aunt and uncle and instead argued that he had the ability to care for Katy. *Id.* at 545. Importantly, respondent concedes that in the trial court he "did not argue this issue as a violation of a constitutional right." To support its preservation ruling, the Court of Appeals cited its decision in *In re B.R.W.*, 278 N.C. App. 382, 399 (2021), *aff'd on other grounds*, 381 N.C. 61 (2022).

The dissent asserted that the trial court's findings concerning the constitutional standard were "premature and unnecessary to the trial court's dispositional decision awarding temporary custody to relatives." *In re K.C.*, 288 N.C. App. at 552 (Carpenter, J., dissenting). Relying on a series of unpublished Court of Appeals decisions, the dissent reasoned that, during the initial, temporary stages of these juvenile proceedings, the constitutional right was not yet implicated. Thus, the dissent reasoned, the sole appropriate question for appellate review was whether the trial court's best interests analysis was an abuse of discretion. *Id.* at 552–53. The dissent did not address the preservation issue.

DSS filed a notice of appeal based on the dissent and also petitioned for discretionary review of three additional issues that concerned the scope of the constitutional right to parent and the applicable legal test for that right at the initial stages of a juvenile proceeding. We allowed the petition for discretionary review of these additional issues.

We later entered a special order informing the parties that we were allowing discretionary review on an additional issue: "In addition to the issues addressed in this Court's order allowing the petition for discretionary review on additional issues, the Court intends to address the following issue: Whether respondent properly preserved this constitutional issue for appellate review." *In re K.C.*, No. 142A23, 386 N.C. 952 (July 9, 2024).

We also instructed the parties to submit supplemental briefs on this additional issue, including "whether the Court of Appeals' reliance on its decision in *In re B.R.W.*, 278 N.C. App. 382, 399 (2021), conflicts with this Court's holding in *In re J.N.*, 381 N.C. 131, 133 (2022)."

Analysis

I. The constitutionally protected status of a parent

The Supreme Court of the United States has held it "firmly established that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (cleaned up). Thus, there is "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Id.* (cleaned up).

This Court, applying this federal precedent, has long acknowledged a parent's "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child." *Price v. Howard*, 346 N.C. 68, 79 (1997). Because of this right, we held in *Price* that custody can be awarded to a non-parent in a family law proceeding, based on the best interests of the child, only when the parent engages in "conduct inconsistent with the parent's protected status." *Id.* We further held that "unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy" and that "other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents." *Id.*

II. Application of this constitutional right in juvenile cases

Because cases like *Quilloin* and *Price* concerned private parties seeking permanent custody or guardianship of a child, they did not address how the constitutional right of parents applies in juvenile cases in which the State seeks to remove a child because of abuse, neglect, or dependency.

Abuse, neglect, and dependency cases are governed by a lengthy set of statutes known as the Juvenile Code. *See* N.C.G.S. §§ 7B-100 *et seq.* One core purpose of these statutes is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents." *Id.* § 7B-100(1).

In nearly all cases in which a trial court adjudicates a child abused, neglected, or dependent, the trial court's resulting disposition, even if it removes the child from the parent, will be constitutional. This is because, as we explained in *Price*, "unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status

parents may enjoy" and many other types of conduct "also rise to this level so as to be inconsistent with the protected status of natural parents." 346 N.C. at 79. Thus, in most juvenile cases, the underlying facts that support the adjudication of abuse, neglect, or dependency also will satisfy the constitutional criteria.

Nevertheless, in the years since we decided *Price*, we have recognized that there might be rare circumstances in which the provisions of the Juvenile Code are insufficient to protect the constitutional rights of parents. *See*, *e.g.*, *In re B.R.W.*, 381 N.C. at 77. In other words, there are rare cases in which, as applied to a particular parent, the Juvenile Code is unconstitutional because it does not provide sufficient protection of the parent's rights. In these rare cases, even if the Juvenile Code authorizes the trial court to remove a child from a parent, the court may not do so because the United States Constitution prohibits it. *Id.*

III. Preservation of the constitutional argument

The recognition that the constitutional right to parent *could* be implicated in these rare juvenile cases created a preservation question that confounded the Court of Appeals for a number of years. Some of our case law observed that "the law presumes parents will perform their obligations to their children" and also "presumes their prior right to custody." *Petersen v. Rogers*, 337 N.C. 397, 403 (1994). Relying on this precedent, parents began to assert that the presumption of parental fitness meant the trial court must assess the constitutionality of a child's removal in every case. As a result, the parents argued, the issue always was preserved for appellate review, even if the parent never raised it.

Ultimately, we rejected this argument and held that *Petersen* did not "negate our rules on the preservation of constitutional issues." *In re J.N.*, 381 N.C. at 133. "Thus, a parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court." *Id.*

At the same time, a line of cases developed in the Court of Appeals holding that this constitutional argument was preserved so long as the parent opposed removal of the child on *any* grounds, even if the parent never expressly asserted a constitutional argument. *See In re B.R.W.*, 278 N.C. App. at 397; *In re X.D.P-S.*, No. COA21-109, slip op. at 4 (N.C. Ct. App. Oct. 19, 2021) (unpublished) (citing *In re B.R.W.* for the proposition that "when a parent presents evidence opposing a recommendation of guardianship, the parent sufficiently preserves the constitutional issue"); *In re A.N.*, No. 22-498, slip op. at 8 (N.C. Ct. App. June 6, 2023)

(unpublished) (citing *In re B.R.W.* for the proposition that the constitutional issue was preserved because the parent "requested the trial court reject the recommendation of guardianship").

This line of cases began with *In re B.R.W.*, in which the Court of Appeals acknowledged that the parent did not expressly raise an argument on constitutional grounds. Nevertheless, the trial court made a finding that the parent was "unfit" and "acted in a manner inconsistent with [the parent's] constitutionally protected status." 278 N.C. App. at 395. In the lead opinion, a single Court of Appeals judge stated that the parent had preserved the issue because she "presented evidence regarding her ability to care for the children, opposed the recommendation of guardianship, and requested that the trial court reject the recommendation of guardianship and allow a trial home placement." *Id.* at 399.

A second judge concurred in the judgment but questioned the preservation discussion, noting that it appeared to conflict with other Court of Appeals case law "concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court." *Id.* at 410 (Dietz, J., concurring). A third judge dissented on other issues and did not address the preservation issue. *Id.* at 410–16 (Carpenter, J., dissenting).

The parent filed a notice of appeal based on the dissent, but no party sought discretionary review on the preservation issue. This Court affirmed the Court of Appeals without addressing preservation. *In re B.R.W.*, 381 N.C. at 93.

But *on the same day* that this Court issued its decision in *In re B.R.W.*, we also issued the decision in *In re J.N.* which, as noted above, squarely addressed the preservation issue that divided the Court of Appeals in *In re B.R.W.* and many other cases.

In *In re J.N.*, we held that parents must raise the constitutional issue in the trial court to preserve it for appellate review. 381 N.C. at 133. Importantly, as in *In re B.R.W.*, the parent in *In re J.N.* had opposed DSS's recommendation of guardianship in the trial court and argued that "reunification would be a more appropriate plan." *Id.* at 134. But, we noted, the parent never argued that the guardianship "would be inappropriate *on constitutional grounds*." *Id.* (emphasis added). We therefore held that "respondent waived the argument for appellate review." *Id.*

Thus, under *In re J.N.*, a parent who merely argues against a child's removal, or against the child's placement with someone else, does not adequately preserve the constitutional issue. To preserve it, the parent must inform the trial court and the opposing parties that the parent is

challenging the removal on constitutional grounds and articulate the basis for the constitutional claim.

This preservation requirement is necessary for a crucial reason. As noted above, the argument is essentially a claim that the Juvenile Code is unconstitutional as applied to that parent. After all, the argument applies only when the Juvenile Code *authorizes* the removal of the child from the parent's care, but the Constitution nevertheless *prohibits* it. Thus, the parties opposing the parent's argument must be given notice of the constitutional challenge so that they can present evidence to rebut it. *Price*, 346 N.C. at 79. This evidence, by its nature, may be different from the evidence those parties present to establish grounds for removal under the Juvenile Code—after all, the constitutional claim can prevail only in rare cases where the evidence that is sufficient to satisfy the Juvenile Code nevertheless is insufficient to comply with the constitutional criteria.

Moreover, because of this need to provide notice to the opposing parties, the preservation requirement applies even if the trial court addresses the constitutional claim on its own initiative in its order. A trial court's findings are limited to evidence in the record. *In re L.N.H.*, 382 N.C. 536, 546 (2022). Without notice that the parent is asserting a constitutional claim, the opposing parties will not know that they must present evidence that would support the necessary findings to reject the claim. *Price*, 346 N.C. at 79.

In sum, the Court of Appeals' preservation analysis in *In re B.R.W.* did not survive our holding in *In re J.N.* To prevent further confusion, we expressly overrule the preservation holding of the Court of Appeals decision in *In re B.R.W.* and the holdings of the resulting Court of Appeals case law that followed it.

Having reaffirmed the applicable preservation standard, we turn to the facts of this case. Here, respondent concedes that he "did not argue this issue as a violation of a constitutional right." Thus, under *In re J.N.*, the constitutional claim is not preserved for appellate review. Because this was the sole issue raised by respondent in the Court of Appeals, and because the issue is waived as a matter of law and not subject to appellate review, we reverse the decision of the Court of Appeals. As a result, we do not reach the remaining arguments presented to us in this appeal.

Finally, some words about the dissent. The dissent accuses us of "advocating" rather than objectively deciding this appeal. This is so, the dissent argues, because we examined whether the key constitutional

issue in the case was preserved for appellate review. The parties raised that issue in their Court of Appeals briefing but did not do so in their filings with this Court. The dissent therefore asserts that it was improper for us to consider it.

This is a flawed argument for several reasons. First, it is well-settled from precedent dating back nearly a century that "this Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." *State v. Creason*, 313 N.C. 122, 127 (1985) (collecting cases). This rule applies regardless of whether the opposing party asserts in its appellate briefing that the constitutional issue was waived. *See City of Durham v. Manson*, 285 N.C. 741, 743 (1974). As we have repeatedly explained, when a constitutional issue "was not raised in the trial court but was injected for the first time on appeal to the Court of Appeals" that issue "was not properly before the Court of Appeals" and therefore is "not properly before us." *Id.*

Even putting this precedent aside, we are the court of last resort in our State. This Court is tasked with allowing discretionary review "on its own motion" when a "decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N.C.G.S. § 7A-31(a). We do this because it is our responsibility to ensure the consistency of the State's jurisprudence and prevent competing lines of precedent from lingering and causing confusion in the lower courts. As explained above, the Court of Appeals decision in this case, and the line of cases it followed, conflicts with our holding in *In re J.N.*

We therefore entered a unanimous order (joined by our dissenting colleagues) accepting discretionary review of this issue. *In re K.C.*, No. 142A23, 386 N.C. 952 (July 9, 2024). Addressing this lingering conflict in our jurisprudence is not advocacy; it is this Court performing its central role as the Supreme Court of North Carolina.

Conclusion

We reverse the decision of the Court of Appeals.

REVERSED.

Justice RIGGS dissenting.

In a case where, until supplemental briefing requested by this Court, no party argued to this Court that Father waived his constitutional

challenge and contrary to our settled practice, the majority steps into the role of advocate and makes a "better" argument for a party. Here, the majority intervenes as such to rule that a parent may only preserve a constitutional challenge in a juvenile proceeding by informing the trial court and the opposing parties of such a challenge and providing an articulable basis for that constitutional challenge. In an improper vehicle, the majority delivers on a request from the Court of Appeals three years ago in *In re B.R.W.*, 278 N.C. App. 382, 410 (2021) (Dietz, J., concurring) ("[T]his Court could benefit from the guidance of our Supreme Court concerning when and how the constitutional issue of whether parents have acted inconsistently with their constitutionally protected rights must be raised and preserved in the trial court."). The majority then steps in to answer its own posed question by adopting a harsh, unforgiving procedural rule for constitutional claims argued in juvenile court. I respectfully dissent.

I. Appellate Review Under Rule 16

Our appellate review is limited "to consideration of the issues stated in . . . the petition for discretionary review and the response thereto . . . and properly presented in the new briefs." N.C. R. App. P. 16(a). And for appeals based on dissents, this Court's review is "limited to consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs."[1] N.C. R. App. P. 16(b). Here, as the majority points out, we are reviewing DSS's dissent-based appeal as well as additional issues on which we allowed discretionary review. But until this Court requested supplemental briefing, issue preservation had not been properly raised before this Court. Issue preservation was not addressed in the dissent, not addressed in the notice of appeal, not addressed in the petition for discretionary review, and not addressed in the new briefs. We are jurists, not advocates. Because no party argued that Father failed to preserve his constitutional claim, this Court should have addressed the merits of this appeal.

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1. The majority claims that precedent and statutory law say otherwise, but those arguments are not compelling here. Neither of the cases cited, *State v. Creason*, 313 N.C. 122 (1985), or *City of Durham v. Manson*, 285 N.C. 741 (1974), speak to the situation here, when a party fails to properly submit an issue for consideration by this Court. As explained in this dissent, Rule 16(a) and (b) dictate the outcome here. Moreover, Section 7A-31 merely addresses when this Court may certify a *cause*, i.e., a case, for review rather than when this Court may consider an *issue* for review. *See Cause*, Garner's Dictionary of Legal Usage 142 (3d ed. 2011) ("*Case* is more commonly used, to be sure, but *cause* (= lawsuit) has long been current in the speech and writing of lawyers.").

Even if Father did not preserve his constitutional claim, though, the majority ignores that we can nevertheless address the merits of this appeal under Rule 2. *See* N.C. R. App. P. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules . . . ."). Our precedent recognizes that we may consider unpreserved issues in the interest of justice. *See Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463 (1984) ("However, in the interest of justice we will consider this issue and the other issues raised by plaintiffs' brief and argument [that were not properly raised at trial].").

Notwithstanding the ruling in this case, Appellate Rule 2 still allows for this Court to "suspend the appellate rules either upon application of a party or upon its own initiative." *Bailey v. State*, 353 N.C. 142, 157 (2000) (cleaned up). Rule 2 specifically "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578 (1986)). "[W]hether an appellant has demonstrated that [their] matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603 (2017) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196 (2008)). While I believe the parties waived issue preservation questions, even if the question was not waived, addressing Father's constitutional claim would certainly prevent an injustice—being stripped of his parental right to custody without due process. If Rule 2 needed to be invoked, I believe Father presents "the rare case meriting suspension" of our preservation requirement. *Id.*

II. Father's Constitutional Right to Parent

In his principal brief, Father argued that the trial court's decision to deprive him of custody of Katy in favor of nonparents violated Father's constitutionally protected rights as a parent. Because no party nor the dissenting judge at the Court of Appeals contended that Father failed to preserve his constitutional claim, this Court should have addressed the merits of that argument. I do so below and conclude that we should have affirmed the Court of Appeals' decision and remanded this case to the trial court for more findings as to whether the Father's parenting negatively affected Katy.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits this State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, cl. 1. According to the Supreme Court of the United States, "perhaps the oldest of the fundamental liberty interests" triggering due process protections are "the interests of parents in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). This Court has expressed similar sentiments. *See Petersen v. Rogers*, 337 N.C. 397, 402 (1994) ("North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth [by the Supreme Court of the United States].").

Because these constitutional lodestars warrant due process protections, they "do[ ] not evaporate simply because [parents] have not been [flawless] or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Owenby v. Young*, 357 N.C. 142, 146 (2003) ("[The] Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child."). This legal principle is further bolstered by the presumption that if "parents [ ] perform their obligations to their children," they possess a "prior right to custody." *Petersen*, 337 N.C. at 403 (quoting *In re Hughes*, 254 N.C. 434, 436–37 (1961)). Under this presumption, "the constitutionally-protected paramount right of parents to custody, care, and control of their children *must* prevail." *Petersen*, 337 N.C. at 403–04 (emphasis added). This presumption especially "favor[s] a parent in a custody dispute with a non-parent." *Routten v. Routten*, 374 N.C. 571, 576 (2020) (emphasis removed).

Yet that presumption "is not absolute." *In re R.T.W.*, 359 N.C. 539, 543 (2005) (citing *David N. v. Jason N.*, 359 N.C. 303, 305 (2005)). This Court has long acknowledged "parental rights and parental responsibilities as two sides of the same coin." *Id.* (citing 1 Blackstone, Commentaries 434–40); *see also David N.*, 359 N.C. at 305 ("[W]hile a fit and suitable parent is entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right."). Thus, the State may take a parent's child away by "showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *In re E.B.*, 375 N.C. 310, 315

(2020) (quoting *Adams v. Tessener*, 354 N.C. 57, 62 (2001)). While "unfitness, neglect, and abandonment" facially undermine the parent's status, "other types of conduct . . . can also rise to this level so as to be inconsistent with the protected status of natural parents." *Boseman v. Jarrell*, 364 N.C. 537, 549 (2010) (cleaned up) (quoting *Price*, 346 N.C. at 79).

Notably, though, that is the only way a parent may lose their child to the State. *Id.* (emphasis added); *see also* Becca Pearson, *The Price to Parent*, 102 N.C. L. Rev. 1299, 1309 (2024) ("There must be a very substantial reason before parental custody can be terminated by the State." (cleaned up)). And because "there is no bright line beyond which a parent's conduct meets this standard," *Boseman*, 364 N.C. at 549, all allegedly inconsistent conduct "must be viewed on a case-by-case basis." *Owenby*, 357 N.C. at 147 (quoting *Price*, 346 N.C. at 79). Indeed, we must "examine each case individually in light of all of the relevant facts and circumstances and the applicable legal precedent." *In re B.R.W.*, 381 N.C. 61, 82 (2022); *see also id.* at 83 ("In conducting the required analysis, 'evidence of a parent's conduct should be viewed cumulatively.' " (quoting *Owenby*, 357 N.C. at 147)). Only after a trial court concludes that a parent has acted in a manner inconsistent with their parental status may the "best interest of the child test . . . be applied without offending the Due Process Clause." *Owenby*, 357 N.C. at 146 (internal citation omitted); *see also Price v. Howard*, 346 N.C. 68, 79 (1997) ("If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause.").

Further, "a trial court's determination that a natural parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence." *David N.*, 359 N.C. at 307 (quoting *Adams*, 354 N.C. at 63). The clear and convincing standard "is more exacting than the preponderance of the evidence standard generally applied in civil cases" and "requires evidence that should *fully* convince." *In re I.K.*, 377 N.C. 417, 421 (2021) (emphasis added) (quoting *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009)). If a finding is "unsupported by the record," we "simply disregard[ ] [that] finding[ ] and examine[ ] whether the remaining findings support the trial court's determination." *In re A.J.L.H.*, 384 N.C. 45, 48 (2023).

The trial court adjudicated Katy a neglected child on 15 October 2021, but as Father correctly explains, that adjudication only addressed Mother's neglect of Katy. But even the existing findings in the trial court's disposition order on 8 February 2022 are insufficient to demonstrate

that Father is unfit or that his conduct was inconsistent with his constitutionally protected status.[2] Thus, the majority implicates significant Due Process Clause concerns by even reaching the "best interest of the child" standard.

Only a fraction of the trial court's findings of fact in the disposition order address Father or his conduct. The trial court found that Father was formerly convicted "for drug-related crimes and assault on a female" and was charged with multiple offenses while the instant petition was pending, including "communicating threats and larceny of a firearm" and "assault on a female," but no evidence was specifically developed on these matters. No one testified at trial about any of Father's convictions or charges, nor were any details included in the DSS court report or any addendums.

Also, while Father was arrested for domestic violence charges against a woman in November 2021, this kind of alleged incident is insufficient to undermine Father's constitutionally protected status. *See Price*, 346 N.C. at 79 (holding that a parent's behavior is inconsistent with their right to parent "if he or she fails to shoulder the responsibilities that are attendant to rearing a child"). As the Court of Appeals noted, Father's charge was still pending at the disposition hearing, and Father consistently maintained his innocence. *See In re K.C.*, 288 N.C. App. 543, 551 (2023) ("[W]e are unable to say that . . . the existence of an unproven domestic violence charge warrant[s] forfeiture of [Father's] constitutionally protected status."). Further, there was no evidence that Katy witnessed the incident. According to Father, the incident occurred outside, and Katy was inside the back room of the house. Family court cannot be a place where the presumption of innocence in criminal matters falls by the wayside.

Besides Father's alleged criminal history, the trial court also considered the condition of Father's home and the nature of his job. Yet neither of these findings support a conclusion that Father was unfit to parent Katy. First, the trial court made no finding of fact concerning the impact of the condition of Father's home on Katy. *See* N.C.G.S. § 7B-101(15) (2023) (defining a neglecting parent as one who "[c]reates or allows to be created a living environment that is injurious to the

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2. We note that the trial court also incorrectly labeled Finding 61—that Father "acted inconsistent with [his] constitutional right as [a] parent[ ]"—a finding of fact. *See In re B.R.W.*, 381 N.C. at 77 ("A trial court's determination that a parent has acted inconsistently with his or her constitutionally protected status as the parent is [a conclusion of law] subject to de novo review.").

juvenile's welfare"); *see also In re C.L.*, No. COA11-98, slip op. at 7 (N.C. Ct. App. July 19, 2011) (unpublished) ("The trial court did not make any findings about specific risks that might result from the condition of the home, nor did the court find that the condition of the home contributed to any particular impairment or risk of impairment to the children."). For example, as Father explains, "[t]here was no reported filth or bug infestations or other problems . . . that would have subjected Katy to a dangerous environment." In particular, Finding 56 states that "[t]he [c]ourt was disturbed by what she saw at [Father's] house during the video testimony," but does not provide any additional detail. In comparison to other cases from this Court, this finding is plainly insufficient to support a conclusion of unfitness. *See In re I.K.*, 377 N.C. 417, 426–28 (2021) (agreeing that clear and convincing evidence existed supporting a finding of unsafe living conditions where "the clutter in the home was piled to the ceiling in some areas and there were holes in the floor of the home covered with plywood"). Further, the DSS social worker testified that the Father always secured housing for Katy that was approved by DSS.

Second, the trial court's findings about the Father's clothing, employment, and tendency to move should not have been considered because they all relate to the Father's socioeconomic status. *See Dunn v. Covington*, 272 N.C. App. 252, 265 (2020) ("[S]ocioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation . . . have no bearing on the question of fitness."); *see also Raynor v. Odom*, 124 N.C. App. 724, 731 (1996) ("[S]ocioeconomic status is irrelevant to a fitness determination . . . ." (citing *Jolly v. Queen*, 264 N.C. 711, 713–14 (1965))). Refraining from such considerations is critical to protecting the interests of "honest, industrious parents," regardless of their income status. *Jolly*, 264 N.C. at 715; *see also Bost v. Van Nortwick*, 117 N.C. App. 1, 8–9 (1994) ("[T]he finding that [a non-parent] could provide a more stable environment and better financial situation . . . does not mandate that respondent's rights as the natural father . . . be terminated."). Thus, these findings were impermissible for the trial court to rely on in concluding that Father was unfit to parent Katy.

III. Conclusion

At bottom, under the umbrella of rights that parents enjoy is the right to temporarily entrust their child to the care of trusted family and friends. The majority's failure to address the merits is particularly pernicious here. As a society, we should want to encourage parents getting the help they need, whether it be for addiction or mental health treatment or the ability to regain financial footing. If this Court punishes

a parent's thoughtful decision to make temporary, informal custody arrangements in order to advance the wellbeing of the entire family unit, we will disincentivize that kind of good parenting. Parents will not get the help they need if they will lose custody of their child because of those thoughtful decisions.

This is not to say that, upon proper investigation and substantiation, Father's criminal history and housing conditions could not be considered in relation to his constitutional right to parent. *See In re A.J.*, 386 N.C. 409, 417 (2024) ("[W]hen an appellate court determines that the trial court's findings of fact are insufficient, the court must examine whether there is sufficient evidence in the record that could support the necessary findings." (citing *In re K.N.*, 373 N.C. 274, 284 (2020)). Thus, I would affirm the Court of Appeals' judgment and remand this matter back to the trial court to "decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings." *Id.* (citing *In re K.N.*, 373 N.C. at 284–85).

Justice EARLS joins in this dissenting opinion.

IN THE MATTER OF L.L.

No. 333PA23

Filed 13 December 2024

Child Abuse, Dependency, and Neglect—full custody awarded to non-relative—statutorily required findings sufficient

Following an abuse and neglect adjudication, the district court's final permanency planning order—awarding full custody to the juvenile's foster parents (rather than placing the juvenile with a maternal grandfather) and converting the case to a civil custody proceeding—was affirmed because the written findings of fact complied with the Juvenile Code provisions cited in the mother's appeal in that: no written finding regarding placement of the juvenile with the mother within six months was required where the impossibility of such a placement was uncontested (N.C.G.S. § 7B-906.1(e)); the findings reflected the court's determination that reunification with the mother was inconsistent with the juvenile's health and safety (N.C.G.S. § 7B-906.2(b), (d)(4)); the findings, including facts in the department of social services court report incorporated by

reference in the order, detailed the mother's availability to the court and the guardian ad litem (N.C.G.S. § 7B-906.2(d)(3)), as well as her participation in her case plan (N.C.G.S. § 7B-906.2(d)(2)); and the findings demonstrated the district court's consideration of the maternal grandfather as a potential placement, in conformance with the requirement of N.C.G.S. § 7B-903(a1) that it "first consider" a relative as a placement for a juvenile.

Justice RIGGS concurring in part and dissenting in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a per curiam, unpublished decision of the Court of Appeals, *In re L.L.*, No. COA22-1045 (N.C. Ct. App. Nov. 21, 2023), vacating and remanding a permanency-planning order entered by Judge James W. Bateman III in District Court, Onslow County. Heard in the Supreme Court on 31 October 2024.

Fox Rothschild LLP, by Nathan W. Wilson, Matthew Nis Leerberg, and Margaret McCall Reece, for petitioner-appellants Daniel and Jessica Hall.

Matthew D. Wunsche, for petitioner-appellant Guardian ad Litem.

Mercedes O. Chut for respondent-appellee mother.

No brief for Onslow County Department of Social Services.

BARRINGER, Justice.

Petitioners Daniel and Jessica Hall appeal from the Court of Appeals unpublished, per curiam opinion, which reversed and remanded the trial court's permanency-planning and custody order that awarded full custody of Liam[1] to petitioners and converted the case to a Chapter 50 civil custody proceeding. The question before this Court is whether the findings contained in that trial court order are sufficient to satisfy

1. A pseudonym is used to protect the juvenile's identity and for ease of reading. *See* N.C. R. App. P. 42(b).

the relevant statutory provisions. We conclude those findings are sufficient. Accordingly, we reverse the decision of the Court of Appeals.

I. Background

A. Factual Background

The beginning of Liam's life was marked by tragedy. When Liam was barely one month old, his parents took him to the Naval Hospital in Onslow County because he appeared to have trouble breathing. Liam arrived with numerous bruises to his head and face, a fracture to his right arm, nine broken ribs, and a skull fracture. When medical staff examined Liam more closely, they further discovered that he had a chest abrasion and a skin laceration to his penis. Due to the severity of Liam's injuries, he was intubated, sedated, placed on a mechanical ventilator, and then airlifted to UNC Hospital. Liam weighed less than he did at birth.

While receiving treatment at UNC Hospital, Liam experienced multiple seizures over his first two days there and remained on a ventilator for nearly a week. Subsequent diagnostic tests revealed that Liam had already endured multiple traumas prior to hospitalization. These additional traumas included a fracture to Liam's left leg, with accompanying soft tissue damage and swelling; fractures to his right shoulder; healing lesions to the tip of his penis; and a skull fracture, with associated cranial hemorrhages and swelling. Both respondent, Liam's mother, and Liam's father claimed that the injuries occurred when Liam's father accidentally dropped Liam. The Onslow County Department of Social Services (DSS) conducted its initial inspection of the family home and found the house "very dirty, with a sticky residue on the floor and a strong odor of urine."

DSS subsequently filed a juvenile petition alleging that Liam was an abused and neglected juvenile. The petition alleged that Liam's injuries and clinical presentation were "most consistent with a medical diagnosis of abusive head trauma and non-accidental trauma." The petition further alleged that the parents' "stated history of [Liam's] trauma" did "not explain the severity or extent of the child's injuries." Liam's parents were his sole caretakers. Therefore, to ensure the immediate safety of Liam, DSS sought and obtained nonsecure custody of him that same day.

Liam's injuries were life-altering. Now, at age four, he suffers from cerebral palsy, continued seizures, developmental delay, and a possible intellectual disability. In addition, Liam lacks full awareness of his right hand and arm due to the long-term effects of his head injury. As a result, Liam requires around-the-clock care and constant medical consultations,

including six therapeutic appointments each week, bi-annual neurology monitoring, and regular gastroenterologist visits.

Both parents were arrested and charged with felony child abuse. On 16 July 2020, respondent, who had bonded out of jail and moved to Georgia, entered a case plan with DSS which required that she complete recommended parenting classes and demonstrate learned skills, complete a comprehensive clinical assessment for mental health, and participate in Liam's ongoing medical appointments. Still to this day, respondent has never plausibly explained Liam's injuries, nor participated in a single one of Liam's medical appointments as ordered by the court.

After being discharged from the hospital, Liam was placed with his foster family, petitioners, Daniel and Jessica Hall. Liam is now four years old, and petitioners are the only family he can remember. He has a loving relationship with petitioners, and considers their children his siblings. Jessica Hall has been instrumental in Liam's recovery. She schedules and attends each of Liam's medical appointments and stays at home to provide the continuous extensive care he now requires. Petitioners have provided Liam a stable, nurturing environment in which to flourish.

Before the first permanency-planning hearing in this case, Liam's maternal grandfather expressed an interest in obtaining Liam's custody; however, the maternal grandfather barely knows Liam. Moreover, by his own admission, the grandfather is unable to provide for Liam's around-the-clock medical care; instead, the grandfather claims that his live-in girlfriend would be.

These circumstances did not go unnoticed by Liam's guardian ad litem (GAL). A GAL is a trained volunteer who is wholly invested in the juvenile's best interests during abuse and neglect proceedings.[2] Among a GAL's statutory duties are "offer[ing] evidence and examin[ing] witnesses at adjudication; [ ] explor[ing] options with the court at the dispositional hearing;" and "protect[ing]and promot[ing] the best interests of the juvenile." N.C.G.S. § 7B-601(a) (2023). Pivotal to this role is the creation and maintenance of independent reports for the courts to review.[3]

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2. N.C. Jud. Branch, *About Guardian ad Litem (GAL)*, https://www.nccourts.gov/programs/guardian-ad-litem/about-guardian-ad-litem-gal#:~:text=Guardians%20ad%20Litem%20are%20appointed,that%20belongs%20to%20the%20community (last visited Dec. 5, 2024).

3. N.C. Jud. Branch, *Volunteer as a GAL* https://www.nccourts.gov/programs/guardian-ad-litem/volunteer-as-a-gal (last visited Dec. 5, 2024).

In the GAL's report, the GAL was adamant that Liam remain with petitioners. The GAL reported that as a result of his extensive injuries "Liam requires 24-hour care [that] will continue through his entire life." Petitioners currently provide and are committed to providing that continued care in the future. The report further explains that, in addition to the petitioners' proven ability to provide for all of Liam's medical needs, Liam "will shut down and become unresponsive" "if the foster mother[,] [petitioner,] is not present." This is because "[Liam's] cognitive abilities are very limited such that he does not understand being away from his foster mother." Moreover, the report emphasized that all of "[Liam's] therapists agree that if [Liam] is removed from [petitioners' care], his condition will severely deteriorate."

Despite Liam's demonstrated extraordinary needs and the GAL's strong recommendation that Liam stay with petitioners, DSS recommends that it is in Liam's best interest that he move to the maternal grandfather's home in Georgia.

B. Procedural Background

The trial court adjudicated Liam as abused and neglected on 22 September 2021, which neither parent contested.

In December 2021, the initial permanency-planning hearing was held. The trial court entered an initial permanency-planning order on 18 January 2022. That order found in part that "[DSS] would like to see respondent . . . scheduling [more] phone visits with [Liam]." The court further found that DSS is "concerned with [Liam] returning to the care of respondent mother due to [Liam's] extensive injuries and exceptional needs." The trial court also stated that it "would like to hear from both respondent mother and [the maternal grandfather] about what they will be willing to do to get [Liam] his needed medical care and what their plan is for [Liam's] care if he is placed with them in Georgia." The trial court ordered that the primary plan for Liam be reunification with his parents and that the secondary plan be custody of Liam with a court-approved caretaker, like petitioners.

At the beginning of May 2022, a second permanency-planning hearing was held. The resulting order found again that "[DSS] would like to see respondent mother scheduling [more] phone visits with [Liam]." The court also reiterated its concerns with returning Liam to respondent "due to [Liam's] extensive injuries and exceptional needs." The trial court's primary and secondary permanency plans remained unchanged.

One month later, a third permanency-planning hearing was held. At this time, Daniel Hall, a Major in the United States Marine Corps, had

received military orders which required moving the family to Florida permanently. The permanency-planning order remained substantially the same with the exception that the trial court approved the petitioners' "go[ing] on an extended visit with the juvenile in Florida."

The fourth and final permanency-planning hearing was held across the first two days of August 2022. The resulting order (final order) from this hearing made a number of findings, including findings number six and ten. Finding number six stated: "The [c]ourt received into evidence the court report of the Guardian Ad Litem." Finding number ten stated: "That the [c]ourt has considered information from any person designated by N.C.G.S. § 7B-906.1(c)."[4] It is therefore evident that the trial court heard and considered the GAL report. The Court then granted legal and physical custody of Liam to petitioners.[5]

Respondent appealed the final order to the Court of Appeals. Respondent argued that the trial court erred in ceasing reunification as a permanent plan and by awarding custody of Liam to his foster parents. *In re L.L.*, No. COA22-1045, slip op. at 8 (N.C. Ct. App. Nov. 21, 2023) (per curiam) (unpublished). Respondent challenged, first, various factual findings in the trial court's order, and then disputed the sufficiency of those findings to satisfy the relevant statutory provisions. In a per curiam, unpublished decision, the Court of Appeals rejected the first challenge but agreed with the second. *In re L.L.*, slip op. at 16–17. In the court's view, the findings were insufficient to comply with the relevant statutory provisions. Accordingly, the Court of Appeals vacated the trial court's order and remanded the matter for a new permanency-planning hearing to be held. *Id.* at 25.

Petitioners filed for discretionary review with this Court pursuant to N.C.G.S. § 7A-31 (2023). We allowed the petition.

II. Standard of Review

Respondent did not appeal the Court of Appeals' holding that the trial court's findings of fact were supported by competent evidence. Therefore, those findings are binding on appeal. *In re J.M.*, 384 N.C. 584, 591 (2023). The only question before this Court is whether the trial court's findings are sufficient under the relevant statutory provisions.

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4. N.C.G.S. § 7B-906.1 states in pertinent part, "[a]t each hearing, the court shall consider information from [ ] the guardian ad litem."

5. Judge Bateman presided during this entire permanency-planning process.

This Court interprets statutory provisions de novo. *State v. J.C.*, 372 N.C. 203, 206 (2019) (citation omitted). Moreover, "[t]he trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed for abuse of discretion." *In re J.M.*, 384 N.C. at 591 (extraneity omitted). "An abuse of discretion is shown where a trial 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 A.A.*, 381 N.C. 325, 338 (2022) (extraneity omitted).

III. Analysis

"The provisions in Chapter 7B (Juvenile Code) of our General Statutes reflect the need both to respect parental rights and to protect children from unfit, abusive, or neglectful parents." *In re J.M.*, 384 N.C. at 591–92 (extraneity omitted). The Juvenile Code divides abuse, neglect, and dependency proceedings into two main phases: adjudicatory and dispositional. At the adjudicatory phase, the Department of Social Services must show by "clear and convincing evidence" that a juvenile qualifies as "abused, neglected, or dependent" as defined by the Juvenile Code. N.C.G.S. §§ 7B-101, -805 (2023). If shown, the proceedings move on to the dispositional phase. At the dispositional phase, the court's task "is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." *Id.* § 7B-900 (2023).[6]

The challenges at issue here were made in the dispositional phase. At this phase, the trial court may select or combine various alternatives for disposition, including placing the juvenile "in the custody of a parent, relative, private agency . . . , or some other suitable person." *See id.* § 7B-903(a) (2023). The "polar star" guiding the trial court's decision is "the best interests of the juvenile." *Id.* § 7B-100(5) (2023) (explaining that "the best interests of the juvenile are of paramount consideration by the court"); *see also In re Montgomery*, 311 N.C. 101, 109 (1984) (emphasizing that "the best interest of the child is the polar star"). Several statutory provisions direct the trial court's analysis of the best interests of the juvenile. *See* N.C.G.S. §§ 7B-906.1, 7B-906.2, 7B-903 (2023).

Petitioners argue the Court of Appeals erred by holding that the trial court failed to make sufficient findings under four subsections of those statutory provisions: N.C.G.S. §§ 7B-906.1(e), 7B-906.2(b), 7B-906.2(d), and 7B-903(a1). We agree with petitioners and address each provision in turn.

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6. Those objectives are set out in N.C.G.S. § 7B-100 (2023).

A. N.C.G.S. § 7B-906.1(e)

Subsection 7B-906.1(e) requires the trial court, "[a]t any permanency planning hearing where the juvenile is not placed with a parent" to "additionally consider the following criteria and make written findings *regarding those that are relevant*." *Id.* § 7B-906.1(e) (emphasis added). One of those criteria includes "[w]hether it is possible for the juvenile to be placed with a parent within the next six months . . . ." *Id.* The Court of Appeals held that this subfactor was not satisfied because "the permanency planning order contains no mention of Liam's placement with [respondent] mother within the six months following the order." *In re L.L.*, slip op. at 17.

The Court of Appeals failed to follow the plain language of the statute in reaching its holding. The plain language of this subsection states that the trial court must consider all enumerated criteria but need only "make written findings regarding those that are *relevant*." N.C.G.S. § 7B-906.1(e) (emphasis added). In other words, the Court of Appeals read out the key phrase "that are relevant." This omission of words runs counter to the long-standing surplusage canon of statutory interpretation. *See e.g.*, *In re B.O.A.*, 372 N.C. 372, 380 (2019) ("In construing statutory language, 'it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.' " (quoting *Lunsford v. Mills*, 367 N.C. 618, 623 (2014))).

Moreover, "that are relevant" appears identically in another provision of our Juvenile Code. *Compare* N.C.G.S. § 7B-906.1(e), *with* N.C.G.S. § 7B-1110(a) (2023). Our previous interpretation of this identical phrase comes as no surprise. We interpreted this phrase to only require written findings for those *criteria that are relevant*. *In re A.U.D.*, 373 N.C. 3, 10 (2019) ("The statute does not, however, explicitly require written findings as to each factor."). This plain language interpretation is aligned with the well-established principle that "words used in one place in a statute have the same meaning in every other place in the statute." *State v. Rogers*, 371 N.C. 397, 403 (2018) (extraneity omitted). Accordingly, we hold that only relevant criteria require written findings under N.C.G.S. § 7B-906.1(e). The trial court has discretion to determine which factors were relevant.

Here the trial court did not need to make written findings as to whether Liam could be placed with respondent in the next six months. It was uncontested that Liam could not. Throughout the permanency-planning process, no party advocated that respondent should receive custody of Liam within the next six months. Instead, the parties

contested whether Liam should remain with petitioners or be transferred to the care of the maternal grandfather. In fact, DSS affirmatively agreed that respondent should not receive custody of Liam. Indeed, the DSS court report stated that it "still has concerns" about placing Liam with respondent "due to the severe abuse and injuries that [Liam] sustained without explanation from the parents."

The record therefore reveals that it was uncontested that Liam would not be placed in respondent's care within the next six months. As we stated before, where factors are uncontested there is no reason for the trial court to make written findings about them. *See In re A.K.O.*, 375 N.C. 698, 704 (2020) (clarifying that the identical phrase does not require written findings as to each factor, "particularly when there was no conflict in the evidence regarding those factors"). Accordingly, the trial court did not abuse its discretion by choosing not to make a written finding on this uncontested criterion.

Even still, the trial court's consideration of "[w]hether it is possible for the juvenile to be placed with a parent within the next six months" can be properly inferred from the findings. *See*, *e.g.*, *In re L.R.L.B.*, 377 N.C. 311, 323 (2021) (encouraging appellate courts to draw plausible inferences from findings to determine simply whether the "trial court adequately address[ed] the substance and concerns of [the statute]").

The trial court's previous permanency-planning orders had repeatedly found "[t]hat it is not likely that [Liam] will be returned home within the next six (6) months and placement with a parent is not in [Liam's] best interests because, neither parent is able to explain how [Liam] sustained the serious injuries." Then, in the final order the trial court found again that "[t]he parents were and are unable to provide any plausible explanation as to the cause of the injuries." From the context of these prior uncontested orders, an appellate court can reasonably draw the plausible inference that placement with a parent was not possible.

Moreover, the final order found Liam's injuries were the result of "non-accidental trauma" while in "the exclusive care" of respondent and Liam's father, and that both parents have been "unable to provide any plausible explanation as to the cause of the injuries." Collectively, these findings, too, create the plausible inference that placement with either parent was not possible. *See*, *e.g.*, *In re L.R.L.B.*, 377 N.C. at 323 (concluding that a finding that the respondent-mother was living with a domestic abuser was sufficient to infer that the trial court considered whether respondent was acting consistent with the juvenile's health or safety).

Liam could not be placed with respondent in the next six months because the very problems that necessitated Liam's removal had not been resolved. *See id.* (reasoning that, "the very problems that necessitated [the juvenile's] removal from the home" had not changed and therefore "returning [the juvenile] to his parents' home would be 'contrary to his welfare and best interests' "). Moreover, respondent failed to comply with the part of the plan specifically designed to address the devastating effect of these injuries; for instance, respondent has not participated in any of Liam's multiple weekly medical appointments. These findings adequately address the substance and concerns of N.C.G.S. § 7B-906.1(e).

Consistent with this Court's previous holdings, we conclude that the trial court did not abuse its discretion by failing to make written findings of fact regarding uncontested statutory factors. This conclusion alone is sufficient to support our holding that the trial court did not err under N.C.G.S. § 7B-906.1(e). Even still, we further conclude that the trial court *did* make sufficient findings for a reviewing court to draw the plausible inference that the juvenile's placement with a parent is unlikely within six months. Accordingly, we hold that the trial court did not err in its application of N.C.G.S. § 7B-906.1(e).

B. N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)

The next provisions at issue govern the feasibility of reunification. "The goal of the permanency planning process is to 'return the child to their home or when that is not possible to a safe, permanent home within a reasonable period of time.' " *In re J.M.*, 384 N.C. at 593 (quoting Sara DePasquale, *Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings in North Carolina* 7–10 (UNC School of Government 2022)). Aligned with this goal, reunification ordinarily must be the primary or secondary plan in a juvenile's permanency plan. N.C.G.S. § 7B-906.2(b).

Yet, "[t]he requirement to make reunification the primary or secondary plan is not absolute." *In re J.M.*, 384 N.C. at 594. Reunification is no longer required where "the [trial] court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *See* N.C.G.S. § 7B-906.2(b). Further, the court must make written findings at each permanency hearing regarding certain factors listed in N.C.G.S. § 7B-906.2(d), "which shall demonstrate the degree of success or failure toward reunification." *See id.* § 7B-906.2(d). These factors are:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department [of Social Services], and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department [of Social Services] and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Id. § 7B-906.2(d) (2023).

At the outset, we reiterate this Court's previously articulated standard for written findings under the Juvenile Code. Specifically, the trial court's written findings need not track the statutory language verbatim, but "they must make clear that the trial court considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re J.M.*, 384 N.C. at 594 (extraneity omitted) (referencing N.C.G.S. § 7B-906.2).

Similarly, in keeping with this Court's approach under N.C.G.S. §§ 7B-906.1(e) and 7B-1110(a), we recognize the Juvenile Code's flexibility for written findings that are responsive to each permanency-planning dispute. Subsection § 7B-906.2(d) requires written findings "which shall demonstrate the degree of success or failure toward reunification." N.C.G.S. § 7B-906.2(d). We therefore hold that only those factors which demonstrate the degree of success or failure toward reunification require written findings.

The Court of Appeals held that the trial court failed to make sufficient findings under N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(2)–(d)(4). *In re L.L.*, slip op. at 19–20. We disagree. As discussed below, a careful examination of the final order and its incorporated findings confirms that these statutory requirements have been met.

1. N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(4)

Subsection § 7B-906.2(b) is synonymous with N.C.G.S. § 7B-906.2(d)(4) and therefore warrants the same analysis. Both require written findings that demonstrate reunification is inconsistent with the health or safety

of the juvenile. The final order, while not tracking the statutory language verbatim, did just that.

The final order found that Liam suffered severe injuries from abuse while in respondent's and Liam's father's care, that respondent has never plausibly explained the cause of those injuries, that respondent was charged with felony child abuse, and that respondent has failed to comply with trial court orders to participate in Liam's medical appointments to familiarize herself with the "extreme medical needs" of Liam. While not quoting its exact language, the final order's written findings clearly address the statute's concerns. *See In re L.M.T.*, 367 N.C. 165, 168 (2013) ("The trial court's written findings must address the statute's concerns, but need not quote its exact language."); *see also In re J.M.*, 384 N.C. 584 (2023).

Moreover, due regard for our own precedent requires us to hold that such findings are sufficient. This Court has repeatedly held that a parent's failure to offer an honest explanation for his or her child's injuries while the child was in that parent's sole custody can satisfy N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(4). *See In re J.M.*, 384 N.C. at 602 ("[T]he record evidence in this case provides ample basis for the trial court's determination that respondents' persistent unwillingness to acknowledge responsibility for [the juvenile's] life-threatening injuries would render further efforts at reunification clearly unsuccessful and 'inconsistent with the [juveniles'] health or safety.' " (second alteration in original)); *see also In re D.W.P.*, 373 N.C. 327, 338 (2020) (observing that "[w]ithout recognizing the cause of [the juvenile's] injuries, respondent-mother cannot prevent them from reoccurring"; therefore, termination of parental rights was proper). After all, a permanency-planning order is not a final order and may be modified at any time in response to new developments in a case, such as offering an honest explanation for Liam's injuries or attending medical appointments to understand the care Liam requires. *See In re J.M.*, 384 N.C. at 602 (noting the same).

In summary, the final order made findings that respondent failed to take responsibility for the severe abuse to Liam that occurred while in respondent's care. This alone is sufficient. But the final order went further. The trial court found that respondent failed to comply with numerous trial court orders which directed respondent to make an effort to understand the life-altering impact of that abuse on Liam. These findings address the statute's concerns and amount to more than enough support for the conclusion that reunification is inconsistent with the health or safety of Liam.

Accordingly, the record evidence and our caselaw confirm that the written findings contained in the final order fulfill the requirements of N.C.G.S. §§ 7B-906.2(b) and 7B-906.2(d)(4). The trial court did not err in its assessment of the reunification issue.

2. N.C.G.S. §§ 7B-906.2(d)(2) & (d)(3)

Subfactors §§ 7B-906.2(d)(2) and 7B-906.2(d)(3) relate to respondent's cooperation and progress with her case plan and her interactions with the trial court. *See* N.C.G.S. § 7B-906.2(d)(2) ("Whether the parent is actively participating in or cooperating with the plan, the department [of social services], and the guardian ad litem for the juvenile."); *see also id.* § 7B-906.2(d)(3) ("Whether the parent remains available to the court, the department [of social services] and the guardian ad litem for the juvenile.").

The Court of Appeals concluded that "there are no findings that address whether [respondent] had cooperated with DSS or the guardian ad litem, as required by [N.C.G.S. §] 7B-906.2(d)(2)." *In re L.L.*, slip op. at 19. The court additionally opined that "[s]imilarly, no findings address the considerations of [N.C.G.S. §] 7B-906.2(d)(3)." *Id.*

It appears that the Court of Appeals did not properly consider the DSS court report that the trial court incorporated by reference into its final order. When trial courts incorporate documents by reference, the factual findings contained in those documents—but not their opinions or recommendations—become the findings of the trial court's order. *See In re K.N.*, 378 N.C. 450, 459 (2021) (examining external files of which the trial court took judicial notice).

The DSS report listed in chronological order all contact maintained by both parents with the trial court, DSS, and the GAL. The report also noted that respondent "has travel[ed] to several court hearings"; and the report explicitly listed all prior legal proceedings in this matter. The DSS report further detailed respondent's participation with her case plan, including completing a parenting class, participating in therapy, and obtaining housing; yet the report also noted respondent's failure to attend Liam's medical appointments as ordered by the court. Taken together, these incorporated facts exhibit respondent's availability to the trial court and the GAL under N.C.G.S. § 7B-906.2(d)(3), as well as her participation with the plan, DSS, and the GAL under N.C.G.S. § 7B-906.2(d)(2). Once again, the trial court is not obligated to recite the statutory language. *In re J.M.*, 384 N.C. at 594.

Furthermore, as we have explained above, the trial court has discretion whether to make written findings under N.C.G.S. § 7B-906.2(d). Only

those factors that demonstrate the degree of success or failure toward reunification require written findings. Consequently, the trial court was not required to mechanically recite such inapplicable subfactors.

For these reasons, the trial court did not abuse its discretion. Accordingly, we conclude the trial court did not err by failing to satisfy the requirements under N.C.G.S. §§ 7B-906.2(d)(2) and 7B-906.2(d)(3).

C. N.C.G.S. § 7B-903(a1)

Subsection § 7B-903(a1) guides a trial court's placement of the juvenile. It provides a statutory preference for the placement of the juvenile with a relative. The subsection states:

> 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.

N.C.G.S. § 7B-903(a1) (emphases added). The Court of Appeals reasoned that the trial court erred because its "findings were insufficient to overcome the statutory preference for placement with a willing and able relative." *In re L.L.*, slip op. at 20.

The Court of Appeals read the subsection as a directive to the trial court to *first* "make findings" as to "whether the maternal grandfather is willing and able to provide proper care and supervision for Liam, which can include appropriate care provided by other parties during the maternal grandfather's workday." *Id.* at 24. *Then*, "[i]f the court determines placement with the maternal grandfather is not in Liam's best interests, that determination must be supported with and based on findings explaining why." *Id.*

Notably, however, N.C.G.S. § 7B-903(a1)'s language does not require the trial court to make any written findings, but rather to "*consider* whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." N.C.G.S. § 7B-903(a1) (emphasis added).

This language is in contrast to the language contained in N.C.G.S. § 7B-906.1(e). *See id.* § 7B-906.1(e). As previously discussed, N.C.G.S.

§ 7B-906.1(e) *does* require written findings for those *relevant* subfactors. This requirement is justified by the plain language of N.C.G.S. § 7B-906.1(e) which states that "the court *shall* additionally *consider* the following criteria *and make written findings* regarding those that are relevant." *Id.* (emphases added). Subsection § 7B-906.1(e) makes clear that when the legislature intends a "written findings requirement," it states just that. In contrast, N.C.G.S. § 7B-903(a1) says nothing about written findings. Therefore, we presume the legislature did not intend to impose a written findings requirement in N.C.G.S. § 7B-903(a1) because it did not state one. *See State v. Baker*, 229 N.C. 73, 77 (1948) ("It is reasonable to assume that the Legislature comprehended the import of the words it employed to express its intent when it enacted the statutes [at issue].").

Moreover, the language of the subsection does not support the Court of Appeals' interpretation that the trial court must consider in a vacuum whether placement with the maternal grandfather was contrary to Liam's best interests. *See In re L.L.*, slip op. at 24 ("The statute requires a full analysis of a relative placement prior to *any* consideration of a non-relative placement."). To be sure, it would be functionally impossible for the trial court to determine which placement option is in the "best interests" of the juvenile without considering and comparing all the placement options.[7]

Whether the trial court properly considered N.C.G.S. 7B-903(a1) is reviewed for abuse of discretion.

Here the trial court certainly considered whether the maternal grandfather was "willing and able" to care for Liam. The maternal grandfather testified extensively at the hearing about his willingness and ability to take custody of Liam. The trial court then expressly found "[t]hat it is in the best interests of [Liam] that his custody be granted to [petitioners]." The trial court then made twelve additional findings outlining why placement with petitioners was better for Liam than placement with the maternal grandfather.

For example, despite the maternal grandfather's testimony regarding his capacity to care for Liam, the trial court was doubtful based on its finding that he "is employed full-time and unable to provide the type

7. To the extent the Court of Appeals' opinion might be read to mean that subsection 7B-903(a1) requires a specific arrangement of written findings, we reject any such understanding. Subsection 7B-903(a1) does not require any specific sequence of findings in the trial court's order.

of childcare necessary to meet [Liam's] needs." Instead, the trial court found that the grandfather's girlfriend, who "is not related by blood or marriage to [Liam]," would care for him. Moreover the court found that, "[Liam] has not had significant regular contact with [the grandfather] or [his girlfriend] sufficient to form a close bond with them." At the hearing, the trial court even voiced concern that neither the maternal grandfather nor his girlfriend had ever actually talked with Liam's doctors to understand the level of medical care Liam requires.

It is evident from the trial court's findings that it did consider placement of Liam with the grandfather as the statute requires. However, the trial court was unconvinced that placement with the grandfather—who lacked knowledge of the full extent of Liam's medical needs, who worked full-time, and who lacked any bond with Liam—was in Liam's best interests. This reflects the trial court's proper exercise of its function as a factfinder. *In re N.C.E.*, 379 N.C. 283, 292 (2021) ("[I]t was the trial court's role as fact-finder 'to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " (quoting *In re A.R.A.*, 373 N.C. 190, 196 (2019) (extraneity omitted))).

In contrast, the trial court also made numerous findings in the final order regarding the placement of Liam with petitioners. The trial court found that "[Liam] has been living with the Hall's for twenty-six months, [and] they are the only 'family' that he is familiar with." The court further found that "[Liam] has a close, loving, and bonded relationship in the nature of a parent/child relationship with the Hall's and . . . their children." Moreover, the court found that "[petitioners] have demonstrated over the past twenty-six months that they are willing and able to provide for all of [Liam's] special and intensive needs." These trial court findings adequately demonstrate that placement with the maternal grandfather was not in Liam's best interests.

Furthermore, in findings of facts numbers six and ten, the trial court confirmed that it *considered* the GAL's report that was received into evidence. This report evidenced the GAL's strong recommendation that Liam remain with the petitioners. As stated above, the GAL reported that as a result of his extensive injuries "Liam requires 24-hour care [that] will continue through his entire life." Petitioners currently provide and are committed to providing that continued care in the future. The report further explains that, in addition to the petitioner's proven ability to provide for all of Liam's medical needs, Liam "will shut down and become unresponsive" "if the foster mother[, petitioner,] is not present." This is because "[Liam's] cognitive abilities are very limited such that he

does not understand being away from his foster mother." Moreover, the report emphasized that all of "[Liam's] therapists agree that if [Liam] is removed from [petitioners' care], his condition will severely deteriorate."

The hearing testimony, reports, and resulting final order indicate that the trial court considered placement with the maternal grandfather. The trial court's consideration of the maternal grandfather but ultimate decision to place Liam with petitioners instead is not manifestly unsupported by reason. We therefore conclude that the trial court did not abuse its discretion and thus satisfied the plain language of N.C.G.S. § 7B-903(a1).

IV. Conclusion

In this case, the trial court removed an infant from the custody of his parents after one or both parents inflicted life-altering injuries upon him. Confronted with the severity of the abuse, the unwillingness of either parent to admit responsibility, the extensive ongoing needs of the child as a result of this unexplained abuse, and the failure of respondent to gain an understanding of the child's medical needs as the court repeatedly ordered, the trial court determined that reunification with respondent and placement of the child with respondent's father would be inconsistent with the child's health or safety. We hold that those findings contained in the trial court's order are sufficient to satisfy the provisions of N.C.G.S. §§ 7B-906.1(e), 7B-906.2(b), 7B-906.2(d), and 7B-903(a1). Accordingly, we reverse the decision of the Court of Appeals and affirm the trial court's order awarding full custody of Liam to petitioners and converting the case to a Chapter 50 civil custody proceeding.

REVERSED.

Justice RIGGS concurring in part and dissenting in part.

Liam's short life has already been harder than any child's life should be, and I understand the resistance to disrupting the stability he has found with his foster parents. However, as judges, emotion plays no role in our obligation to apply the law and defer to the legislature's policy decisions. In difficult situations like this, the General Assembly has evinced a clear preference that children should be placed with willing and able relatives rather than with the department of social services or a foster family. *See* N.C.G.S. § 7B-903(a1) (2023) ("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."). The preference for relative placement is rooted in the state's objective to "design an appropriate plan to meet the needs of the juvenile" and "strengthen the home situation" with appropriate community-level resources. *Id.* § 7B-900 (2023). This direction aligns with the federal requirement that state foster care systems "shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child" to be eligible for federal social security grants. 42 U.S.C. § 671(a)(19).

Here, the majority's statutory interpretation of N.C.G.S. § 7B-903(a1) contradicts the General Assembly's clear policy preference for placement of children with willing and able relatives. The majority's decision allows direct comparison of relative placement with foster care placements and runs the risk of introducing class bias into child placement decisions. Further, the majority weakens the statutory requirement that the trial court make specific findings of fact at each permanency planning hearing and before eliminating reunification with the child's parent under N.C.G.S. § 7B-906.2. This majority's decision to disregard the statutory requirements for written findings will only serve to frustrate the ability of appellate courts to engage in meaningful review of disposition orders under Chapter 7B. For these reasons, I respectfully dissent in part. I concur in part with the majority's decision that N.C.G.S. § 7B-906.1(e) only requires written findings as to the factors that are relevant to the case.

I. Analysis

A. Preference for Relative Placement Under N.C.G.S. § 7B-903(a1).

In interpreting N.C.G.S. § 7B-903(a1), the majority first concluded that a trial court is not required to make any written findings establishing that the trial court first considered a family placement because, unlike other statutes, the statutory language of N.C.G.S. § 7B-903(a1) does not explicitly require the trial court to make written findings. The statute, however, requires if the trial 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." N.C.G.S. § 7B-903(a1) (emphases added). Second, the majority effectively writes the preference for relative placement out of the statute by concluding—contrary to the plain language of the statute—that the trial court can compare a foster care placement to a relative placement. I disagree with both conclusions.

First, findings of fact play an important role in the legal system by allowing appellate courts to engage in meaningful review of the trial court's decision. *See State v. Jordan*, 385 N.C. 753, 757 (2024) (recognizing that when the trial court does not make findings of fact, the lack of findings frustrates the ability of appellate courts to engage in appellate review because the appellate court has no underlying facts to which it can apply the law). In reviewing a disposition order, like the order in this case, appellate courts consider whether the findings of fact support the conclusions of law. *See*, *e.g.*, *In re J.M.*, 384 N.C. 584, 591 (2023) ("Appellate review of a trial court's permanency planning order is restricted to whether there is competent evidence in the record to support the findings of fact and whether the findings support the conclusions of law." (cleaned up)); *In re J.D.R.*, 239 N.C. App. 63, 66 (2015) ("On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact are supported by clear and convincing evidence, and (2) whether its conclusions of law are supported by the findings.").

When the trial court does not provide findings of fact to support a conclusion that relative placement is "contrary to the best interests of the juvenile," N.C.G.S. § 7B-903(a1), then the appellate court will have no choice but to remand for additional findings or essentially abandon any meaningful appellate review. *See*, *e.g.*, *In re L.R.L.B.*, 377 N.C. 311, 326 (2021) (remanding for additional findings of fact sufficient for appellate review regarding whether the trial court contemplated N.C.G.S. § 7B-906.2(d)(3)); *In re N.K.*, 375 N.C. 805, 824–25 (2020) (remanding for findings regarding whether the department of social services complied with notice requirements under the Indian Child Welfare Act). Although this statute does not explicitly require findings of fact to demonstrate that the trial court first considered relative placement, such findings would be consistent with the legislature's commitment to creating records that allow for meaningful appellate review. *See Coble v. Coble*, 300 N.C. 708, 712 (1980) ("The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed . . . to allow the appellate courts to perform their proper function in the judicial system." (cleaned up)). Findings are necessary to demonstrate whether the trial court appropriately considered the relative placement before making a permanent placement decision. Consistent with the design and practice of all juvenile cases, to minimize disruptive revisiting of placement decisions during appellate review, I believe the General Assembly did indeed intend for trial courts to make findings of fact that it "first consider[ed]" whether placement with a relative would be "contrary to the best interests of the juvenile." N.C.G.S. § 7B-903(a1).

Second, the majority asserts that "it would be functionally impossible for the trial court to determine which placement option is in the 'best interests' of the juvenile, without considering and comparing all the placement options." Therefore, in the majority's view, the trial court must compare a relative placement with a foster care placement and award custody to the "better" placement between the two.

This interpretation is obviously contrary to the plain language of N.C.G.S. § 7B-903(a1). It is hard to imagine that the legislature could have been clearer. "[T]he 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." N.C.G.S. § 7B-903(a1) (emphasis added). There is simply no reasonable interpretation of this statutory language to allow for a comparison between a relative placement and a foster care placement. "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." *Id.* (emphasis added). "It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 368 N.C. 360, 365 (2015) (cleaned up) (quoting *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 361 N.C. 372, 378 (2007)). Thus, the statute mandates that the trial court consider the suitability of a relative placement before it even considers the foster care placement. Direct comparison of the placements contradicts the plain language of the statute.

Sensible policy reasons explain why the legislature did not adopt the approach the majority takes today. Directly comparing foster care placements to relatives creates a troubling environment where foster or adoptive placements with more financial means or two-parent households have an advantage over less affluent or single relatives. The state has no business deciding whether a nicer house or access to a car means that a non-relative placement is better for the child than a relative placement. Put simply, the majority opens the door for classist biases and assumptions to pour into trial courts' considerations of placement and best interest. Family poverty will cost children the opportunity to stay in their community and grow up with their relatives. Working people will be treated as lesser parents than those in households where one or more parents have the privilege of not working outside the home. Economic wealth will determine custody. Opening this door is a terrible injustice for many far outside the confines of this case.

The General Assembly has clearly decided that relative placement is preferred. Today the majority steps beyond its proper role and into the role of legislature by rewriting the statute to, at best, create an even playing field between relative placements and foster care placements and, at worst, disadvantage relative placements because of wealth. *See Brown v. Brown*, 213 N.C. 347, 349 (1938) ("[I]t is a well-settled rule that all questions of public policy are for the determination of the Legislature and not for the courts, it will not be assumed that any statute enacted by the Legislature was intended to override or depart from principles of public policy founded on good morals unless the language of the statute clearly and unequivocally indicates such an intent.").

Beyond this enormous overstep, legally, the majority also is on shaky ground factually. The trial court in this case did not find that placement with Liam's grandfather would be contrary to his best interests, as required by the statute. Instead, the trial court found that "it is in the best interests of the juvenile that his custody be granted to [the Halls.]" The trial court's order includes four findings about placement with the grandfather: (1) "[the grandfather] is employed full-time and unable to provide the type of childcare necessary to meet [Liam's] needs"; (2) "[the grandfather] lives with his [partner], . . . who is willing to provide care for the child"; (3) "[the grandfather's partner] is not related by blood or marriage to [Liam]"; and (4) "[t]he child has not had significant regular contact with [the grandfather] or [the grandfather's partner] sufficient to form a close bond with them."

Concluding that placement with Liam's grandfather is contrary to Liam's best interest simply because the grandfather works full time and Liam's caretaker is not related by blood or marriage necessarily suggests that working parents are somehow less valuable or important than stay-at-home parents. I worry that if the grandfather were employed as an investment banker or in some other occupation that allowed him to pay for professional nurses and therapists to care for Liam all day, then the trial court and the majority might not have had the same concerns about Liam's care during working hours. And that in and of itself is a problem. Here, the record shows that Grandfather is gainfully employed and able to provide for Liam; further, his partner left her job to provide full-time care to meet Liam's unique needs. Absent further findings, by necessity made in writing, establishing that the trial court found it is contrary to Liam's best interest to be placed with the grandfather, the majority's conclusion unreasonably limits relative placements by approving improper considerations as to who provides care during working hours. *See, e.g.*, *Fisher v. Gaydon*, 124 N.C. App. 442, 445 (1996) (recognizing

that the "traditional two-parent model . . . is not the determinative factor qualifying a group of persons as a family" and that "[*u*]*nmarried* parents living with their children have also been accorded recognition as family units"); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.").

For these reasons, I would remand this case to the trial court to make findings about whether placement with Liam's grandfather is contrary to Liam's best interest.

B. Required Findings Under N.C.G.S. § 7B-906.2(b) & (d).

The majority also weakens the statutory requirements for findings of fact in other areas of Chapter 7B, specifically the requirement for findings when the trial court ceases reunification efforts with the parents. The decision to cease reunification efforts with a child's parents is a significant step that should not be taken lightly.

For that reason, at a permanency planning hearing during which the trial court decides to cease reunification efforts with the parents, "the court shall make written findings as to each of the [factors], which shall demonstrate the degree of success or failure toward reunification." N.C.G.S. § 7B-906.2(d) (2023). Additionally, the trial court must make "written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *Id.* § 7B-906.2(b).

> Although use of the actual statutory language is the best practice, the statute does not demand a verbatim recitation of its language. Instead, the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

In re L.E.W., 375 N.C. 124, 129–30 (2020) (cleaned up) (considering whether the trial court made the factual findings required by N.C.G.S. § 7B-906.2(b) and (d) in eliminating reunification with the parent).

In this case, the majority concluded the order was sufficient to eliminate reunification for three reasons. First, significantly, the majority holds that the trial court does not need to make written findings about

each factor under N.C.G.S. § 7B-906.2(d)—"only those factors that demonstrate the degree of success or failure toward reunification require written findings." This conclusion directly contravenes the plain language of the statute. Second, the majority determined that factual findings contained in documents that have been incorporated by reference become findings of the trial court. This conclusion also runs contrary to the General Assembly's requirement that the trial court make written findings. Finally, the majority concluded that N.C.G.S. § 7B-906.2(b) is synonymous with N.C.G.S. § 7B-906.2(d)(4), and therefore, separate analysis of the factors is unnecessary. In my view, these required findings address independent issues and warrant separate findings.

1. Subsection 7B-906.2(d) Requires Written Findings for Each Factor

First, the majority concluded that only those N.C.G.S. § 7B-906.2(d) "factors that demonstrate the degree of success or failure toward reunification require written findings." The basis for this conclusion was that in other areas of the Juvenile Code, the General Assembly included limiting language that written findings were only required for those factors that were relevant. *See* N.C.G.S. § 7B-906.1(e) (2023) ("[T]he court shall additionally consider the following criteria and make written findings regarding those that are relevant . . . ."; N.C.G.S. § 7B-1110(a) (2023) ("[T]he court shall consider the following criteria and make written findings regarding the following that are relevant . . . ."). The comparison is flawed because the mandate and language in N.C.G.S. § 7B-906.2(d) is markedly different than those other examples. Here, "the court *shall make written findings* as to *each* of the following, which shall demonstrate the degree of success or failure toward reunification." N.C.G.S. § 7B-906.2(d) (emphases added).

The statute instructs that written findings shall be made for all factors, and the second clause provides instructions on the purpose of those findings. *See In re H.A.J.*, 377 N.C. 43, 51 (2021) (affirming the trial court's order after concluding the "trial court's findings of fact establish that it addressed *each of the factors* specified in N.C.G.S. § 906.2(d)" (emphasis added)). The majority relied upon the clause "which shall demonstrate the degree of success or failure toward reunification" to support its conclusion that findings are not required for all factors. But of course, the basic rules of grammar tell us that a phrase introduced by the word "which" is a nonrestrictive clause, and the omission of the clause does not change the meaning of the sentence. *See* Bryan A. Garner, *The Redbook: A Manual on Legal Style*, § 13.3, at 342 (5th ed. 2023) ("*Which* introduces a nonrestrictive clause, one set off by commas

and whose omission would not change the meaning . . . ."); *see also Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811 (1999) ("Ordinary rules of grammar apply when ascertaining the meaning of a statute." (quoting *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134 (1992))). Therefore, the sentence requiring findings under N.C.G.S. § 7B-906.2(d) can only properly be read as written: "[T]he court shall make written findings as to each of the following[.]" N.C.G.S. § 7B-906.2(d). For that reason, I would hold that N.C.G.S. § 7B-906.2(d) requires the trial court to make written findings as to each factor.

2. The Trial Court—Not the Reference Documents—Makes the Findings of Fact

Second, the majority creates a novel standard that "factual findings contained in [reference] documents" become findings of the trial court. Relying upon this Court's decision in *In re K.N.*, 378 N.C. 450 (2021), the majority says that the trial court does not need to make written findings; rather, the appellate court can use factual findings found in documents the trial court incorporated by reference, and those findings become the findings of the trial court. However, in *In re K.N.*, "the trial court took judicial notice of the children's underlying file," but the trial court itself made the findings of fact and conclusions of law. *Id.* at 459. The case only stands for the proposition that the trial court may take judicial notice of and incorporate reference documents, *id.*, but the trial court—not the authors of the incorporated documents—must still make the findings of fact required by N.C.G.S. § 7B-906.2.

The General Assembly identified a requirement that the trial court make the written findings of fact under both N.C.G.S. § 7B-906.2(b) and N.C.G.S. § 7B-906.2(d) and "[i]t is not the province of the courts to rewrite statutes." *State v. J.C.*, 372 N.C. 203, 208 (2019). This Court has held that "information contained in the respective reports of [department of social services] and the [guardian ad litem], however, does not satisfy the trial court's statutory obligation to fulfill the requirements of N.C.G.S. § 7B-906.2(d)[ ] by making written findings . . . ." *In re L.R.L.B.*, 377 N.C. at 324 (concluding that information in a department of social services report or guardian ad litem report was insufficient to meet the statutory requirement for a written finding under N.C.G.S. § 7B-906.2(d)(3)). Additionally, for the required finding under N.C.G.S. § 7B-906.2(b), this Court has held that the trial court must make clear that it "considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." *In re J.M.*, 384 N.C. at 594 (cleaned up) (quoting *In re H.A.J.*, 377 N.C.

43, 49 (2021)). Unless the trial court makes such findings, an appellate court cannot determine whether the trial court properly considered the evidence.

On review, an appellate court should not comb through the reference documents to identify "findings" in the record because doing so would infringe on the trial court's duty to decide "the weight and credibility of the evidence, and the inferences drawn from the evidence." *In re D.W.P.*, 373 N.C. 327, 330 (2020). The "trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law." *Id.* at 330–31 (cleaned up). "The resulting findings of fact must be sufficiently specific to allow an appellate court to review the decision and test the correctness of the judgment." *Id.* at 331 (cleaned up).

Thus, I would remand this case to the trial court for the trial court to make findings of fact as to each of the required factors in N.C.G.S. § 7B-906.2(d) rather than assuming that some parts of the incorporated documents constitute the trial court's findings.

3. Subsections 7B-906.2(b) & 7B-906.2(d) Require Separate Findings

Third, the majority merges the requirement for findings under N.C.G.S. § 7B-906.2(d)(4) regarding Liam's mother's success or failure toward reunification with the ultimate finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health and safety" under N.C.G.S. § 7B-906.2(b). These are different findings and should not be combined into a single analysis.

The requirements of N.C.G.S. § 7B-906.2(d) direct the trial court to consider "the degree of success or failure" the parent is making toward reunification. N.C.G.S. § 7B-906.2(d). Specifically, N.C.G.S. § 7B-906.2(d)(4) requires a written finding as to "[w]hether the parent is acting in a manner inconsistent with the health or safety of the juvenile." *Id.* § 7B-906.2(d)(4). The language here evidences an intent to consider how the parent is currently acting toward the child. In contrast, N.C.G.S. § 7B-906.2(b) requires an ultimate conclusion as to whether "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health and safety" before ceasing all effort for reunification. *Id.* § 7B-906.2(b). Subsection 7B-906.2(b) asks the trial court to consider the growth and development of the parent toward healthy future interactions with the child.

In concluding that the findings of fact in the order were sufficient under both subsections, the majority primarily relied upon the past

incidents that originally led to Liam being taken into custody by the Onslow County Department of Social Services. However, the trial court order gave little consideration to findings about the current interactions between Liam and his mother. That is not to say that the trial court might not, in compliance with the statute, arrive at the same conclusion; however, in my view, the trial court fell short of establishing that further efforts at reunification would clearly be unsuccessful or inconsistent with the health and safety of the child. I would remand this case to the trial court to make the findings of fact required by our statutes.

Finally, the majority concluded that the mother's failure to offer an explanation for the child's injury alone is sufficient to meet the requirement for findings to cease reunification with the parents under N.C.G.S. § 7B-906.2(b). While I understand that our most recent precedent holds that a parent's "persistent unwillingness to acknowledge responsibility for [a child's] life-threatening injuries would render further efforts at reunification clearly unsuccessful and inconsistent with the juvenile's health or safety" and may satisfy the requirement of subsection 7B-906.2(b), *In re J.M.*, 384 N.C. at 602 (cleaned-up), I also recognize that situations exist in which a parent did not injure their child and does not have the information to provide an honest explanation for the injuries, *see id.* at 613 (Earls, J., dissenting) (recognizing the problem of creating a situation where, in cases in which the parent actually does not know who injured the child, "[t]here is nothing the parent can do to overcome his or her ignorance about the cause of [the child's] injuries unless the parent chooses to dishonestly blame the other").

While I agree that the mother's failure to take responsibility for Liam's injuries is a relevant consideration, I must emphasize a few additional important considerations. There is a real tension in requiring a parent facing a criminal charge to forfeit their right against self-incrimination and then also stating as the majority does, as a matter of law, that failure to claim responsibility for abuse is sufficient to sever a parent-child relationship permanently. Second, blanket rules about one specific issue are counterproductive in complex family law cases. In this case, the trial court found that "[t]he parents were and are unable to provide any plausible explanation as to the cause of the injuries." While this finding does say that the mother has not taken responsibility for Liam's life-altering injuries, the order does not establish that the mother continues to act in a manner inconsistent with Liam's health and safety. For example, it is unclear if the trial court considered, and the majority does not discuss, whether the mother's compliance with her Georgia case plan and her success in regaining custody of Liam's brother demonstrates that she is currently acting in a manner consistent with Liam's health

and safety. Such developments should be reflected in the trial court's assessments. These cases are much too complex for simplistic one-size-fits-all conclusions, and the majority contributes to that misfit. *See id.* at 615 (Earls, J., dissenting) ("Contrary to the majority's conclusion that *In re D.W.P.* requires this Court to affirm the trial court's elimination of reunification from the permanency plan here, *In re D.W.P.* suggests that a holistic review of respondent-parents' subsequent conduct was required, rather than treating their lack of knowledge about the cause of [the child's] injuries as determinative. Specifically, the parents' relationship with their children, their compliance with their case plans, and their demonstrated behavioral growth as a result of engaging with their case plan requirements are all relevant considerations in assessing whether reunification is appropriately included in their children's permanency plans.").

In sum, I would remand this case for independent findings for each of the factors identified in N.C.G.S. § 7B-906.2(d) and for an ultimate finding that continued reunification efforts would be clearly inconsistent with Liam's health or safety as required by N.C.G.S. § 7B-906.2(b).

C. Required Findings Under N.C.G.S. § 7B-906.1(e).

I concur with the majority's conclusion that a trial court is only required to make written findings about the factors in N.C.G.S. § 7B-906.1(e) that are relevant. Even still, if the factor is relevant, the trial court must make the finding. Appellate courts may, of course, make inferences from the findings in the order that is appealed but should not engage in a fact-finding journey into other orders that were not appealed or reports considered by the trial court in an effort to make findings on behalf of the trial court. *See In re L.R.L.B.*, 377 N.C. at 323–24 (remanding for additional findings when the trial court's findings do not address the statute's concerns even though information in the record may address the concern). It is not the role of the appellate court to infer the findings from orders that were not appealed or reports that the trial court considered.

II. Conclusion

In sum, I would hold that a trial court must make findings of fact to demonstrate that it first considered whether a willing and able relative placement was contrary to the best interests of the child before the trial court considers a foster care placement. Additionally, I would follow the plain language of N.C.G.S. § 7B-906.2(d) and hold that the trial court must make written findings as to each factor identified in N.C.G.S. § 7B-906.2(d). I would also hold that when a trial court decides to cease

reunification efforts with a parent, the trial court must make an independent finding demonstrating that the court considered whether further efforts at reunification would clearly be unsuccessful or inconsistent with the juvenile's health or safety as required by N.C.G.S. § 7B-906.2(b). For these reasons, I respectfully concur in part and dissent in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

NORTH STATE DELI, LLC D/B/A LUCKY'S DELICATESSEN; MOTHERS & SONS, LLC D/B/A MOTHERS & SONS TRATTORIA; MATEO TAPAS, L.L.C. D/B/A MATEO BAR DE TAPAS; SAINT JAMES SHELLFISH LLC D/B/A SAINT JAMES SEAFOOD; CALAMARI ENTERPRISES, INC. D/B/A PARIZADE; BIN 54, LLC D/B/A BIN 54; ARYA, INC. D/B/A CITY KITCHEN AND VILLAGE BURGER; GRASSHOPPER LLC D/B/A NASHER CAFE; VERDE CAFE INCORPORATED D/B/A LOCAL 22; FLOGA, INC. D/B/A KIPOS GREEK TAVERNA; KUZINA, LLC D/B/A GOLDEN FLEECE; VIN ROUGE, INC. D/B/A VIN ROUGE; KIPOS ROSE GARDEN CLUB LLC D/B/A ROSEWATER; AND GIRA SOLE, INC. D/B/A FARM TABLE AND GATEHOUSE TAVERN

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; AND DOES 1 THROUGH 20, INCLUSIVE

No. 225PA21-2

Filed 13 December 2024

Insurance—commercial—government-ordered pandemic restrictions—temporary business closures—"direct physical loss" met

In a claim brought by numerous bars and restaurants (plaintiffs) seeking insurance coverage for their loss of business when—during the COVID-19 pandemic—government-mandated restrictions temporarily limited the use of and access to their physical properties, plaintiffs were entitled to partial summary judgment on the issue of whether their losses were covered by their "all-risk" commercial property insurance or supplemental business income policies. Under each policy, any ambiguity in the phrase "direct physical loss" was construed in favor of the policyholders, and, here, plaintiffs sufficiently alleged direct physical losses where government-issued orders rendered their properties unusable for their insured purposes, and the policies did not specifically exclude viruses or contaminants from covered risks.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 284 N.C. App. 330 (2023), reversing an order entered on 9 October 2020 by Judge Orlando F. Hudson Jr. in Superior Court, Durham County, and remanding the case. Heard in the Supreme Court on 22 October 2024.

The Paynter Law Firm, PLLC, by Gagan Gupta and Stuart M. Paynter, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Kimberly M. Marston, Jim W. Phillips Jr., and Gary S. Parsons; and Litchfield Cavo, LLP, by Daniel G. Litchfield, pro hac vice, and Alan I. Becker, pro hac vice, for defendant-appellees.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Kaeli Czosek, Solicitor General Fellow, for the State of North Carolina, amicus curiae.

Robinson, Bradshaw & Hinson, P.A., by Richard C. Worf Jr.; and Covington & Burling LLP, by Rukesh A. Korde, pro hac vice, and Tyler Weinblatt, pro hac vice, for United Policyholders and National Independent Venue Association, amici curiae.

Guy W. Crabtree for North Carolina Restaurant & Lodging Association, Restaurant Law Center, and Angus Barn, Inc., amici curiae.

Office of the City Attorney for the City of Durham, by Kimberly M. Rehberg; and Patrick W. Baker, Adam M. Jones, Rhonda D. Orin, pro hac vice, Marshall Gilinksy, pro hac vice, and Madilynne Lee, pro hac vice, for Cities of Charlotte and Durham, amici curiae.

Roger A. Peters II for American Property Casualty Insurance Association, amicus curiae.

EARLS, Justice.

Plaintiffs are bars and restaurants in North Carolina (collectively, restaurants) that were forced to suspend business operations because of COVID-19-related orders by government authorities.[1] When the

1. They are Lucky's Delicatessen, Mothers & Sons Trattoria, Mateo Bar de Tapas, Saint James Seafood, Parizade, Bin 54, City Kitchen, Village Burger, Nasher Cafe, Local 22,

global pandemic struck in the spring of 2020, each restaurant carried a materially similar commercial property insurance policy with defendants Cincinnati Insurance Company and Cincinnati Casualty Company (together, Cincinnati). Those policies protect the businesses' building and personal property as well as business income from any "direct physical loss" to property not excluded by the policy. The dispute here is whether a "direct physical loss" occurred when government orders forced temporary restrictions on the use of and access to the restaurants' physical property.

Cincinnati argues that these temporary physical closures are not the type of direct "loss" contemplated by the policy and refuses liability for coverage. The restaurants argue that these closures are a covered property "loss" under the policy's ordinary meaning and seek a declaratory judgment to that effect.

Below, the trial court sided with the restaurants, finding on a motion for partial summary judgment that such losses are covered. The Court of Appeals then reversed that order, interpreting the insurance contract to exclude such losses, and remanded the case, directing the trial court to enter summary judgment in favor of defendants. *N. State Deli, LLC v. Cincinnati Ins. Co.*, 284 N.C. App. 330, 334 (2022). We disagree with the Court of Appeals based on our Court's long-standing rules of insurance contract interpretation. Because a reasonable policyholder in the restaurants' shoes could expect "direct physical loss" to property, as used in this policy, to include the results of COVID-19-era government orders which affected the restaurants' use of and access to their physical property, and because the policy otherwise contains no exclusion for viruses, we construe the ambiguity here in favor of coverage. Accordingly, we hold that this policy does cover the restaurants' alleged losses and that the restaurants are entitled to their motion for partial summary judgment. We therefore reverse the judgment of the Court of Appeals and remand to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

I. Background

A. Government orders issued in response to COVID-19 forced covered establishments to suspend business operations.

"A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all

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Kipos Greek Taverna, Golden Fleece, Vin Rouge, Rosewater, Farm Table, and Gatehouse Tavern. These restaurants and bars are based in Buncombe, Chatham, Durham, Orange, and Wake counties. The parent companies of those businesses are the plaintiff parties.

inferences in the non-movant's favor." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). Undisputed evidence submitted during discovery showed the following: starting in March of 2020, state and local governments responded to the COVID-19 public health crisis with multiple orders aimed at stopping the virus's spread. *See, e.g.*, Exec. Order No. 141, 34 N.C. Reg. 2360 (May 20, 2020). The orders imposed broad limitations on the use and operation of a variety of business properties across the state. Relevant here, they forced owners and employees of bars and restaurants to close or curtail business operations. For example, varying state orders limited the sale of food and beverages "to carry-out, drive-through and delivery services only" and limited access to facilities that sell food and beverages accordingly. *See, e.g.*, Exec. Order No. 118, 34 N.C. Reg. 1834 (Mar. 17, 2020). Bars with no food service were closed outright. *See id.* Later orders kept restaurants closed except for preparing food for off-premises consumption, *see* Exec. Order No. 120, 34 N.C. Reg. 1844 (Mar. 23, 2020), and established social distancing and occupancy limits as time progressed, *e.g.*, Exec. Order No. 131, 34 N.C. Reg. 1960 (Apr. 9, 2020). These state orders were enforced by threat of criminal prosecution. *E.g.*, *id.* at 1968.

Local or municipal orders supplemented these statewide measures. For example, the City of Durham, where at least some of the restaurants are or were located, prohibited travel to or engagement in business activities with enumerated exceptions, including that restaurants were permitted to prepare and serve food for off-premises consumption only.

The restaurants offered evidence that these mandated closures, use restrictions, and corresponding declines in business income caused the businesses to furlough and lay off their employees and even risk having to close permanently. Sixteen of the restaurants closed completely after the orders, and two remained open for take-out only before closing for business in May 2020 for a period of time. After the pandemic, at least one of the restaurants (Lucky's Delicatessen) never reopened.

B. The restaurants maintained an "all-risk" commercial property insurance policy and supplemental business income coverage.

At the time of these forced closures, the restaurants carried an "all-risk" commercial property insurance policy and supplemental business income policy with Cincinnati. "All-risk" or "open-perils" insurance is a type of property insurance that protects property loss or damage from any peril, unless the peril is expressly excluded. *See Open-Perils Insurance*, Black's Law Dictionary (12th ed. 2024). It is more protective for insureds because it covers imagined and unimagined perils, so a

business need not guess in advance what misfortune might befall it. *See Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146 (1973). The policy is also structured to allow insurance companies to carve out certain events from coverage, including those not conducive to risk-spreading across the pool of insureds. Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 Conn. Ins. L.J. 185, 194–95 (2021). In addition to excluded perils, an "all-risk" or "open-perils" policy is further limited by what types of losses are actually covered—as in, the type of property "damage" or "loss" triggering coverage under a commercial property insurance policy. *See Avis*, 283 N.C. at 146 (noting that "all risks" does not include "all losses").

A hypothetical to clarify this risk/loss distinction: If an alien spaceship crashes into a small restaurant, that is a covered risk (aliens are not an excluded cause of loss) and a covered loss (the commercial building is damaged). If an alien spaceship dumps glitter all over the restaurant, that is a covered risk (aliens are not excluded), but the insurance company likely could successfully contend that is not a covered loss (the owner can vacuum up the glitter, and the building is fine). A policyholder is entitled to coverage if they experience both a covered "risk" and a qualifying "loss."

The restaurants here have such "all-risk" policies for which they have paid tens of thousands of dollars in premiums. Specifically, they each have a commercial property insurance policy that insures building and personal property from direct physical loss or damage caused by a covered cause of loss—that is, all causes of loss that are not specifically excluded. They also have a "Business Income (and Extra Expense) Coverage" supplement insuring against lost business income sustained when the business must suspend its operations because of a covered loss.[2]

Starting with the property insurance policy, it says the following: "We will pay for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." The quotations denote a term defined in the policy. According to the definitions section, " 'Loss' means accidental physical loss or accidental physical damage." But the policy does not define "physical loss," "physical damage," or

2. Although there are multiple policies at issue across the multiple restaurants, the operative language is the same in each, and therefore, we refer to North State Deli's policy, attached as an exhibit to Matthew Raymond Kelly's affidavit.

"accidental," even as it defines dozens of other terms across three pages of definitions.

The policy confirms that it is an "all-risk" policy by defining the scope of its risk coverage only by its exclusions: Covered Causes of Loss means "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." The excluded Causes of Loss span six pages. Examples include: earthquakes; an ordinance or law that regulates construction, use, or repair of any building or structure; war or military action; certain kinds of flooding or mudslides; fungi; wear and tear; dishonest or criminal acts; exposure to weather; and pollutants of certain kinds.

Notably, viruses or contaminants are not excluded. On the contrary, one of the restaurants' owners and operators, Matthew Raymond Kelly, alleged that he expressly requested that his insurance broker ensure that the policies provide coverage for losses due to viruses, given his knowledge of a previous norovirus outbreak among North Carolina restaurants. (The broker, Morris Insurance Agency, Inc., is a defendant in this action.) The broker allegedly indicated that the policy *would* cover virus-related events —the very policy under which the restaurants now seek coverage.

The specific provision under which the restaurants seek coverage is the supplemental "Business Income (And Extra Expense) Coverage Form." It stipulates:

> We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" . . . . The "loss" must be caused by or result from a Covered Cause of Loss.

Loss here is defined the same way as above ("accidental physical loss or accidental physical damage"). A "suspension" means, in relevant part, a "slowdown or cessation of . . . business activities." The period of restoration is defined as:

> a. Begins at the time of direct "loss".
>
> . . . .
>
> b. Ends on the earlier of:
>
> (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality;

> (2) The date when business is resumed at a new permanent location; or
>
> (3) 12 consecutive months after the date of direct "loss".

Putting together this web of provisions, the restaurants are entitled to recover insurance payments for the slowdown or cessation of business activities if their losses stemming from the government-ordered shutdowns are a "direct" "physical loss or . . . physical damage" to property caused by a covered risk.

C. The trial court sided with the restaurants, and the Court of Appeals reversed.

Because they were concerned Cincinnati would deny coverage for their claimed losses, the restaurants filed suit in 2020. At issue here is the restaurants' claim for a declaratory judgment that gubernatorial, county, and municipal orders constitute covered perils under the policies that caused "direct physical loss" to property at the described premises and that Cincinnati must therefore pay the resulting lost business income and extra expenses as defined by the polices. The restaurants moved for partial summary judgment on that count on 3 August 2020.

The trial court agreed with the restaurants and granted their motion. Because Cincinnati did not define "direct" "physical loss" or "physical damage" in the policy, the court reasoned, those words must be given their ordinary meaning. The ordinary meaning of "loss," it noted, includes the "act of losing possession." "Direct" and "physical" connote a causal relationship between a source and a material object. It further noted that "or" in "physical loss or . . . physical damage" suggests "loss" cannot also require structural alteration to property or else "damage" would be rendered meaningless. Moreover, it determined that since the policy does not exclude the cause of the restaurants' losses, government shutdowns due to a virus must be included.

At the Court of Appeals, a unanimous panel reversed the trial court's order. While noting that the goal of insurance contract interpretation is to arrive at the coverage intended by the parties and that any ambiguities are to be construed against the insurer, it concluded that no "direct physical loss of or damage to" property occurs from loss of use of or access to property. *N. State Deli*, 284 N.C. App. at 333. Since there was no physical harm to property, only "loss of business," partial summary judgment in favor of the restaurants was error. *Id.* at 333–34. The restaurants filed a petition for discretionary review, and the Court allowed the petition.

II. Analysis

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo." *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 137 (2018) (quoting *In re Will of Jones*, 362 N.C. 569, 573 (2008)), *aff'd sub nom. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 588 U.S. 262 (2019). Summary judgment is appropriate when "the record shows 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.' " *In re Will of Jones*, 362 N.C. at 573 (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24 (2007)). The meaning of language in an insurance policy presents a question of law for the Court. *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295 (2020).

A dispute regarding coverage under an insurance policy is properly resolved on summary judgment "where the material facts and the relevant language of the policy are not in dispute and the sole point of contention is 'whether events as alleged in the pleadings and papers before the court are covered by the policies.' " *N.C. Farm Bureau Mut. Ins. Co. v. Martin ex rel. Martin*, 376 N.C. 280, 285 (2020) (quoting *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690–91 (1986)).

Cincinnati does not contest the restaurants' factual allegations, nor does it argue that any exclusions apply that preclude coverage. Its sole contention is that the restaurants have failed to carry their burden to establish that their businesses had to suspend operations because of a direct physical loss or damage to property. Since the dispute over the restaurants' claim for a declaratory judgment turns only on the interpretation of "direct" "physical loss or . . . physical damage" to property as used in the policy, we agree that this claim is properly resolved at summary judgment.

B. Rules of Insurance Contract Interpretation

As with all contracts, the goal of interpreting a contract for insurance "is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505 (1978). In doing so, "the plain language of the policy controls." *N.C. Farm Bureau Mut. Ins. Co.*, 376 N.C. at 286. Terms that are defined in a policy should be given that definition. *Woods*, 295 N.C. at 505–06. Undefined words are given their ordinary meaning consistent with the context in which the term is used. *Accardi*, 373 N.C. at 295. One way of understanding ordinary meaning is to consult standard, nonlegal dictionaries. *N.C. Farm*

Bureau Mut. Ins. Co., 376 N.C. at 287. Terms should also be interpreted in harmony with other portions of the policy, if possible, and to give effect and purpose to each word or term. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355 (1970).

In addition to these general rules for contract interpretation, special interpretive principles apply when interpreting contracts for insurance, as our Court has long recognized. *E.g.*, *Jones v. Cas. Co.*, 140 N.C. 262, 263–65 (1905). Namely, the insurance contract "should be given that construction which a reasonable person in the position of the insured would have understood it to mean." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978); *accord Wachovia Bank & Tr. Co.*, 276 N.C. at 356 (noting that undefined terms should be given the "meaning most favorable to the insured which is consistent with the use of the term in ordinary speech"); *Register v. White*, 358 N.C. 691, 699 (2004). Where a policy term is ambiguous, because "the language is 'fairly and reasonably susceptible to either of the constructions for which the parties contend,' " it should be construed against the insurance company and in favor of the policyholder. *Accardi*, 373 N.C. at 295 (quoting *Wachovia Bank & Tr. Co.*, 276 N.C. at 354); *accord Brown v. Lumbermens Mut. Cas. Co.*, 326 N.C. 387, 392 (1990). Subject to those principles of construction, provisions granting coverage must be read expansively, and provisions excluding coverage must be read narrowly. *Wachovia Bank & Tr. Co.*, 276 N.C. at 355.

These basic principles reflect the reality of the parties' respective bargaining power: insurance companies prepare the policies and choose what language to use. *See Grant*, 295 N.C. at 43. They are also experienced in managing risk and drafting policies accordingly. *Cf. Infected Judgment*, at 194–95 (describing insurance as a "risk-based product, designed to buffer chance happenings of loss-related events by pooling collective risk" and noting some considerations in structuring and pricing insurance polices in light of possible pandemic-related losses). This Court will not impose on an insurance company liability it did not assume and for which the policyholder did not pay. *Accardi*, 373 N.C. at 295. But insurance companies have ample notice of these longstanding interpretive principles, which set clear " 'rules of engagement' for novel arguments" on which all parties can rely. *See* New Appleman North Carolina Insurance Law §§ 1.03, 1.05 (2024 ed. 2023) (noting that insurance disputes are governed by "basic principles [that] have been invoked by the courts time and again," including that provisions that provide coverage are construed liberally and ambiguities are resolved against the insurer); 18 Strong's North Carolina Index 4th, Insurance

§ 124 (2014) (compiling cases). Such rules of engagement are a useful interpretive tool to ensure efficient dispute resolution and are consistent with our approach to other kinds of contract interpretation. *See O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 227 (1978) (describing the general rule of contract interpretation that ambiguities are construed against the drafting party).

Put simply, because of these rules, insurance companies know they must clearly "mark out and designate" the contours of their policy and that "it is not the function of the court to sprinkle sand upon the ice by strict construction of the [otherwise slippery] term." *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 437 (1966). If, in applying these background principles, coverage expands beyond what the company says it contemplated, then "the fault lies in its own selection of the words by which it chose to be bound." *Id.* at 438.

C. Application to the Restaurants' Policies

The issue here is whether the phrase "direct" "physical loss" to property as it is used in the restaurant's policies covers their loss of physical use of and access to their property due to virus-related government orders.

Again, the policy does not define this operative term. "Loss" is defined as "accidental physical loss or accidental physical damage," but none of those constituent phrases are defined among the dozens of definitions in the policy. "Accidental" is part of this definition, but it is not contested here. Our task then is to interpret the ordinary meaning of "direct physical loss" in the context of this policy.

We start by consulting relevant definitions in standard, nonlegal dictionaries. *See N.C. Farm Bureau Mut. Ins. Co.*, 376 N.C. at 287. "Direct" is characterized by "a close esp[ecially] logical, causal, or consequential relationship" or marked by the "absence of an intervening agency, instrumentality, or influence." *Direct*, Webster's Third New International Dictionary 640 (2002). "Physical" means material, as opposed to mental, moral, spiritual, or imaginary. *Physical*, Webster's Third New International Dictionary 1706. "Loss" means a deprivation, failure to keep possession, or the state or fact of being destroyed. *Loss*, Webster's Third New International Dictionary 1338.[3] Put together, a covered cause

3. Ironically, Webster's Third also defines "loss" as "the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event (as death, injury, destruction, or damage) in such a manner as to charge the insurer with a liability under the terms of the policy," which if applied here renders the policy totally circular. *Loss*, Webster's Third New International Dictionary 1338.

of loss must, absent an intervening factor, result in the material deprivation, dispossession, or destruction of property.

Both parties make reasonable arguments about whether that ordinary meaning includes closures due to government orders. The restaurants argue that the orders did immediately result in material deprivation of property. The orders targeted individual conduct on the property, the functions of the property, and how policyholders could physically access and occupy the insured space, including whether and under what conditions the business premises could be open. *See*, *e.g.*, Exec. Order No. 120, 34 N.C. Reg. 1844 (Mar. 23, 2020). That in turn affected the feasibility of business operations. It is true that these restrictions were temporary, but there is no "total" or "partial" modifier that excludes temporary property restrictions from coverage.

Cincinnati counters that "direct physical loss" cannot simply mean "loss of physical use." By analogy, it points out that "loss of a car" does not mean the same thing as "loss of use of a car," as any grounded teenager could confirm, quoting *Image Dental, LLC v. Citizens Ins. Co. of Am.*, 543 F. Supp. 3d 582, 590–91 (N.D. Ill. 2021). Extending that logic, it notes that the COVID-19 virus and corresponding government orders regulated the activities of people, not property, and that the restaurants experienced no physical change to the business property itself.

Contrary to Cincinnati's arguments, though, we fail to see why the ordinary meaning of "direct physical loss" is entirely insensitive to the "use" for which a property is insured. Again, by analogy, the homeowner who cannot live in their house due to irremediable cat urine odor is not placated that their property is not "lost" because it could be used as a home for cats. *See Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (concluding that "physical loss to property" could include loss resulting from persistent cat urine odor which rendered a property "temporarily or permanently unusable or uninhabitable"). This overlap between property "use" and "loss" follows from a contextual and common-sense expectation that insurance should protect from threats to property that make it unusable for the purpose for which it is insured. Property "loss" surely occurs when it is no longer usable for its insured purpose, as a policyholder would reasonably expect. Thus when the restaurants lost physical use of their properties as restaurants due to the pandemic orders, they experienced a direct physical loss.

Can harmonizing the phrase "direct physical loss" with other policy provisions clarify its contours? We note, as the trial court below did, that "direct physical loss" is used in conjunction with "direct physical

damage," so "loss" must have some meaning distinct from "damage" to effectuate both provisions. *See also C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 142 (1990). "Damage" is defined as "injury or harm to . . . property." *Damage*, Webster's Third New International Dictionary 571. The distinct meaning of "loss" could be one of degree, as Cincinnati argues: "loss" is complete destruction or total dispossession, as in an instance of theft, while "damage" is a less-than-complete impairment or alteration. That reading would exclude temporary restrictions under the pandemic-era government orders that barred access to or use of restaurant dining rooms but not the restaurants' entire premises. Alternatively, a reasonable policyholder could see these two words in the disjunctive and read "loss" as purposely broader than "damage." A broader definition could encompass dispossession, deprivation, or impairment of use or function, complete or partial. That would include temporary dispossession or deprivation of the businesses' physical property under government orders, as the restaurants argue.

It is not obvious from the conjunction "or" which of these two distinct yet overlapping meanings the parties intended. But a "reasonable person in the position of the insured" could certainly read the provision to include the latter, and the ambiguity counsels us to find in favor of the restaurants' reading. *See Grant*, 295 N.C. at 43.

Looking yet further to neighboring language in the policies, Cincinnati urges that the provision indicating the duration for which it will provide insurance benefits after the property loss or damage, called the "period of restoration," should color the meaning of "direct physical loss" in the policy. Assuming without deciding that a reasonable insured would look to a provision on the duration of coverage to understand the scope of the coverage, the ordinary meaning of the "period of restoration" here again supports both parties' constructions.

The provision in the restaurants' policies about the "period of restoration" states that it runs through one of three disjunctive alternatives: the date by which the property should be repaired, rebuilt, or replaced; the date when business is resumed at a new permanent location; or twelve consecutive months after the direct physical loss or damage. Cincinnati points out that the indemnity ends "on the earlier of" the three alternatives. Necessarily then, a policyholder must know exactly how long each alternative takes, so all losses must be capable of complying with all three alternatives, it argues. That implies direct physical losses are only those that can be "repaired, rebuilt or replaced," it says.

But that conclusion does not follow as a matter of ordinary meaning, rooted in the reasonable understanding of the insured. If a policy gives two alternatives and says the "earlier" is operative, and one is clearly inapplicable, the "earlier" is the only applicable one. The insured does not lose coverage because the "loss" cannot be restored under both alternatives.[4] Same, here. If two of the three options (resuming at a new permanent location or repairing, rebuilding, or replacing the lost property) do not apply, a reasonable policyholder would expect the twelve-consecutive-month limit to be the "earliest" and thus controlling option. And that temporal limit says nothing as to the contours of a "direct physical loss."

Looking even further, the varying "exclusions" from covered causes of loss underscore that the restaurants reasonably expected their losses in these circumstances to be covered. Because the policy excludes certain kinds of government zoning regulations, government ordinances, government seizures, and war and military actions, a person in the insured's shoes could reasonably expect virus-related government orders that are *not* an excluded cause of loss to be covered under the policy.

Notably, too, the restaurants' policies contain no exclusions for viruses in general, even as 82.83% of business insurance policies had such exclusions.[5] Cincinnati may dismiss the existence of virus exclusions in other policies as extratextual, but where a contract defines coverage only by excluded risks, as this one does, a policyholder must know something about the universe of perils beyond the four corners of the document to know what coverage they have paid for.

Further, concerns about viruses and their consequences for business operations were common enough in the restaurant industry that at least one restaurant specifically sought coverage for such losses under

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4 Consider the instant policy, putting aside the temporal alternative of twelve consecutive months. One restoration end-date is when the property at the premises "should be repaired, rebuilt or replaced." The other is "[t]he date when business is resumed at a new permanent location." It is clear a policyholder would not comply with both. For example, if escaped radioactive waste from a nuclear powerplant renders the next-door restaurant completely inoperable, then the restaurant policyholder may not have the option to rebuild, repair, or replace its lost property. She would need to move to a new permanent location. And the time it takes to resume at that new permanent location would be the "earliest" and thus operative period of restoration.

5. This figure is according to one insurance industry data measure. *See* Nat'l Ass'n of Ins. Comm'rs, COVID-19 Property & Casualty Insurance Business Interruption Data Call, Part 1, Premiums and Policy Information, at 3 (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf (last visited Dec. 10, 2024).

the instant policy. Knowledge of the risks of viruses, together with knowledge that other policies exclude virus risks while this one does not, underscores that a policyholder would reasonably understand the absence of such an exclusion as an affirmative grant of coverage. *See Grant*, 295 N.C. at 43. This conclusion is further supported by the allegation that the restaurants' insurance broker apparently shared this interpretation of the policy.

Finally, at the highest level of context, Cincinnati emphasizes that this is a commercial property insurance policy. It is not insurance against lost profits, which it says follows from the restaurants' reading of "direct" "physical loss" to property. But the restaurants counter that they seek coverage not under the first-level property insurance policy—rather their claim is under the supplemental business income coverage form. A policyholder may reasonably believe that "they purchased business interruption insurance as an add-on to their property coverage in order to insure a capital asset—the income-earning power of their business." *Infected Judgment*, at 199. If that capital asset "is interrupted due to an interference with their use of the property[,] . . . their reasonable expectation would be that the business interruption portion of their policy would cover such losses," especially since the interruption coverage relates to the "all-risk" property insurance for which viruses and corresponding orders are not excluded. *See id.* That is a particularly reasonable expectation for a restaurant policyholder, since restaurants are accustomed to operating on razor-thin margins and can only do business with use of their physical space.

Cincinnati, again, could have provided a narrower definition of "direct physical loss" for this business income coverage. It did not. Instead, it opted only to restate its non-definition: " 'Loss' means accidental physical loss or accidental physical damage." Of course, the more definitions there are, the longer contracts become, and the more difficult they can be for an ordinary policyholder to understand. But an insurance company need not define every term in its policy to define the core provision around which the entire policy operates.

At bottom, a reasonable person in the position of the insured would understand the restaurants' policies to include coverage for business income lost when virus-related government orders deprived the policyholder restaurants of their ability to physically use and physically operate property at their insured business premises. Since Cincinnati's interpretation of "direct physical loss" to property is also reasonable, North Carolina's background principles compel us to resolve this ambiguity in favor of the insured policyholder. *See Accardi*, 373 N.C. at 295.

We therefore conclude that the restaurants have stated a claim for coverage due to a "direct physical loss" to property under their policies, and they are entitled to partial summary judgment as the trial court concluded.

In so holding, we decline to do what other courts have done and affirmatively define the "slippery" term Cincinnati chose to use in this manifestly ambiguous situation. *See Jamestown*, 266 N.C. at 437; *see also Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 302 A.3d 67, 77 (N.H. 2023) (cautioning against an overly broad judicial interpretation of "direct physical loss"). We are aware of the opinions by other courts holding the opposite of what we hold today. But the array of definitions offered in those opinions underscores that "direct physical loss" has a range of reasonable interpretations—many of which include considerations of use, possession, and function that are implicated by virus-related government orders. *See, e.g.*, *Ungarean v. CNA & Valley Forge Ins. Co.*, 323 A.3d 593, 607–08 (Pa. 2024) (concluding that "direct physical loss . . . of property" requires "a physical disappearance, partial or complete deterioration, or absence of a physical capability or function of the property"); *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515, 529 (Vt. 2022) (concluding that "direct physical loss" means "persistent destruction or deprivation, in whole or in part, with a causal nexus to a physical event or condition"); *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 262 (Nev. 2023) ("[D]irect physical loss to covered property requires material or tangible destruction or dispossession as a result of material or tangible impact directed toward the property itself." (cleaned up)); *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, 2022-01349 (La. 3/17/23), 359 So. 3d 922, 926 ("[D]irect physical loss . . . requires [that a] property sustain a physical, meaning tangible or corporeal, loss or damage [or otherwise become uninhabitable]."); *Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 198 (Conn. 2023) ("[D]irect physical loss of property . . . [requires] some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible." (cleaned up)); *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 307 (Cal. 2024) ("[D]irect physical loss or damage to property . . . must result in some injury to or impairment of the property as property.").

North Carolina's background rules of insurance contract interpretation counsel against this approach. It is the insurance company's responsibility to define essential policy terms and the North Carolina courts' responsibility to enforce those terms consistent with the parties' reasonable expectations. *See Grant*, 295 N.C. at 43. Otherwise, insurance companies are licensed to pitch consumers on an expansive, "all-risk" policy,

while hiding behind a narrower definition imposed by judicial fiat when it comes time to pay out. Such a setup contradicts our Court's holdings that the lodestar for insurance contract interpretation is the reasonable expectation of the policyholder and that ambiguities should be resolved in the insured's favor.

III. Conclusion

In light of the above, we cannot say that the restaurants' policies unambiguously bar coverage when government orders and threatened viral contamination deprived the policyholder restaurants of their ability to physically use and physically operate property at their insured business premises. Accordingly, the policyholder restaurants have stated a claim for coverage and are entitled to their claim for partial summary judgment. We reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for further remand back to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PHILIP MORRIS USA, INC., PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. 62A23

Filed 13 December 2024

Taxation—statutory construction—purpose and legislative intent—export credit allowed in a tax year—summary judgment improper

In a complex business case requiring the interpretation of N.C.G.S. § 105-130.45 (repealed effective 1 January 2018) regarding a taxpayer's yearly limit of $6,000,000 of export credit—a tax credit based on the number of cigarettes manufactured in the state for export in a given year—the trial court erred in allowing summary judgment in favor of the Department of Revenue, whose position was that the provision capped the export credit that could be generated in any tax year. Construing the pertinent language of the statute, the Supreme Court held that the $6,000,000 cap applied only to the amount of export credit that could be claimed in any tax year

and did not limit a taxpayer's ability to generate credit in excess of that amount in any tax year, to carry forward as otherwise provided.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on petition for review of final decision entered on 29 September 2022 by Judge Julianna Theall Earp, 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 14 February 2024.

Ward & Smith, P.A., by Alex C. Dale and Christopher S. Edwards; and Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart and Dylan Z. Ray, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Tania X. Laporte-Reveron, Assistant Attorney General, and Ronald D. Williams, Special Deputy Attorney General, for respondent-appellee.

BARRINGER, Justice.

This matter involves a dispute between Philip Morris USA, Inc. (Philip Morris) and the North Carolina Department of Revenue (Department), related to tax credits available to manufacturers of cigarettes for exportation (Export Credits), carried forward from prior years' tax returns by the citizen taxpayer. The specific issue before the Court is whether the "credit allowed" in N.C.G.S. § 105-130.45(b) (2003) (repealed effective 1 January 2018) limits the Export Credits claimed by Philip Morris such that the citizen taxpayer cannot carry forward to future years the Export Credits generated in prior years.

Therefore, to address that issue, the Court must determine what is meant by "credit allowed" in N.C.G.S. § 105-130.45, titled "credit for manufacturing cigarettes for exportation" (Export Credit Statute). Philip Morris and the Department each argue that the plain meaning of the statute supports their respective positions; however, since neither party's textual analysis provides a univocal interpretation, we find the statute ambiguous. For the reasons stated below, we hold that any

generated Export Credit in excess of the annual statutorily defined cap may be carried forward for the succeeding ten years. Accordingly, we reverse the trial court's order of summary judgment in favor of the Department and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

Background

The Export Credit Statute allows cigarette manufacturers a tax credit based on the volume of cigarettes they manufactured in North Carolina for export each year. N.C.G.S. § 105-130.45 (2003). The Export Credit that may be taken or claimed in any tax year is "not [to] exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year." *Id.* § 105-130.45(c). "This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years." *Id.*

Philip Morris' cigarette exportation generated more than six million dollars of Export Credits in 2005 and 2006 but less than the cap in 2012, 2013, and 2014. Nevertheless, Philip Morris claimed the maximum six million dollars for tax years 2012, 2013, and 2014, carrying forward a portion of the generated but unclaimed Export Credits from 2005 and 2006.

The Department audited Philip Morris' corporate income tax returns for tax years 2012 through 2014.[1] The Department then issued a report disallowing Export Credits claimed by Philip Morris, followed by proposed assessments for each of the audited tax years. The Department disallowed Philip Morris' claimed credits because, according to the Department, the Export Credit Statute limits the credits that can be "generated." Accordingly, credits generated in a year are capped at six million dollars. Thus, according to the Department, Philip Morris had no credits available to carry forward as it had generated, and used, six million dollars in both 2005 and 2006. Philip Morris objected and requested review by the Department pursuant to N.C.G.S. § 105-241.11. Following review, the Department issued a Notice of Final Determination sustaining the proposed assessments.

Philip Morris then petitioned the Office of Administrative Hearings for a contested tax case hearing. The parties filed cross-motions for

1. The Department conceded that all the Export Credits on the 2012 return and some on the 2013 return were proper. Therefore, these credits are not at issue.

summary judgment. The administrative law judge (ALJ) issued a final decision granting the Department's motion and denying Philip Morris' motion. Philip Morris then petitioned the superior court for judicial review of the final decision.

The trial court stated that "the amended Export Credit Statute plainly indicates that the General Assembly intended to limit credit generation to six million dollars per year effective 1 January 2005." On this basis, the trial court found that Philip Morris improperly claimed the excess Export Credits, carried forward from the 2005 and 2006 tax years, on its 2013 and 2014 returns. Accordingly, the trial court affirmed the final decision of the ALJ and granted summary judgment in favor of the Department.

Philip Morris now appeals the trial court's order and opinion to this Court, pursuant to N.C.G.S. § 7A-27(a)(2).

Standard of Review

Questions of law, including matters of statutory interpretation, are reviewed de novo. *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 729–30 (2020). " '[*D*]*e novo*' mean[s] fresh or anew; for a second time . . . ." *In re Hayes*, 261 N.C. 616, 622 (1964) (extraneity omitted).

Analysis

The Export Credit Statute, N.C.G.S. § 105-130.45,[2] reads in pertinent part:

> (b) Credit. -- A corporation engaged in the business of manufacturing cigarettes for exportation to a foreign country and that waterborne exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year is allowed a credit against the taxes levied by this Part. The amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with the corporation's base year exportation volume, rounded to the nearest whole percentage. In the case of a successor in business, the amount of credit allowed under this section is determined by comparing the

2. We note that subsection (f), "Report," became effective 1 January 2007. *See* N.C.G.S. § 105-130.45(f) (2005). This has no bearing on our statutory analysis of the 2003 Amendment to the subject statute.

> exportation volume of the corporation in the year for which the credit is claimed with all of the corporation's predecessor corporations' combined base year exportation volume, rounded to the nearest whole percentage. The amount of credit allowed may not exceed six million dollars ($6,000,000) . . . .
>
> . . . .
>
> (c) Cap. -- The credit allowed under this section may not exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years. Any unused portion of a credit allowed in this section may be carried forward for the next succeeding ten years.
>
> . . . .
>
> (f) Report. -- The Department [of Revenue must publish by May 1 of each year] the following information itemized by taxpayer [for the 12-month period ending the preceding December 31]:
>
> (1) The number of taxpayers taking a credit allowed in this section.
>
> (2) The total amount of exports with respect to which credits were taken.
>
> (3) The total cost to the General Fund of the credits taken.

A. Statutory Terms Defined

Since the propriety of allowing the tax credit carryforwards is the crux of this case, it is necessary to define these statutory terms. "If words at the time of their use had a well-known legal or technical meaning, they are to be so construed unless the [document at issue] itself discloses that another meaning was intended." *Wachovia Bank & Tr. Co. v. Waddell*, 237 N.C. 342, 346 (1953) (interpreting the meaning of "receipts" in a will); *see also* Antonin Scalia & Bryan A. Garner, *Reading*

Law: The Interpretation of Legal Texts 69 (2012) [hereinafter *Reading Law*] ("Words are to be understood in their ordinary, everyday meanings—*unless the context indicates that they bear a technical sense.*" (emphasis added)). Therefore, when a term has a well-known technical meaning in an industry or profession, such as accounting, the technical meaning rather than the plain meaning is favored.

A "carryforward" is "[a]n income-tax deduction [or credit] . . . that cannot be taken entirely in a given period but may be taken in a later period." *Carryforward*, *Black's Law Dictionary* (8th ed. 2004) The Financial Accounting Standards Board (FASB) defines "carryforward" as "the amount by which tax credits available for utilization exceed statutory limitations." Fin. Acct. Stands. Bd., *Statement of Financial Accounting Standards* No. 109, at 112 (1992).[3] Therefore, examination of the carryforward allowed by the Export Credit Statute as recognized in the tax accounting industry is critical to our analysis.

In the context of the accounting industry and profession, a "credit" is "an amount that directly offsets tax liabilities." Richard A. Westin, *Lexicon of Tax Terminology* 154 (1984) [hereinafter *Lexicon*]. Furthermore, "[c]redits . . . reduce income taxes for the year." *Id.* *Black's Law Dictionary* defines "tax credit" as "an amount subtracted directly from one's total tax liability . . . as opposed to a deduction from gross income." *Tax Credit*, *Black's Law Dictionary* (8th ed. 2004). By contrast, a deduction is something that is or may be subtracted from one's gross income. *Deduction*, *Black's Law Dictionary* (8th ed. 2004); *see also Pittsburgh Brewing Co. v. Comm'r*, 107 F.2d 155, 156 (3d Cir. 1939).

The meaning of "allow" as defined by *Merriam-Webster* includes, "to reckon as a deduction or an addition." *Allow*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003); *accord Lexicon* 30 ("[A]llowed: the amount of depreciation actually claimed, whether or not legally excessive."). These definitions of "allow" are consistent with the Supreme Court of the United States' 1943 interpretation of "allowed." *Virginian Hotel Corp. v. Helvering*, 319 U.S. 523, 526–28, 526 n.7 (1943)

3. "The FASB is recognized by the U.S. Securities and Exchange Commission as the designated accounting standard setter for public companies. FASB standards are recognized as authoritative by many other organizations, including state Boards of Accountancy and the American Institute of CPAs (AICPA). The FASB develops and issues financial accounting standards through a transparent and inclusive process intended to promote financial reporting that provides useful information to investors and others who use financial reports." Fin. Acct. Stands. Bd., *About the FASB*, https://www.fasb.org/about-us/about-the-fasb (last visited Nov. 29, 2024).

(examining the meaning of "allowed depreciation deductions"). In *Virginian Hotel Corp.*, the Court states that " '[a]llowed' connotes a grant." *Id.* at 527. Furthermore, the Court states that "[d]eductions stand if the Commissioner takes no steps to challenge them. . . . If the deductions are not challenged, they certainly are 'allowed,' since tax liability is then determined on the basis of returns." *Id.*; *see also United States v. Hemme*, 476 U.S. 558, 565–66 (1986). This logic is consistent with interpreting the definition as meaning "to exist" or "to claim."

Since 1943, the Supreme Court of the United States has interpreted the word "allowed" to mean "claimed." *See Virginian Hotel Corp.*, 319 U.S. at 526–28. "When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 550 (2018) (extraneity omitted).

As demonstrated by the foregoing definitions, the phrase "credit allowed" means the maximum credit a taxpayer may *claim*. Such an interpretation aligns with the technical use and long-standing meaning of the term in the accounting industry. Consistent with this clear technical definition, the Department concedes that Philip Morris' interpretation of "credit allowed" in subsection (b) as claimed, and consequently what is allowed to be carried forward, is consistent with the Department's prior interpretation of N.C.G.S. § 105-130.45 before the 2003 Amendment to that statute.

To be sure, however, this technical definition does not allow a taxpayer to offset an unlimited amount of tax liability by claiming the credit. The statute caps a taxpayer's ability to offset its tax liability in any given year at "six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable." N.C.G.S. § 105-130.45(c). This limitation also applies to the use of any unclaimed credit carryforward from previous years. "Any unused portion of a credit allowed . . . may be carried forward for the next succeeding ten years." *Id.*

B. Ambiguous Use of "Credit Allowed"

Philip Morris and the Department each argue that the plain meaning of the Export Credit Statute supports their respective positions. Yet, a close reading of the statute reveals that "credit allowed" is used in two inconsistent ways—once in its technical meaning and once in its plain meaning—thus producing a statutory ambiguity.

Recently, this Court in *State v. Fritsche* summarized the analytical framework for engaging in statutory construction:

> 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. However, when the language of [the] statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

385 N.C. 446, 449 (2023) (quoting *In re R.L.C.*, 361 N.C. 287, 292 (2007)).

We have further clarified that in tax cases, "[w]hen a statute provides for an exemption from taxation, any ambiguities therein are resolved in favor of taxation." *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140 (1988) (citation omitted) (recognizing that "[d]eductions . . . are in the nature of exemptions"[4]). But, this tenet does not mean "game over," and that we should put down our pens and decline to analyze the language further. Instead, "[i]n cases of [any] ambiguous statutory language, we examine the language of the statute itself, the context, and what the legislation seeks to accomplish as the best indicators of the legislature's intent." *Fritsche*, 385 N.C. at 449. Moreover, "[c]anons of construction are interpretive guides, not metaphysical absolutes. They should not be applied to reach outcomes plainly at odds with legislative intent." *Town of Midland v. Harrell*, 385 N.C. 365, 376 (2023).

Subsection (c) uses the term "allowed" according to its technical meaning—"to claim." This subsection, entitled "Cap," establishes the cap or limit on the amount that a corporation may *claim* on its annual income tax return. This is consistent with the technical definition discussed above. As indicated by the statutory context and further clarified by the title "Cap," this subsection limits the amount of Export Credits that may be claimed annually.[5]

To reconcile this ambiguity and bring clarity and logical meaning to the statute, the context of the statute and the "whole text" canon require a plain meaning reading of "credit allowed" in subsection (b). "Generate" means "to define or originate (as a mathematical or linguistic set or structure) by the application of one or more rules or operations." *Generate*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

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4. It follows that credits are in the nature of deductions and exemptions.

5. The title to subsection (c), "Cap," serves to clarify that subsection (c) imposes a limit on the export credit's use. However, the title of subsection (b), "Credit," is not sufficiently specific to add clarity as to whether "credit allowed" means "credit generated" or "credit earned."

Here the statute provides the formula by which the "Export Credit Statute" is calculated each year: the amount by which the exportation volume of the corporation in the year exceeds the corporation's base year exportation volume, rounded to the nearest whole percentage. N.C.G.S. § 105-130.45(b). Based on this formulaic purpose of subsection (b), the dictionary definition, and the statutory context, the plain and logical meaning of "credit allowed" in subsection (b) is "generate."

The Department argues, and the trial court agreed, that the 2003 Amendment to the Export Credit Statute clarifies that credit "generated" for carryforward purposes is limited to six million dollars each year. We disagree. As stated above, the Department concedes that Philip Morris' interpretation of "credit allowed" prior to the 2003 Amendment did not limit the amount of Export Credit that could be generated each year. So, what has changed?

The 2003 Amendment added the following language to subsection (b):

> *In the case of a successor in business*, the amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with *all of the corporation's predecessor corporations' combined base year exportation volume*, rounded to the nearest whole percentage. The amount of credit allowed may not exceed six million dollars ($6,000,000).

Id. (2003) (emphases added). This amendment ensured that "a successor in business" could not claim its own six million dollar credit in addition to any carryforward credit available to its predecessors.

As stated above, the Department concedes that the *original* statute did not impose a limit on the amount of credit that could be generated each year. Here the legislature demonstrates by its word choice—"[i]n the case of a successor in business" and "all of the corporation's predecessor corporations' combined base year exportation volume"—that it did not amend the statute to change the amount of credit that could be generated and thus available for carryforward. Instead, its amendment is designed to prevent "double dipping" by a surviving corporation and a merged corporation, prohibiting both from taking advantage of the same credit and carryforward on their separate income tax returns. It is difficult to understand how this interpretation amounts to an absurd or bizarre consequence as the dissent contends.

Furthermore, the application of the doctrine of last antecedent bolsters this interpretation. "[R]elative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding rather than extending to or including others more remote . . . ." *Wilkie*, 370 N.C. at 548–49 (extraneity omitted). The language at issue, "[t]he amount of credit allowed may not exceed six million dollars ($6,000,000)," follows directly after the sentence beginning, "[i]n the case of a successor in business" without even a paragraph break. N.C.G.S. § 105-130.45(b). Under this doctrine, the last sentence's "credit allowed" limitation can only relate to "successors in business."

Further support for the point that "credit generated" is not limited to six million dollars is found by comparing the subject statute with N.C.G.S. § 105-130.46, titled "credit for manufacturing cigarettes for exportation while increasing employment and utilizing state ports" (Enhanced Employment Credit Statute). These statutes are a part of the same session law and were adopted by the General Assembly on the same day. An Act to . . . Modify the Cigarette Exportation Tax Credit and Modify the Base Year . . . [and] Create an Enhanced Tax Credit for Cigarette Exportation, S.L. 2003-435, §§ 5.2-5.4, 6.1-6.2, 2003 N.C. Sess. Laws (2d Extra Sess. 2003) 1421, 1431–35. The Export Credit Statute incentivized increasing exports; the Enhanced Employment Credit Statute incentivized increasing employment. The Enhanced Employment Credit Statute reads as follows:

> (a) Purpose. -- The credit authorized by this section is intended to enhance the economy of this State by encouraging qualifying cigarette manufacturers to increase employment in this State with the purpose of expanding this State's economy, the use of the North Carolina State Ports, and the use of other State goods and services, including tobacco.
>
> . . . .
>
> (d) Credit. -- A corporation that satisfies the employment level requirement under subsection (c) of this section, is engaged in the business of manufacturing cigarettes for exportation, and exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year is allowed a credit as provided in this section. The amount of credit allowed under this section is equal to forty cents (40¢) per one thousand cigarettes exported. The amount of

> credit *earned* during the taxable year may not exceed ten million dollars ($10,000,000).
>
> . . . .
>
> (g) Ceiling. -- The total amount of credit that may be taken in a taxable year under this section may not exceed the lesser of the amount of credit which may be *earned* for that year under subsection (d) of this section or fifty percent (50%) of the amount of tax against which the credit is taken for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section or G.S. 105-130.45 for previous tax years.
>
> . . . .
>
> (k) Reports. -- Any corporation that takes a credit under this section must submit an annual report by May 1 of each year to the Senate Finance Committee, the House of Representatives Finance Committee, the Senate Appropriations Committee, the House of Representatives Appropriations Committee, and the Fiscal Research Division of the General Assembly. The report must state the amount of credit *earned* by the corporation during the previous year, the amount of credit including carryforwards claimed by the corporation during the previous year, and the percentage of domestic leaf content in cigarettes produced by the corporation during the previous year. The first reports required under this section are due by May 1, 2006.

Id. § 105-130.46 (2004) (emphases added).

The term "earned" in the Enhanced Employment Credit Statute is conspicuously absent in the statute before us, indicating that the General Assembly clearly imposed a restriction in the Enhanced Employment Credit Statute on the amount of credit that can be generated. In subsection (d) of the Enhanced Employment Credit Statute, unlike the Export Credit Statute, the General Assembly clearly limited the amount of credit that could be generated by specifically stating that "[t]he amount

of credit *earned* during the taxable year may not exceed ten million dollars ($10,000,000)." *Id.* § 105-130.46(d) (emphasis added). Then, in subsection (g), "Ceiling," it tied the amount of "credit earned" to the ceiling by stating: "The total amount of credit taken in a taxable year under this section may not exceed the lesser of the . . . credit which may be *earned*." *Id.* § 105-130.46(g) (emphasis added). This language demonstrates that the General Assembly clearly mandated that the amount "earned" was restricted as to both the amount of the Enhanced Employment Credit that could be generated and the amount of the Enhanced Employment Credit that could be claimed each year, thus limiting maximum carryover. No such limitation appears in the Export Credit Statute.

Statutes are to be read harmoniously in a way that renders them internally compatible, not contradictory. *Reading Law* 180–82; *e.g.*, *Town of Pinebluff v. Moore County*, 374 N.C. 254, 257 (2020); *Bd. of Adjustment v. Town of Swansboro*, 334 N.C. 421, 427 (1993); *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371 (1956). Identical words used in legislation should have the same meaning; different words carry different meanings. *Reading Law* 170–73. The Enhanced Employment Credit Statute uses both of the terms "credit allowed" and "earned," indicating a difference in meaning between the terms. The subject statute does not use the term "earned" at all. Accordingly, "credit earned" and "credit allowed" must have different meanings.

Therefore, in answering our question, "what has changed?", only one change can be found. That change is the amendment to subsection (c) of section 105-130.45. However, that amendment merely increases the time frame for carryforward from five years to ten years. N.C.G.S. § 105-130.45(c) (2003). This does not alter our analysis.

C. The Department's Inconsistent Interpretation of the Statute

The Department concedes that it has taken positions consistent with the interpretation set forth herein. Prior to the 2003 Amendment, the Department did not interpret N.C.G.S. § 105-130.45 to limit the amount of "credit generated." Thus, we begin our analysis with the Department's original interpretation.

At the time relevant to this case, N.C.G.S. § 105-264(a) provided, in part:

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

> interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, *the interpretation is a protection to the* officers and *taxpayers* affected by the interpretation, *and taxpayers are entitled to rely upon the interpretation*.[6]

N.C.G.S. § 105-264(a) (2012) (emphases added).[7] Indeed, this Court has even stated that "[i]n *all* tax cases, the construction placed upon the statute by the Secretary [ ] of Revenue . . . will be given due consideration by a reviewing court." *Aronov*, 323 N.C. at 140 (emphasis added) (citation omitted).

However—to clarify—this is not to say that *every* interpretation by the Secretary of Revenue is deserving of deference by a reviewing court. Subsection 105-264(a) makes clear that while "[a]n interpretation by the Secretary is prima facie correct," that "interpretation is a *protection to the . . . taxpayers* affected by the interpretation." N.C.G.S. § 105-264(a) (emphasis added). In other words, deference to the Secretary's interpretation is warranted in cases in which such an interpretation serves to benefit the citizen taxpayer, not the State. This is a statutory mandate.

To the extent that *Aronov* established a rule permitting deference to the Secretary in all circumstances, we disavow any such understanding. We therefore align ourselves with previous precedent repudiating agency deference when the question is one of law. *See, e.g.*, *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580–81 (1981) ("When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." (citations omitted)).

Nonetheless, even in the absence of such caselaw providing deference, the Department represented its interpretation as controlling. Every year the Department publishes its Tax Law Changes publication, which summarizes the recent legislative changes to the State's Revenue laws.

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6. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Interestingly, "[t]his principle, of course, distributes the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary." *News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 19–20 (2007); *accord*, *e.g.*, *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009).

7. This is the version of section 105-264(a) that was in effect during the tax years in which Philip Morris—relying on the Department's interpretation—claimed the relevant deductions. More specifically, that is, 2012 through 2014.

Consistent with this practice, the Department issued the *Supplement to the 2003 Tax Law Changes: Extra Session on Economic Development Incentives* [hereinafter *2003 Supplement*], https://www.ncdor.gov/documents/laws-and-decisions/north-carolina-supplement-2003-tax-law-changes/open. In this publication the Department states:

> This document is designed for use by personnel in the North Carolina Department of Revenue. *It is available to those outside the Department as a resource document*. It gives a brief summary of the following tax law changes:
>
> (1) Changes made by prior General Assemblies that take effect for tax year 2003. Each change enacted by a prior General Assembly is also discussed in the Department's Tax Law Change document for the year the change was enacted.
>
> (2) Changes made by the 2003 General Assembly, regardless of when they take effect.

N.C. Dep't of Revenue, *North Carolina 2003 Tax Law Changes* 1 (2003), https:// www.ncdor.gov/documents/laws-and-decisions/north-carolina-supplement-2003-tax-law-changes/open (emphasis added). Accordingly, this publication is used internally by the Department and externally relied upon as a resource by citizen taxpayers. *Id.*

As early as 1999, the Department included the Export Credit Statute in its website publication *1999 Tax Law Changes-Corporate Income Tax*, https://www.ncdor.gov/taxes-forms/information-tax-professionals/revenue-laws/1999-tax-law-changes/1999-tax-law-changes-corporate-income-tax. Indicated by the web address "information-tax-professionals," the Department recognized that information it disseminates on the website regarding this tax provision was provided for use by "tax professionals" representing taxpayers, bolstering its reliability.

In the *Rules and Bulletins Taxable Years 2003 & 2004*, the Department noted that the "second extra session of the 2003 General Assembly made several changes to [the Export Credit Statute]." N.C. Dep't of Revenue, *Rules and Bulletins Taxable Years 2003 & 2004* [hereinafter *2003 & 2004 Bulletin*], https://www.ncdor.gov/documents/files/corp-rules-and-bulletins-2003-and-2004/open. But because, the changes would not be effective until 2005, the Department declared the Amendment "outside the scope of this publication" and *specifically* directed citizen taxpayers to the Department's website for information regarding these law changes. *Id.*

In the *2003 Supplement* found on the Department's website, the Department summarized several substantive, clarifying, and technical changes made by the 2003 Amendment to the statute. *See 2003 Supplement*, https://www.ncdor.gov/documents/laws-and-decisions/north-carolina-supplement-2003-tax-law-changes/open. The Department neither indicated a change of position nor identified a new limitation on a taxpayer's ability to generate, and thus carry forward credits under N.C.G.S. § 105-130.45.

Inexplicably, the Department even failed to mention that the carryover provision had been extended to ten years; however, the Department did acknowledge other changes. The Department acknowledged that "[s]ubdivision (3) was added to provide a definition for successor in business." *2003 Supplement* at 5. The Department further stated that "[a] successor in business is a corporation that through amalgamation, merger, acquisition, consolidation, or other legal succession becomes invested with the rights and assumes the burdens of the predecessor corporation and continues the cigarette exportation business." *Id.*

The Department also discussed one change to subsection (b) of N.C.G.S. § 105-130.45 that it characterized as "clarifying." According to the Department: "The clarifying change clarifies that the maximum *allowable credit* for cigarettes exported during a tax year is six million dollars, before applying the tax limitations provided for in subsection (c)." *Id.* (emphasis added). Nowhere does the Department use the term "generate." Instead, the Department uses the term, "allowable credit." *Id.* As defined above, "allowable credit" or "credit allowed" is the maximum credit that a taxpayer may *claim*. *See Virginian Hotel Corp.*, 319 U.S. at 526–27. Therefore, according to the Department's own explanation of the 2003 Amendment, the change only applied to amounts claimed and not to those generated.

Moreover, "[a] clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9 (2012). In recognition that the Department has conceded that the original Export Credit Statute, prior to the 2003 Amendment, did not limit credit generation, a clarifying statement does not alter this position.

The Department missed yet another opportunity to notify citizen taxpayers that it changed its position when it published its 2005 & 2006

bulletin.[8] "When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation." N.C.G.S. § 105-264(a). In this bulletin, there was an entire section dedicated to "limitations and carryforward," which largely parroted the language of the statute. However, significantly, the Department again made no mention that it was changing positions. *See* N.C. Dep't of Revenue, *Rules and Bulletins Taxable Years 2005 & 2006* [hereinafter *2005 & 2006 Bulletin*], https://www.ncdor.gov/documents/files/2005-2006-rulesandbulletins/open.

The trial court found that "the [foregoing] documents upon which Philip Morris claims to rely are not rules, bulletins, or directives from the Secretary communicating the Secretary's interpretation of the law." We disagree.

Black's Law Dictionary defines "bulletin" as "an officially published notice or announcement concerning the *progress of matters* of public importance and interest." *Bulletin*, *Black's Law Dictionary* (6th ed. 1990) (emphasis added).[9] *The 1999 Tax Law Changes-Corporate Income Tax*, the *2003 & 2004 Bulletin*, the *2003 Supplement*, and the *2005 & 2006 Bulletin* are undoubtedly officially published announcements concerning matters of public importance. These are precisely the type of documents contemplated by the statute, and those upon which citizen taxpayers can rely. *See* N.C.G.S. § 105-264(a) ("[T]he interpretation [of the Secretary of the Department of Revenue] is a protection to the officers and taxpayers affected by the interpretation, and *taxpayers are entitled to rely upon the interpretation*." (emphasis added)).

For example, the *2003 Supplement* evidenced the "progress of the matter" as the General Assembly revised the statute to clarify the rules for successors in business and extended the carryforward time period. The Department endorsed this document in its *2003 & 2004 Bulletin* by *specifically* directing citizen taxpayers to the Department's official website for "information on these tax changes." *2003 & 2004 Bulletin* at 76. Therefore, Philip Morris was entitled to rely upon this series of bulletins.

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8. On 11 April 2006, Philip Morris made it clear by letter to the Department of Revenue its intention to claim tax credit carryforwards earned in tax years 1999 through 2004 in excess of six million dollars each year.

9. We recognize that the most appropriate definition would be found in *Black's Law Dictionary* 8th edition, which was published in 2004; however, *Black's Law Dictionary* suspended its printing of the definition for "Bulletin" in 2004.

Finally and most troubling, after the subject tax years, the Department published for calendar year 2008 an economic incentives report on the Export Credits as mandated by section 105-130.45(f). *See* N.C.G.S. § 105-130.45(f) (2007). In this report the Department noted that Philip Morris had "generated" Export Credits of twelve million dollars over multiple years. Therein, the Department wrote that Philip Morris' "export volumes . . . resulted in the generation of credits above the $6 million cap. *These excess credits are available to be taken in future years*." N.C. Dep't of Revenue, *Cigarette Export Credits*, Processed During Calendar Year 2008 (2009) (emphasis added). Even after the Department had taken one position regarding the 2006 and 2007 returns, it took the opposite position in 2008 without any explanation for doing so.

Simply put, the Department's actions amount to an abrupt reversal of policy without notice to the public or taxpayers. The actions here lacked transparency and are plainly contrary to the trust the public deserves from its government. This conduct is unacceptable. As mandated by statute and recognized by the Department in its own publications, citizen taxpayers must be able to rely on the representations of the Department. Businesses need consistency and clarity to operate efficiently. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024) (stating "unwarranted instability in the law[ ] leav[es] those attempting to plan around agency action in an eternal fog of uncertainty"); *see also*, *e.g.*, *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro*, *Inc.*, 285 N.C. 467, 472 (1974) (explaining "stability in the law and uniformity in its application . . . enable people to predict with reasonable accuracy the consequences of their acts and business transactions").

The Department should consistently, plainly, and publicly interpret and apply revenue statutes and regulations for all taxpaying citizens. This is a statutory mandate.

Conclusion

The fulcrum of this case is the meaning of "credit allowed" contained in subsections (b) and (c) of the Export Credit Statute. A close reading of the statute reveals an inconsistent use of the term which creates an ambiguity.

In examining subsection (c), we appropriately consider the term's technical use and understanding. That technical use and understanding compel us to adopt an interpretation of "credit allowed" in subsection (c) consistent with its common use in the accounting industry. Accordingly, we define "credit allowed" as contained in subsection (c) as the amount of credit which may be *claimed* each tax year.

At the same time to bring clarity and logical meaning to the statute, in subsection (b) we examine the context of the statute and employ the "whole text" canon to find that the plain meaning of "credit allowed" is most appropriate. We, therefore, reconcile any ambiguity by adopting the term's plain meaning in that context. The plain meaning of "credit allowed" contained in subsection (b) is the amount of credit which may be *generated* each tax year.

Even further, it is undisputed that the Department interpreted the original version of the Export Credit Statute as permitting unlimited credits calculated based on cigarette exports, which could then be carried forward. In fact, as found by the trial court, the Department conceded that Philip Morris' current interpretation of "credit allowed" is consistent with the Department's prior interpretation of N.C.G.S. § 105-130.45 before the 2003 Amendment.

The Department now argues that the 2003 Amendment revised the statute to limit export credits generated to six million dollars each year. We disagree. The legislature—as demonstrated by the language in the Amendment—made clear that the Amendment is designed to prevent "double dipping" by a surviving corporation and a merged corporation, thus prohibiting both from taking advantage of the same credit and carryforward on their separate income tax returns. The only change to the carryforward provision is the extension of the carryforward period from five to ten years.

Moreover, the Department's representations and actions do not support its current position. Despite acknowledging the ability to "generate" credits "above the $6 million cap" in its 2008 economic incentives report mandated by subsection (f) of the Export Credit Statute, the Department now argues that the 2003 Amendment always created a limit on export credits "generated." Yet the Department has repeatedly failed to act in accordance with this interpretation or even announce its change in position. As mandated by N.C.G.S. § 105-264(a) and recognized by this Court, Philip Morris is entitled to rely on these representations and actions.

Accordingly, we reverse the trial court's order of summary judgment in favor of the Department and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice RIGGS dissenting.

The question presented by this case is whether the North Carolina statute that provides a tax credit to corporations manufacturing cigarettes for exportation, N.C.G.S. § 105-130.45, limits the credit that a taxpayer can generate in a given tax year. The plain language of the amended version of the statute unambiguously says the amount of credit a taxpayer can generate in a given year under N.C.G.S. § 105-130.45(b) "may not exceed six million dollars." N.C.G.S. § 105-130.45(b) (2003).[1] While I agree with the majority that the phrase "credit allowed" has different meanings in different subsections of N.C.G.S. § 105-130.45, reading the statute in context, I do not agree that the different meanings create ambiguity in the statute. Subsection (b) provided a taxpayer the formula for calculating the credit that the taxpayer can generate within a given year. Reading the entire subsection in context, the phrase limiting the "credit allowed" to six million dollars should apply equally to corporations and successors in business. *See King v. Burwell*, 576 U.S. 473, 486 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (cleaned up)). Therefore, I would affirm the decision of the Business Court and respectfully dissent.

I. Analysis

In 1999, the General Assembly adopted economic development legislation to provide export tax credits to manufacturers of cigarettes exported for sale outside of the United States. Under the original version of N.C.G.S. § 105-130.45, subsection (b) allowed a taxpayer to generate or accrue an unlimited amount of export tax credit based on its volume of cigarettes exported, while subsection (c) limited the amount of credit a taxpayer could claim per year to six million dollars. Neither party disputes that the original 1999 version of N.C.G.S. § 105-130.45 was unambiguous.

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1. Section 105-130.45 was amended by Session Law 2003-435 and was effective for cigarettes exported on or after 1 January 2005. *See* Act of Dec 16, 2003, S.L. 2003-435, § 5.2, 2003 N.C. Sess. Laws 1421, 1431–32. The modified language was first codified in the 2004 interim supplement but was left out of the General Statutes until 2009. *Compare* N.C.G.S. § 105-130.45 (Supp. 2004), *with* N.C.G.S. § 105-130.45 (2005). The language in the session law, however, is controlling. *See Wright v. Fid. & Cas. Co. of N.Y.*, 270 N.C. 577, 587 (1967) (noting that Session Laws are controlling over the codified version of the General Statutes).

In 2003, the General Assembly modified the language in N.C.G.S. § 105-130.45(b), the subsection that provides the formula for calculating the tax credit for corporations engaged in the business of manufacturing cigarettes within the state for foreign exportation. The section was modified by the addition of the language in italics below:

> (b) Credit. — A corporation engaged in the business of manufacturing cigarettes for exportation to a foreign country *and that waterborne exports cigarettes and other tobacco products through the North Carolina State Ports during the taxable year* is allowed a credit against the taxes levied by this Part. The amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with the corporation's base year exportation volume, rounded to the nearest whole percentage. *In the case of a successor in business, the amount of credit allowed under this section is determined by comparing the exportation volume of the corporation in the year for which the credit is claimed with all of the corporation's predecessor corporations combined base year exportation volume, rounded to the nearest whole percentage.* The amount of credit allowed *may not exceed six million dollars ($6,000,000) and* is *computed* as follows:
>
> . . . .
>
> (c) Cap. — The credit allowed under this section may not exceed the lesser of six million dollars ($6,000,000) or fifty percent (50%) of the amount of tax imposed by this Part for the taxable year reduced by the sum of all other credits allowable, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years. Any unused portion of a credit allowed in this section may be carried forward for the next succeeding *ten* years.

An Act to Make the Following Changes Recommended by the Governor: . . . Extend the Sunset On and Modify the Cigarette Exportation Tax

Credit and Modify the Base Year, [and] Create an Enhanced Tax Credit for Cigarette Exportation . . . . , S.L. 2003-435 § 5.2, 2003 N.C. Sess. Laws (2d Extra Sess. 2003) 1421, 1431–32. Although not included in the excerpt above, subsection (b) of N.C.G.S. § 105-130.45 concludes with a calculation table incorporating the computation specifications for calculating the tax credit based upon export volume.

A. N.C.G.S. § 105-130.45 Is Not Ambiguous

The majority begins its analysis by concluding that N.C.G.S. § 105-130.45 is ambiguous because the phrase "credit allowed" has different meanings in subsections (b) and (c) of the statute. However, the fact that the phrase "credit allowed" has different meanings in subsection (b) and subsection (c) does not per se create ambiguity in the statute. When we apply the majority's definition of "credit allowed" to the plain language of subsection (b)—in its entirety—the amended statute applies a six million dollar annual limit to the generation of export tax credits for both corporations and successors in business alike.

This Court begins every question of statutory interpretation with a presumption that the words used in the statute unambiguously represent the will of the legislature. *See N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used."). Whether statutory language is ambiguous does not turn solely on dictionary definitions of its component words but also on "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The Court "does not read segments of a statute in isolation"; rather, we construe statutes to "giv[e] effect, if possible, to every provision." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004). It is well established that "[w]hen the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006).

Generally, there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). But that presumption does not always hold, and the fact that a legislative body may choose to give identical words different meanings in different sections of a statute does not, by definition, mean that

the statute is ambiguous. *See id.* (recognizing that the presumption that words in the same statute have the same meaning "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent"). Words have different shades of meaning and may be construed differently even when used in the same statute. *Id.* The Supreme Court of the United States has repeatedly "affirmed that identical language may convey varying content" even when used "in different provisions of the same statute." *Yates*, 574 U.S. at 537 (plurality opinion); *see also*, *e.g.*, *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313–14 (2006) ("located" has different meanings in different provisions of the National Bank Act); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594–98 (2004) ("age" has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *Robinson*, 519 U.S. at 342–44 ("employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("wages paid" has different meanings in different provisions of 26 U.S.C.); *Atl. Cleaners*, 286 U.S. at 433–37 ("trade or commerce" has different meanings in different sections of the Sherman Act). For this reason, I do not find it reasonable to conclude the statute is ambiguous simply because credit allowed is used differently in different subsections.

Statutory interpretation is determined "not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates*, 574 U.S. at 537 (plurality opinion) (cleaned up); *see also Vogel v. Reed Supply Co.*, 277 N.C. 119, 131 (1970) ("Words and phrases of a statute must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." (cleaned up)). In N.C.G.S. § 105-130.45, the titles of the different subsections provide context for the different uses of the phrase "credit allowed" and aid our interpretation of the statute. The majority, in a footnote, says "while the title of subsection (c) "Cap" serves to clarify that subsection (c) imposes a limit on the export credit's use, the title of subsection (b) "Credit" is not sufficiently specific to add clarity." I find this reasoning circular: the majority jumps to assume ambiguity in a statute to which it objects and then disclaims that a subsection title cannot save the statute from ambiguity. But if you start from a presumption of non-ambiguity, the subsection titles provide corroborating evidence and are not required to do much work to save the statute.

Indeed, when these titles are viewed in the context of the purpose of the statute—to provide a tax credit for cigarette manufacturing for export—it is obvious that one of the subsections in N.C.G.S. § 105-130.45 must tell the taxpayer how to calculate the credit. That is exactly the purpose of subsection (b): to give the taxpayer the formula to calculate how much credit it has generated in a given year. *See King*, 576 U.S. at 486 ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' " (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))). This interpretation is further reinforced by the language in the final sentence of subsection (b) leading into the calculation table: "The amount of credit allowed may not exceed six million dollars ($6,000,000) and is computed as follows:".

The majority concludes that the first phrase of that final sentence—the amount of credit allowed may not exceed six million dollars—only applies to successors in business. But that interpretation does not work for two reasons: First, it runs contrary to the principle that portions of a subsection should not be read in a vacuum. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (recognizing "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context" (internal citation omitted)). Second, adhering to the majority's interpretation would produce an absurd result. *See State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Off.*, 294 N.C. 60, 68 (1978) ("In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results."). Following the majority's interpretation to its logical conclusion would result in a statute that only provides a tax credit for successors in business.

To the first point, subsection (b) must be interpreted in the context of the entire subsection. *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) (acknowledging that with statutory construction the "choice of words is presumed to be deliberate, so too are [statute's] structural choices"). Subsection (b) is composed of four sentences. The first sentence states the conditions that a corporation must meet to qualify for this credit. *See* N.C.G.S. § 105-130.45(b). The balance of the subsection explains how taxpayers determine the credit. The second sentence begins with the phrase "The amount of credit allowed under this section is determined by," and goes on to explain that a corporation determines the applicable credit by comparing exportation volume in the year the credit is claimed with a base year exportation volume. *See id.*

The next sentence of the subsection clarifies that a successor in business determines its tax credit using export volumes of the "corporation's predecessor corporations' combined base year exportation volume." *See id.* The final sentence of the subsection begins with "[t]he amount of credit allowed may not exceed six million dollars" and then provides the computational details. *See id.* This sentence does not contain any limiting clause to indicate that it only applies to a "successor in business." The contrast between the last two sentences makes clear that if the General Assembly wanted to limit the amount of credit calculated based upon the formula that follows, it knew how to add a limiting clause. However, the General Assembly did not include limiting language to restrict the application of the final sentence to just successors in business.

The majority's interpretation produces an absurd result: A scenario in which the tax credit statute only provides a computational framework for a successor in business, not the original corporation, to calculate a tax credit. Using the majority's logic, if the phrase "[t]he amount of credit allowed may not exceed six million dollars ($6,000,000)" only applies to a successor in business, then the second clause of that same sentence also only applies to a successor in business because "credit allowed" is the subject for both clauses of the sentence. Therefore, credit allowed must mean the same thing when applied to each clause in the sentence. If credit allowed in that final sentence only applies to successors in business, then the computation details also only apply to a successor in business and corporations like Philip Morris are left without a means of calculating a tax credit. Because principles of statutory interpretation require avoidance of an absurd result, the final sentence in subsection (b) must limit the amount of tax credit generated per year to six million dollars for both corporations and successors in business.

The majority also argues that the doctrine of the last antecedent bolsters its interpretation that the six million dollar limit only applies to a successor in business. However, the majority misapplies the doctrine. The majority quotes the doctrine of the last antecedent from *Wilkie v. City of Boiling Spring Lakes* but omits the final phrase of the doctrine that explains the doctrine applies "unless the context indicates a contrary intent." 370 N.C. 540, 548–49 (2018) (quoting *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Hum. Res.*, 327 N.C. 573, 578 (1990)). In full, the doctrine says that "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding rather than extending to or including others more remote, unless the context indicates a contrary intent." *Id.* (cleaned up). Put simply, "a limiting clause or phrase . . . ordinarily . . . modifi[es]

only the noun or phrase that it immediately follows." *Paroline v. United States*, 572 U.S. 434, 447 (2014) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The phrase at issue, here, "The amount of credit allowed may not exceed six million dollars," is not a relative or qualifying phrase in the sentence discussing how the credit allowed is determined for a successor in business. Rather, it is an independent clause in a different sentence that explains the methodology for calculating the credit. Furthermore, "successor in business" is not the noun or phrase immediately preceding "credit allowed." The statute's context plainly indicates that "credit allowed" does not modify "successor in business." The doctrine of the last antecedent does not apply in this scenario.

B. The Department's Interpretation of the Statute

The majority concludes that because the Department allowed taxpayers to generate an unlimited amount of tax credit before the statute was amended and the Department did not identify the change in the statute as a substantive change in its 2003 Tax Supplement, the Department should be precluded from enforcing the six million dollar generation limit in the amended statute. But by that logic, the majority's argument would allow an administrative agency to invalidate legislative action simply by not identifying the legislative action as substantive. That cannot be the case.

The majority begins its discussion of Philip Morris' reliance on the Department's interpretation of N.C.G.S. § 105-130.45 by stating that the Court should not defer to the Department's interpretation in all circumstances. I agree generally, but I think this then creates some trouble for the majority's cause. The statute that gives the Secretary of the Department of Revenue the duty to interpret laws administered by the Department, N.C.G.S. § 105-264(a), explicitly states that "[t]he Secretary's interpretation of these laws shall be consistent with the applicable rules." This Court has further recognized that in reviewing a taxpayer's challenge to an exemption from tax, the Court is mindful that tax credits, a type of exemption from taxation, "are privileges, not rights, and are allowed as a matter of legislative grace." *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140 (1988) (cleaned up). "A statute providing exemption from taxation is strictly construed against the taxpayer and in favor of the State." *Id.*

It then becomes significant that this Court is asked to construe an amended statute. In construing a statute with reference to an amendment, "it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law." *Childers v. Parker's, Inc.*,

274 N.C. 256, 260 (1968). The majority attached significance to the fact that prior to the amendment, the Department did not interpret N.C.G.S. § 105-130.45 to limit the amount of "credit generated." But before the amendment, the statute did not contain language limiting the amount of credit a taxpayer could generate—that language was added as part of the amendment. This Court assumes that the legislature understands the law, understands that a taxpayer could generate an unlimited tax credit before N.C.G.S. § 105-130.45 was modified, and intentionally made the change.

After the statute was amended, the Department identified the change in the *Supplement to 2003 Tax Law Changes*. To be sure, the Department characterized the change as a clarifying change. The supplement stated the change "clarifies that the maximum allowable credit for cigarettes exported during a tax year is six million dollars, before applying the tax limitations provided for in subsection (c)." Thus, while it is understandable that Philip Morris may consider this change to be more substantive than clarifying, the Department does not, by supplement publication, get to change the nature of the amendment to the statute. The Department's definition of the change as clarifying instead of substantive in the Supplement is not dispositive because the Department's interpretation of the nature of the amendment is not dispositive. *See Aronov*, 323 N.C. at 140 ("In all tax cases, the construction placed upon the statute by the Secretary . . . of Revenue, although not binding, will be given due consideration by a reviewing court."). This Court, and the majority, have recognized that a clarifying amendment "gives further insight into the way in which the legislature intended the law to apply from its original enactment." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9 (2012). The legislature seemingly realized the original statute allowed taxpayers to generate and carry forward an unlimited amount of tax credit and wanted to place limits on the maximum tax credit a taxpayer could generate under this statute, similar to the limits placed on the maximum generation of tax credits found in N.C.G.S. § 105-130.46, captioned "Credit for manufacturing cigarettes for exportation while increasing employment and utilizing State Ports." N.C.G.S. § 105-130.46(d) (2005) ("The amount of credit earned during the taxable year may not exceed ten million dollars ($10,000,000)."). The legislature has that authority. I doubt the Court would allow the legislature's authority to amend criminal statutes to be undermined by a similar concern of notice to taxpayers.

In concluding that the *Supplement to 2003 Tax Law Changes* would not put a taxpayer on notice that the change limited the amount of credit a taxpayer could generate in a given year, the majority contradicts its

own interpretation of the statute. The *Supplement to 2003 Tax Law Changes* identified that the modifications to subsection (b) "clarifie[d] that the maximum allowable credit for cigarettes exported during a tax year is six million dollars, before applying the tax limitations provided for in subsection (c)."[2] The majority interpreted this explanatory language to "appl[y] to the amounts claimed and not to those generated." But the majority already said that "the plain and logical meaning of 'credit allowed' in subsection (b) is 'generate.' " If subsection (b) addresses how much credit a taxpayer can generate, then a modification to that subsection is a modification to the amount of credit a taxpayer can generate.

Finally, I am troubled by the scolding tone with which the majority addresses the Department. The majority does not purport to overrule *North Carolina Acupuncture Licensing Board v. North Carolina Board of Physical Therapy Examiners* or the long line of cases cited in that decision, so it is still the law of the land that this Court "gives great weight to an agency's interpretation of a statute it is charged with administering" even though the "agency's interpretation is not binding." 371 N.C. 697, 700 (2018) (cleaned up). It is also still true that the Supreme Court "will not follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *Id.* at 701 (cleaned up). Here, it seems plain to me that regardless of the Department's prior interpretations, the Department's current interpretation is consistent with the clear intent and purpose of the law at issue here. I do not see any grounds for inferring bad intent or actions on the part of the Department for honoring the intent of the legislature. It may be that this Court intends to follow the federal trend and more fully reject agency deference as the Supreme Court of the United States did in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). But this larger, politically-charged issue does not relate to situations in which an agency is acting in accord with the legislature regarding what I believe to be a non-ambiguous statute. In my view, the General Assembly clearly amended N.C.G.S. § 105-130.45(b) to add a limit to the credit a taxpayer could generate under the amended statute. The Department identified the change to the taxpayer. The Department's identification of the change as a clarifying change, not a substantive change, does not give this Court an avenue to write the change out of the statute. *See Ali*

2. Subsection (c), captioned as "Cap," limits the "cumulative amount of the credit allowed in any tax year, including carryforwards claimed by the taxpayer under this section for previous tax years." N.C.G.S. 105-130.45(c).

v. Fed. Bureau of Prisons, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable.").

II. Conclusion

In sum, I would hold that the amended version of N.C.G.S. § 105-130.45 creates a limit on the amount of tax credit that a corporation or successor in business can generate in a given tax year and thus would affirm the decision of the Business Court.

Justice EARLS joins in this dissenting opinion.

SCHOOLDEV EAST, LLC
v.
TOWN OF WAKE FOREST

No. 268A22

Filed 13 December 2024

Zoning—unified development ordinance—school construction—connectivity requirements—ambiguous provision—free use of land

In conducting a de novo review of a town's denial of petitioner's permit applications for the construction of a proposed charter school, the Supreme Court reversed the decision of the Court of Appeals and held that, where the town's unified development ordinance regarding the inclusion of off-premise sidewalks was ambiguous, the lower appellate court erred by adopting the town's interpretation of that provision and instead should have strictly construed the provision in favor of the free use of land per public policy. Since petitioner carried its initial burden of production by presenting competent, material, and substantial evidence tending to show that it was entitled to the issuance of permits and no evidence was presented to the contrary, the matter was remanded with instructions for the town to approve petitioner's site plan and subdivision applications.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 434 (2022), affirming an order entered on 14 April 2021 by Judge Vince Rozier in Superior Court, Wake County. On 6 April 2023, the Supreme Court allowed respondent's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 9 April 2024.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, Tobias R. Coleman, and Amy Crout; and Stam Law Firm, P.L.L.C., by Paul Stam and R. Daniel Gibson, for petitioner-appellant.

Wyrick Robbins Yates & Ponton LLP, by Samuel A. Slater, D. Scott Hazelgrove II, and T. Nelson Hughes Jr., for respondent-appellee.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Jazzmin M. Romero, for North Carolina Coalition of Charter Schools, amicus curiae.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus; and J. Michael Carpenter for North Carolina Home Builders Association, Inc., amicus curiae.

ALLEN, Justice.

The public policy of North Carolina encourages "the free and unrestricted use and enjoyment of land." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852 (2016) (cleaned up). This policy advances our state's enduring commitment to property rights. *See id.* at 852–53 ("The fundamental right to property is as old as our state." (citing N.C. Const. of 1776, Declaration of Rights § XII; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 9 (1787))).

At the same time, laws enacted by our General Assembly grant counties and municipalities significant authority to adopt and enforce zoning and other land use ordinances that limit what property owners may do with or on real property. Although this Court will uphold legitimate ordinances, the state's public policy disfavoring property restrictions influences how we construe unclear or ambiguous ordinance provisions in disputes between property owners and local governments. Specifically, this Court will resolve any well-founded doubts about a provision's

meaning in favor of "the free use of land." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308 (2001).

The outcome of this litigation between respondent Town of Wake Forest and petitioner Schooldev East, LLC, depends on the proper interpretation of a provision in the Town's Unified Development Ordinance (UDO). The Town relied on the provision to deny petitioner's applications for permits necessary for the construction of a proposed charter school. Because the provision's meaning is unclear, the Court of Appeals should have construed it in favor of the free use of land. The Court of Appeals instead adopted the Town's interpretation and ruled against petitioner. When properly construed, the UDO provision does not sustain the denial of petitioner's applications, which petitioner supported with competent, material, and substantial evidence. We therefore reverse the decision of the Court of Appeals and remand this case with instructions to the Town to approve petitioner's applications.

I. Background

Petitioner proposed to build a charter school in the Town. To that end, petitioner agreed to purchase some thirty-five acres of a roughly sixty-eight-acre tract of land owned by Jane Harris Pate and located on Harris Road. On 4 November 2019, petitioner applied to the Town for a major subdivision plan permit and a major site plan permit.[1] If granted, the subdivision permit would have resulted in the division of the Pate tract into three parcels, with petitioner's thirty-five-acre parcel in the middle. The site plan permit application sought approval for the construction of the charter school on the middle parcel (campus lot).

On 3 September 2020, pursuant to procedures outlined in the Town's UDO, the Town's planning board and board of commissioners (BOC) held a joint public hearing and quasi-judicial hearing during which petitioner's legal counsel presented evidence including maps, graphs, reports, and witness testimony in support of petitioner's applications. A substantial portion of the presentation was devoted to explaining how the applications complied with section 3.7.5 in the UDO's supplemental

1. As defined by the UDO, "[a] site plan is an architectural and/or engineering drawing of proposed improvements for a specific location that depicts such elements as building footprints, driveways, parking areas, drainage, utilities, lighting, and landscaping." Town of Wake Forest UDO, § 6.2.1(D). A "major site plan" refers to permit applications that "include 100 or more residential dwelling units and to all development applications which require an Enhanced Transportation Impact Analysis." *Id.* § 15.8.2(A). A "major subdivision plan" involves permit applications requiring "divisions of land into [four] or more lots, or which require dedication of public utilities and/or public streets." *Id.* § 15.9.2(A).

use standards for elementary and secondary schools, which reads in pertinent part:

> **A. For Schools in the RD**[2] **Zone Only**: To encourage walking and bicycle accessibility by schoolchildren to schools, it shall be required by the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths[,] or greenways to connect to existing networks.
>
> **B. For All Schools:**
>
> . . . .
>
> 2. Connectivity (vehicular and pedestrian) to surrounding residential areas is required. Where a full vehicular connection is impractical, a multi-use trail connection shall be provided.

Petitioner's evidence indicated that petitioner intended to construct a ten-foot-wide multi-use path along the entire Harris Road frontage of the campus lot. The multi-use path would have provided pedestrian and bicycle access to Joyner Park, a public park across the road from the campus lot with more than three miles of paved trails. It would also have provided pedestrian and bicycle access to a future 273-home subdivision on the other side of Harris Road.

No one challenged petitioner's evidence or introduced evidence in opposition thereto. On the contrary, the Town's planning staff advised the planning board and the BOC that N.C.G.S. § 160A-307.1 prevented the Town from requiring petitioner to "install[ ] road, curb/gutter[,] and multiuse path improvements." Under that statute, "[a] city may only require street improvements related to schools that are required for safe ingress and egress to the municipal street system and that are physically connected to a driveway on the school site." N.C.G.S. § 160A-307.1 (2023).

By a four-to-three vote, the planning board recommended that the BOC deny petitioner's applications. The BOC subsequently considered

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2. "RD" refers to the Town's "rural holding district." A rural holding district is a district where "the principal uses of the land are restricted due to lack of available utilities, unsuitable soil types[,] or steep slopes." It is "intended for low density with the maximum density for residential developments within" the district being "1 unit per acre." The campus lot was in the Town's rural holding district.

the applications at its meeting on 20 October 2020. According to the UDO, each application had to comply with the following standards:

> 1. The plan is consistent with the adopted plans and policies of the town;
> 2. The plan complies with all applicable requirements of this ordinance;
> 3. There exists adequate infrastructure (transportation and utilities) to support the plan as proposed; and
> 4. The plan will not be detrimental to the use or development of adjacent properties or other neighborhood uses.

Town of Wake Forest UDO, §§ 15.8.2(J) (major site plans), 15.9.2(J) (major subdivision plans).

The Town attorney advised the commissioners that they could not simply endorse the planning board's recommendation. Rather, they had to determine independently whether "competent, substantial, and material evidence in the record" satisfied the four UDO standards listed above.

The BOC took up petitioner's site plan first. Despite the Town attorney's admonition, the commissioners' deliberations went beyond the evidence introduced at the quasi-judicial hearing. Some commissioners worried that the proposed charter school would have a negative impact on a nearby public elementary school. One commissioner remarked that the elementary school had an occupancy level of just sixty-seven percent. Another opined that "with [the charter school] directly abutting [the elementary] school that's below occupancy," the charter school would "draw students from [the elementary school] which means less money going into [the elementary] school."

Ultimately, one of the commissioners moved to deny the site plan for lack of compliance with Standards 1 and 2.[3] With respect to Standard 1, the commissioner asserted that the site plan was inconsistent with aspects of the Town's comprehensive plan. *See generally* N.C.G.S. § 160D-501(a1) (2023) ("A comprehensive or land-use plan is intended to guide coordinated, efficient, and orderly development within the

3. The commissioner also moved to deny the site plan application for noncompliance with Standard 4. However, the superior court later ruled that petitioner presented sufficient evidence of compliance with Standard 4, and the Town did not appeal that ruling. Accordingly, this issue is not before us.

planning and development regulation jurisdiction based on an analysis of present and future needs.").[4] In particular, the commissioner pointed to the comprehensive plan's statement that school designs should allow safe pedestrian access from adjacent neighborhoods. To justify denial under Standard 2, the commissioner highlighted the residential connectivity requirement in UDO § 3.7.5(B). The commissioners unanimously voted in favor of the motion to deny the site plan.

The BOC's discussion of the subdivision plan centered on UDO § 3.7.5(A). Several commissioners expressed their belief that the subdivision plan did not provide adequate pedestrian and cycling accessibility. The discussion then turned to whether the Town could lawfully mandate that developers construct sidewalks connecting schools to surrounding neighborhoods. The Town attorney advised the BOC that N.C.G.S. § 160A-307.1 preempted such action. The commissioners disregarded that advice and unanimously voted to deny the subdivision plan based on lack of compliance with UDO § 3.7.5(A).

The BOC reduced its decisions to writing in two orders dated 17 November 2020. The first denied the site plan application because petitioner "failed to demonstrate compliance with UDO [§ 3.7.5(B)], which requires connectivity (vehicular and pedestrian) to surrounding residential areas." The second order denied the subdivision plan application because "the evidence submitted failed to demonstrate how the application was complying with UDO [§ 3.7.5(A)], which states that, schools in the RD zone are to encourage walking and bicycle accessibility by school children to schools."

Petitioner sought review of the BOC's orders in the Superior Court, Wake County. Following a hearing, the superior court entered an order on 14 April 2021 affirming those orders. The court rejected petitioner's contention that the denial of its applications violated N.C.G.S. § 160A-307.1. According to the court, the BOC "properly analyzed the scope of [N.C.G.S. § 160A-307.1] and determined that it did not preempt Town plans and ordinances requiring [petitioner] to demonstrate pedestrian and bicycle connectivity." The superior court further concluded, based on a review of the whole record, that the site plan failed to satisfy "the Town's plans and ordinances requiring pedestrian and bicycle connectivity" and "[a]s a result, the [BOC] properly denied both the [s]ite [p]lan [a]pplication and the [s]ubdivision [a]pplication." Petitioner appealed.

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4. When petitioner filed its applications, the relevant enabling legislation was codified in Chapter 160A. In 2019, the General Assembly consolidated and recodified the land use enabling laws into Chapter 160D. This recodification has no bearing on our disposition.

A divided panel of the Court of Appeals affirmed the superior court's order. *Schooldev E., LLC v. Town of Wake Forest*, 284 N.C. App. 434, 448 (2022). As a threshold matter, the majority agreed with petitioner that the superior court "erred when it applied whole record review to the issue of whether the burden of production is met." *Id.* at 444 (cleaned up). The superior court "should have 'applied *de novo* review to determine the initial legal issue of whether [p]etitioner had presented competent, material, and substantial evidence.' " *Id.* (quoting *PHG Asheville, LLC v. City of Asheville*, 262 N.C. App. 231, 241 (2018), *aff'd*, 374 N.C. 133 (2020)). Nonetheless, the majority held that the superior court "correctly affirmed the [BOC's] decisions because [p]etitioner failed to meet its burden of production to show it [was] entitled to the requested permits." *Schooldev*, 284 N.C. App. at 444.

In reaching its holding, the majority acknowledged that N.C.G.S. § 160A-307.1 restricts the ability of municipalities to require street improvements for new schools. *Id.* at 447–48. The majority reasoned, however, that the statute did not control the outcome of this case because "the term 'street improvements' referred to in [N.C.G.S.] § 160A-307.1 does not include sidewalk improvements." *Id.* at 448.

Turning to UDO Standard 1 (consistency with the Town's plans and policies), the majority examined whether petitioner made a sufficient showing that its site and subdivision plans were "consistent with the adopted plans and policies of the Town." *Id.* at 449 (cleaned up). It noted that the BOC considered the comprehensive plan's policy that "school campuses shall be designed to allow safe, pedestrian access from adjacent neighborhoods."[5] *Id.* at 450 (cleaned up). Although comprehensive plans themselves are merely advisory in nature, the majority characterized UDO § 3.7.5 as "an ordinance by which [this policy] was implemented." *Id.* at 451; *see also* N.C.G.S. § 160D-501(c) (stating that comprehensive plans "shall be advisory in nature without independent regulatory effect"). Thus, "[p]etitioner's failure to satisfy UDO § 3.7.5 was a proper basis on which the Town denied [p]etitioner's applications." *Schooldev*, 284 N.C. App. at 451.

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5. The BOC had also concluded that petitioner's plans failed to satisfy the comprehensive plan's policy that school locations "should serve to reinforce desirable growth patterns rather than promoting sprawl." *Schooldev*, 284 N.C. App. at 437. However, because the BOC had not adopted a zoning regulation to implement this policy, the Court of Appeals majority held that the policy was "solely advisory" and thus "was not a proper basis for the [BOC] to deny the [s]ite [p]lan [a]pplication." *Id.* at 450. The Town did not seek our review of this issue.

Similarly, the majority determined that UDO Standard 2 (compliance with UDO requirements) mandated that petitioner's site and subdivision plans satisfy UDO § 3.7.5. *Id.* The majority expressly rejected petitioner's argument that UDO § 3.7.5 was a zoning ordinance and therefore was "inapplicable to [petitioner's] subdivision request." *Id.* It then explained why, in its view, petitioner's evidence did not rise to the level of competent, material, and substantial evidence.

> Our review of the record shows [p]etitioner brought forth evidence demonstrating it would dedicate a twenty-five-foot right of way line along the frontage of the property and provide a ten-foot-wide multi-use path one foot behind the right of way line. Petitioner also offered testimony tending to show the proposed sidewalk would align with the entrance into Joyner Park and the trails within Joyner Park. Since [p]etitioner demonstrates that it would provide pedestrian connectivity to only one residential neighborhood through Joyner Park located to the south of the proposed school, we hold the superior court did not err in affirming the [BOC's] decision to deny the [a]pplications.

Id. at 452–53 (cleaned up).

The dissenting judge agreed that the superior court erred by applying the whole record test. *Id.* at 453 (Tyson, J., concurring in part and dissenting in part). Unlike the majority, however, the dissenting judge would have held (1) that N.C.G.S. § 160A-307.1 barred the Town from requiring petitioner and other school developers to construct "sidewalks, bike paths, trails, etc. to link . . . school campus[es] to surrounding neighborhood[s]" and (2) that "[p]etitioner clearly produced competent, material, and substantial evidence to make a *prima facie* showing of entitlement to the respective permits." *Id.* at 461, 463.

Petitioner filed a notice of appeal based on the dissent in the Court of Appeals. Although it has since been repealed, N.C.G.S. § 7A-30(2) then created 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." *See* N.C.G.S. § 7A-30(2) (2023), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d)–(e), https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H259v7.pdf. Pursuant to N.C.G.S. § 7A-31, the parties

filed petitions for discretionary review asking us to consider additional issues. We allowed their petitions.[6]

II. Judicial Review of Quasi-Judicial Decisions

"Quasi-judicial decisions involve the application of ordinance policies to individual situations rather than the adoption of new policies." David W. Owens, *Land Use Law in North Carolina* 6 (4th ed. 2023). The BOC's decisions in this case qualify as quasi-judicial because in making them the BOC had to "find[ ] . . . facts regarding the specific proposal[s] and . . . exercise . . . some judgment and discretion in applying predetermined policies to the situation." *Id.*; *see also County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507 (1993) ("In the zoning context, these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations.").

When considering permit applications in a quasi-judicial capacity, a local government board "must determine whether '[the] applicant has produced competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of [the requested] permit.' " *PHG Asheville*, 374 N.C. at 149 (quoting *Humble Oil & Refin. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468 (1974)). Competent evidence is evidence that is relevant and admissible. *Competent Evidence*, Black's Law Dictionary (12th ed. 2024). Material evidence has "some logical connection with the facts of the case or the legal issues presented." *Material Evidence*, Black's Law Dictionary (12th ed. 2024). Substantial evidence consists of "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Humble Oil*, 284 N.C. at 470–71 (cleaned up).

By satisfying its initial burden of production, an applicant makes a prima facie case that the permit should be issued. *Id.* at 468. The board must then grant the application unless it makes contrary findings that are likewise supported by "competent, material, and substantial evidence

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6. In its petition for discretionary review, petitioner asked this Court to consider whether the Town had "the statutory authority to require a school to provide off-site sidewalk improvements under the power granted by N.C.G.S. § 160A-372 (now N.C.G.S. § 160D-804)." The Town's petition requested that we determine whether the decision of the Court of Appeals majority "equate[d] to a finding . . . that the Town could require sidewalk improvements on land outside of the subdivision." We conclude at the end of this opinion that there is no need for us to decide these additional issues.

appearing in the record." *Id.* A decision to deny the application must rest on one or more grounds set out in the ordinance. *Id.* In short, the board must base its decision on the evidence and the text of the ordinance, not on the biases or whims of its members.

"Appeals of [a local government board's] quasi-judicial decisions go directly to superior court." Owens, *Land Use Law*, at 266; *see also* N.C.G.S. § 160D-1402(b) (2023) ("An appeal in the nature of certiorari shall be initiated by filing a petition for writ of certiorari with the superior court."). When reviewing a quasi-judicial decision by a local government board, the superior court does not function as a trial court; rather, it "sits in the posture of an appellate court[ ] and . . . reviews th[e] evidence presented to the [local government] board." *PHG Asheville*, 374 N.C. at 149 (quoting *Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 12–13 (2002)).

The superior court reviews the board's decision to determine whether it was:

> a. In violation of constitutional provisions, including those protecting procedural due process rights[;]
>
> b. In excess of the statutory authority conferred upon the local government, including preemption, or the authority conferred upon the decision-making board by ordinance[;]
>
> c. Inconsistent with applicable procedures specified by statute or ordinance[;]
>
> d. Affected by other error of law[;]
>
> e. Unsupported by competent, material, and substantial evidence in view of the entire record[; or]
>
> f. Arbitrary or capricious.

N.C.G.S. § 160D-1402(j)(1).

The standard of review used by the superior court depends on the precise issues raised on appeal. *PHG Asheville*, 374 N.C. at 150. If a petitioner alleges that the board made an error of law, the court reviews the alleged error de novo, "consider[ing] the matter anew and freely substitut[ing] its own judgment for the [board's] judgment." *Id.* (quoting *Mann Media*, 356 N.C. at 13–14); *see also* N.C.G.S. § 160D-1402(j)(2) ("The court shall consider the interpretation of the decision-making board [when reviewing an alleged error of law], but is not bound by that interpretation, and may freely substitute its judgment as appropriate.").

On the other hand, if a petitioner alleges that the board's action was unsupported by competent, material, and substantial evidence or was arbitrary or capricious, the court undertakes a whole record review. *PHG Asheville*, 374 N.C. at 150–51. "In conducting a whole record review, the [superior] court must examine all competent evidence (the 'whole record') in order to determine whether the [board's] decision is supported by substantial evidence." *Id.* at 151 (cleaned up).

The decision of the superior court is subject to appeal. In such cases, the Court of Appeals analyzes the superior court's order for errors of law by "(1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quoting *Mann Media*, 356 N.C. at 14). "In the event that the case under consideration reaches this Court after a decision by the Court of Appeals, the issue before this Court is whether the Court of Appeals committed any errors of law." *Id.*

III. Analysis

To examine the Court of Appeals' decision for errors of law, this Court must "make the same inquiry that the Court of Appeals was called upon to undertake in reviewing the [superior] court's order. As a result, we will now examine whether the [superior] court utilized the appropriate standard of review and, if so, whether it did so properly." *See id.*

As we have seen, whole record review is the proper standard of review for allegations that a local government board did not base its quasi-judicial decision on competent, material, and substantial evidence. Yet the question before the superior court was not whether competent, material, and substantial evidence in the record supported the BOC's decision. Instead, the question was whether the evidence petitioner submitted to satisfy its initial burden of production amounted to competent, material, and substantial evidence. Under this Court's precedent, answering that second question "involves the making of a legal, rather than a factual, determination." *PHG Asheville*, 374 N.C. at 152. Accordingly, the Court of Appeals majority rightly held that the superior court erred by not conducting a de novo review. *Id.* at 152–53; *see also* N.C.G.S. § 160D-1402(j)(2) ("Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable de novo.").

"If a [superior] court fails to properly make a de novo review" of alleged errors of law, "the appellate court can apply a de novo review rather than remand the case" where, as here, "the record on appeal . . .

provide[s] the requisite information for the review." Owens, *Land Use Law*, at 653. Consequently, we review de novo whether petitioner met its initial burden of production.

In its principal brief to this Court, petitioner offers three main reasons for reversing the Court of Appeals majority's ruling that "[p]etitioner failed to meet its burden of production to show it met [UDO § 3.7.5] to establish a *prima facie* case for entitlement of the permits." *Schooldev*, 284 N.C. App. at 453. First, petitioner argues that the Town exceeded its statutory authority by, among other things, erroneously relying on UDO § 3.7.5 to deny petitioner's subdivision permit request even though UDO § 3.7.5 is a zoning ordinance, not a subdivision ordinance. *See generally Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 158-59 (2012) (explaining that "subdivision ordinances control the development of specific parcels of land while general zoning ordinances regulate land use activities over multiple properties located within a distinct area of the [local government's] territorial jurisdiction"). Second, petitioner maintains that N.C.G.S. § 160A-307.1 largely preempts the pedestrian and bicycle connectivity requirements in UDO § 3.7.5. Third, petitioner argues that it presented sufficient evidence of compliance with UDO § 3.7.5 and so should have been granted the requested permits in any event.

We agree with petitioner's third argument. As explained below, petitioner carried its initial burden of production by presenting competent, material, and substantial evidence of compliance with UDO § 3.7.5, and the BOC did not have before it any competent, material, and substantial evidence to support a finding to the contrary. Hence, the BOC should have approved petitioner's permit applications regardless of whether UDO § 3.7.5 qualifies as a subdivision ordinance or N.C.G.S. § 160A-307.1 preempts UDO § 3.7.5. We therefore do not reach petitioner's first two arguments.

In its brief to this Court, the Town argues that petitioner's evidence was insufficient because UDO § 3.7.5 "does not require connectivity to just one 'surrounding residential area,' but instead to all surrounding residential areas." The Court of Appeals majority appears to have adopted the Town's interpretation of UDO § 3.7.5. *See Schooldev*, 284 N.C. App. at 453 (noting that petitioner's plans "would provide pedestrian connectivity to only one residential neighborhood").

The dispositive issue on appeal is thus whether UDO § 3.7.5 mandates pedestrian and bicycle connectivity to *all* residential areas surrounding the campus lot. To resolve this matter, we again refer to the text of UDO § 3.7.5.

> **A. For Schools in the RD Zone Only:** To encourage walking and bicycle accessibility by schoolchildren to schools, it shall be required by the applicant to demonstrate how such accessibility can be achieved, given the low density nature of this district. Accommodation may include the construction of additional off-premise sidewalks, multi-use trails/paths[,] or greenways to connect to existing networks.
>
> **B. For All Schools:**
>
> . . . .
>
> 2. Connectivity (vehicular and pedestrian) to surrounding residential areas is required. Where a full vehicular connection is impractical, a multi-use trail connection shall be provided.

Although UDO § 3.7.5(A) requires a permit applicant to demonstrate how its plans can achieve pedestrian and bicycle connectivity, it does not expressly declare that the applicant's plans must provide connectivity to *all* surrounding residential areas. Similarly, while UDO § 3.7.5(B)(2) declares that pedestrian connectivity "to surrounding residential areas is required," it does not state that connectivity to *all* surrounding residential areas is necessary.

In some of its arguments to this Court, the Town essentially concedes that UDO § 3.7.5 is unclear. It admits that municipalities lack statutory authority to compel developers to build streets or roads outside their respective subdivisions. *See Buckland v. Haw River*, 141 N.C. App. 460, 463 (2000) (holding that the subdivision enabling statute "does not empower municipalities to require a developer to build streets or highways *outside* its subdivision"). For this reason, the Town insists that UDO § 3.7.5 should not be interpreted to require the construction of sidewalks or other improvements across land outside a developer's subdivision site. Thus, according to the Town, the term "off-premise" in UDO § 3.7.5(A) does not refer to areas outside a subdivision; rather, "off-premise" means "off the school's premises (the school's campus) but still within the subdivision site." While the Town's narrow interpretation of "off-premise" may not contradict anything in UDO § 3.7.5(A), it is not obvious from the text of the ordinance that the BOC used the term with that meaning in mind.

Furthermore, if we accept the Town's position that UDO § 3.7.5 does not mandate off-site improvements, it appears that there could be

scenarios in which UDO § 3.7.5(B)(2) would not mandate pedestrian connectivity to all surrounding residential areas. Under the Town's reading, UDO § 3.7.5(B)(2) cannot be understood to require connectivity to a surrounding residential area if providing it would entail the construction of a sidewalk or multi-use path outside the developer's subdivision. This situation might arise, for instance, where an empty lot separates the subdivision site for a proposed school from a nearby neighborhood. Perhaps the BOC did not intend the phrase "surrounding residential areas" in UDO § 3.7.5(B)(2) to include any neighborhood that does not actually share a border with the developer's subdivision site. We cannot reach that conclusion based solely on the text of UDO § 3.7.5 or related UDO provisions, however.

As if it were checkmate, our dissenting colleagues point to dictionary definitions of "surrounding" to argue that the phrase "surrounding residential areas" is not ambiguous. Specifically, they maintain that, because "surrounding" has been defined as "all around a place or thing" and "enclosing or encircling," the BOC did not need to use the term "all" in UDO § 3.7.5(B)(2) to express its intent that developers provide connectivity to every residential area located around a proposed school.

Courts often rely on dictionary definitions when construing terms in statutes or ordinances—we did so earlier in this very opinion—but this practice can do more harm than good when courts apply the definitions to manufacture a false certainty. Our dissenting colleagues ignore that modifiers such as "completely," "entirely," and "all" are commonly attached to "surrounding," "surrounded," and similar words. We might say, for example, that a military unit is "completely surrounded" by hostile forces. Likewise, one dictionary defines "encompass" to mean "to surround *entirely*." *Encompass*, *Oxford Dictionary of English* (3d ed. 2010) (emphasis added). Another dictionary defines "surround" as "to enclose *on all sides*." *Surround*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007) (emphasis added). Thus, even lexicographers sometimes add modifiers to words like "surround" to ensure clarity.

Because UDO § 3.7.5 is unclear, we consult this Court's precedents on the correct interpretation of uncertain provisions in land use ordinances. These precedents instruct us to resolve any "well-founded doubts" about a provision's meaning "in favor of the free use of property." *Yancey v. Heafner*, 268 N.C. 263, 266 (1966) (cleaned up); *see also Westminster Homes*, 354 N.C. at 308 ("[A]mbiguous zoning statutes should be interpreted to permit the free use of land . . . .").

This is no arbitrary canon of construction. It reflects our state's longstanding public policy favoring the "free and unrestricted use and enjoyment of land." *Kirby*, 368 N.C. at 853 (quoting *J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 71 (1981)). That public policy recognizes and preserves the foundational place of property rights in our constitutional order. *See id.* at 852–53 ("The fundamental right to property is as old as our state." (citing N.C. Const. of 1776, Declaration of Rights § XII; *Bayard*, 1 N.C. (Mart.) at 9)). If local governments adopt ordinances that interfere with property rights, they owe it to property owners to use plain language. *See Arter v. Orange Cnty.*, 386 N.C. 352, 352 (2024) ("Local governments have a responsibility to enact clear, unambiguous zoning rules."). Property owners should not need law degrees to figure out what local government ordinances allow them to do with their own land.

Consistent with our precedents, we resolve our doubts about the meaning of UDO § 3.7.5 against the Town and in favor of the free use of property. Thus, we do not interpret UDO § 3.7.5 to require pedestrian and bicycle connectivity to all residential areas surrounding the campus lot. Petitioner satisfied its initial burden by presenting competent, material, and substantial evidence that its proposed multi-use path would provide pedestrian and bicycle access to the public park and 273-home subdivision on the other side of Harris Road.

Because petitioner carried its initial burden of production and no one offered any evidence in opposition to its applications, the BOC had no basis on which to conclude that petitioner's applications failed to satisfy Standards 1 and 2 of the UDO. Consequently, the superior court erred by affirming the BOC's orders denying the applications, and the Court of Appeals erred in turn by affirming the superior court's order.

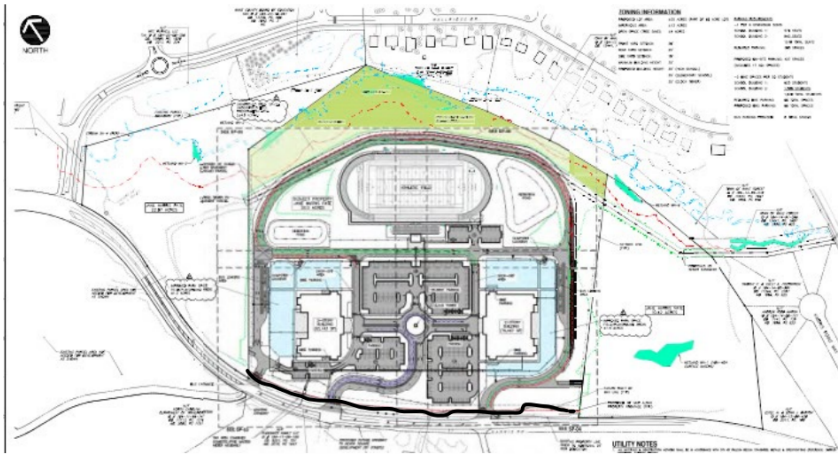
IV. Conclusion

For the reasons explained above, we reverse the decision of the Court of Appeals and remand this case with instructions to the Town to approve petitioner's site plan and subdivision plan applications. Inasmuch as our resolution of this case makes it unnecessary to reach the additional issues raised in the parties' petitions for discretionary review, we further conclude that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice RIGGS dissenting.

In our system of law, we develop factual records for a reason. And we, as appellate courts, understand that we should treat with deference the evidence presented to and found by decision makers. Although a trite saying, the adage "a picture is worth a thousand words" carries much significance in this matter.



The site plan map above answers so many questions about the matter at hand, but rather than examine it and meaningfully engage with what it shows, the majority ignores this evidence and renders a clear ordinance meaningless. How does it do this? By invoking the "free use of land" canon of statutory construction. That canon, though, is reserved only for ambiguous ordinances. And even when it is appropriate, it merely calls for a strict interpretation of the ordinance; the canon does not permit a court to entirely disregard the ordinance's language. Further, the canon cannot be used to sidestep the ordinance's purpose.

Notwithstanding the ordinance's straightforward language and purpose, the majority invokes the free use of land canon to defang a legitimate local regulation of property rights. In doing so, the majority provides no clarity for what level of connectivity is required under the Town's ordinance. For these reasons, I respectfully dissent.

I. The Free Use of Land Canon

Municipal corporations, upon creation, "take[ ] control of the territory and affairs over which [they are] given authority." *Parsons v. Wright*,

223 N.C. 520, 522 (1943). Indeed, the very "object of incorporating a town or city is to invest the inhabitants of the municipality with the government of all matters that are of special municipal concern." *Id.* Zoning ordinances fall into this neat category, and the General Assembly has "delegated [the original zoning power] to the legislative body of municipal corporations." *Allred v. City of Raleigh*, 277 N.C. 530, 540 (1971) (cleaned up); *see also* N.C.G.S. § 160A-174(a) (2023) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city . . . ."). Zoning laws are, thus, products of our political processes just like any other type of legislation. They "involve a reciprocity of benefit as well as of restraint" and "balanc[e] public against private interests." *McKinney v. City of High Point*, 237 N.C. 66, 71 (1953) (quoting 8 McQuillin, *The Law of Mun. Corps.* § 25.25 (3d ed. 1949)). Moreover, they are emblematic of legislation dedicated to the public welfare and serve a "fundamental purpose[ ]" in "stabiliz[ing], conserv[ing], and protecting . . . uses and values of land and buildings." *Id.* (quoting *The Law of Mun. Corps.* § 25.25).

That is not to say that "[v]ast property rights are [not] affected by zoning regulations." *Id.* As far back as 1919, this Court took notice of the rule that "all statutes in derogation of the common law are to be construed strictly" unless the common law was "changed by express enactment." *Price v. Edwards*, 178 N.C. 493, 500 (1919) (cleaned up). Among the examples noted by this Court were statutes "impos[ing] restrictions upon the control, management, use, or alienation of private property." *Id.* (cleaned up). For that exact reason, our jurisdiction and others have adopted the rule of construing ambiguous land ordinances "strictly in favor of the free use of real property." *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 157 (2011).

For example, a little under sixty years ago, in *Yancey v. Heafner*, 268 N.C. 263 (1966), we allowed the construction of a high school athletic stadium despite zoning restrictions. *Id.* at 263. Neighbors of the high school were upset about the potential lighting and noise disturbances, so they filed suit challenging the validity of the permit. *Id.* at 263, 265. When the case reached this Court, we concluded that the applicable zoning ordinance was silent as to whether athletic facilities were "forbidden in zones where schools are permitted." *Id.* at 264. To this Court, that silence was dispositive; it signified that the city council did not contemplate prohibiting athletic stadiums and, thus we leaned on the adage that "well-founded doubts as to the meaning of obscure provisions of a [z]oning [o]rdinance should be resolved in favor of the free

use of property." *Id.* at 266 (quoting 1 Yokley, *Zoning Law & Practice* § 184 (2d ed. 1962)).

Notwithstanding this canon, this Court does not find default ambiguity in order to minimize restrictions on the free use of land. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 308 (2001) ("While ambiguous zoning statutes should be interpreted to permit the free use of land, . . . no such ambiguity exists here."); *see also* 1 Arthur H. Rathkopf & Daren A. Rathkopf, *Ruthkopf's The Law of Zoning and Planning* § 5:14 (Sara C. Bronin & Dwight H. Merriam eds., 2024) ("The doctrine that zoning ordinances should be construed in favor of the free use of land operates *only* where ambiguity exists." (emphasis added)); *id.* ("[T]his rule of construction favoring the free use of land should not be applied where common sense indicates the result would be contrived, unreasonable, or absurd in view of the manifest object and purpose of the ordinance.").

Indeed, in *Westminster Homes*, we abstained from invoking the free use of land canon where a conditional use permit expressly allowed homeowners to install "fences" but did not mention "gates." 354 N.C. at 300–01. In doing so, we first emphasized the importance of "ascertain[ing] and effectuat[ing] the *intention* of the municipal legislative body." *Id.* at 303–04 (emphasis added) (quoting *George v. Town of Edenton*, 294 N.C. 679, 684 (1978)); *see also Long v. Branham*, 271 N.C. 264, 268 (1967) ("[C]onstruction in favor of the . . . unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction." (cleaned up)). We then achieved that goal by simply looking to the ordinance's plain language, which conveyed "a clear desire for privacy through a wide, comprehensive buffer." *Westminster Homes*, 354 N.C. at 307. Because the ordinance's text and intent were clear, there was no need to resort to statutory construction and we concluded that the permit did not allow residents to install gates. *Id.* at 308.

Here, the majority's conclusion contravenes the plain language of Section 3.7.5(B)(2). Under Section 3.7.5(B)(2), the applicant is "required" to provide "vehicular and pedestrian" "[c]onnectivity . . . to surrounding residential areas." UDO § 3.7.5(B)(2) (2013). In the event that "full vehicular connection is impractical," the ordinance indicates that "a multi-use trail connection" is an adequate replacement. The majority takes issue with this provision because "it does not state that connectivity to *all* surrounding residential areas is necessary." But that is, in fact, what this provision does.

The plain language of Section 3.7.5(B)(2) requires an applicant to connect to each residential area surrounding it. As explained earlier, the basic rule of ordinance interpretation "is to ascertain and effectuate the intention of the municipal legislative body." *Westminster Homes*, 354 N.C. at 303–04 (cleaned up). This intent is determined "by examining [the] (i) language, (ii) spirit, and (iii) goal of the ordinance." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 138 (1993). "When interpreting a municipal ordinance, we apply the same principles of construction used to interpret statutes." *Morris Commc'ns Corp.*, 365 N.C. at 157 (citing *Westminster Homes*, 354 N.C. at 303). "Undefined and ambiguous terms in an ordinance are given their ordinary meaning and significance." *Id.* (citing *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638 (2000)); *see also The Law of Zoning and Planning* § 5:11 ("Where a word or term is not defined for the purposes of the ordinance, it will usually be given its plain, ordinary, and usually understood meaning."). Thus, it is well accepted that "courts may appropriately consult dictionaries" to "ascertain the ordinary meaning of undefined and ambiguous terms." *Morris Commc'ns. Corp.*, 365 N.C. at 158 (citing *Perkins*, 351 N.C. at 638).

According to several dictionaries, "surrounding" means "*all* around a particular place or thing," *New Oxford American Dictionary* 1751 (3d ed. 2010) (emphasis added), or "enclosing or encircling," *The Random House Dictionary of the English Language* 1916 (2d ed. 1987). Thus, the ordinary meaning of Section 3.7.5(B)(2) requires some type of effort to provide vehicular or bicycle connectivity to *all* residential areas encircling it. And this makes sense considering the plural tense of "residential areas"—the ordinance clearly requires applicants to connect the planned site with adjacent neighborhoods through streets and walkable pathways. But rather than conduct a simple dictionary check, the majority reads in an ambiguity.[1] The city ordinance writers did not include the word "all" in Section 3.7.5(B)(2) because "all" is necessarily implied by the word "surrounding."

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1. The majority offers a dictionary definition for Section 3.7.5(B)(2). But rather than define "surrounding" (the adjective in the ordinance's text), the majority defines "surround"—a verb. The difference is significant here. Using the actual word in the text, it remains the case that there is no need to state "all surrounding residential areas" because "surrounding residential areas" necessarily implies that the ordinance requires connectivity to residential areas "all around [the subdivision]." The majority's reading neither relies on the plain language nor the ordinance's purpose. *See Lanvale Properties, LLC*, 366 N.C. 142, 155–56 (2012) (rejecting the proposition that "an [alleged] lack of specificity" is fatal in light of the legislation's "clear guidance").

Lastly, this reading of the ordinance comports with one of the listed purposes in the Town's Unified Development Ordinance. Section 1.4, entitled "Purpose and Intent," indicates that Section 3.7.5 was adopted to "[f]acilitate walking and biking in the community by providing a well-integrated network of streets, sidewalks, bikeways, walking trails, and greenway trails," among other purposes. UDO § 1.4 (2013). By requiring some sort of connectivity to each neighboring residential area, an applicant may satisfy this prerequisite. And this is no minor consideration—the level of connectivity in a neighborhood plays several roles in our everyday life, such as vehicular traffic, obesity, and happiness. *See* Kevin M. Leyden et al., *Walkable Neighborhoods: Linkages Between Place, Health, and Happiness in Younger and Older Adults*, 90 J. of Am. Planning Ass'n 101, 101 (2024) ("We found that the way neighborhoods are planned and maintained matter[ ] for happiness, health, and trust."); Milan Zlatkovic, et al., *Assessment of Effects of Street Connectivity on Traffic Performance and Sustainability Within Communities and Neighborhoods Through Traffic Simulation*, 46 Sustainable Cities & Soc'y 1, 1 (2019) ("People need to be able to travel within the community in a safe and efficient manner."); Arlie Adkins, et al., *Contextualizing Walkability: Do Relationships Between Built Environments and Walking Vary by Socioeconomic Context?*, 83 J. of Am. Planning Ass'n 296, 296 (2017) ("Supportive built environments for walking, bicycling, and transit use are predictive of a larger share of trips made by active travel modes and higher rates of walking or physical activity."). By reading in an ambiguity and invoking the free use of land canon, the majority disregards this plain reading of the UDO.

The majority also ignores the plain language of Section 3.7.5(A). Section 3.7.5(A) requires the applicant to "demonstrate how [walking and bicycle] accessibility can be achieved," given the residential district's "low density nature." UDO § 3.7.5(A) (2013). The ordinance further provides examples of how this accessibility may be accomplished: "Accommodations may include the construction of additional off-premise sidewalks, multi-use trails/paths or greenways to connect to existing networks." *Id.* Like with Section 3.7.5(B)(2), the majority also concluded this section was ambiguous because "it does not expressly declare that the applicant's plans must provide connectivity to *all* surrounding residential areas." But the majority misses the point: the plain language of Section 3.7.5(A) requires a demonstration of how the applicant plans to achieve accessibility for schoolchildren. It does not require the same proof that Section 3.7.5(B)(2) does. Because this ordinance is not ambiguous, the majority again wrongly invoked the free use of land canon.

II. Schooldev Failed to Meet Its Prima Facie Burden

In one sentence, the majority addresses Schooldev's prima facie burden. Such brevity illuminates how thin Schooldev's argument is. Schooldev presented no affirmative evidence to meet its burden under Sections 3.7.5(A) and 3.7.5(B)(2), and thus, the Court of Appeals' judgment should have been affirmed.

When determining whether to grant or deny a land use permit, the trial court first places a burden on the applicant to establish a prima facie case of entitlement to a conditional use permit. *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 149 (2020) (citing *Humble Oil & Refin. Co. v. Bd. of Alderman*, 284 N.C. 458, 468 (1974)). At this point, the applicant must produce "competent, material, and substantial evidence *tending to establish* the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit." *Id.* (emphasis in original) (alteration in original) (quoting *Humble Oil*, 284 N.C. at 468). If this *prima facie* case is established, the agency may only deny the application "based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* (quoting *Humble Oil*, 284 N.C. at 468). Those findings must contradict "grounds [ ] expressly stated in the ordinance." *Id.* (quoting *Woodhouse v. Bd. of Comm'rs*, 299 N.C. 211, 218 (1980)). Relevant here, the Town denied Schooldev's permit application because it failed to establish compliance with Sections 3.7.5(A) and 3.7.5(B)(2). Thus, on appeal, the question is whether Schooldev satisfied its prima facie burden to proffer evidence tending to prove compliance with these ordinances.

Schooldev argues that it met its prima facie burden by "presenting evidence that the campus would have a 10-foot-wide multi-use path that connects to a nearby residential neighborhood and an adjoining town park with a network [of] pedestrian paths." But Schooldev's site plan map tells a different story. To the east and west of the planned site lay undeveloped tracts of land. Residential homes along Walridge Road sit north of the school. Across Harris Road from the planned site is a 117-acre park. As the Town points out, the only accessibility or connectivity accommodation provided by Schooldev is a sidewalk that "connect[s] two of the school's driveways at the front of the school on Harris Road." Schooldev's claim that it provides connectivity is misleading, as the site plan does not include any connection to the homes to the north on Walridge Road. Schooldev incorporated no plans to connect those homes, and nothing prevented Schooldev from providing paths within its own property—the pathways did not need to be off-premises.

Statements made during the Town's planning board meeting further supports the conclusion that Schooldev did not meet its prima facie burden. During that meeting, Schooldev's counsel testified about possible conflicts with the ordinance. Everything its counsel addressed concerned the single ten-foot-wide sidewalk at the property's frontage. For biking, Schooldev's counsel asserted that the development plan was "consistent with the policy for bike ways" because it provides a multi-use path for a community currently lacking "any pedestrian or bike way facilities." That "multi-use path" is the one sidewalk to Harris Road and the only connectivity on any of the four sides of the school. Aside from that sidewalk, Schooldev's counsel argued vaguely that "[s]tem streets . . . offer some connectivity to the adjacent undeveloped parcels if there is future development and the connectivity is possible." To Schooldev's counsel, "[t]he project *seeds* Harris Road with the multi-use pathway . . . for a walkable and bikeable community." (Emphasis added.) Because no sidewalk currently exists from the property to Harris Road, Schooldev's counsel essentially argued its plan was better than nothing and that it "begins the connection." But that is not what the ordinance plainly requires.

It is worth reiterating that ordinances are products of our political processes. Like any other legislation, a zoning ordinance "may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434 (1968) (citing *In re Markham*, 259 N.C. 566 (1963)). It "is not a contract with the property owners of the city and confers upon them no vested right . . . to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance." *Id.* at 434 (citing *McKinney v. City of High Point*, 239 N.C. 232 (1954)). In other words, if a property owner is upset with an existing ordinance, they may engage with their local legislative body. Like with many laws, any necessary fix should be primarily legislative, not judicial.

III. Conclusion

It is worth reiterating that ordinances are products of our political processes. Like any other legislation, a zoning ordinance "may be repealed in its entirety, or amended as the city's legislative body determines from time to time to be in the best interests of the public." *Zopfi v. City of Wilmington*, 273 N.C. 430, 434 (1968) (citing *In re Markham*, 259 N.C. 566 (1963)). It "is not a contract with the property owners of the city and confers upon them no vested right . . . to demand that the boundaries of each zone or the uses to be made of property in each zone remain as declared in the original ordinance." *Id.* at 434 (citing

McKinney v. City of High Point, 239 N.C. 232 (1954)). In other words, if a property owner is upset with an existing ordinance, they may engage with their local legislative body. Like with many laws, any necessary fix should be primarily legislative, not judicial.

In sum, because the ordinance is not ambiguous and because Schooldev failed to meet its burden of production, I respectfully dissent from majority's decision to reverse the judgment of the Court of Appeals.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
SEAGA EDWARD GILLARD

No. 316A19

Filed 13 December 2024

1. Evidence—prior bad acts—murder trial—prior armed assaults and rapes—common scheme or plan—temporal proximity and similarity

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not err in admitting evidence from two women who related separate incidents that each took place less then two months before the fatal shooting in which each woman, while working as a prostitute at a hotel, was raped and robbed at gunpoint by defendant and a second man. The incidents were admissible under Evidence Rule 404(b) as evidence of defendant's identity, motive, and a common plan or scheme to rape and rob the murder victim because there was sufficient temporal proximity and similarity between those incidents and the one that gave rise to the murder charges. Given that the evidence demonstrated a common plan or scheme, its admission was not unfairly prejudicial so as to outweigh any probative value under Evidence Rule 403. Further, the trial court's limiting instruction regarding the prior incidents was not in error or, even if there was any error, it was invited error since the instruction was given at defendant's request.

2. Evidence—murder trial—gun never recovered—prior assault with a firearm—relevance

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, in which the gun defendant used to shoot one of the victims was never recovered, the trial court did not commit plain error by admitting evidence from a woman about a prior incident involving defendant making a threat to her by putting his gun up to her mouth and telling her if she didn't comply with his demands, then her blood would be on the walls. The prior incident was relevant to the question of whether defendant possessed a firearm and, even if the evidence was not relevant, defendant failed to show that the jury probably would have reached a different result absent the evidence.

3. Evidence—witness testimony—background information—past experience of abuse—plain error review

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not commit plain error by admitting personal background information from two witnesses during the guilt-innocence phase of the trial and from two other witnesses during the sentencing phase, where the evidence was relevant and more probative than prejudicial. Testimony from the sister of one of the victims about the victim's past experience of abuse was limited in scope, provided an explanation for how the victim ended up as a prostitute, and did not constitute impermissible character testimony. Testimony from the other witness during the guilt-innocence phase detailing her abusive upbringing similarly served to provide context as to why she was working as a prostitute on the night she was attacked by defendant. For each of the two witnesses who detailed their experiences of abuse during the sentencing phase—in which less restrictive standards apply—their testimony introduced each of them to the jury and related to the aggravating circumstance of showing a course of conduct by defendant engaging in violent acts. Finally, the trial court properly instructed the jury that all of the evidence in both phases of the trial could be considered during sentencing deliberations.

4. Evidence—photographs—murder victims and scene—not repetitive or cumulative

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel, the trial court did not abuse its discretion by admitting nearly one hundred photographs of the victims and the crime scene, only nine of which defendant challenged at trial. The challenged photos were not unnecessarily repetitive and cumulative where they depicted different angles

of the victims' bodies and injuries—as well as the distance between the bodies, shell casings, and bloody footprints in the context of the general layout of the room and hallway where the incident took place—and were illustrative of what officers observed when they arrived on the scene.

5. Homicide—first-degree murder—felony murder—underlying felony—sufficiency of evidence

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence of first-degree murder based on felony murder, where the evidence—including testimony about prior rapes and robberies committed by defendant against other women, which was submitted pursuant to Evidence Rule 404(b) as evidence of a common plan or scheme—supported an inference that defendant intended to rape the female victim or rob her at gunpoint, and took overt steps to do so, before he was interrupted when his accomplice shot the other victim in the hallway outside the hotel room.

6. Homicide—first-degree murder—premeditation and deliberation—sufficiency of evidence

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented substantial evidence from which a jury could conclude that defendant acted with premeditation and deliberation to support the first-degree murder charge regarding the female victim, including that defendant arrived at the hotel with a loaded weapon, there was no evidence of provocation by the female victim based on video surveillance, and the victim was unarmed when she was shot. Further, the two shots defendant fired at the victim, both of which hit her, constituted evidence of intent to kill.

7. Homicide—first-degree murder—acting in concert—murder committed in pursuit of a common plan

In a capital murder prosecution arising from the fatal shooting of a prostitute (a female) and her protector (a male) by defendant and another man, the State presented substantial evidence that defendant and his accomplice were acting in concert when the accomplice shot and killed the male victim. Specifically, there was sufficient evidence from which the jury could determine that the murder of the male victim occurred during the pursuit, and as a natural and probable consequence of the two men's common plan to

rob and rape the female victim; therefore, the charge of first-degree murder of the male victim based on theories of premeditation and deliberation and felony murder was properly submitted to the jury.

8. Sentencing—murder trial—aggravating circumstance—murder perpetrated during commission of felonies

In the sentencing phase of a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the State presented sufficient evidence that the murders occurred during the commission of the attempted rape or armed robbery of the female victim to support the submission of this aggravating circumstance to the jury.

9. Criminal Law—jury instructions—capital murder trial—culpability for killing by accomplice—major participant in events leading to death

In a capital murder prosecution arising from the fatal shooting of a prostitute and her protector (a male) at a hotel by defendant and another man, there was no plain error with regard to defendant's argument that, since he was not the one who killed the male victim and therefore could not have had the requisite intent to kill for imposition of the death penalty, the trial court should have included a culpability requirement in its jury instruction pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). The instruction was not required because defendant was convicted of first-degree murder for the killing of the male victim on both theories of felony murder and premeditation and deliberation based on evidence showing that defendant was a major participant in the male victim's death by actively planning, arranging, and perpetrating an armed, violent felony that was likely to lead to a person's death.

10. Sentencing—capital murder trial—jury instructions—aggravating factors—multiple factors supported by same evidence

In the sentencing phase of a capital murder prosecution arising from the fatal shooting of a prostitute and her protector at a hotel by defendant and another man, the trial court did not commit plain error by failing to instruct the jury that it could not use the same evidence to support more than one aggravating factor. There was not a complete overlap in the evidence supporting the aggravating circumstance that the murders occurred during the attempt to commit rape or armed robbery and the evidence used to support the aggravating circumstance that the murders were part of a course of conduct by defendant engaging in violent acts against the victims.

There was substantial separate evidence that defendant subjected prior victims to the same type of violence perpetrated on the night in question.

11. Identification of Defendants—capital murder trial—sentencing phase—pre-trial identification—not induced by State action

In the sentencing phase of a capital murder prosecution arising from the fatal shooting of two victims, there was no violation of defendant's due process rights from the admission of a witness's pretrial identification of defendant as the perpetrator of a prior armed assault and robbery committed against her, where the identification did not result from any State action. Although the witness was contacted by a detective who was investigating whether a link existed between the murders and her prior reported attack, the witness did her own independent research and recognized defendant from a photograph in a news article. Any questions about the reliability of her testimony were for the jury to determine and went to the weight rather than the admissibility of the evidence.

12. Criminal Law—jury instructions—capital murder trial—felony murder—final mandate—felony elements not repeated

In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not plainly err when, in its final mandate to the jury on first-degree murder based on felony murder, it failed to repeat the elements for the underlying felonies—attempted first-degree rape and attempted robbery with a dangerous weapon—because the instructions, taken as a whole, included thorough and correct instructions regarding each element of those felonies and, therefore, there was no reasonable cause to suggest that the jury was misled or misinformed.

13. Criminal Law—capital murder trial—no error—no cumulative error

In a capital murder prosecution arising from the fatal shooting of two victims, defendant failed to show that cumulative prejudicial error deprived him of a fair trial and required reversal of his convictions and a new trial or sentencing hearing. Where the Supreme Court addressed each of defendant's substantive claims on appeal and found no error by the trial court, there could be no cumulative error.

14. Jury—selection—capital murder trial—excusal for cause—views on death penalty

During jury selection for a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not abuse

its discretion by excusing three prospective jurors for cause based on their answers to questions about their ability to consider imposing a penalty of death—the one who stated that he didn't think that he could vote for (or would have a hard time voting for) the penalty; a second who stated unequivocally that she did not believe in the death penalty and would not vote for it; and a third who equivocated but then agreed that he would automatically vote for life without parole. In each case, the court's determination that the prospective jurors' stated views would substantially impair the performance of their duties to impartially apply the law was not manifestly unreasonable and, further, there was no abuse of discretion in the trial court's decision not to allow further questioning of each prospective juror by defendant in light of the improbability that different answers would be given.

15. Sentencing—capital murder trial—mitigating circumstances—peremptory instructions not required

During the sentencing phase of a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by failing to give peremptory instructions to the jury regarding three out of forty mitigating circumstances, which would have directed the jury to find that a particular mitigating circumstance had been established if the jury found the facts presented to be true. Contrary to defendant's assertion, the evidence supporting each of the three non-statutory mitigating factors (that defendant's asthma as a child prevented him from engaging in sports, that his home life impacted his ability to succeed in school, and that he suffered from other specified trauma and related stressor disorder) was not uncontroverted.

16. Constitutional Law—capital murder trial—pretrial motion to strike death penalty—prosecutorial discretion

In a capital murder prosecution arising from the fatal shooting of two victims, the trial court did not err by denying defendant's pretrial motion to strike the death penalty because the decision to seek a particular sentence or to engage in plea bargaining is within the exclusive and discretionary power of the district attorney and does not impermissibly burden a defendant's constitutional rights.

17. Constitutional Law—Eighth and Fourteenth Amendments—death penalty—method of lethal injection—substantial and imminent risk not shown

In a capital murder prosecution arising from the fatal shooting of two victims in which defendant received a sentence of death,

defendant failed to meet his burden of demonstrating that the state's method of lethal injection involved a substantial risk of serious harm (severe pain over and above death itself) and that an alternative method was available that would entail significantly less risk of needless suffering. Therefore, defendant's argument that the state's method of punishment was cruel and unusual and unconstitutional under the Eighth and Fourteenth Amendments was rejected.

18. Criminal Law—capital murder trial—preservation issues

In a capital murder prosecution arising from the fatal shooting of two victims, arguments presented by defendant as preservation issues—that the death penalty should be invalidated and that the indictment was insufficient to elevate the crime of murder from second-degree to first-degree and did not allege aggravating circumstances—did not include compelling reasons to depart from well-established precedent.

19. Constitutional Law—effective assistance of counsel—capital murder trial—premature consideration on direct appeal

In a capital murder prosecution arising from the fatal shooting of two victims, where defendant's claims that his counsel provided ineffective assistance—by failing to object at numerous points throughout the trial and sentencing—could not be determined on the cold record, those claims were dismissed without prejudice to defendant's right to raise them in a subsequent proceeding.

Justice EARLS concurring in part and dissenting in part.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Paul C. Ridgeway on 4 March 2019 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court on 31 October 2023.

Joshua H. Stein, Attorney General, by Heidi M. Williams, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Amanda Zimmer, Assistant Appellant Defender, and Aaron Johnson, Assistant Appellate Defender, for defendant-appellant.

BERGER, Justice.

Defendant was convicted of two counts of first-degree murder and sentenced to death. He raises several issues on appeal, including admission and use of Rule 404(b) evidence, adequacy of jury instructions, and improper challenges for cause during jury selection, along with other perfunctory arguments. We address each in turn and conclude that defendant received a fair trial free from error. In addition, the trial court's judgment that defendant should be sentenced to death based upon the jury's recommendation during the sentencing phase was free from error.

I. Factual and Procedural Background

In the early morning hours of 2 December 2016, Dwayne Garvey and April Holland were shot and killed at a Raleigh hotel. Surveillance footage showed two men were the perpetrators. Raleigh Police released still photographs of the suspects, and an anonymous tip reported that defendant and Brandon Hill were involved. Police arrested defendant in his home on 3 December 2016.

Text messages showed that at approximately 3:30 a.m. on 2 December 2016, defendant contacted Holland[1] stating that he was seeking sexual services. Holland replied with her price and provided defendant with the address for the hotel. Defendant informed Holland of his arrival around 4:38 a.m., and Holland responded with her room number.

Surveillance footage showed defendant and Hill enter the hotel through a side door, and they began walking towards Holland's room. The two men were seen pacing in the hallway prior to defendant entering Holland's room. The footage showed Garvey, who served as Holland's protector, walk past defendant and Hill in the hallway. An extraction report of Garvey's phone showed that he texted Holland "I saw two dudes. . . . Let me know you good."

Approximately four minutes later, the footage showed Garvey banging on the door to Holland's room. Hill then reentered the hallway carrying a gun and Garvey tried swatting at it before putting his hands in the air. The footage showed Hill shoot Garvey several times. Defendant exited Holland's room and fired two shots into the room.

Both Garvey and Holland sustained multiple gunshot wounds and were dead when officers arrived. The autopsy of Garvey showed that

1. Holland and Garvey both received the text messages using Google Voice.

the fatal shot severed his aorta. Holland's autopsy revealed that she was twelve weeks pregnant at the time and had suffered two gunshot wounds, one to the right side of her face and a fatal shot to her chest.

As part of their investigation, police obtained a search warrant for defendant's home. During the search, officers seized two cell phones. An extraction report of defendant's phones showed he had conducted an internet search for female escorts on the morning of the murders, followed by a search for the address of the hotel where Garvey and Holland were located. His browsing history also showed that shortly after the murders occurred, defendant searched multiple times for "man wanted for shooting," "man wanted for shooting, Raleigh, NC," "two men wanted in Raleigh," and "[h]ow much can you face for double homicide?" He also accessed a webpage concerning state laws on fetal homicide.

On 23 January 2017, defendant was indicted by a Wake County grand jury on two counts of first-degree murder, and the State subsequently announced its intent to seek the death penalty. Defendant filed numerous pretrial motions seeking to prohibit the State from introducing evidence of prior criminal activity by defendant against multiple victims, to suppress witnesses' pretrial identifications of defendant, and to prohibit the imposition of the death penalty on various grounds.

A Wake County jury found defendant guilty of two counts of first-degree murder, and he was sentenced to death on 4 March 2019 following the jury's recommendation. Defendant timely appealed to this Court pursuant to N.C.G.S. § 7A-27(a). We find no prejudicial error in defendant's conviction and affirm the trial court's death sentence.

II. Analysis

A. Admission of 404(b) Evidence of Prior Acts Against Bessie A. and Rachel B.[2]

[1] Defendant first argues that the trial court erred in admitting the State's 404(b) evidence regarding prior criminal acts that defendant committed against Bessie A. and Rachel B.

Approximately two months before the murders of Garvey and Holland, Bessie A. was contacted by a man who was seeking sexual services. Bessie A. agreed to meet the man at a low-budget hotel in Raleigh, and she was ambushed when two men entered her room

2. Throughout this opinion, we have chosen to use first names and initials to identify sexual assault victims who provided 404(b) evidence to ensure that their experiences are not anonymized or diminished, while at the same time respecting their privacy.

brandishing firearms. The men forced Bessie A. to remove her clothes and then stole her purse, bank card, driver's license, tablet, and cell phone. One of the men, whom Bessie A. recalled wearing a red hat and having a tattoo on his hand, raped her at gunpoint. The men then tied Bessie A.'s feet and hands together using pillowcases, threw blankets on top of her, and fled the scene. Bessie A.'s license was discovered by police in Hill's possession, and she later identified both defendant and Hill as the perpetrators. Bessie A. specifically named defendant as the individual who had raped her.

Less than two weeks later, on 28 October 2016, Rachel B. was also contacted by a man who planned to meet her at a low-budget hotel for sexual services. When Rachel B. opened the door to greet the man, she was ambushed by two men with guns. The two men began going through her personal items, forced her to undress, tied her hands and feet together, and then took turns raping her. The men then strangled her with a phone cord and took turns kicking her in the face. The two men stole Rachel B.'s ID, Social Security card, birth certificate, cell phone, clothes, and other personal items before leaving the hotel room. During this incident, Rachel B. noticed one man had a foreign accent and spider tattoos on his calf. She later identified this individual as defendant.

After the State disclosed its intent to call Bessie A. and Rachel B. as witnesses, defendant filed motions in limine to exclude this evidence. In its order on the admissibility of 404(b) evidence concerning the Bessie A. incident, the trial court made the following findings of fact:

> 11. On October 16, 2016, [Bessie A.] was raped and robbed in a hotel. The night of the rape, [Bessie A.] had been prostituting herself and had agreed to meet up with a potential "John." To [Bessie A.]'s surprise, two black males arrived and forced her into the hotel bedroom.
>
> 12. Both assailants had pistols, one silver and one black, and told her to get on the hotel bed. The men continued to yell at [Bessie A.] and demand for her to tell them where her money and belongings were. They took her I.D. and her debit card from her purse and forced her to reveal her PIN.
>
> 13. The men stripped her of her clothes, bound her hands and feet with the telephone cord, and the first man proceeded to rape her.

> 14. After the first man was finished, he disposed of the condom in the toilet. The second man was unwilling to penetrate because he did not have a condom. The two men then wrapped [Bessie A.] in a blanket and left her naked and restrained on the bed.
>
> 15. [Bessie A.] was able to make her way downstairs to the hotel lobby and was aided by the staff, and later, the police.
>
> 16. [Bessie A.] was able to identify Defendant and Co-Defendant Hill as her assailants with 80% certainty from a properly-administered police photo lineup.
>
> 17. Through further police investigation, [Bessie A.]'s I.D. and debit card were found in the car used by co-defendant Brandon Hill.
>
> 18. Defendant and co-defendant Brandon Hill are known associates, having been identified as such by the video of the Holland/Garvey crime scene . . . .
>
> 19. As to the victims, [Bessie A.] and Holland were both prostitutes in Raleigh who agreed to have sex with a single male in exchange for payment.
>
> 20. Rather than a single male, two black males showed up to the scene where [Bessie A.] and Holland were assaulted.
>
> 21. In each instance, the two assailants were armed with pistols used to threaten [Bessie A.] and Holland.
>
> 22. Both of the assaults took place in low-budget hotels in Raleigh, North Carolina.
>
> 23. The criminal activity against [Bessie A.] and Holland/Garvey occurred 47 days apart in Raleigh, North Carolina.

The trial court then concluded that this evidence was admissible pursuant to Rule 404(b) of the North Carolina Rules of Evidence, for the following reasons:

> 4. The similarities in the events between [Bessie A.] and Holland show motive and a common scheme or plan: a plan that starts with the luring of a prostitute

> into a low-budget hotel room and ends with a robbery and sexual assault, and sometimes violence, if Defendant's plan meets a hurdle as apparently it did with Holland.
>
> 5. The two events are close enough in proximity of time and similarity of facts that this Court concludes that the evidence of the robbery and sexual assault of [Bessie A.] is probative of a motive and common scheme or plan of Defendant, as well as Defendant's identity, with respect to the crimes charged in this trial.

In a similar 404(b) order concerning the admissibility of Rachel B.'s testimony, the trial court made the following findings of fact:

> 11. On October 28, 2016, [Rachel B.] reported she had been raped in the early morning hours in a Microtel hotel in Morrisville, NC by two black males.
>
> 12. The morning of the rape, [Rachel B.] had been prostituting herself by using a website called "Backpage." After a smoke break outside of the hotel, [Rachel B.] was grabbed by two men and forced back into her hotel room.
>
> 13. Both assailants had pistols, one silver and one black, and told her to get on the hotel bed. The assailants continued to yell at [Rachel B.] and demanded her to tell them where her money and belongings were. They took her I.D. and her Social Security card from her bag.
>
> 14. The assailants stripped [Rachel B.] of her clothes, "hogtied" her hands and feet with the telephone cord, covered her head with a pillow case and stuffed her underwear in her mouth. Threatening her with hand guns, both men raped her and perpetrated other sexual offenses against her. After the assailants were finished, they told [Rachel B.] to stay put and said they were going to get their friends to have "more fun with her." After the assailants left, [Rachel B.] was able to escape and make her way downstairs to the hotel lobby where she was aided by the staff, and later, the police.

> 15. [Rachel B.] reported that the assailants were black males and that one, the more violent of the two, had a foreign accent and had a tattoo of three spiders on his lower right leg, and a tattoo of a sunset on his lower left leg. She further reported that the assailants had a black "camera case" styled box that was full of firearms.
>
> 16. Defendant, a native of St. Lucia, has a Caribbean Island accent. He also has a tattoo of three spiders on his lower right leg and a tattoo of a sunset on his lower left leg.
>
> . . . .
>
> 20. As to the victims, [Rachel B.] and Holland were both prostitutes in Wake County, North Carolina (Raleigh/Morrisville) who agreed to have sex with different men in exchange for payment and utilized the Backpage website to solicit clients.
>
> 21. Two assailants were involved in the assaults on both [Rachel B.] and Holland/Garvey, and both involved unprovoked violence.
>
> 22. Both assailants were armed with pistols used in the commission of the crimes against [Rachel B.] and Holland.
>
> 23. Both of the assaults took place in low-budget hotels in Wake County, North Carolina.
>
> 24. The criminal activity against [Rachel B.] and Holland/Garvey occurred 35 days apart.

The trial court concluded that the evidence regarding Rachel B. was admissible pursuant to Rule 404(b), because:

> 4. The similarities in the events between [Rachel B.] and Holland/Garvey show motive and a common scheme or plan: a plan that starts with the confinement of a prostitute in a low-budget hotel room and ends with a robbery and sexual assault, and sometimes violence, if Defendant's plan meets a hurdle as it apparently did with Holland/Garvey.

> 5. The two events are close enough in proximity of time and similarity of facts that this Court concludes that the evidence of the robbery and sexual assault of [Rachel B.] is probative of a motive and common scheme or plan of Defendant, as well as Defendant's identity, with respect to the crimes charged in this trial.

The trial court also considered the proffered evidence of both witnesses in light of Rule 403, concluding that,

> [a]fter weighing the probative value of the proffered evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, and considerations of undue delay, waste of time, or needless presentation of cumulative evidence . . . the proffered evidence should not be excluded under Rule 403.

Both Bessie A. and Rachel B. subsequently testified at defendant's trial. Defendant requested that the trial court give a limiting instruction related to their testimony, and the trial court gave essentially the same limiting instruction to the jury for both witnesses, stating:

> This evidence was received solely for the following purposes: the identity of the person who committed the crime charged in this case, if committed; that the defendant had a motive for the commission of the crime charged in this case, if committed; and that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case, if committed. If you believe this evidence, you may consider it but only for the limited purposes for which it was received. You may not consider it for any other purpose.

On appeal, defendant raises several arguments contesting the admissibility of this evidence. First, defendant contends that the admission of the evidence of the prior acts with Bessie A. and Rachel B. did not fall within the proper bounds of Rule 404(b) evidence. Second, defendant asserts that even if this evidence was proper under Rule 404(b), it should have been excluded under Rule 403 for its cumulative prejudicial impact. Third, defendant argues that the trial court's limiting instructions did not appropriately limit the jurors' use of the evidence. And fourth, defendant asserts that the focus on this "highly disturbing evidence" derailed the jurors' consideration of the actual events, influencing the jury's verdict. We disagree.

1. 404(b) Evidence

Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant." *State v. Coffey*, 326 N.C. 268, 278–79 (1990) (cleaned up); *see also State v. Carpenter*, 361 N.C. 382, 386 (2007). While this type of evidence may not be admitted "to prove the character of a person in order to show that he acted in conformity therewith," such evidence may be admitted "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) (2023).

But because there lies a risk of the jury "giv[ing] excessive weight to the vicious record of [a] crime," *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002) (quoting 1A John H. Wigmore, *Evidence* § 58.2 (Peter Tillers ed. 1983)), there are safeguards in place to ensure that evidence admitted under Rule 404(b) is proper. Specifically, 404(b) evidence is "constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154 (citing *State v. Lloyd*, 354 N.C. 76, 88 (2001); *State v. Lynch*, 334 N.C. 402, 412 (1993)).

Prior acts are sufficiently similar under Rule 404(b) if the facts "tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304 (1991). These facts need not "rise to the level of unique and bizarre." *State v. Beckelheimer*, 366 N.C. 127, 131 (2012) (cleaned up). Rather, the ultimate question is one of "logical relevancy." *State v. McClain*, 240 N.C. 171, 177 (1954) (explaining that there must be a logical connection between the prior bad act and the crime charged); *see also State v. Fowler*, 230 N.C. 470, 473 (1949) ("The touchstone is logical relevancy."); *State v. Felton*, 283 N.C. 368, 372 (1973); *State v. Hunt*, 305 N.C. 238, 246 (1982).

Once a trial court determines that the requirements of Rule 404(b) have been met, it must then "balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *Carpenter*, 361 N.C. at 388–89. "When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, we look to whether the evidence supports the findings and whether the findings support the conclusions." *Beckelheimer*, 366 N.C. at 130. "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.*

Here, defendant contests several of the trial court's findings of fact and conclusions of law in both 404(b) orders. First, defendant asserts that finding of fact No. 21 in the Bessie A. Order is not supported by the

evidence.[3] Specifically, defendant contends that because the hotel surveillance footage did not show defendant entering Holland's room with a gun in his hand or otherwise threaten Holland prior to Hill shooting Garvey, and because there were no signs of struggle or restraint against Holland, "the evidence did not support a finding that [defendant] used his gun to threaten Holland after entering the room."

But defendant reads into the finding that he threatened Holland *before* Hill shot and killed Garvey. This finding does not distinguish the point in time defendant used his weapon to threaten Holland, whether before or after Hill shot Garvey, and is overwhelmingly supported by competent evidence as the surveillance footage alone showed defendant stepping out of Holland's hotel room with his gun in hand, and then shooting and killing her.

Defendant next argues that finding of fact No. 21 in the Rachel B. Order was not supported by competent evidence. Defendant concedes that there was no provocation for the crimes committed against Rachel B., but he argues that his shooting of Holland was provoked by Hill's shooting of Garvey in the hallway.

Provocation "must ordinarily amount to an assault or threatened assault by the victim against the perpetrator." *State v. Watson*, 338 N.C. 168, 176 (1994), *cert. denied*, 514 U.S. 1071 (1995), *overruled in part on other grounds by State v. Richardson*, 341 N.C. 585 (1995). Thus, finding of fact No. 21 in the Rachel B. Order was supported by competent evidence as neither the shooting of Garvey by someone acting in concert with defendant nor defendant's shooting of Holland were committed in response "to an assault or threatened assault by the victim[s]." The surveillance footage showed Garvey banging on Holland's hotel door when he was approached by Hill, who was brandishing a firearm. In response, Garvey attempted to swat at the gun, but then put his hands up in the air and backed up against the wall in submission to Hill before he was shot and killed. Garvey's actions resulted exclusively from Hill's escalation of force by the introduction of a firearm into this encounter. Thus, as Garvey neither threatened nor assaulted Hill, it cannot be said that Hill's actions were provoked by the victim's response. *See Watson*, 338 N.C. at 176. This evidence alone was sufficient to support the challenged finding.

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3. In his brief, defendant concedes that the trial "court's finding as to [Rachel B.] is more accurate as it states at finding [of fact No.] 22 that '[b]oth assailants were armed with pistols used in the commission of the crimes against [Rachel B.] and Holland.' "

But even assuming *arguendo* that Hill's killing of Garvey was sufficiently "provoked" by Garvey's actions, the killing of an individual by a co-defendant cannot amount to legal provocation to kill another person when there is no evidence that the second victim posed any threat. Holland was naked and defenseless at the time of her murder, and there is no evidence that she threatened or assaulted defendant such that she provoked her murder.

Defendant next challenges three portions of the trial court's 404(b) conclusions of law in the Bessie A. Order. First, defendant argues that the portion of conclusion of law 4—that each victim was lured to a low-budget hotel—is not supported by the evidence. Defendant essentially asserts that the women could not have been lured to a hotel because they were already located there for their work as prostitutes.

First, we note that this portion of conclusion of law No. 4 is more properly categorized as a finding of fact, and as such we review whether competent evidence supports this finding. *State v. Johnson*, 269 N.C. App. 76, 81–82 ("[F]indings of fact normally involve logical reasoning through the evidentiary facts." (cleaned up)), *aff'd*, 378 N.C. 236 (2021); *Williams v. Marchelle Isyk Allen, P.A.*, 383 N.C. 664, 672–73 (2022) ("Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." (cleaned up)); *Beach v. McLean*, 219 N.C. 521, 525 (1941) ("If it is a mixed question of fact and law it is likewise conclusive, provided there is sufficient evidence to sustain the element of the fact involved.").

Defendant is correct that both Bessie A. and Holland were located at low-budget hotels by nature of their work as prostitutes. However, we disagree with his contention that because the women were already located at low-budget hotels, his actions could not constitute "luring." Defendant contacted both women on the pretext of obtaining consensual prostitution services for himself. Thus, defendant was the cause of their presence at each location at the relevant, agreed upon times.

Moreover, neither woman was aware that defendant would arrive with a companion and that the two men would rob them and perpetrate violent acts against them. The evidence of the pretextual initiations of these visits to both Bessie A. and Holland as one which would include consensual sexual services with one man sufficiently support the trial court's finding that defendant enticed or otherwise caused these women to utilize hotels for the purposes of robbing and sexually assaulting them. *See State v. Howell*, 343 N.C. 229, 236 (1996) ("These facts are so strikingly similar as to permit [the victim's friend, a fellow prostitute, to

testify] for the purpose of proving defendant's identity as well as showing a common opportunity, plan, and *modus operandi* to defendant's attacks."). *See also State v. Pruitt*, 94 N.C. App. 261, 267 (1989) (concluding that testimony from the defendant's former lovers was admissible to prove the defendant's modus operandi, plan, motive and intent concerning defendant's actions to lure his victims by pretextually befriending them before assaulting them); *State v. Morrison*, 85 N.C. App. 511, 514 (1987) (stating that defendant lured his victims to the crime scene on the pretext of changing clothes before they went out on a date).

Defendant also challenges additional portions of conclusion of law No. 4 for both the Bessie A. and Rachel B. Orders, asserting that the evidence does not support a finding that the common scheme "ends with a robbery and sexual assault, and sometimes violence, if [d]efendant's plan meets a hurdle as it apparently did with Holland." Defendant contends that because "[n]o hurdles came up in the [Bessie A.] and [Rachel B.] incidents," the State could not show that "Hill and [defendant] had a plan to use violence if someone other than the woman they were meeting showed up and presented an obstacle to their activity." Defendant concedes that he and Hill "used violence to control" both Bessie A. and Rachel B.

As with the portion of the Bessie A. Order conclusion of law No. 4 discussed above, these portions of the Bessie A. and Rachel B. Orders are better categorized as findings of fact, as they demonstrate the trial court's "logical reasoning from the evidentiary facts." *See Williams*, 383 N.C. at 672–73. Thus, we analyze to determine whether competent evidence supports the finding that defendant's actions against both Bessie A. and Rachel B. would end with "violence, if [d]efendant's plan meets a hurdle."

One could argue that defendant's narrow reading of the finding—that these encounters would "sometimes" end in "violence if [d]efendant's plan me[t] a hurdle as apparently it did with Holland"—may not be supported by the evidence. Defendant concedes, however, that these incidents *always* involved violence regardless of whether defendant's plan met a hurdle. We therefore "examine whether the remaining findings support the trial court's determination" that both Bessie A.'s and Rachel B.'s encounters "show[ed] motive and a common scheme or plan" under Rule 404(b).

Defendant argues that the trial court erred in concluding that there was sufficient similarity between the Bessie A., Rachel B., and Holland incidents "to show a common scheme or plan." Defendant concedes that

there were many similarities between the events, such as the facts that "all three women were working as prostitutes out of cheap hotels, . . . using Backpage to set up meetings, and" only expecting a single male client when two men appeared armed with pistols. But defendant argues that these "do not show that the events leading to Holland's death were part of a common scheme or plan." Rather, defendant encourages us to focus on the differences in the incidents, arguing that because defendant and Hill both immediately forced their way into Rachel B.'s and Bessie A.'s rooms, while only defendant entered Holland's room in this case, and because there were no signs of struggle or injury to Holland before she was shot, these prior acts should not have been admitted under Rule 404(b).

But the trial court correctly concluded that defendant's prior acts against Bessie A. and Rachel B. and the charged crime were "close enough in proximity of time and similarity of facts" to demonstrate a common scheme or plan.

While defendant is correct in his assertion that there are a few minor differences between these three occurrences, "the correct analysis for the admissibility of Rule 404(b) evidence involves focusing on the similarities and not the differences between the two incidents." *State v. Pickens*, 385 N.C. 351, 359 (2023). "Our Rule 404(b) standard does not require identical or even near-identical circumstances between the charged offense and the prior bad act for evidence of the prior bad act to be admissible." *Id.* But all that is required is some logical connection in both the prior bad act and the charged crime. *See McClain*, 240 N.C. at 177; *Fowler*, 230 N.C. at 473.

Here, all three women were prostitutes working out of low-budget hotels in the Raleigh and Wake County areas; they were operating through Backpage; defendant and Hill appeared together at the hotels before each crime took place; and both men were armed with pistols which were used to threaten the women in some capacity. Further, Bessie A., Rachel B., and Holland were contacted by one man, who then unexpectedly arrived with a companion. These facts are sufficient in both temporal proximity and similarity to demonstrate a common plan or scheme to rape and rob Holland on the night she was murdered. And because "Rule 404(b) allows the use of extrinsic conduct evidence so long as the evidence is relevant for *some purpose* other than to show . . . propensity," we need not consider whether this evidence was also sufficient to demonstrate motive. *State v. Cummings*, 326 N.C. 298, 310 (1990) (emphasis added) (quoting *State v. Morgan*, 315 N.C. 626, 637 (1986)).

2. Rule 403 Analysis

Once it is established that "a prior bad act is both relevant and meets the requirements of Rule 404(b), the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403." *Carpenter*, 361 N.C. at 388–89. Otherwise admissible evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1, Rule 403 (2023).

It goes without saying that "evidence probative of the State's case is always prejudicial to the defendant," *Stager*, 329 N.C. at 310 (citing *Coffey*, 326 N.C. at 281), but this is not the threshold for exclusion. Rather, it must be unfairly prejudicial in that it has "an undue tendency to suggest decision on an improper basis." *State v. DeLeonardo*, 315 N.C. 762, 772 (1986) (cleaned up). We review a trial court's Rule 403 determination for abuse of discretion and will only disturb it when it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Richardson*, 385 N.C. 101, 133 (2023) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

Defendant contends that the trial court abused its discretion because the "prejudicial impact of the evidence on the jury cannot be viewed separately as to each incident, but rather must be viewed as to the cumulative impact of the evidence" regarding Bessie A. and Rachel B. Further, defendant contends that the emotional impact of Bessie A.'s and Rachel B.'s testimonies was unfairly prejudicial because it most likely influenced "[a]ny juror who might have harbored a reasonable doubt that [defendant] acted with premeditation and deliberation in shooting Holland, or a reasonable doubt that [defendant] had attempted to rape or rob Holland" on the night she was murdered.

But this evidence was not unfairly prejudicial, nor did it substantially outweigh the highly probative value, because it was introduced to establish defendant's common scheme or plan. A review of the record shows that the trial court carefully considered the Rachel B. and Bessie A. evidence, and then provided multiple limiting instructions to the jury during trial, as will be discussed below. As such, it cannot be said that the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Richardson*, 385 N.C. at 133 (quoting *Hennis*, 323 N.C. at 285).

3. Limiting Instruction

Defendant next asserts that the trial court plainly erred in its limiting instructions regarding Bessie A.'s and Rachel B.'s Rule 404(b) evidence.

Specifically, defendant contends that because the limiting instructions did not sufficiently advise the jury that the 404(b) evidence could only be considered on the issues of attempted robbery or rape, the jury was permitted to consider the evidence for purposes of defendant's state of mind when shooting Holland.

However, not only did defendant fail to object to these limiting instructions, but to the contrary, he requested them. After review, there was no error in the trial court's limiting instructions. But even if there was error, it was invited error as "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. Duke*, 360 N.C. 110, 124 (2005) (alteration in original) (quoting *State v. McPhail*, 329 N.C. 636, 643 (1991)); *see also State v. Wilkinson*, 344 N.C. 198, 214 (1996) ("Since defendant asked for the exact instruction that he now contends is prejudicial, any error was invited error." (cleaned up)); *State v. Miller*, 289 N.C. App. 429, 433 (2023) ("[T]he invited error doctrine [applies] when a defendant's affirmative actions directly precipitate error.").

B. Evidence of a Prior Assault with a Firearm on Kara L.

[2] Next, defendant argues that the trial court plainly erred under Rules 401 and 403 of the Rules of Evidence by admitting evidence at trial regarding a prior assault on Kara L. Defendant filed a motion in limine to exclude the evidence but failed to renew this objection at trial. As such, defendant's unpreserved claim is subject to plain error review. *See State v. Lawrence*, 365 N.C. 506, 516 (2012).

1. Kara L.'s Testimony

In November 2016, Kara L. met defendant through a website on which she was advertising herself for prostitution. Kara L. and defendant met at defendant's home and had consensual sex. At the time, defendant introduced himself as "Carlos" online, but Kara L. later discovered his identification card with the name "Seaga Gillard" listed on it.

After three days of being together, defendant told Kara L. that he was going to advertise her online for prostitution and that she was going to make money for him and his friend, "B." When Kara L. protested, defendant threatened to kill her family. Over the course of the next few days, defendant transported Kara L. to a hotel in Raleigh and told her to call him after she made $1,000.00.

Once Kara L. informed defendant that she had earned sufficient money, defendant and "B" picked her up, took her back to defendant's home, and told her that she was required to make an additional $5,000.00

for them. Kara L. objected to this request and asked to be taken home. In response, defendant took out his gun, told Kara L. to show her teeth, and placed the gun up to her mouth. Defendant told Kara L. that she did not have a choice, and that "if he did not love her[,] her blood would be all over the room." During this time, Kara L. heard defendant refer to his gun by the name of "Lemon Squeeze."

Prior to defendant's trial, the State noticed its intent to introduce evidence of the incident between defendant and Kara L. In response, defendant filed a pretrial motion to prohibit the State from introducing this evidence during both the guilt-innocence and sentencing phases of trial. The trial court held a hearing to determine whether the proposed evidence was admissible and entered an order that permitted the State to elicit testimony from Kara L. to identify defendant and/or the weapon he used on the night she was assaulted. However, the trial court excluded evidence that may have constituted the offenses of human trafficking, kidnapping, assault, and other wrongs because the evidence was "too dissimilar to the charges" of first-degree murder.

At trial, Kara L. testified regarding her experience with defendant. Defendant did not object to Kara L.'s testimony, but instead requested that the trial court give the State a cautionary instruction based upon the order limiting Kara L.'s testimony. The trial court instructed the State and Kara L. that Kara L. should not testify about defendant forcing her to engage in prostitution or taking money in connection with prostitution.

During Kara L.'s trial testimony, she vaguely recounted meeting defendant online, staying at his house for a few days, and then subsequently discovering that his name was "Seaga Gillard." Kara L. confirmed that during her stay at defendant's house, she met defendant's friend named "B," and that both defendant and "B" had guns. Kara L. further testified as follows:

> [The State]. Did he have a name for his gun?
>
> [Kara L.]. Lemon Squeeze.
>
> . . . .
>
> [The State]. At some point, did an incident occur with his gun and you?
>
> [Kara L.]. Yes, ma'am.
>
> [The State]. What did he do with his gun?
>
> [Kara L.]. He put the gun to my face, told me to show

> [my] teeth, and said, "If [I] d[idn]'t love [him], my blood would be all over the walls."
>
> [The State]. And you said he told you to show your teeth?
>
> [Kara L.]. Yes, ma'am.
>
> [The State]. What did he do with his gun when you showed your teeth?
>
> [Kara L.]. He put it up to my mouth.

Kara L. then identified defendant and "B" as the two perpetrators in the still photographs taken from the hotel surveillance footage on the night of the murders.

Defendant did not object to Kara L.'s testimony or the identification, but instead requested a limiting instruction "concerning the gun to the mouth" incident. The trial court granted this request, giving the following limiting instruction to the jury:

> All right. Ladies and gentlemen, I'll give you a brief instruction regarding a portion of the evidence you heard. Evidence has been received tending to show that this defendant held a firearm in the face of this witness, and this evidence was received solely for the following purposes: for the purpose of showing the identity of the person that committed the crime charged in this case, if it was committed, and the identity of a firearm used in the crime charged in this case, if it was committed. If you believe this evidence, you may consider it but only for the limited purposes for which it was received. You may not consider it for any other purpose.

The trial court gave this limiting instruction once again during the final jury charge as well, stating:

> Evidence has been received tending to show that the defendant assaulted or threatened Kara [L.] with a firearm. This evidence was received solely for the purposes of showing, A, the identity of the person who committed the crimes charged in this case and, B, the identity of a firearm which may have been related to the crimes charged in this case. If you believe the evidence, you may consider it but only for the limited

> purposes for which it was received. You may not consider it for any other purpose.

Defendant now contends that the trial court committed plain error by permitting Kara L. to testify that defendant assaulted her with a firearm. Specifically, defendant argues that Kara L.'s testimony that defendant had a gun, and that he used the gun to threaten her, "had no relevance to identifying the gun used in the shooting of Holland, and hence did not meet the requirements of Rule 401" or Rule 403. Defendant argues that this amounted to plain error because "[a] juror who had not been swayed by the emotional impact of the evidence of the assault of [Kara L.] might well have convicted [defendant] of second-degree murder."

2. Plain Error Review

This Court applies the plain error standard of review for "unpreserved instructional or evidentiary error[s]" which occur at trial. *Lawrence*, 365 N.C. at 518. Plain error is an extreme remedy and "should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error." *Id.* at 517 (quoting *State v. Odom*, 307 N.C. 655, 661 (1983)).

Recently, this Court reiterated the standard for plain error review, clarifying that for a defendant to succeed, three things must be shown:

> First, the defendant must show that a fundamental error occurred at trial. 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. 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.

State v. Reber, 386 N.C. 153, 158 (2024) (cleaned up).

This exacting standard demands that even if error exists under step one, a defendant must still demonstrate "that a jury *probably would have* reached a different result," which "requires a showing that the outcome is significantly more likely than not." *Id.* at 159. Even then, defendant must show that this is the exceptional case in which plain error review is warranted because the purported error affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 158 (quoting *Lawrence*, 365 N.C. at 518).

Further, plain error review is unavailable for issues that fall "within the realm of the trial court's discretion," *State v. Steen*, 352 N.C. 227, 256 (2000), such as Rule 403 determinations. *See State v. Murillo*, 349 N.C. 573, 602 (1998) (holding exclusion of evidence under Rule 403 "is a matter left to the sound discretion of the trial court"); *see also State v. Norton*, 213 N.C. App. 75, 81 (2011) ("Because our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review, we need not address [defendant]'s argument on this issue." (cleaned up)); *State v. Smith*, 194 N.C. App. 120, 126–27 (2008) ("Our Supreme Court has held, however, that discretionary decisions by the trial court are not subject to plain error review."); *State v. Cunningham*, 188 N.C. App. 832, 837 (2008) ("[W]e do not apply plain error 'to issues which fall within the realm of the trial court's discretion.' " (quoting *Steen*, 352 N.C. at 256)).

We, therefore, decline to address defendant's Rule 403 argument for plain error. However, because a "trial court's rulings on relevancy are technically not discretionary," we must review defendant's challenge under Rule 401. *State v. Lane*, 365 N.C. 7, 27 (2011).

Evidence is "relevant" to a case 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). "All relevant evidence is admissible, except as 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" our Rules of Evidence. N.C.G.S. § 8C-1, Rule 402 (2023). While a trial court's relevancy determinations are not discretionary, "we accord them great deference on appeal." *Lane*, 365 N.C. at 27.

As a general rule "[w]eapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime." *State v. Wilson*, 280 N.C. 674, 678 (1972). And in cases where "no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes *especially* relevant." *State v. Mlo*, 335 N.C. 353, 376 (1994) (emphasis added); *see also State v. Smith*, 357 N.C. 604, 614 (2003) ("Because the weapon used to murder the victim was never found, evidence that defendant carried a knife with him at times had some relevance to the case.").

Here, defendant's argument that the trial court committed plain error under Rule 401 is without merit. First, the gun used by defendant

to shoot Holland was never recovered. Therefore, Kara L.'s testimony about defendant's possession of, preference for, and prior assault with a firearm was relevant as it made the fact that defendant possessed and used the weapon to kill Holland more probable. *See Mlo*, 335 N.C. at 376. Thus, the trial court did not err in admitting relevant evidence, and because there was no "fundamental error," there can be no plain error. *Reber*, 386 N.C. at 158.

However, even if the admission of Kara L.'s statement regarding defendant's assault with a firearm was not relevant, defendant cannot show that a jury "probably would have reached a different result," or that this purported error affects "the fairness, integrity or public reputation of judicial proceedings." *Reber*, 386 N.C. at 158–59. At trial, the State presented overwhelming evidence of defendant's guilt—including video footage of Hill and defendant shooting Garvey and Holland. Thus, defendant cannot demonstrate plain error in the trial court's admission of this evidence.

C. Evidence of the Abusive Backgrounds of Prior Women Victimized by Defendant

[3] Defendant next argues that the admission of testimony regarding background information of witnesses Angel Holland, Rachel B., Keyona T., and Keyana M. was plain error because it was irrelevant and highly prejudicial. The evidence regarding the personal background information of Holland and Rachel B. was introduced during the guilt-innocence phase of trial, while the evidence related to Keyona T. and Keyana M. was introduced during the capital sentencing phase. We address each in turn.

1. Guilt-Innocence Phase

Among the many witnesses called by the State during the guilt-innocence phase of trial were Rachel B. and the victim's sister, Angel Holland. Angel Holland was asked on direct examination if something had happened when she and her sister were young "that kind of put April on a . . . downward spiral." Defendant objected and requested to be heard outside the presence of the jury, arguing that the question solicited victim-impact testimony in violation of a pretrial order. According to defendant, testimony regarding the victim's childhood was irrelevant and violative of this Court's precedent in *State v. Hembree*, 368 N.C. 2 (2015).

The State responded to the objection, arguing that it was not

> asking her about how this has affected her or anything like that. I think that what has been clear in this trial

> is that April was at a point in her life where she was prostituting, and I think, as part of that story, kind of understanding what got her there would make some sense to this jury and would be relevant. I don't plan on going very far into that but just kind of where she was and how that got her to a point where she began to prostitute.
>
> We've had no evidence so far that she actually was prostituting, and this is actually where the police found this out . . . from her family, which is exactly why we then start researching crimes against prostitutes. It kind of starts that whole spiral into this investigation.

The trial court responded that

> the fact that this victim was engaged in prostitution . . . i[s] relevant to the jury to give some context to get to how she came to be at the place she was that night, engaging with a stranger over the Back Page ad. I think its probative to give the context of why she was engaged in that type of conduct.
>
> I will caution the witness that characterizations of your sister as, you know, a kind person or a loving person or all of those things . . . would not be relevant at this stage of the proceedings. So I'll ask you to listen carefully to the questions that are asked of you and answer them—answer specifically what's being asked of you . . . .

The direct examination of Angel Holland continued:

> [Angel:] When she was around seven or eight, she was molested, and from there things started changing with her, in a couple years of the incident.
>
> [The State:] And as far as, kind of, as that starts to change her, did she begin to date much older men?
>
> [Angel:] Yes, she did.
>
> [The State:] Would you say that those relationships were abusive?
>
> [Angel:] Yes.

> [The State:] Yes?
>
> [Defendant:] Objection.
>
> The Court: Overruled.
>
> [The State:] Did you know that your sister began to prostitute?
>
> [Angel:] It took a while for me to find out, but she did —told — within a year, sort of.

On appeal, defendant again argues that "[t]he evidence that April Holland was sexually abused as a child, engaged in abusive relationships with older men, and began sex work as a teenager . . . had no relevance to the issues before the jury." Because defendant preserved his argument, which does not relate to a federal constitutional right, we review pursuant to N.C.G.S. § 15A-1443(a). Thus, defendant has the burden of demonstrating that the trial court erred, and "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2023).

During the guilt-innocence phase of trial, evidence concerning a victim's character is generally not relevant. *See Hembree*, 368 N.C. at 16 ("Evidence of a victim's character, or the effect of the victim's death on others, is only rarely relevant when making a determination of guilt."). On the other hand, this Court has held that evidence of a victim's history or habits may be "relevant to explain the particular circumstances of the crime." *See State v. Barden*, 356 N.C. 316, 349 (2002) (holding that evidence that a victim worked late nights and kept cash in his wallet was relevant to explaining why he was robbed and killed at his workplace in the middle of the night). However, even if evidence is deemed to meet the low threshold for relevance, it must "still be excluded when its probative value is substantially outweighed by the danger of unfair prejudice." *Hembree*, 368 N.C. at 17 (citing N.C.G.S. § 8C-1, Rule 403).

Here, Angel's testimony about her sister's abusive background and subsequent prostitution was not character evidence, as it did not relate to April Holland's disposition or traits. In fact, the trial court cautioned Angel to avoid testifying about any "characterizations of your sister as, you know, a kind person or a loving person or all of those things." Instead, the evidence revealed the factual circumstances of April Holland's life relevant to explaining why she was engaging in prostitution on the night she was murdered by defendant at the hotel. *See Barden*, 356 N.C. 316. Further, because Angel Holland was the first witness for the State to

directly reveal that April Holland was engaging in prostitution, coupled with the fact that her testimony was extremely limited in scope, the probative value of this testimony was not substantially outweighed by the risk of unfair prejudice against defendant. Thus, because there was no error, there can be no plain error. *Reber*, 386 N.C. at 158.

Defendant next argues that the trial court plainly erred by allowing Rachel B. to testify about her abusive childhood and subsequent experience as a prostitute. Specifically, defendant contends that portions of Rachel B.'s testimony were irrelevant "to proving Gillard's identity, whether he acted as part of a common scheme or plan or his motive in the events that led to Holland's murder." Because defendant failed to object to this portion of Rachel B.'s testimony at trial, we review for plain error. *See Reber*, 386 N.C. at 158.

As discussed above, Rachel B.'s 404(b) testimony was "probative of a motive or common scheme or plan of [d]efendant, as well as [d]efendant's identity." But before recounting defendant's prior acts against her, Rachel B. testified that she was put into foster care and lived in group homes or with other family members when she was a child due to her mother's drug addiction. Rachel B. also testified that she discovered that a family member had been filming her while she was showering or using the bathroom, and then masturbating to the videos of her. Rachel B. also testified that as a child, her mother trafficked her in exchange for drugs. As a result of these events, Rachel B. stated that she turned to stripping and prostitution where she was subjected to physical violence. After discussing her background, Rachel B. then testified about her encounter with defendant in October of 2016.

While defendant objected to Rachel B.'s 404(b) testimony, he did not object to the testimony concerning her abusive childhood, subsequent prostitution, and the violence she experienced as a sex worker. This may have been part of defendant's trial strategy because defense counsel cross-examined Rachel B. regarding the violence she experienced as a prostitute, probing beyond the State's line of questioning. Defendant now argues that this testimony was irrelevant and highly prejudicial, such that it constitutes plain error.

But a defendant cannot raise the issue of plain error on appeal for evidence which he elicited during cross-examination of the witness. *See State v. Rivers*, 324 N.C. 573, 575–76 (1989) ("It is clear . . . that the testimony of which the defendant now complains was elicited by counsel for the defendant during cross-examination of the witness and that he did not object to the testimony in any way or move to have it stricken at

trial. 'Any error thus was invited and defendant cannot complain of such error on appeal.' " (quoting N.C.G.S. § 15A-1443(c) (1988))).

Even so, "[i]t is elementary that when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, etc." *State v. Sports*, 41 N.C. App. 687, 690, *disc. rev. denied*, 298 N.C. 205 (1979) (holding that evidence of a witness's orphan status, epileptic history, scholarship assistances and summer employment was relevant for "introductory and general purposes [and] as an explanation as to why the witness was . . . walking home alone on the night in question"); *see also* 1 Kenneth S. Broun et al., *Brandis & Broun on North Carolina Evidence* § 167 (8th ed. 2018). Introductory evidence of a witness is relevant if it helps identify the witness, their knowledge of the case at hand, or to give context as to why they were in a particular situation. *See Pittman v. Camp*, 94 N.C. 283, 284–85 (1886) ("The question 'where do you live?' . . . was not irrelevant, because it tended to identify the witness, and to show in some slight degree, his opportunity to be informed in respect to the matter about which he was testifying.").

The reviewable portions of Rachel B.'s testimony relate to Rachel B. being removed from her mother's care at age ten, being sold out to men in exchange for drugs by her mother, the incident of being secretly filmed by a family member, and her living in group and foster homes for most of her childhood. This introductory evidence—though lengthy—provided context to the jury for how Rachel B. crossed paths with defendant on the night he attacked her and was relevant. As such, there is no error. Moreover, because defendant failed to object at trial, we cannot review this evidence for whether the risk of unfair prejudice substantially outweighed its probative value under Rule 403. *See Steen*, 352 N.C. at 256.

2. Sentencing Phase

Keyona T. and Keyana M. were among the witnesses called during the sentencing phase, both of whom testified as to defendant's prior violence against them. Similar to the testimony of Rachel B. and Angel Holland, Keyona T. and Keyana M. shared information with the jury regarding the difficult circumstances of their childhoods before testifying about defendant's violence against them. Defendant objected to their background testimony as irrelevant and unfairly prejudicial, preserving the issues for appeal.

But "[t]he rules of evidence do not apply in sentencing proceedings, and any competent evidence which the court deems to have probative value may be received." *State v. Augustine*, 359 N.C. 709, 731 (2005)

(cleaned up) (citing N.C.G.S. § 8C-1, Rule 1101(b)(3) (2003); N.C.G.S. § 15A-2000(a)(3) (2003)); *see also State v. Smith*, 352 N.C. 531, 557 (2000); *State v. Atkins*, 349 N.C. 62, 94 (1998). These less restrictive standards afford the trial court "considerable leeway and discretion in governing the conduct of a sentencing proceeding." *Smith*, 352 N.C. at 557. "Evidence may be presented as to any matter that the court deems relevant to sentenc[ing], and may include matters relating to any of the aggravating or mitigating circumstances." *State v. Golphin*, 352 N.C. 364, 464 (2000) (quoting N.C.G.S. § 15A-2000(a)(3) (1999)). Because of this considerable leeway, "trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding." *Id.* (quoting *State v. Flippen*, 349 N.C. 264, 273 (1998), *cert. denied*, 526 U.S. 1135 (1999)). Further, during the sentencing phase, "the jury is properly permitted to consider all the evidence presented during the guilt-innocence phase." *State v. Moseley*, 338 N.C. 1, 41 (1994).[4]

a. Keyona T. & Keyana M.

The State called Keyona T. and Keyana M. to testify at the sentencing hearing about their prior violent encounters with defendant. This evidence was presented to establish the aggravating factor: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and that included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (2023). However, before testifying about the violence they had endured at defendant's hands, both witnesses briefly recounted details of their troublesome upbringings. On appeal, defendant contests the admission of the background information as irrelevant and unfairly prejudicial.

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4. The dissent expresses disagreement with North Carolina's established procedures in the sentencing phase, preferring instead to limit consideration by the jury of relevant evidence that may be beneficial in reaching a sentencing recommendation. Although the dissent acknowledges that use of this evidence does not violate North Carolina law, the dissent contends specifically that the death sentences here should be overturned. More generally though, the dissent asserts that the sentencing scheme imposed by the General Assembly and sanctioned by this Court should be cast aside based primarily on citation to law review articles.

We also note that the dissent attempts to engage in a proportionality review of defendant's death sentence by incorporating arguments from his pretrial Motion to Strike Death Penalty because the Death Penalty Violates the Evolving Standards of Decency in this Community. This motion included a host of irrelevant information, including polling results. The motion was denied by the trial court and defendant failed to object to the trial court's ruling. Defendant failed to preserve this argument, and the issue is not properly before the Court. N.C. R. App. P. 28.

Keyona T. testified that she was raised by her mother, but that her mother was not present during her upbringing. Keyona T. stated that she was sexually abused by one of her mother's boyfriends, and both she and her siblings were physically abused by another. As a result, DSS removed Keyona T. from the home three times. She further testified that she suffered from PTSD and became a prostitute after she was forced to drop out of college. Ultimately, Keyona T. identified defendant in court and testified about a violent encounter she had with him while she was a prostitute.

Keyana M. likewise discussed her difficult childhood before ultimately testifying about a night when she was tied up, raped, and robbed by defendant at a hotel. Keyana M. briefly testified that as a child, her parents left her to be raised by her grandmother, and that around age twelve she was sexually assaulted. She then stated that at around age eighteen, she began engaging in prostitution, which is how she met defendant.

The challenged testimony was used to introduce each witness to the jury, and it related to the aggravating circumstance under N.C.G.S. § 15A-2000(e)(11) as it showed a course of conduct by defendant of engaging in violent acts against vulnerable women and prostitutes. *See Golphin*, 352 N.C. at 464. Because of the highly deferential standard in which trial courts are afforded "considerable leeway and discretion" during the sentencing phase, we find no error. *See Smith*, 352 N.C. at 557.

b. Permitted to Consider Evidence from Guilt Phase

Defendant argues that because the jury was told they could consider the evidence from the guilt phase of trial during their sentencing deliberations, Gillard's right to a fair capital sentencing hearing was undermined by the "the unfairly inflammatory evidence of the traumatic and abusive backgrounds of Holland, [Rachel B.], [Keyona T.], and [Keyana M.]."

But there is "nothing in the instant case to suggest that the jury's decision to recommend a sentence of death was based on any unfair prejudice that may have been created by [admission of this evidence]." *State v. Moody*, 345 N.C. 563, 572 (1997). The trial court instructed the jury during the sentencing phase that "[a]ll of the evidence which you hear[d] in both phases of the case is competent for your consideration in recommending punishment." Defendant did not object to this instruction, and as such, this unpreserved claim is subject to plain error review. *See Reber*, 386 N.C. at 158. However, because an instruction during the sentencing phase "to consider all the evidence presented during the guilt-innocence phase," *Moseley*, 338 N.C. at 41, is not erroneous, there can be no plain error. *Reber*, 386 N.C. at 158.

D. Admission of Photographic Evidence

[4] Defendant next argues that the trial court abused its discretion in admitting nine photos as part of nearly one hundred photos in the State's Exhibit 3 over defense counsel's objection in light of other evidence admitted at trial. Specifically, defendant argues that photos 63, 64, 66, 69, 70, 71, 72, 75, and 76 were "unnecessarily repetitious and cumulative," and that their probative value, in light of the rest of the photos and the crime scene video, was so substantially outweighed by the danger of inflaming the passions of the jury that they should have been excluded under Rule 403. *See* N.C.G.S. § 8C-1, Rule 403.

When tasked with determining whether photographic evidence should be admitted, "the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant." *State v. Blakeney*, 352 N.C. 287, 309 (2000) (citing *State v. Goode*, 350 N.C. 247, 258 (1999)). Because this determination lies within the sound discretion of the trial court, "the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up).

Generally, "[p]hotographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Hennis*, 323 N.C. at 284 (citing *State v. Murphy*, 321 N.C. 738 (1988)). "The number of photographs alone is an insufficient measure of their capacity to prejudice and inflame the jury." *State v. Phipps*, 331 N.C. 427, 454 (1992). And while there is "no definitive test for the admissibility of photographs alleged to be inflammatory and unduly prejudicial," *Mlo*, 335 N.C. at 374, this Court has discussed certain factors which may be helpful in making this determination. "What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies," *Hennis*, 323 N.C. at 285, and "whether the photographs are unnecessarily duplicative of other testimony," *Richardson*, 385 N.C. at 133, must be considered when determining whether a photograph's probative value is substantially outweighed by its prejudicial impact.

This Court has emphasized that "[w]hen a photograph adds nothing to the State's case, then its probative value is nil, and nothing remains but its tendency to prejudice." *Hennis*, 323 N.C. at 286 (cleaned up) (quoting

State v. Temple, 302 N.C. 1, 14 (1981)). However, the State is permitted to present, consistent with the rules, evidence which it contends conveys a full perspective of the victim's injuries and a defendant's actions. Thus, when photographs are admitted which show different angles of a victim's injuries and the surrounding crime scene, they are not unnecessarily duplicative and excessive—even if similar—so long as they contribute individual value to the State's case. *See State v. Kandies*, 342 N.C. 419, 443 (1996) (multiple photographs, including autopsy photographs, were admissible to show "various angles of the lacerations to the head as well as the injuries to the vaginal area and properly illustrated the nature of the wounds and the manner of killing"); *Richardson*, 385 N.C. at 139–46 (holding that eighty-eight photographs of a victim's body were admissible because they "accurately reflected the reality of the crimes with which [the] defendant was being tried and were probative to the issues before the jury"); *State v. Pierce*, 346 N.C. 471, 488 (1997) ("Given the number, nature, and extent of the victim's injuries . . . the trial court did not abuse its discretion by admitting twenty-six photographs of the victim's body."); *State v. Haselden*, 357 N.C. 1, 16 (2003) ("[E]ach photograph was taken at a different angle, offering a unique perspective on the nature and location of [the victim]'s wounds.").

Defendant argues that photos 63, 64, 66, 69, 70, 71, 72, 75, and 76 in State's Exhibit 3 were unnecessarily repetitive and cumulative because other evidence presented at trial showed that Holland was found naked by the door of the hotel room, that her cause of death was a bullet wound to the chest, and that shell casings were found near her body. Ultimately, defendant asserts that because these photographs "depicted substantially the same scene" as other photographs, their probative value was "nil." We disagree.

At trial, the State presented all of the color photographs by displaying a PowerPoint onto a small television for the jury to view. Photographs 63 and 64 were not unnecessarily duplicative of photograph 62. Photograph 62 was taken from the hallway into the hotel room, and illustrated how Holland's body was partially blocking the door upon entry into the room. Photograph 63 was the first close-up of Holland's body lying in a pool of blood, which demonstrated the scene that first-responders observed upon arrival. Photograph 64 was a different angle from both 62 and 63 and was used to illustrate the distance between Holland's body and the main portion of the hotel room where the bed was located.

We likewise reject defendant's argument that photograph 66 was unnecessarily duplicative of photograph 65. Photograph 65 provided an all-encompassing view of Holland's body and surrounding footprints,

whereas photograph 66 only showed a portion of Holland's body and zoomed in on the footprints found in the blood next to Holland's body.

Further, photographs 69, 70, and 71, while similar, demonstrated different angles of Holland's injuries. Photograph 69 was a close-up of the bullet wound and surrounding blood splatter on Holland's chest and was the only close-angle photograph taken of Holland's chest at the crime scene. Photograph 70 was a close-up of the bullet wound to Holland's face and did not show Holland's chest at all. Photograph 71 was taken from a side-angle and illustrated both bullet wounds and their locations in relation to each other.

Finally, photographs 72, 75, and 76 were properly admitted as well. Photograph 72 depicted Holland's body relative to the discovery of a shell casing between her body and the door. Photograph 75 depicted crime scene markers placed beside the footprints in the blood to the right of Holland's body, and photograph 76 depicted a marker placed beside an additional footprint which was discovered by the door.

The trial court overruled defendant's objection to these photographs, determining that it was "satisfied that each [photograph had] independent evidentiary value that shows the different angles or provides scale, distances, location of items of evidence, and specifically what the officers observed when they were on the scene." Thus, these photographs provided sufficiently distinct information of independent value to the State's case, making them neither unnecessarily duplicative nor excessive, *see Kandies*, 342 N.C. at 443, and the admission of these photographs was not "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Blakeney*, 352 N.C. at 309 (cleaned up).

E. Failing to Dismiss Charges for First-Degree Murder of Holland

Defendant next argues that the trial court erred by denying defendant's motion to dismiss the charge of first-degree murder against Holland on both theories of felony murder and premeditation and deliberation on the basis of insufficient evidence. The trial court denied this motion, and defendant was thereafter found guilty of first-degree murder of Holland on both theories. We address each theory in turn.

When ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Golder*, 374 N.C. 238, 249 (2020) (quoting *State v. Winkler*, 368 N.C. 572 (2015)).

Put another way, "[i]f there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court' s duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344–45 (1958). "The terms 'more than a scintilla of evidence' and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66 (1982).

The trial court must consider the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378–79 (2000). "In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination . . . the case is for the jury and the motion to dismiss should be denied." *Golder*, 374 N.C. at 250 (cleaned up). Whether the State presented substantial evidence to support each element of a crime is a question of law, and thus, we review a trial court's denial of a motion to dismiss de novo. *Id.*

1. Felony Murder

[5] Defendant first argues that there was insufficient evidence to prove that Holland was murdered during the commission of an attempted rape or robbery. Specifically, defendant contends that the State failed to show that he intended to rape or rob Holland and the use of circumstantial evidence under Rule 404(b) could not remedy this alleged error.

A killing which is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." N.C.G.S. § 14-17(a) (2023). As is relevant here, "[t]he elements of an attempt to commit a crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Baker*, 369 N.C. 586, 595 (2017) (cleaned up).

Because "[i]ntent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756 (1963). This Court has upheld the use of Rule 404(b) evidence for proving the intent of a defendant to commit an underlying felony. *See State v. Williams*, 355 N.C. 501, 581–82 (2002) (affirming a trial court's denial of defendant's motion to dismiss when, among other things, "Rule 404(b) evidence tended to show that defendant lured his victims to isolated

locations where he would assault them . . . while raping or attempting to rape them"); *Al-Bayyinah*, 359 N.C. at 748 (evidence of a defendant's statement that he "wanted to go back to prison" was "substantially probative of defendant's motive and intent" to commit the underlying robbery).

Further, in proving an overt act, the State must demonstrate that a defendant has taken a "direct movement towards the commission [of the offense] *after* the preparations are made." *State v. Melton*, 371 N.C. 750, 760 (2018) (cleaned up) (emphasis added). This threshold has been defined as a "subsequent step in a direct movement towards the commission of the offense after the preparations are made," but it need not be "the last proximate act" before the crime occurs. *Id.* at 757 (quoting *State v. Miller*, 344 N.C. 658, 668 (1996)). Instead, it is sufficient once a defendant has "begun to execute the criminal design that he helped concoct." *Id.* at 762 (cleaned up).

We turn first to the attempted crime of rape. To prove intent, the State must produce evidence that the "defendant intended to gratify his passion on the person of the woman." *Gammons*, 260 N.C. at 755. "Sexual intent may be proved circumstantially by inference, based upon a defendant's actions, words, dress, or demeanor." *State v. Cooper*, 138 N.C. App. 495, 498 (2000) (citing *State v. Robbins*, 99 N.C. App. 75, 80, *aff'd*, 327 N.C. 628 (1990)). Giving the State the benefit of all reasonable inferences based on the evidence presented at trial, a reasonable juror could believe that defendant intended to rape Holland on the night she was murdered.

First, contrary to defendant's assertion, 404(b) evidence may be considered when determining whether the State has presented sufficient evidence of a defendant's intent to commit an underlying crime. *See Williams*, 355 N.C. at 581–82. Here, Bessie A.'s and Rachel B.'s 404(b) testimonies demonstrated that defendant had a common scheme or plan to rape and rob prostitutes. This plan began with either defendant or Hill contacting the women over Backpage, posing as an individual man seeking sexual services, and ended with both men arriving at low-budget hotels armed with pistols, forcing the women to undress, tying them up, and raping them. In addition to the 404(b) evidence, the State also provided evidence that on the morning Holland and Garvey were murdered, defendant sent a text to Hill after setting up his appointment with Holland that he had "got one." Considering the evidence in the light most favorable to the State and giving it all reasonable inferences, a reasonable juror could accept that defendant intended to rape Holland before he was interrupted by Hill's shooting of Garvey in the hallway.

Next, based on this same evidence, a rational juror could believe that defendant intended to rob Holland prior to being interrupted by the shooting of Garvey. "An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *Miller*, 344 N.C. at 667–68 (quoting *State v. Allison*, 319 N.C. 92, 96 (1987)).

Bessie A.'s and Rachel B.'s 404(b) evidence demonstrated that defendant had a particular scheme or plan associated with raping and robbing prostitutes. Both Rachel B. and Bessie A. testified that they were forced to undress, were tied up with bedsheets, and were raped by the men, who would rummage through the women's personal items either before or after raping them.[5] While there was no direct evidence that Holland's personal items had been pillaged through or taken, this is not a requirement for proving intent. *See State v. Davis*, 340 N.C. 1, 12–13 (1995) (concluding that intent existed even though defendant did not demand money or take any money or valuables from the scene after shooting the victim).

Defendant entered the room with a loaded weapon and a sheet was found near Holland's body, evidence from which the jury could infer that defendant was executing a similar plan as he had before with Bessie A. and Rachel B. Additionally, at the time that the murders occurred, defendant had only been in Holland's room for approximately four minutes, suggesting that had Garvey not interrupted and subsequently been shot by Hill, defendant and Hill would have proceeded with the robbery and rape of Holland. Thus, considering this evidence in the light most favorable to the State and giving it the benefit of every reasonable inference, the State provided substantial evidence of defendant's intent to rob Holland with his firearm on the night she was murdered.

Finally, the State's evidence also demonstrated defendant's overt acts toward the commission of both the attempted rape and robbery of Holland. Defendant argues that although his scheduling of the meeting with Holland, his arrival at the hotel, and his entry of the room support a

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5. The dissent takes issue with the admission of what it terms, "unadjudicated offenses" under Rule 404(b), even though the dissent concedes that use of this evidence does not violate any rule or statute. Instead, the dissent relies on two law review articles in an effort to impose a new per se restriction on the use of relevant evidence. But the simple fact that an individual was not charged with an offense or convicted of a crime does not mean that the incident did not occur. Rule 404(b) thus focuses on logically connected conduct, not convictions.

finding that he "devised the means necessary for the commission of the offense," it was only proof of mere preparation, not the overt act.

However, defendant's actions went beyond mere preparation. Defendant and Hill traveled to the hotel armed with weapons, and surveillance footage showed defendant and Hill pacing in the hallway outside of Holland's room, engaging in a brief discussion. Even if we assume defendant's travel to the hotel did not constitute an overt act, defendant's entry into Holland's room was a "direct movement towards the commission of the offense" necessary to constitute an overt act, *Melton*, 371 N.C. at 757 (cleaned up), as it would have "result[ed] in the commission of the offense in the ordinary and likely course of things." *Id.* at 762 (cleaned up). As such, defendant's argument is without merit.

2. Premeditated Murder

[6] In addition to felony murder, the jury was also instructed on the theory of premeditation and deliberation. Defendant asserts that because the killing of Garvey and Holland "lasted less than 30 seconds," there was no time for him to sufficiently "weigh the consequences of his actions" to deem this premeditated and deliberate. As such, he asserts there was insufficient evidence for this theory to be submitted to the jury. We disagree.

"First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346 (1999). "[M]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238 (1997). Premeditation occurs when "the act was thought over beforehand for some length of time, however short." *State v. Leazer*, 353 N.C. 234, 238 (2000) (cleaned up). A killing is deliberate when it is "carried out in a cool state of blood" and is not "under the influence of a violent passion, suddenly aroused by legal provocation or lawful or just cause." *State v. Trull*, 349 N.C. 428, 448 (1998).

Because premeditation and deliberation are "mental processes that are not readily susceptible to proof by direct evidence," they are often proven through circumstantial evidence. *State v. Childress*, 367 N.C. 693, 695 (2014) (quoting *State v. Sierra*, 335 N.C. 753, 758 (1994)). This Court has provided examples of evidence which may support a finding of premeditation and deliberation, including the absence of provocation on the part of the deceased, the nature and number of the victim's wounds, a defendant's arrival at the scene with a weapon, and whether a defendant discharged or otherwise utilized a weapon multiple times. *See*

Childress, 367 N.C. at 695–96; *State v. Olson*, 330 N.C. 557, 565 (1992); *State v. Taylor*, 362 N.C. 514, 531 (2008). Further, "lack of provocation by the victim supports an inference of premeditation and deliberation." *Miller*, 339 N.C. 663, 682 (1995); *see also Olson*, 330 N.C. at 565.

Here, there was more than sufficient evidence for the charge of first-degree murder on the basis of premeditation and deliberation to be submitted to the jury. To begin, malice is "presumed" because defendant's shooting of Holland was intentional. *See McNeill*, 346 N.C. at 238. Further, defendant arrived at the hotel with a loaded weapon, suggesting not only that he anticipated the potential need to use the weapon, but also that he was prepared to use it. *See Taylor*, 362 N.C. at 531.

In addition, there was no provocation on the part of Holland as she was unarmed at the scene and surveillance footage did not show that she posed any threat to defendant. *See Childress*, 367 N.C. at 695. Defendant ultimately fired two shots at Holland, one striking her in the face and the other in the chest, with each shot sufficient to demonstrate an intent to kill on the part of defendant. *See Olson*, 330 N.C. at 565–66 (concluding that evidence that "the wounds were fatal in nature" supported a finding of premeditation and deliberation); *State v. DeGregory*, 285 N.C. 122, 130 (1974) ("The deadly shots through the heart after each victim had been felled . . . almost require[ ] the legitimate inference of premeditation and deliberation."). Given the extent of this evidence and viewing it in the light most favorable to the State, a rational juror could have concluded that defendant's killing of Holland was premeditated and deliberate, and therefore, defendant's argument is without merit.

F. Failing to Dismiss Charges for First-Degree Murder of Garvey

[7] Defendant argues that the trial court erred by failing to dismiss the first-degree murder charge against him for co-defendant Hill's killing of Garvey on the theories of felony murder and premeditation and deliberation. Defendant contends that the State failed to provide substantial evidence that defendant and Hill were acting in concert when Hill shot and killed Garvey.

"The acting in concert doctrine allows a defendant acting with another person for a common purpose of committing some crime to be held guilty of a murder committed in the pursuit of that common plan . . . ." *State v. Roache*, 358 N.C. 243, 306 (2004). Concert of action may "be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *In re J.D.*, 376 N.C. 148, 156 (2020) (cleaned up).

In *State v. Blankenship*, this Court, straying from over 160 years of established precedent on acting in concert, held that "one may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires specific intent, unless he is shown to have the requisite specific intent." 337 N.C. 543, 558 (1994). Nonetheless, just three years later in *State v. Barnes*, this Court explicitly overruled *Blankenship* and returned to the "well established principle" that where

> two persons join in a purpose to commit a crime, each of them . . . is not only guilty as a principal if the other commits that particular crime, but he is also guilty of *any other crime* committed by the other in pursuance of the common purpose or as a natural or probable consequence thereof.

345 N.C. 184, 232–33 (1997) (cleaned up) (emphasis added).

Defendant asks this Court to overrule *Barnes* and reinstate *Blankenship*. But *Blankenship* was an outlier, and we decline defendant's invitation to abandon the "well established principle" in *Barnes*.

1. Felony Murder

The State presented sufficient evidence that defendant and Hill had engaged in a common plan or scheme to commit rape and robbery with a dangerous weapon against Holland through the State's Rule 404(b) evidence. Even though Garvey was not the intended victim of this common scheme or plan, he was killed in pursuit thereof. Because a defendant can be "held guilty of a murder committed in the pursuit of [a] common plan," *Roache*, 358 N.C. at 306, we conclude that the trial court properly submitted this issue to the jury.

2. Premeditated Murder

Defendant also argues that the State failed to produce sufficient evidence that he intended to kill Garvey, and that the trial court erred by submitting the charge of first-degree murder on the theory of premeditation and deliberation to the jury.

During execution of the plan to rape and rob Holland, Garvey sought to intervene and was shot and killed by Hill in the hallway. The surveillance footage showed Hill threaten Garvey with the gun, and he ultimately fired nine rounds at Garvey, despite Garvey putting his hands in the air in submission. Hill's violence against Garvey was unprovoked, Garvey was unarmed, and nine separate rounds were fired by Hill, with

multiple gunshot wounds to Garvey's body. Thus, the evidence demonstrates that Garvey's murder resulted from premeditation and deliberation on the part of Hill. *See Leazer*, 353 N.C. at 238; *Barnes*, 345 N.C. at 233.

It is certainly foreseeable that a prostitute would have another individual monitoring business-related activity for safety and protection. Regardless of whether defendant knew of Garvey's presence, because Garvey's murder occurred in the pursuit of and as a natural and probable consequence of defendant and Hill's plan to rob and rape Holland, this charge was properly submitted to the jury. *Barnes*, 345 N.C. at 233.

G. Finding of the Aggravating Circumstance that the Murders were Committed During the Commission of an Attempted Rape and Attempted Robbery

[8] Defendant next argues that the State's evidence was insufficient to submit the aggravating circumstance that the murders occurred during the "commission of, or flight after committing, the Attempted First-Degree Rape of April Holland and the Attempted Robbery with a Firearm of April Holland" to the jury. Defendant again contends that because the State's evidence was insufficient to demonstrate an attempted rape or armed robbery of Holland, it was similarly insufficient to submit this aggravating factor to the jury during the sentencing phase of trial.

Defendant failed to object to the introduction of this aggravating circumstance. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure ordinarily requires that a party present "to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling" in order to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1). However, despite defendant's failure to object, this issue is nonetheless preserved for appeal pursuant to *State v. Canady*, 330 N.C. 398 (1991), and *State v. Meadows*, 371 N.C. 742 (2018), because the trial court knew or should have known that defendant was contesting the aggravating factor. *Canady*, 330 N.C. at 402 (holding that the issue was preserved because "[t]he defendant did not want the court to find the aggravating factor and the court knew or should have known it"); *Meadows*, 371 N.C. at 746–47 (holding that the sentencing issue was preserved because "the danger of gamesmanship was not present" and "the sentencing court knew or should have known defendant sought the minimum possible sentence" (cleaned up)).

But, again, the evidence of the attempted rape and armed robbery of Holland was sufficient for its submission to the jury as an aggravating factor. Subsection 15A-2000(e)(5) of our General Statutes permits the jury to find as an aggravating factor that "[t]he capital felony was

committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, [or] rape." N.C.G.S. § 15A-2000(e)(5) (2023). The evidence presented by the State, discussed at length above, was sufficient to persuade a rational juror that the murders occurred while the defendant was engaged in the commission of an attempted rape and armed robbery.

H. Trial Court's Failure to Submit the *Enmund/Tison* Issue to the Jury for the Murder of Garvey

[9] Next, defendant argues that because he did not kill Garvey, the trial court erred by failing to submit an instruction to the jury under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Because defendant failed to request the *Enmund/Tison* instruction, he is limited to plain error review. *Golphin*, 352 N.C. at 472; N.C. R. App. P. 10(c)(4).

This Court has succinctly explained the culpability requirements which the jury must consider for imposition of the death penalty as established by *Enmund* and *Tison*:

> In *Enmund*, the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. In a later case [*Tison*], however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the death penalty.

Golphin, 352 N.C. at 473 (cleaned up).[6]

The defendant in *Enmund* was the getaway driver for co-defendants who shot and killed two victims and robbed them of their money. It was undisputed that the defendant was not present at the time of the robbery

6. The dissent incorrectly suggests that *Enmund-Tison* is an "and" test, rather than an "or" test. A defendant is not required to meet the intent requirement in *Enmund and* the major participant and reckless indifference requirements in *Tison*. Either is sufficient to satisfy state and federal constitutional concerns.

and murder. *Enmund*, 458 U.S. at 786, 788. The Supreme Court determined that imposition of the death penalty on those who had not manifested an intent to kill violates the Eighth Amendment. *Id.* at 798 ("The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for [defendant]'s own conduct. The focus must be on *his* culpability, not on . . . those who . . . shot the victims . . . .").

The facts in *Tison*, however, are similar to those of the case *sub judice*. There, three brothers helped their father and another inmate escape from prison. *Tison*, 481 U.S. at 139. The group robbed and abducted a family in a highway encounter in the Arizona desert. *Id.* at 139–40. The father and inmate then killed the family of four, while the brothers watched, but declined to help the victims. *Id.* at 141.

The Supreme Court stated that merely looking at a defendant's intent to kill for Eighth Amendment purposes

> is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all—those who act in self-defense or with other justification or excuse . . . . On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

Tison, 481 U.S. at 157–58.

Both *Enmund* and *Tison* "explore[ ] the degree of culpability necessary for the imposition of capital punishment in cases involving

felony-murder convictions." *Gilson v. Sirmons*, 520 F.3d 1196, 1212 (10th Cir. 2008). While *Enmund* focuses on the intent of minor participants, *Tison* is more concerned with "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." *Tison*, 481 U.S. at 152. The Supreme Court essentially concluded that major participation in felonious conduct in which there is a significant risk of death is no different for Eighth Amendment purposes than the intent to kill issue that *Enmund* confronted. *See Ross v. Davis*, 29 F.4th 1028, 1043–44 (9th Cir.), *cert. denied sub nom. Ross v. Bloomfield*, 143 S. Ct. 375 (2022) (holding that the Eighth Amendment allows the death penalty to be imposed on "felony murderers" (1) "who actually killed, attempted to kill, or intended to kill," or (2) "whose participation in the felony is major and whose mental state is one of reckless indifference to the value of human life." (cleaned up)).

Consistent with the direction from the Supreme Court, this Court has clarified that an *Enmund/Tison* instruction is not required when a defendant is "found . . . guilty of first-degree murder on the basis of premeditation and deliberation under the theory that [he] committed all the elements or that he acted in concert." *Golphin*, 352 N.C. at 473. *See also State v. Fletcher*, 354 N.C. 455, 479 (2001); *State v. Gaines*, 345 N.C. 647, 682 (1997). Moreover, in *State v. Robinson*, this Court determined that an *Enmund/Tison* instruction is not required when a defendant is convicted "of first-degree murder upon the theory of premeditation and deliberation in addition to the felony murder theory." 342 N.C. 74, 88 (1995).

Here, as noted above, defendant was convicted of first-degree murder for the killing of Garvey based on both theories of felony murder and premeditation and deliberation. Unlike the defendant in *Enmund*, here, defendant was not a minor participant. Rather, like the brothers in *Tison*, he was a major participant in criminal conduct known to carry a grave risk of death. Defendant was actively involved in planning, arranging, and perpetrating an armed, violent felony that was likely to result in the loss of life. In addition to possessing and using a firearm, defendant was physically present throughout the commission of these violent crimes, and his conduct was part of a prolonged criminal scheme.

Therefore, even if we assume that the trial court erred, defendant has not demonstrated plain error because a rational juror could find that defendant was not merely a minor participant in the crimes detailed herein.[7] The United States Supreme Court in *Tison* noted that there was

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7. We also note that the trial court provided the jury with an instruction on malice. Specifically, the trial court informed the jury, "Malice means not only hatred, ill will, or

"apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.' " 481 U.S. at 154 (cleaned up). As stated above, defendant was "a major participa[nt] in the felony committed" and demonstrated "a reckless indifference to human life, [which] is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158. "[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment . . . ." *Id.* at 157–58. Defendant's actions underscore the notion that "the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." *Id.* at 156.

Thus, any purported error did not have a probable impact on the outcome of his sentencing hearing and cannot satisfy the plain error standard set forth in *Reber*.

I. Jury Instructions Regarding the Use of the Same Evidence to Support More Than One Aggravating Factor

[10] Defendant next argues that the trial court erred by failing to instruct the jury that it could not use the same evidence to support more than one aggravating factor. Defendant failed to request that the jury be given this instruction, and as such, he must show plain error. *See Lawrence*, 365 N.C. at 518.

"In a capital case the trial court may not submit multiple aggravating circumstances supported by the same evidence." *State v. Lawrence*, 352 N.C. 1, 29 (2000). "This Court has held that the trial court should instruct the jury that it cannot use the same evidence as a basis for finding more than one aggravating circumstance." *State v. Conaway*, 339 N.C. 487, 530 (1995). However, "[a]ggravating circumstances are not considered redundant absent a *complete overlap* in the evidence supporting them." *State v. Moseley*, 338 N.C. 1, 54 (1994) (emphasis added). Moreover, a

> trial court's failure to instruct the jury that it could not use the same evidence to support more than one

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spite, as it is ordinarily understood. To be sure, that is malice. But it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another person's death without just cause, excuse, or justification." Thus, though not required for the reasons stated above, the trial court instructed the jury on the substance of an *Enmund/Tison* instruction. *See State v. Augustine*, 359 N.C. 709, 729 (2005) (holding that an instruction to the jury is sufficient if the substance of the instruction is provided).

> aggravating circumstance does not rise to the level of plain error. . . . [When there is] substantial separate evidence supporting each aggravating circumstance, it is improbable that the jury would have reached a different result . . . .

Conaway, 339 N.C. at 531.

Here, the trial court instructed the jury that it could consider the subsection (e)(5) and subsection (e)(11) aggravating circumstances, and while these two aggravating factors are supported by similar evidence, there was not a complete overlap. *See* N.C.G.S. § 15A-2000(e)(5), (11). The subsection (e)(5) aggravating factor—that the murders of Holland and Garvey occurred during the attempt or flight after the attempt to commit first-degree rape or armed robbery against Holland—was supported by the 404(b) evidence of defendant's prior rapes and robberies of Bessie A. and Rachel B. under similar circumstances. Even though defendant's attempt to rape and rob Holland fell short of completion, additional facts, such as defendant's confirmation text to Hill that he had "got[ten] one" and the bedsheet found on the floor beside Holland's body, suggested that these killings occurred during the attempt and/or flight from the attempted rape and robbery of Holland.

On the other hand, the subsection (e)(11) factor—that the murders of Holland and Garvey were part of a course of conduct in which defendant was engaged—was supported by substantial separate evidence from additional victims that were subjected to the ongoing course of conduct that defendant was similarly engaged in on the night Holland and Garvey were murdered. Specifically, in both the guilt and sentencing phases of trial, the State presented evidence of additional women, Kara L., Keyona T., Keyana M., Serena S., and Asia G., all of whom were victimized by defendant.

At trial, Kara L. testified that she had consensual relations with defendant until it turned violent with defendant holding a gun to her mouth threatening to kill her and her family. During the sentencing phase, Keyona T. testified that while prostituting herself at a low-budget hotel, she was attacked and tied up, sexually assaulted, and robbed by defendant and Hill. Keyana M. testified to a similar experience with defendant, stating that she was tied up with a phone cord, raped, and robbed of her personal possessions and money by defendant and his companion. Also, Serena S. testified that she was contacted by a single man but then was attacked by two armed men at the hotel, who tied her up and forced her to contact additional male clients whom the

perpetrators could rob, and then was robbed herself. Asia G. testified that on the same morning Serena S. was attacked, she was tied up and robbed by defendant's companion, Hill, while defendant remained in the room with Serena S.

Therefore, while the 404(b) evidence of defendant's prior rapes and robberies of Bessie A. and Rachel B. was used to support aggravating circumstances under subsections (e)(11) and (e)(5), the subsection (e)(11) factor was supported by substantial additional evidence, and there is no error.

J. Trial Court's Denial of Defendant's Motion to Suppress Keyona T.'s In-Court Identification

[11] Defendant next argues that the trial court erred in denying his motion to suppress Keyona T.'s identification of defendant in court. Specifically, defendant contends that Keyona T.'s in-court identification violated his due process rights.

Keyona T. testified during the sentencing phase that while working as a prostitute out of a low-budget motel in April of 2016, her friend, Lynda P., who was also working as a prostitute, was contacted by a man who set up an appointment with Lynda P. Keyona T. stated that her motel room shared a wall with Lynda P.'s and that as soon as the "client" arrived, she heard knocking and beating sounds coming from Lynda P.'s room. A few minutes later, two men entered Keyona T.'s room with Lynda P., holding Lynda P. at gunpoint. The two men forced Keyona T. and Lynda P. to undress, tied their hands with pillowcases, began rummaging through Keyona T.'s belongings, and then one of the men sexually assaulted her with a firearm. Keyona T. stated that she reported this incident to the police, but no action was ever taken.

Before Keyona T. testified at defendant's sentencing hearing, the trial court allowed voir dire regarding her identification of defendant. Keyona T. testified that in December of 2018, she was contacted about the incident by Detective Eric Gibney with the Raleigh Police Department. Gibney informed Keyona T. that he was investigating a homicide that might have been related to her earlier reported attack, and he described the crime as involving a pregnant mother and a father who had been killed. Keyona T. testified that Gibney did not show her a lineup or any photos of defendant but that he gave her a name of someone involved in the crime. Keyona T. stated that after her conversation with Gibney, she researched the crime on her own. Keyona T. stated that she recognized defendant in the Google photos based on his "familiar face" from her previous encounter with him.

At the close of the voir dire, defendant objected to Keyona T. testifying at the sentencing hearing, arguing that the "government action . . . taint[ed] the identification in this case" and that it was not reliable. The trial court determined that Keyona T. was permitted to testify, as she "took it upon herself to . . . view the newspaper and, in looking at the photograph that was published in connection with this story, . . . she believed [defendant] was the person that committed these offenses," but the court reserved ruling on Keyona T.'s in-court identification.

At the sentencing hearing, Keyona T. testified to many of the same facts as she did on voir dire. In addition, she stated that she did not know defendant's name but that one of the perpetrators had an "island accent." Keyona T. also testified that she recognized defendant in the photos based on his "eyes and . . . nose," and knew him to be the man with the island accent who had sexually assaulted her and robbed her in April of 2016. Defendant's renewed objection to Keyona T.'s in-court identification was overruled. The trial court stated:

> I'm going to allow the in-court identification. I first find that the circumstances of this witness viewing the photograph were not the result of State action and so that there was no constitutional violation occasioned by that procedure.
>
> Secondly, the witness had significant opportunity to view the defendant or the perpetrator of the April 2016 events clearly, and she on her own accord viewed photographs in news media accounts and was able to identify the defendant.
>
> In listening to her testimony, I infer that the identification was relatively certain. She described the features that she found to be distinctive. It is also — the reliability of that identification is also bolstered by the fact that the person she identified also has a distinctive island accent, as was elicited from prior testimony. So I find this goes to the weight, not the admissibility that safeguards the cross-examination and instructions to the jury about the — I will instruct the jury during the charge that it is the State's burden to identify the defendant as the perpetrator of these alleged acts that are used in the sentencing phase beyond a reasonable doubt. I will so instruct the jury with respect to that.

> And for all of those reasons, I believe that the safeguards that are inherent in our adversarial trial process are sufficient to test the reliability of her identification in this case. So I'm going to allow the in-court identification.

As a general rule, the reliability of evidence is for the jury, not the trial court, to decide. *State v. Malone*, 373 N.C. 134, 146 (2019). However, "due process considerations do place limitations upon the admission of eyewitness identification evidence obtained as the result of impermissible official conduct." *Id.* When tasked with determining whether impermissible official conduct has occurred, a court must "utilize a two-step process." *Id.* First, the court must "determine whether the identification procedures were impermissibly suggestive." *State v. Fowler*, 353 N.C. 599, 617 (2001). If so, the court must then determine "whether the procedures created a substantial likelihood of irreparable misidentification." *Id.* However, a court need not reach this two-step analysis if it first determines that the witness's pretrial identification of the defendant did not arise from State action, as "suggestive pretrial identification procedures that do not result from state action do not violate [a] defendant's due process rights." *State v. Fisher*, 321 N.C. 19, 24 (1987).

Here, Detective Gibney did not show Keyona T. photographs of defendant, he did not refer her to any news articles containing defendant's pictures, he did not instruct nor encourage Keyona T. to conduct her own research, nor was he present or on the phone with Keyona T. when she researched the crime. Rather, Gibney merely provided a vague overview of the crimes committed against Holland and Garvey and informed Keyona T. that evidence from her reported attack had been recovered. And as Keyona T. confirmed in her testimony, "[she] looked it up on [her] own." Thus, given the attenuation between Gibney's phone call with Keyona T. and her subsequent independent research, Keyona T.'s identification was not a result of State action and does not violate defendant's due process rights. Questions concerning Keyona T.'s identification go to the weight to be given to her testimony, not its admissibility, and defendant's argument is without merit.

K. Trial Court's Final Mandate for First-Degree Murder

[12] Defendant next argues that the trial court erred in its final mandate to the jury for first-degree murder under the theory of felony murder because the instruction failed to repeat the elements for the underlying felonies of attempted first-degree rape and attempted robbery with a dangerous weapon. Defendant failed to object to the trial court's alleged

omission but argues that the argument is still preserved for appeal. To support this contention, defendant cites *State v. Ross*, 322 N.C. 261 (1988), and *State v. Keel*, 333 N.C. 52 (1992), for the proposition that an alleged instructional error is preserved for appeal if the instruction was "promised" by the trial court but then never given to the jury.

In *Ross*, this Court held that, notwithstanding a defendant's failure to object at trial, a challenge to a jury instruction is preserved "where the requested instruction is subsequently promised but not given." 322 N.C. at 265. Likewise, in *Keel*, this Court held that "[t]he State's request [for a pattern jury instruction], approved by the defendant and agreed to by the trial court, satisfied the requirements of . . . the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal." 333 N.C. at 56–57.

However, these two cases are inapposite. Here, during the charge conference, the trial court informed both parties that it planned to give the pattern instruction for first-degree murder found in North Carolina Pattern Jury Instructions for Criminal Cases (N.C.P.I.—Crim. 206.14). Both parties were given draft copies of the proposed jury instructions which contained the language that defendant now argues was improper. The State's only proposed changes were clerical, not substantive. Defendant had access to the specific language that was to be used by the trial court but concedes that he never proposed new instructions nor objected to them at the conclusion of the conference. The State also did not object to nor request any specific instructions. Therefore, both *Ross* and *Keel* are inapplicable, as there was no requested instruction by either the State or defendant which was promised by the trial court but then was not given to the jury. As such, we review the trial court's final mandate to the jury for plain error. *See Lawrence*, 365 N.C. at 516.

Because the "[u]se of the pattern instructions is encouraged, but is not required," *State v. Garcell*, 363 N.C. 10, 49 (2009), the failure of a trial court to follow these instructions does not automatically constitute error, *State v. Bunch*, 363 N.C. 841, 846 (2010). Rather, an instruction is proper "as long as [it] adequately explains each essential element of an offense." *Id.* When reviewing a charge to the jury, it "is to be construed as a whole." *State v. McKinnon*, 306 N.C. 288, 300 (1982). In addressing the adequacy of a final mandate, this Court held that if the trial court "explained the underlying elements of the crimes [charged] just prior to the final mandate" and "it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed," then a final mandate is sufficient even if it does not repeat the essential elements. *Id.*

The trial court instructed the jury on the requisite elements of first-degree murder under both premeditation and deliberation and felony murder. For the count of first-degree murder of Holland, the trial court explained that to find defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, the State must have proved five things beyond a reasonable doubt:

> First, that the defendant intentionally and with malice killed April Holland with a deadly weapon. Malice means not only hatred, ill will, or spite, as it is ordinarily understood. To be sure, that is malice. But it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon and which proximately results in her death without just cause, excuse, or justification.
>
> If the State proves beyond a reasonable doubt the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused her death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inference along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.
>
> I instruct you that a firearm is a deadly weapon.
>
> Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred, and one that a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result.
>
> Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

> Fourth, that the defendant acted after premeditation, that is, that the defendant formed the intent to kill the victim over some period of time, however short, before the defendant acted.
>
> And, fifth, that the defendant acted with deliberation, which means the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly-aroused, violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

The trial court also instructed the jury that in order to find defendant guilty of first-degree murder of Holland on the basis of felony murder, the State must have proved three things beyond a reasonable doubt:

> First, that the defendant committed the offense of attempted robbery with a firearm and/or attempted first-degree rape of April Holland. To establish this first element, the State must prove two things beyond a reasonable doubt:
>
> A, that the defendant intended to commit the crime of robbery with a firearm of April Holland. Robbery with a firearm occurs when one has in his possession a firearm and takes and carries away property from the person or presence of a person without her voluntary consent by endangering or threatening her life with the use or threatened use of a firearm, the perpetrator knowing that he was not entitled to take the property and intending to deprive the victim of its use permanently.
>
> And, B, that at the time the defendant had this intent the defendant performed an act which was calculated and designed to bring about robbery with a firearm but which fell short of the completed offense and which in the ordinary and likely course of things the defendant would have completed that crime had the defendant not been stopped or prevented from completing the defendant's apparent course of action. Mere preparation or mere planning is not

> enough to constitute such an attempt, but the act need not be the last act required to complete the crime.
>
> Alternatively, the State may prove this first element by establishing beyond a reasonable doubt the following:
>
> That the defendant intended to commit the crime of first-degree rape of April Holland. First-degree rape occurs when one engages in vaginal intercourse with the victim by force and against her will while the perpetrator is displaying or employing a deadly or dangerous weapon.
>
> And, B, that at the time the defendant had this intent, the defendant performed an act which was calculated and designed to bring about first-degree rape but which fell short of the completed offense and which, in the ordinary and likely course of things, the defendant would have completed that crime had the defendant not been stopped or prevented from completing the defendant's apparent course of action. Mere preparation and mere planning is not enough to constitute such an attempt, but the act need not be the last act required to complete the crime.
>
> The second element the State must prove beyond a reasonable doubt to establish felony murder is that, while committing the offense of attempted robbery with a firearm or the offense of attempted first-degree rape, the defendant killed April Holland.
>
> And, third, that the defendant's act was a proximate cause of April Holland's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

The trial court then gave nearly identical instructions to the jury regarding the requisite elements for the count of first-degree murder of Garvey on the basis of felony murder, with the exception of changing the language to include "defendant or a person with whom the defendant was acting in concert" and further instructing the jury on the theory of acting in concert.

Upon recitation of the required elements for each basis of first-degree murder, the trial court then gave the final mandates for both

counts of first-degree murder. Defendant only contests the trial court's final mandate as to felony murder, which was as follows:

> Whether or not you find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether the defendant is guilty of first-degree murder under the first-degree felony murder rule. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant committed the offense of attempted robbery with a firearm *as that offense is defined above* or attempted first-degree rape *as that offense is defined above* and that, while committing attempted robbery with a firearm or attempted first-degree rape, the defendant killed [the victim] and that the defendant's act was a proximate cause of [the victim's] death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule.

(Emphasis added.) Similarly, the trial court's final mandate for the first-degree murder of Garvey under the theory of felony murder was as follows:

> Whether or not you find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether the defendant is guilty of first-degree murder under the first-degree felony murder rule. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, committed attempted robbery with a firearm or attempted first-degree rape and that while committing either or both of these offenses the defendant or a person with whom the defendant was acting in concert killed the victim and that the defendant's act or the act of the person with whom Defendant was acting in concert was the proximate because of Dwayne Garvey's death, it would be your duty to return a verdict of guilty of first-degree murder under the felony murder rule. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first-degree murder under the felony murder rule.

Defendant contends that "the lack of definition of attempted robbery and attempted rape in the final mandate probably impacted the jury's decision to find [defendant] guilty of first-degree murder." However, "constru[ing] [it] as a whole," *McKinnon*, 306 N.C. at 300, our review of the transcript shows that the trial court thoroughly and correctly instructed the jury as to the elements of the underlying felonies. Therefore, "it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed," *see id.*, and the final mandate was not improper.

L. Cumulative Error in Denying Defendant a Fair Trial and Sentencing Hearing

[13] Defendant argues that the cumulative prejudicial impact of "the erroneous admission of extensive character evidence, irrelevant victim impact evidence, and repetitive, graphic photo evidence; unsupported and incomplete instructions; and improper closing argument" entitle him to a new trial or sentencing hearing.

"Cumulative errors lead to reversal when taken as a whole the errors by the trial court deprived the defendant of his due process right to a fair trial free from prejudicial error." *State v. Wilkerson*, 363 N.C. 382, 426 (2009) (cleaned up); *see also State v. Johnson*, 334 S.C. 78, 93 (1999) ("[Defendant] must demonstrate more than error in order to qualify for reversal on [cumulative error] ground[s]. Instead, the errors must adversely affect his right to a fair trial."). However, when "none of the issues present error, [appellate courts will] decline to consider defendant's cumulative error argument." *State v. Betts*, 377 N.C. 519, 527 (2021). *See also State v. Thompson*, 359 N.C. 77, 106 (2004) (holding that because there was no error, defendant's cumulative error argument should not be considered); *Maldjian v. Bloomquist*, 275 N.C. App. 103, 125 (2020) (concluding that where an appellate court can "discern no error . . . , [a] trial court's rulings cannot cumulatively be deemed prejudicial error."); *see also Pham v. State*, 177 So. 3d 955, 962 (Fla. 2015) ("[W]here the alleged errors urged for consideration in a cumulative error analysis are individually either procedurally barred or without merit, the claim of cumulative error also necessarily fails." (cleaned up)). Indeed, cumulative error requires there be multiple significant errors before an appellate court can conclude that a defendant has met the high bar of demonstrating that he has been wholly "deprived . . . of his due process right to a fair trial free from prejudicial error." *Wilkerson*, 363 N.C. at 426 (cleaned up).

Here, however, there can be no cumulative error because the trial court did not err. *See Betts*, 377 N.C. at 527 ("Since we hold that none of

the issues present error, we decline to consider defendant's cumulative error argument."); *see also State v. Spangler*, 314 N.C. 374, 388 (1985); *Thompson*, 359 N.C. at 106.[8]

M. Excusing Jurors for Cause Based on Their Views on the Death Penalty

[14] Defendant next asserts that the trial court abused its discretion when it excused prospective jurors McIlvane, Daniels, and Youngquist-Thurow for cause based on their death penalty views. Defendant argues that the three prospective jurors' hesitation in personally imposing a death sentence "did not show [that] they were substantially impaired."

"Challenges for cause in jury selection are matters in the discretion of the court and are not reviewable on appeal except for abuse of discretion." *State v. Kennedy*, 320 N.C. 20, 28 (1987). Reviewing courts "must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially," *State v. Brogden*, 334 N.C. 39, 43 (1993), because it is the trial court "who has the opportunity to see and hear the juror on voir dire and to make findings based on the juror's credibility and demeanor," *Kennedy*, 320 N.C. at 26. Thus, the trial court's determination is only an abuse of discretion if it was " 'manifestly unsupported by reason' and is 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Cummings*, 361 N.C. 438, 447 (2007) (quoting *State v. Lasiter*, 361 N.C. 299, 301–02 (2007)).

Criminal defendants are guaranteed the right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 24 of our State Constitution. *See Richardson*, 385 N.C. at 205 ("Both the United States Constitution and the North Carolina Constitution guarantee capital defendants have a right under the United States Constitution to trial by an impartial jury."); *see also State v. Crump*, 376 N.C. 375, 381 (2020) (citing N.C. Const. art. I, § 24). The State also has a right to an impartial jury. *State v. Chandler*, 324 N.C. 172, 185–86 (1989); *see also State v. Garcia*, 358 N.C. 382, 407 (2004) ("The basic concept in jury selection is that each party to a trial has the right to present his case to an unbiased and impartial jury." (quoting *State v. Carey*, 285 N.C. 497, 506 (1974))). A crucial portion of crafting an impartial jury occurs during voir dire, where the parties "typically may inquire into prospective jurors' morals, attitudes, and beliefs." *Crump*, 376 N.C. at 381. "The primary goal of juror voir dire

8. The only arguable error committed by the trial court concerns the *Enmund-Tison* instruction. As we have discussed above, there can be no cumulative error.

is to ensure that only those persons are selected to serve on the jury who could render a fair and impartial verdict." *Kennedy*, 320 N.C. at 26.

In a capital case, a prospective juror may not be excused because he or she merely "voice[s] general objections to the death penalty." *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). But the State has a "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme." *Wainwright v. Witt*, 469 U.S. 412, 416 (1985). Thus, the proper standard for determining whether a juror may be excused for his view on the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424. This standard does not require that a juror's bias be "proved with 'unmistakable clarity.' " *Id.*

This Court has declined to find an abuse of discretion where jurors' voir dire "responses are inconsistent or when jurors' answers regarding their ability to follow the law are equivocal." *Garcia*, 358 N.C. at 403; *see also State v. Berry*, 356 N.C. 490, 500 (2002) (holding that the trial court did not abuse its discretion by excusing a prospective juror for cause when his responses were "not consistent during *voir dire*, in that he sometimes stated that he could follow the law, while other times he qualified his answers by adding that he would require more than circumstantial evidence"); *State v. Jones*, 355 N.C. 117, 122 (2002) (concluding that the trial court did not abuse its discretion by excusing a prospective juror for cause when the "equivocating nature of her responses . . . led the trial judge to conclude that [she] would be unable to faithfully and impartially apply the law" (cleaned up)); *Smith*, 352 N.C. at 545 (holding that whether a prospective juror's bias makes him excusable for cause is "the court's decision, in the exercise of its sound discretion and judgment"). Further, "where the record shows the challenge is supported by the prospective juror's answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter." *State v. Gibbs*, 335 N.C. 1, 35 (1993) (cleaned up).

During voir dire, the trial court questioned prospective juror McIlvaine about his personal views on the idea of sentencing defendant to death. McIlvaine immediately responded that he "would be nervous about making that decision." The State further questioned McIlvaine, asking if he would be able to sentence defendant to death if the facts and circumstances called for it:

[The State]: . . . The main thing that we need to be sure of or convinced of is would you be able to consider this and would you be able to do that if the facts and circumstances called for it.

Prospective Juror McIlvaine: That's a hard question to answer. I suppose so, but, I mean, I would have to be very convinced.

. . . .

[The State]: Okay. Do you believe that you would be more comfortable — you said nervous before about the death penalty. Would you be more comfortable considering a life sentence for this particular defendant?

Prospective Juror McIlvaine: I would, yeah.

[The State]: So then that brings us to the next step though. After going through this process and after considering all the evidence and the circumstances that were involved, if you were convinced beyond a reasonable doubt that the death penalty was appropriate in this particular case, after going through the evidence and the laws [the judge] gives you, do you believe that you would be able to personally vote for that kind of sentence?

Prospective Juror McIlvaine: I just — I just don't know. I really don't think so.

. . . .

Prospective Juror McIlvaine: I just think I would have a hard time with it.

. . . .

[The State]: But what if you thought a death sentence was appropriate? Would you be able to stand up in open court and tell this judge that you thought that that was an appropriate sentence?

Prospective Juror McIlvaine: Yeah, I would have a hard time with that.

[The State]: Do you believe you would be able to do that?

> Prospective Juror McIlvaine: I'm not sure that I would.

Based on these responses, the trial court found that McIlvaine's views "would prevent or substantially impair the performance of [his] duties as a juror in accordance with his instructions and his oath." The trial court also ruled that there was a "lack of probability that further questioning w[ould] produce different answers from this juror" and dismissed him for cause.

Although McIlvaine at one point stated that he "supposed" he could vote for a sentence of death, his equivocal responses was enough to uphold his dismissal. *See Garcia*, 358 N.C. at 403. Further, because many of McIlvaine's responses demonstrated that he would not have been able to set aside his personal views, the trial court did not abuse its discretion by prohibiting defendant from questioning him further. *See Gibbs*, 335 N.C. at 35. Thus, we conclude that there was no abuse of discretion in the trial court's dismissal of McIlvaine.

We turn next to prospective juror Daniels. During voir dire, the State asked Daniels about her feelings on capital punishment:

> [The State]: Have you had some time in the last couple of days to think through [capital punishment]?
>
> Prospective Juror Daniels: Yes. I'm a[n] honest Christian lady, and I've spoken to my pastor about it, and my thought is I don't believe in capital punishment.
>
> . . . .
>
> [The State]: And is this something that you feel like, even if you were asked to go through a process with the jury, that because of these feelings that you hold you just would not ever be able to consider the death sentence?
>
> Prospective Juror Daniels: No, ma'am.
>
> . . . .
>
> Prospective Juror Daniels: No, ma'am, I would not be able to.
>
> [The State]: And that's fair. That's fair. Is it fair to say that, even if you were asked to go through and to consider aggravating factors versus mitigating

> factors, there's really nothing that is going to change your mind? You are never going to say I'm okay with a death sentence?
>
> Prospective Juror Daniels: Correct, I will not say it.

The trial court dismissed Daniels for cause, concluding that her "views would prevent or substantially impair the performance of [her] duties in accordance [with] her instructions and her oath" and that there was a "lack of probability that further questioning w[ould] produce different answers."

We conclude that the trial court properly exercised its discretion in allowing Daniels to be excused for cause. Daniels's unequivocal answers in opposition to the death penalty demonstrated that her personal views "would not allow [her] to view the proceedings impartially." *See Wainwright*, 469 U.S. at 416. And given the absolute nature of her answers, the trial court did not abuse its discretion by prohibiting defendant from questioning her further. *See Gibbs*, 335 N.C. at 35.

Finally, during the voir dire of prospective juror Youngquist-Thurow, the trial court and the State questioned him about his views on the death penalty:

> The Court: So this is a capital case. . . . And so the question that I would ask of you before I pass you on to the lawyers is is there anything that's on your mind that you have said to yourself this is something that I just need the judge and the lawyers to know about me before we go any further? . . .
>
> Prospective Juror Youngquist-Thurow: Well, the death penalty issue is one that I would not want to consider. I have been a pacifist pretty much all of my life, registered as a conscientious objector draft-wise even though it didn't really affect me, but did that anyway. And I've always been more of a right-to-life choice than —
>
> . . . .
>
> [The State]: . . . I think the death penalty issue and capital punishment is one of those things that . . . people have very strong opinions one way or another, and that's fine. But what is required is to have people who will be willing to sit and weigh each option fairly.

And there's people that . . . hold beliefs, whether they be personal, moral, religious, that . . . this is not the issue for them where they can do that.

. . . .

[The State]: . . . And I guess my question to you is is this that issue for you[?]

Prospective Juror Youngquist-Thurow: I think it could be. When he explained the case, I remembered just that sinking feeling that, "Oh, no. I may have to make that decision," and just feeling uncomfortable with that right away. For me, it's a religious thing. I believe that's God's right, not my right to make that decision.

[The State]: Sure. And that's completely fair. Do you think that because of that kind of deep seated religious belief that you just would not be able to make that decision?

Prospective Juror Youngquist-Thurow: I think it would be very, very difficult for me to do that consciously.

. . . .

[The State]: Do you think that even though you have these beliefs that you could sit and go through the process and, if you determined that all of . . . the steps were met, that you could come in and say that the appropriate sentence was death?

Prospective Juror Youngquist-Thurow: I would have a hard time with that, I believe.

. . . .

[The State]: Sure. And is that that you feel like, because of that, you would just automatically lean towards a life without parole?

Prospective Juror Youngquist-Thurow: Correct.

[The State]: Instead of weighing the circumstances, you would automatically go to that?

Prospective Juror Youngquist-Thurow: Yes.

The trial court allowed Youngquist-Thurow to be excused for cause, finding that because he had "stated consistently that the imposition of the death penalty is very difficult for him . . . [and] instead of weighing the circumstances, [he] would automatically go towards a punishment of life without the possibility of parole," these views would "substantially impair the performance" of his duties. The trial court did not allow for further questioning of Youngquist-Thurow due to the "lack of probability that further questioning w[ould] produce different answers."

We conclude that there was no abuse of discretion here because Youngquist-Thurow repeatedly emphasized that he was not comfortable with imposing the death penalty and then stated that even if all of the circumstances were met, he still would automatically impose a sentence of life without parole rather than the death penalty. These answers demonstrated that Youngquist-Thurow's "opposition to capital punishment would not allow [him] to view the proceedings impartially." *See Wainwright*, 469 U.S. at 416. Thus, the trial court properly exercised its discretion in excusing this juror for cause.

N. Peremptory Instructions on Three Mitigating Circumstances

[15] Defendant next contends that the trial court erred by failing to give peremptory instructions on three out of the forty mitigating circumstances presented during the sentencing phase of trial. Defendant argues that uncontroverted evidence supported the following nonstatutory mitigating circumstances, such that the peremptory instructions should have been given:

> Mitigating Circumstance # 11: "Seaga Gillard's childhood asthma prevented him from participating in the same physical activities and sports as his younger brother."
>
> Mitigating Circumstance # 21: "Seaga Gillard's home environment made it difficult for him to succeed in school."
>
> Mitigating Circumstance # 36: "Seaga Gillard suffers from Other Specified Trauma and Stressor Related Disorder."

A peremptory instruction directs the jury that if it finds the facts presented to be true, then it must find that a particular mitigating circumstance has been established. N.C.P.I.—Crim. 150.12. "Where *all* of the evidence in a capital prosecution, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to

a peremptory instruction on that circumstance." *State v. Gay*, 334 N.C. 467, 492 (1993) (cleaned up) (emphasis added). Nonetheless, where "the evidence is controverted or the evidence supporting the circumstance is not manifestly credible, the trial court *should not* give peremptory instructions." *State v. McLaughlin*, 341 N.C. 426, 449 (1995) (emphasis added) (citing *State v. Green*, 336 N.C. 142, 172–74 (1994)). Thus, we review for whether each mitigating circumstance was supported by uncontroverted evidence. *Id.*; *Golphin*, 352 N.C. at 475.

During the sentencing phase, the State originally stipulated to the three mitigating circumstances at issue, but it later withdrew the stipulations. We address each in turn to determine whether uncontroverted evidence supported each circumstance.

For non-statutory Mitigating Circumstance No. 11, the State withdrew its stipulation concerning defendant's asthma because there was testimony presented that he played soccer as a child. The State said it would agree to the peremptory instruction if the language of the circumstance was changed to "Seaga Gillard's childhood asthma *sometimes* prevented him from participating in the same physical activities and sports as his younger brother," but defendant refused. The trial court then stated that it would not provide a peremptory instruction for Mitigating Circumstance No. 11.

We disagree with defendant's contention that the evidence to support Mitigating Circumstance No. 11 was uncontroverted. Evidence was presented that defendant suffered from asthma as a child and was unable to compete in sports at the same level as his brother, Khalid. Defendant's brother earned a scholarship to play in college. And while evidence was presented that defendant had an asthma attack while playing soccer, he still played sports notwithstanding his asthma. Moreover, defendant's asthma may or may not have had an impact on his ability to participate in similar physical activities as his younger brother; given that his brother was a college athlete, it is equally as likely that defendant simply lacked the athletic ability to participate at the same level. Therefore, even if defendant's asthma tended to flare up when he played soccer, he was not entirely prevented from "participating in the same physical activities and sports as his younger brother." As such, the trial court did not err by failing to provide the peremptory instruction for Mitigating Circumstance No. 11.

For non-statutory Mitigating Circumstance No. 21, the State withdrew its stipulation for the peremptory instruction because evidence was presented that multiple factors purportedly impacted his ability to

succeed in school, not just his home life. Even so, the State offered to stipulate if the language of the circumstances was changed to "Seaga Gillard's home environment *was a factor in making it* difficult for him to succeed in school," but defendant rejected this rephrasing. The trial court found that because the original proposed language of Mitigating Circumstance No. 21 was "stated fairly absolutely," it would permit the State's withdrawal of its stipulation and no peremptory instruction would be provided.

We disagree with defendant that the evidence to support Mitigating Circumstance No. 21 was uncontroverted. While evidence was presented regarding defendant's difficult home life, including that he grew up in extreme poverty, lacked consistent access to food, and often went without proper clothing or books for school, evidence was also presented that defendant began smoking around the age of ten and that he "spent most of his time with his friends on the street."

Thus, there was contradictory evidence presented concerning his ability to succeed in school. Home conditions certainly may be a factor in a child's ability to be successful but failure to attend school, being on the streets, and engaging in behavior that is not age appropriate can also be a contributing factor. Therefore, because the absolute language used in Mitigating Circumstance No. 21 was not uncontroverted, the trial court did not err by declining to submit the peremptory instruction. *McLaughlin*, 341 N.C. at 449.

For non-statutory Mitigating Circumstance No. 36, the State withdrew its stipulation concerning defendant's stressor-related disorder because records from the Ohio Department of Rehabilitation and Correction indicated that defendant did not suffer from "any kind of mental health problems or depression." The trial court agreed and ruled that it would not give a peremptory instruction for Mitigating Circumstance No. 36.

The trial court did not err in its decision to withhold the peremptory instruction as to this mitigating circumstance. During the sentencing phase, Dr. Amy James, a clinical psychologist, testified that she was hired by defendant to provide "an evaluation for a mitigation and sentencing." Dr. James testified that she had diagnosed defendant with "other specified trauma and stressor related disorder." However, Dr. James also admitted that she had reviewed prior medical records from the Ohio Department of Rehabilitation and Correction from March 2012, which indicated that defendant did not suffer from "any kind of mental health problems." This alone demonstrates that there was competing evidence of whether defendant suffered from any mental disorder.

Moreover, this Court has repeatedly held that if evidence is "prepare[d] for testifying at trial, rather than to treat [a] defendant, it lacks the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment." *State v. Bishop*, 343 N.C. 518, 557–58 (1996); *see also Barden*, 356 N.C. at 377 ("We have held that the testimony of an expert witness who has prepared an analysis of a defendant in preparation for trial lacks the indicia of reliability . . . and, because not manifestly credible, does not support a peremptory instruction as to this particular mitigating circumstance." (cleaned up)).

Here, even if the evidence concerning defendant's mental health was uncontroverted, Dr. James's testimony lacked the "indicia of reliability" to support the peremptory instruction because her diagnosis was developed in anticipation of trial rather than to aid in the treatment of defendant. *Bishop*, 343 N.C. at 557–58. Thus, defendant's argument is without merit.

O. Defendant's Motion to Strike the Death Penalty

[16] Defendant next argues that the trial court erred by denying his pretrial motion to strike the death penalty. Defendant contends that the State's decision to proceed capitally had a "chilling effect" on the exercise of his Fifth and Sixth Amendment rights under the United States Constitution and Article 1, Sections 23 and 24 of our State Constitution. Specifically, defendant challenges the District Attorney's discretion in seeking the death penalty and engaging in plea bargaining, asserting that it has created "a death penalty system that is functionally the same as when now repealed N.C.G.S. § 15-162.1 was in effect."[9]

Defendant's argument—that the State's prosecutorial discretion to seek a particular sentence or to engage in plea bargaining is

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9. "Until 1969 North Carolina's death penalty statutes required that unless the jury in its unlimited and unbridled discretion recommended life imprisonment the death penalty would be imposed for convictions of first degree murder, rape, first degree burglary and arson." *State v. McKoy*, 327 N.C. 31, 39–40 (1990). However, under the statutory scheme of former N.C.G.S. § 15-162.1, criminal defendants charged with crimes eligible for the death penalty were permitted to enter a guilty plea in exchange for a sentence of life imprisonment. *State v. Anderson*, 281 N.C. 261, 267 (1972). Nonetheless, "[i]f the defendant plead[ed] not guilty . . . and the jury return[ed] a guilty verdict without recommending life imprisonment, the death sentence bec[ame] mandatory." *State v. Peele*, 274 N.C. 106, 110 (1968). Statutory schemes of this sort were struck down as unconstitutional in *United States v. Jackson*, 390 U.S. 570 (1968), and *Pope v. United States*, 392 U.S. 651 (1968), on the basis that a statutory mandate for the death penalty, absent a guilty plea by a defendant, unnecessarily impinged upon a defendant's constitutional rights to maintain their innocence and to a jury trial. As such, N.C.G.S. § 15-162.1 was repealed by Act of Mar. 25, 1969, ch.117, § 1, 1969 N.C. Sess. Laws 104, 104. *See State v. Niccum*, 293 N.C. 276, 282 (1977).

unconstitutional—is unsupported by this Court's precedent. *See generally State v. Ward*, 354 N.C. 231, 260 (2001); *State v. Smith*, 359 N.C. 199, 225 (2005). Under our current statutory scheme,

> [t]he State, in its discretion, may elect to try a defendant capitally or noncapitally for first degree murder, even if evidence of an aggravating circumstance exists. The State may agree to accept a sentence of life imprisonment for a defendant at any point in the prosecution of a capital felony, even if evidence of an aggravating circumstance exists.

N.C.G.S. § 15A-2004(a) (2023).

Thus, there is no "mandate" for the death penalty here which would impermissibly burden a defendant's constitutional rights. Instead, decisions to seek the death penalty or engage in plea negotiations are left within the "purview of the exclusive and discretionary power of a district attorney," *State v. Diaz-Tomas*, 382 N.C. 640, 649 (2022), and we decline to interfere with the discretion afforded to these constitutional officers. The State is not required to offer a defendant a plea of any sort, and the fact that a plea is offered in which the defendant is given a choice between pleading guilty or having a trial by jury is not a constitutional violation.

P. Lethal Injection as Cruel and Unusual

[17] Defendant asserts that North Carolina's method of lethal injection is cruel and unusual and therefore unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. Defendant concedes that "he cannot show how those drugs would cause needless suffering," yet asserts that the unknown risks of the procedure render it unconstitutional.

In North Carolina, "the mode of executing a death sentence must in every case be by administering to the convict or felon an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the person is dead." N.C.G.S. § 15-188 (2023). The specific procedure is "determined by the Secretary of the Department of Adult Correction, who shall ensure compliance with the federal and State constitutions." *Id.*

The Supreme Court of the United States has held that "[w]hen a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of

showing that the method creates an unacceptable risk of pain." *Glossip v. Gross*, 576 U.S. 863, 884 (2015). To meet this burden, a defendant must (1) "establish that the State's method of execution presents a substantial risk of serious harm—severe pain over and above death itself"; and (2) "identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved." *Nance v. Ward*, 597 U.S. 159, 164 (2022) (cleaned up).[10] "Only through a comparative exercise . . . can a judge decide whether the State has cruelly superadded pain to the punishment of death." *Id.* (cleaned up). To raise constitutional concerns, the method of execution must "present[ ] a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.' " *Glossip*, 576 U.S. at 877 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)). A defendant's challenge fails if they cannot "show that the risks they identified [are] substantial and imminent, and [if] they [have] not establish[ed] the existence of a known and available alternative method of execution that would entail a significantly less severe risk." *Id.* at 878 (citing *Baze*, 553 U.S. at 56–60).

Here, defendant concedes that he has failed to meet his burden under *Glossip* and *Baze*. Instead, he asks this Court to strike down the method of execution under N.C.G.S. § 15-188 based on hypothetical risks. Because defendant has failed to articulate how North Carolina's lethal injection procedure creates a "substantial risk of serious harm" and has failed to "identify an alternative method that is feasible, readily implemented, and in fact significantly reduces the risk of harm involved," *see Nance*, 597 U.S. at 164 (cleaned up), we reject this argument.

Q. Preservation Issues

[18] Defendant raised two issues for preservation which he concedes have been repeatedly rejected by this Court: (1) that this Court should invalidate the death penalty in this State on the basis of international norms, human rights, and prevailing standards of decency; and (2) that the indictment was insufficient to make this a capital case because it did not include any elements which elevate the crime of murder from second-degree to first-degree or allege aggravating circumstances. Defendant presents these issues in order to "permit[ ] this Court to reexamine its prior holdings and to preserve these arguments for any possible further judicial review." *See Golphin*, 352 N.C. at 485.

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10. The Supreme Court held that N.C.G.S. § 15-188, in addition to fourteen similar state statutes that "authorize only the use of lethal injection[,]" is a "more humane way[ ] to carry out death sentences." *Nance*, 597 U.S. at 163 (quoting *Glossip*, 576 U.S. at 868).

We have thoroughly considered defendant's arguments as to these issues and find no compelling reason to depart from our prior holdings in *State v. Allen*, 360 N.C. 297 (2006), and *Golphin*, 352 N.C. 364. *See Golphin*, 352 N.C. at 397 ("[A]n indictment need not contain the aggravating circumstances the State will use to seek the death penalty and the trial court may not order the State to disclose the aggravating circumstances upon which it intends to rely." (citing *State v. Young*, 312 N.C. 669, 675 (1985); *Holden*, 321 N.C. at 153; *State v. Hunt*, 357 N.C. 454 (2003))).

Defendant has also raised two issues which he does not identify as preservation issues but which we consider to be of this sort. First, defendant urges us to hold that death qualification of the jury is unconstitutional. Specifically, defendant argues that death qualification violates his rights to a jury representative of fair cross-section of the community and to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and coordinate rights under Article I, Sections 19, 23, and 27 of the North Carolina Constitution.

However, the Supreme Court of the United States has explicitly stated that "the [United States] Constitution does not prohibit the States from 'death qualifying' juries in capital cases." *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). This Court has likewise held that the North Carolina Constitution does not prohibit " 'death qualification' of juries in capital trials." *State v. Barts*, 316 N.C. 666, 677 (1986); *State v. King*, 316 N.C. 78, 80 (1986) (rejecting the defendant's argument that "the practice of 'death-qualifying' the jury deprives defendants of their right to be tried by a representative cross-section of the community"); *see also Holden*, 321 N.C. at 133 ("Defendant has given us no reason to disregard or overrule our decisions in *King* and *Barts*."); *State v. Waring*, 364 N.C. 443, 494 (2010) ("Although defendant asks that we reconsider *Barts*, we decline to do so."). Similarly here, there is no compelling reason to depart from these long-standing precedents.

Second, defendant argues that in light of evolving standards of decency, the death penalty is unconstitutional. Specifically, defendant argues that the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution because it is cruel and unusual punishment; that North Carolina's capital sentencing scheme is vague, overbroad, and overly discretionary; and that capital punishment is applied arbitrarily to discriminatory effects.

However, the Supreme Court of the United States considers settled the issue of whether the death penalty is unconstitutional under the

United States Constitution: "[W]e have time and again reaffirmed that capital punishment is not *per se* unconstitutional." *Glossip*, 576 U.S. at 881. In addition, "[t]his Court has previously considered and rejected these arguments." *State v. Maness*, 363 N.C. 261, 294 (2009) (citing *Duke*, 360 N.C. at 142); *State v. Hurst*, 360 N.C. 181, 205 (2006) ("This Court has held that the North Carolina capital sentencing scheme is constitutional."); *State v. Powell*, 340 N.C. 674, 695 (1995) (reiterating that the Court "ha[s] consistently rejected defendant's contention" that "North Carolina's death penalty statute is unconstitutional"). As there is nothing cruel and unusual under the Eighth Amendment or cruel or unusual under Article I, Section 27 about the imposition of the death penalty, standing alone, we find no compelling reason to depart from our exhaustive precedents.

R. Ineffective Assistance of Counsel

[19] Lastly, defendant asserts that his trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Specifically, defendant asserts that his trial counsel was "ineffective in failing to make legitimate objections" to: (1) Kara L.'s testimony regarding defendant's assault with a firearm; (2) the trial court's limiting instruction as to the jury's consideration of the Rule 404(b) evidence regarding Bessie A. and Rachel B. when determining whether defendant had the intent to commit rape or robbery; (3) the submission of the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance that Gillard committed the murders during an attempted rape and attempted robbery of Holland; (4) Rachel B.'s testimony regarding her violent childhood which subsequently led to her involvement in prostitution; (5) the State's closing argument regarding defendant's plan or scheme to rape and rob prostitutes; (6) the trial court's lack of an instruction to the jury that it was not permitted to consider the same evidence for more than one aggravating circumstance; and (7) the trial court's lack of an *Enmund/Tison* instruction. Defendant takes the position that these issues are "premature for decision on direct appeal" and requests that this Court dismiss these claims without prejudice so that he may reassert them during a subsequent MAR proceeding.

A criminal defendant's right to counsel pursuant to the Sixth Amendment to the United States Constitution "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561 (1985). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561–62. To make such a showing, a defendant must satisfy a two-part test:

> 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.

Strickland v. Washington, 466 U.S. 668, 687 (1984). "Prejudice is established by showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *State v. Campbell*, 359 N.C. 644, 690 (2005) (quoting *Strickland*, 466 U.S. at 694). "There exists a 'strong presumption that counsel's conduct falls within the wide range of professional assistance,' " but this presumption is rebuttable. *State v. Oglesby*, 382 N.C. 235, 243 (2022) (quoting *Strickland*, 466 U.S. at 689).

Because "[i]t is not the intention of this Court to deprive criminal defendants of their right to have [ineffective assistance of counsel] claims fully considered," IAC claims should only be decided on the merits in a direct appeal when "the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166–67 (2001). Because the "reasonableness" of counsel's performance at trial is a fact-intensive inquiry, "the proper course is generally to dismiss the claim without prejudice to allow for a hearing and further factfinding." *Oglesby*, 382 N.C. at 243 (citing *Fair*, 354 N.C. at 166).

Given the lack of information in the "cold record" relating to defendant's counsel's trial strategy and in keeping with this Court's general policy of affording defendants the opportunity to rebut the reasonableness of their counsels' action, we dismiss these claims without prejudice.

III. Conclusion

For the foregoing reasons, we conclude that defendant received a fair trial and capital sentencing proceeding free of error, and the judgment of the trial court is affirmed.

AFFIRMED.

Justice EARLS concurring in part and dissenting in part.

I completely concur with the majority's judgment that Gillard's convictions for first-degree murder were proper. The overwhelming evidence presented at trial showed that Gillard was responsible for the tragic loss of two lives, those of a twelve-week pregnant woman and the man who was trying to protect her. These murders were heinous acts corroborated by more than enough evidence to establish Gillard's guilt. Evidence from other victims—victims who never got justice for the offenses committed against them individually—was rightly admitted to show Gillard's criminal scheme. Gillard preyed on sex workers by luring them to low-budget hotel rooms where he and an accomplice would rob them and sexually assault them, using violence when necessary, as happened in this case. Thus, I agree with the majority's decision to affirm the trial court on Gillard's conviction for these two murders.

But as the majority describes, there were two phases to this trial: a guilt phase and a sentencing phase. At sentencing, the jury had to choose how to penalize Gillard for the murders it just convicted him of. It could have chosen death or life imprisonment without parole. My grounds for this partial dissent, then, are narrow. I have specific concerns that Gillard did not receive a fair sentencing hearing, in light of errors across both phases of his trial. The majority differs and finds no errors with Gillard's sentencing proceeding. Thus, I dissent only on these narrow grounds and would remand this case for a second sentencing hearing free from those compounding errors.

The death penalty is our "most severe punishment." *Miller v. Alabama*, 567 U.S. 460, 475 (2012). It is "qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). It is final and irreversible. *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring). Once a person is executed, guilty or innocent, their punishment cannot be amended. *See id.*; *Woodson*, 428 U.S. at 305. Perhaps most salient is that "[t]he calculated killing of a human being by the State involves, by its very nature a denial of the executed person's humanity" in a way a term of imprisonment does not. *Furman*, 408 U.S. at 290 (Brennan, J., concurring). This is because while an incarcerated person retains certain rights, the person executed is denied "the right to have rights." *Id.*

The United States Supreme Court has determined that for the death penalty to be constitutional,[1] its application must be "consistent," and

1. Because I would find that the cumulative effect of the errors in this case warrants a new sentencing proceeding, I do not reach the issue Gillard raises of whether the death

the procedures used must ensure "fairness to the accused." *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982). The reviewing court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). If a trial court fails to take careful measures in its rulings, the risk of an arbitrary death sentence rises. An erroneous ruling which exacts unfair prejudice on the defendant can be the difference between life and death. *See State v. Sanderson*, 336 N.C. 1, 9 (1994) (noting the heightened need for fair and proper procedure "where the issue before the jury is whether a human being should live or die").

The risk of an arbitrary death sentence in Seaga Gillard's case is high. This case is riddled with procedural errors by way of: (1) unreliable witness identification; (2) erroneously admitted evidence, such as repetitive photos and irrelevant evidence about the lives of victims of other unprosecuted crimes; (3) the failure to give the jury proper instructions on mitigating and aggravating circumstances; and (4) the failure to give a proper jury instruction regarding Gillard's eligibility for the death penalty for Dwayne Garvey's murder pursuant to *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Additionally, the use of unadjudicated offense evidence during the sentencing phase of trial raises serious questions about the constitutionality of Gillard's death sentence and further increases the risk that his punishment was imposed arbitrarily and capriciously. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Put simply, sentencing a person to death based in part on incidents for which that person has not been convicted is in tension with our legal system's commitment to the presumption that all persons are innocent until proven guilty.

This concern for an arbitrary death sentence is compounded when Gillard's crimes are compared alongside other recent Wake County jury decisions in death penalty cases. Following Byron Waring's death sentence in 2007, Wake County juries have rejected the death penalty in nine separate cases. Those cases included the following crimes:

- The murder of five people in separate incidents, and robbery with a dangerous weapon.
- The sexual assault and murder of a ten-month-old stepdaughter.

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penalty as administered in North Carolina is constitutional under the United States Constitution and the North Carolina Constitution.

- The rape and murder of a stranger at the home where she was sleeping, in which the victim was killed with a heavy object.
- The murder of the defendant's ex-girlfriend to prevent her from marrying someone else and seeking custody of the defendant's child.
- The repeated stabbing of the defendant's wife until she died and elaborate efforts to cover-up the crime.
- Numerous armed robberies, which spanned over several months, and one first-degree murder during the course of one robbery as well as one attempted murder during the course of another.
- A murder which occurred during the course of a home invasion robbery, with an accomplice, in which the victim was beaten and stabbed to death.
- The double murder of the defendant's in-laws at their home and the attempted murder of the defendant's wife, who was shot through the heart and pistol whipped, in front of their children. This case also involved allegations that the defendant shot at the police who were trying to apprehend him and violated a restraining order.
- The double murder of two men during the course of a home invasion robbery with an accomplice.

The Court has been clear in its mandate, that capital punishment "is reserved only for the most culpable defendants committing the most serious offenses." *Miller*, 567 U.S. at 476. But there is no reason to believe that the offenses Gillard was convicted of are dissimilar to those committed by defendants in other Wake County cases where the jury rejected that punishment. Instead, that the jury declined the death penalty in those cases yet imposed it here suggests that the procedural errors in this case, when taken together, impacted the jury's decision to sentence Gillard to death. Equally concerning is the State's use of unadjudicated offense evidence relating to other sexual assaults and robberies. Even though rape is not a death penalty eligible crime, *Coker v. Georgia*, 433 U.S. 584, 592 (1977), these offenses were used during sentencing to prove the course of conduct aggravating factor and to sentence Gillard to death.

Without question the State has an interest in bringing Gillard and others accused of serious crimes to trial. *See Sell v. United States*, 539

U.S. 166, 180 (2003). After all, it is through the application of our criminal laws that the government endeavors to protect "the basic human need for security." *Id.* At the same time, we cannot abandon the rule of law, especially in the hardest cases. Procedures must ensure that criminal defendants receive fair trials and sentencing hearings. *See id.*; *Darden v. Wainwright*, 477 U.S. 168, 178–83 (1986); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In capital cases, where "a defendant's life is at stake," courts must be "particularly sensitive to ensure that every safeguard is observed." *Gregg*, 428 U.S. at 187 (first citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932); and then citing *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in result)). Meaningful appellate review in a capital-sentencing system "serves as a check against the random or arbitrary imposition of the death penalty." *Id.* at 206.

Thus, while I agree with my colleagues that Gillard's convictions are proper under North Carolina law, I disagree that a death sentence is the "appropriate punishment" in this "specific case." *See Woodson*, 428 U.S. at 305. Additionally, although I would not find that any single error in this case meets the plain error standard, the harmless error standard for federal constitutional issues, or the harmless error standard for issues not arising under the United States Constitution, I would hold that when viewed in the aggregate, the cumulative effect of those errors prejudiced Gillard's sentence. He is therefore entitled to a new sentencing hearing.

I. The Trial Court's Admission of Unadjudicated Offenses

In North Carolina, the jury that finds a defendant guilty or innocent of a capital offense is usually the very same jury that then decides whether that defendant receives a sentence of death or life imprisonment. N.C.G.S. § 15A-2000(a)(1)–(2) (2023). During that latter sentencing phase of a capital murder trial, the State may introduce a defendant's unadjudicated criminal offenses: that is, evidence of a crime the defendant allegedly committed, but that has never been proven in a court of law. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 29–30 (1997); Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249, 1250 (1993) [hereinafter Smith, *Unreliable and Prejudicial*]. North Carolina allows juries to consider such unadjudicated offense evidence, *in addition to* all evidence earlier presented in the guilt-innocence phase of the proceeding. N.C.G.S. § 15A-2000(a)(3) (2023); *State v. Holden*, 346 N.C. 404, 422 (1997). This means that unadjudicated offense evidence introduced at either phase of a defendant's

capital trial can be prejudicial to the defendant's sentence, since evidence from either stage bears on the jury's recommendation of punishment. *See* N.C.P.I.—Crim. 150.10 (noting jury instructions that evidence submitted in either stage of a death penalty proceeding "is competent . . . [to the jury's] consideration in recommending punishment").

During closing arguments at the sentencing phase of this case, the State relied heavily on unadjudicated offense evidence and urged the jury to "consider all the evidence in this particular case, all of it, all the way back from the beginning." The State guided the jury in remembering the testimony of Bessie A., Rachel B., Kara L., Keyona T., Serena S., Asia G., and Keyana M. This testimony related to unadjudicated offenses separate from the crime Gillard was on trial for and was used to support the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11) (2023). Referring to those offenses, the State labeled Gillard as a "serial rapist" who "preys on the vulnerable" and claimed "[t]here is no doubt that he raped and brutalized seven other women."

While this evidence might have been admissible under our precedent to prove the course of conduct aggravating circumstance, *see State v. Cummings*, 332 N.C. 487, 507–10 (1992), that does not cure its constitutional infirmity. The use of unadjudicated offenses during the sentencing phase of capital trials raises questions regarding prejudice by way of substantive and procedural due process violations, and through the erosion of a defendant's presumption of innocence until proven guilty by a jury of his peers. Smith, *Unreliable and Prejudicial* at 1282–90; *see also In re Winship*, 397 U.S. 358, 363 (1970) ("[T]he presumption of innocence . . . [is a] bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." (cleaned up)); William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 361 (1995) [hereinafter Laufer, *Innocence*] ("Courts in the jurisdictions where evidence of unadjudicated crimes is used in penalty determinations have denied, ignored, or minimized the fact that all unadjudicated crimes carry a presumption of innocence."). Substantive due process requires that the evidence used to determine a death sentence be reliable.[2] To ensure this, the United States Supreme Court has

2. "Substantive due process asks the question of whether the government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose." Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999). The key question then is whether there is "a good enough reason for such a deprivation." *Id.* In contrast, procedural due process "asks whether the government has followed the proper procedures when it takes away life, liberty, or property." *Id.*

stated that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that punishment will be inflicted in an arbitrary and capricious manner." *Godfrey*, 446 U.S. at 427 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)); *see also Gregg*, 428 U.S. at 188–89. Yet, a jury's consideration of unadjudicated offenses at sentencing creates a risk that a death sentence will be imposed based on erroneous evidence, which has not been deemed trustworthy through the process of a criminal trial. Smith, *Unreliable and Prejudicial* at 1283; *cf.* David McCord & Hon. Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 Cardozo L. Rev. 417, 472–73 (2014) (proposing the requirement of an offer of proof by the prosecution before admitting unadjudicated offenses as a proposed rule of evidence for a capital penalty phase, in light of the "potential to cause a mistrial" if insufficient proof of such conduct exists). "The nature of [this] risk is compounded by the fact that the criminal history of the defendant is by far the most important factor used by the sentencer in capital trials in evaluating the appropriateness of the punishment." Smith, *Unreliable and Prejudicial* at 1283.

Importantly, because sentencing proceedings are not accompanied by the same procedural protections present during the guilt-innocence phase of trial, there is a heightened risk that a death sentence will be erroneously imposed. *Id.*; *see State v. Warren*, 347 N.C. 309, 325 (1997) (providing that the North Carolina Rules of Evidence do not apply during capital sentencing proceedings); *State v. Golphin*, 352 N.C. 364, 464 (2000) (same). When testimony is damaging to a defendant, our legal system trusts the adversarial process "to sort out the reliable from the unreliable evidence." *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983). Yet during a capital sentencing hearing, this process necessarily requires the defendant to rebut allegations of other offenses by engaging in a series of mini trials before the very same jury that just convicted him of murder. Smith, *Unreliable and Prejudicial* at 1288–89. This process also has the effect of stretching defense counsel thin and raising the risk of a Sixth Amendment ineffective assistance of counsel claim. *Id.* For the more collateral attacks the State brings regarding offenses the defendant has not been convicted of, the more time the defense must devote to rebutting those attacks, necessarily reducing the time spent preparing for other portions of the penalty phase of trial. *See id.*

Moreover, the introduction of unadjudicated offense evidence belittles the criminal defendant's presumption of innocence. *Herrera v. Collins*, 506 U.S. 390, 399 (1993). When the State introduces evidence at sentencing that the defendant allegedly committed these other

offenses, it constructively creates a presumption that those allegations are true. Smith, *Unreliable and Prejudicial* at 1289–90. That is a problem, because the preceding trial and guilty verdict only extinguish the presumption of innocence *for that charged offense*—not for all other offenses the defendant may have allegedly committed. *See Herrera*, 506 U.S. at 399. Nor does the State's presentation of that evidence to a jury absolve the presumption of innocence concerns: the jury that just convicted the defendant of a capital crime cannot then serve as an impartial jury on those separate offenses as required by due process. Smith, *Unreliable and Prejudicial* at 1279 (citing *State v. Bobo*, 727 S.W.2d 945, 952 (Tenn. 1987)); Laufer, *Innocence* at 367–68 (summarizing evidence that suggests "the presumption of innocence is not well understood by jurors" and that at least some jurors "quickly abandon a presumption of innocence when presented with any incriminating evidence" of the defendant). Because the presumption of innocence remains until an offense is adjudicated, it is improper for the jury to base its sentencing decision on such evidence. Smith, *Unreliable and Prejudicial* at 1290.

Ultimately, substantive and procedural due process concerns, as well as the erosion of the presumption of innocence, prejudice the defendant during sentencing by: (1) creating the risk that an inaccurate allegation will not be detected and the jury will base its decision to sentence the defendant to death, in whole or in part, on that erroneous evidence; (2) creating a presumption that the allegations against the defendant are true; (3) forcing the defendant to engage in a series of mini trials before the same non-neutral jury that convicted him of murder; and (4) requiring defense counsel to devote valuable time to rebutting unadjudicated offense allegations, rather than solely preparing for the sentencing hearing. *Id.*

The United States Supreme Court's

> principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.

California v. Ramos, 463 U.S. 992, 999 (1983). Accordingly, it has given states latitude to "prescribe the method by which those who commit murder shall be punished." *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)). "This latitude extends to evidentiary rules at sentencing proceedings." *Id.* If the

jury finds a "defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008.

Nevertheless, the admission of relevant evidence during sentencing cannot be "so unduly prejudicial that it renders the trial fundamentally unfair," and in those cases, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Unfortunately, the high threshold established by the United States Supreme Court for assessing the admission of improper evidence during capital sentencing renders this constitutional protection effectively unavailable to most, if not all, capital defendants. *See Romano*, 512 U.S. at 10 (holding that admission of evidence regarding the defendant's prior death sentence in a separate and unrelated trial did not "so infect[ ] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process").

It is perhaps in part for this reason that other states have installed procedural safeguards that protect capital defendants from the use of unadjudicated offense evidence. At least six states have determined unadjudicated offense evidence is not admissible during the capital sentencing phase.[3]

For example, in *State v. Bobo*, 727 S.W.2d 945 (Tenn. 1987), the Tennessee Supreme Court concluded that evidence of the defendant's prior criminal activity must be accompanied by a conviction to be proper under Tennessee's state constitution. *Id.* at 952. The court rested its decision on the Due Process Clause's mandate of "fundamental fairness," concerns about "subjecting a defendant to what is in effect a trial" without substantive and procedural protections, and the bias that is likely to result from review of the defendant's unadjudicated offenses by the same jury that convicted him. *Id.*; *see also State v. Hale*, 840 S.W.2d 307, 312–13 (Tenn. 1992).

In the same vein, Indiana has held it impermissible to introduce evidence of other criminal acts for which the defendant has not been convicted. Namely because of the "prejudice inherent" in the process of first being tried by a jury for the charged offense, and then being tried again by that same jury for another unrelated criminal offense. *State v. McCormick*, 272 Ind. 272, 280 (1979); *see also Lockhart v. State*, 609 N.E.2d 1093, 1101 (Ind. 1993).

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3. These are Tennessee, Indiana, Alabama, Pennsylvania, Florida, and Ohio.

Alabama has recited concerns regarding a defendant's presumption of innocence as a reason not to admit evidence of pending charges during capital sentencing and has held that courts may not rely on unadjudicated offense evidence to negate the existence of a mitigating factor. *Cook v. State*, 369 So. 2d 1251, 1257 (Ala. 1978); *see also Waldrop v. State*, 859 So. 2d 1138, 1147 (Ala. Crim. App. 2000). Pennsylvania has also elected not to allow evidence of unadjudicated criminal acts at the sentencing phase of a death penalty proceeding because admission of such evidence contradicts "the imperative that the death penalty be imposed only on the most reliable evidence." *Commonwealth v. Hoss*, 445 Pa. 98, 118 (1971); *see also Commonwealth v. Hughes*, 581 Pa. 274, 331 (2004).

Moreover, Florida has determined that its statute pertaining to aggravating factors only allows evidence of prior convictions to be admitted during sentencing—not "mere arrests or accusations." *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976) (citing Section 921.141(5)(b), Florida Statutes); *see also Dougan v. State*, 470 So. 2d 697, 701 (Fla. 1985). In making this finding, the court acknowledged the importance of following the language of its death penalty sentencing statute, which was enacted to cure the constitutional infirmities that arise from limitless discretion, that were previously addressed in *Furman v. Georgia*, 408 U.S. 238 (1972). *Provence*, 337 So. 2d at 786.

Ohio has also identified the disadvantage to the defendant that results from the admission of unadjudicated offense evidence as a reason not to allow this evidence during capital sentencing. *State v. Glenn*, No. 89-P-2090, 1990 WL 136629, at *10 (Ohio Ct. App. 1990). Ohio courts have specifically stated that, "disclosure of 'other acts' types of activities, for which a defendant was not convicted, is fraught with potential problems of prejudicial error, as the cumulative effect of the unadjudicated offenses may well turn a jury against a defendant who ostensibly has no criminal record." *Id.*

Other states that have not fully precluded a jury's consideration of this evidence have placed limitations on how and when it can be used. Arkansas, Georgia, Utah, Nebraska, and California require that unadjudicated offense evidence be proven beyond a reasonable doubt. *Ward v. State*, 338 Ark. 619, 628 (1999) ("[W]hen the prior violent felony has not resulted in a conviction, the State must present evidence showing that the defendant committed the act."); *Fair v. State*, 245 Ga. 868, 871 (1980) ("[T]he fact finder in a presentence trial must determine whether beyond a reasonable doubt any of the statutory aggravating circumstances exist under the evidence presented.") *State v. Maestas*, 299 P.3d

892, 970 (Utah 2012) ("[T]he State bears the burden of proving to the jury that the defendant actually committed the crime."); *State v. Galindo*, 278 Neb. 599, 662 (providing that when an unadjudicated offense is used to support an aggravating factor, "the State must prove the unadjudicated offense beyond a reasonable doubt"); *People v. Letner*, 50 Cal. 4th 99, 200 (2010) ("We previously have concluded that the requirement that such unadjudicated offenses be proved beyond a reasonable doubt before the jury may consider them in aggravation is sufficient to protect a defendant's constitutional rights.").

Louisiana has adopted a clear and convincing evidence standard, which requires "that the evidence of the defendant's commission or connection with the commission of the unrelated criminal conduct [be] clear and convincing." *State v. Comeaux*, 699 So. 2d. 16, 20 (La. 1997). Nevada has limited the use of unadjudicated offenses, stating that this evidence cannot be used to establish an aggravating factor. *Crump v. State*, 102 Nev. 158, 161 (1986). This evidence also cannot be "dubious, tenuous, nor of questionable probative value." *Robins v. State*, 106 Nev. 611, 626 (1990) (quoting *Crump*, 102 Nev. at 161). Similarly, South Carolina has limited the use of unadjudicated offense evidence and requires that the jury "be instructed these offenses may not be used as proof of the statutory aggravating circumstances." *State v. Young*, 305 S.C. 380, 384 (1991) (quoting *State v. Stewart*, 283 S.C. 104, 108 (1984)). Additionally, Wyoming has insisted that only convictions be used to support its aggravating factor that "[t]he [d]efendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person." *Hopkinson v. State*, 632 P.2d 79, 170 (Wyo. 1981). As the court observed, "the statue refers to 'previous conviction' . . . not the previous commission of those crimes." *Id.*

Seven states allow for the use of unadjudicated offense evidence: Texas, Oklahoma, Missouri, Oregon, Idaho, Arizona, and North Carolina.[4] Resting its decision on the requirement that "all relevant evidence concerning the defendant must be placed before the jury," Texas has found no constitutional issue with the use of unadjudicated offense evidence during sentencing. *Milton v. State*, 599 S.W.2d 824, 827 (Tex. Crim. App. 1980); *see also Cantu v. State*, 939 S.W.2d 627, 648 (Tex. Crim. App. 1997). Missouri has concluded the same, stating that "at the punishment phase [the jury] is entitled to full information about the defendant and his previous conduct." *State v. Jones*, 749 S.W.2d 356, 364

4. Several states appear not to have addressed the issue: Kansas, Kentucky, Mississippi, Montana, and South Dakota.

(Mo. 1988); *see also State v. Cole*, 71 S.W.3d 163, 174 (Mo. 2002). Oklahoma allows unadjudicated offense evidence during sentencing to support the State's submission of an aggravating factor. *Fuston v. State*, 470 P.3d 306, 329 (Okla. Crim. App. 2020). Moreover, Oregon has also allowed the jury to assess this type of evidence when determining whether to impose a death sentence. *State v. Wagner*, 305 Or. 115, 178 (1988); *see also State v. Montez*, 309 Or. 564, 611 (1990).[5] The same is true for Idaho which has "upheld the consideration of prior unconvicted crimes during sentencing." *State v. Hairston*, 133 Idaho 496, 516 (1999). Arizona also allows prior bad acts, which are not accompanied by a conviction to be used to rebut a defendant's lack of a conviction record when it is advanced as a mitigating factor. *State v. Rossi*, 171 Ariz. 276, 279 (1992).

North Carolina has similarly "refused to require a conviction of [a criminal] offense before the State may use that offense to establish the course of conduct aggravating circumstance." *Cummings*, 346 N.C. at 328; *see also State v. Moseley*, 336 N.C. 710, 719 (1994). Under North Carolina law, during capital sentencing, "[e]vidence may be presented as to any matter that the court deems relevant to [the] sentence." *Golphin*, 352 N.C. at 464 (quoting N.C.G.S. § 15A-2000(a)(3) (1999)). This includes evidence relating to aggravating and mitigating circumstances contained in subsections (e) and (f) of N.C.G.S. § 15A-2000. *Id.* Because the Rules of Evidence do not apply to sentencing hearings, and because the State is permitted to present "competent and relevant" evidence to support an enumerated aggravating factor, "trial courts are not required to perform the Rule 403 balancing test during a sentencing proceeding." *Id.* (quoting *State v. Flippen*, 349 N.C. 264, 273 (1998)).

North Carolina's decision to allow unadjudicated offense evidence as it operated in this case raises serious constitutional questions about the reliability of Gillard's death sentence and the procedures used during that sentencing proceeding, which ultimately led the jury to sentence Gillard to death.

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5. While Oregon law allows for the death penalty, an amendment to the state's death penalty statute in 2019 significantly limited the crimes for which capital punishment can be imposed. Act effective Sept. 29, 2019, 2019 Or. Laws ch. 635. Oregon has also had a moratorium on executions since 2011, and in 2022 Governor Kate Brown commuted the death sentences of those on death row to life in prison without the possibility of parole. Governor Kate Brown, *Commutation of Sentence*, https://apps.oregon.gov/oregon-newsroom/OR/GOV/Posts/Post/governor-kate-brown-commutes-oregon-s-death-row-15087 (last accessed Dec. 10, 2024).

A. Evidence of Unadjudicated Offenses

1. Rachel B.

a. Testimony

Rachel B.'s testimony from the guilt-innocence phase recounted an incident, which took place on 28 October 2016 at the Microtel in Morrisville, North Carolina, when she was twenty-three years old. She stated that she was scheduled to meet with a single customer at 4:00 a.m. but two men arrived at her room instead. Upon arrival, the men pushed their way into her room, told her they had been watching her, knew who she was, and demanded to know where her money was located. One of the men threatened her, stating she should think about her kids, "before you die," while the other man searched her belongings. The men then undressed Rachel B., tied her feet together and her hands behind her back, and took turns raping her. The men also forced her to perform oral sex on them.

When Rachel B. tried to get a look at the men, they hit her and put a pillowcase over her head. They also shoved a pair of underwear in her mouth and tied a pillowcase around her neck. After the rape, the men tied a telephone cord around her neck and strangled her. Rachel B. testified that as the men strangled her, she lost consciousness, and each time she regained consciousness the men strangled her again. According to Rachel B., this went on for hours. At one point, Rachel B. got up off the bed and sat up against the wall, only to be kicked in the face.

Rachel B. also testified that the more violent of the two men had a foreign accent and a tattoo with three spiders on his calf. Consistent with this, Rachel B. stated that during her attack, the man without the accent leaned down and told her to pretend to be dead because the other man wanted Rachel B. killed. Rachel B. followed these instructions and prayed for her daughter because she was sure the men were going to kill her. Both men had guns. One of them pointed the gun at the back of Rachel B.'s head and said that he was going to kill her. Once the men left, Rachel B. was able to get up and exit the room, where she began yelling and hotel staff came to her aid.

The men took Rachel B.'s identification, social security card, birth certificate, phone, clothes, and other "random" items. Her driver's license and social security card were later found in connection with the investigation into the April Holland and Dwayne Garvey murders. Rachel B. suffered several injuries during her attack and photos of these injuries were entered into evidence. She explained that her esophagus had been

crushed, that she had ligature marks on her wrists and legs, and that she had an injury on her face where she was kicked. She also testified that as a result of these injuries she was required to wear a neck brace for a month, and that she has since experienced memory problems and post-traumatic stress disorder (PTSD).

While Rachel B. reported the incident to law enforcement, she explained that the officers "didn't care" about what had happened to her and believed that she knew the men who attacked her. Rachel B. later learned about Holland's and Garvey's murders from a friend who was staying at the hotel where the murders occurred. After Googling the news story, Rachel B. identified the men who attacked her and called the Morrisville Police Department on 7 December 2016 to report the same.

The State introduced testimony from the employee of the Microtel who found Rachel B. naked, tied up, and with a pillowcase over her head and around her neck. Testimony from Detective Mullis from the Morrisville Police Department recounted Rachel B.'s statements to police immediately following the event while Rachel B. was in the hospital emergency room. The State also presented into evidence the telephone cord and pillowcase that were used on Rachel B. This evidence was accompanied by testimony from Detective Mullis about Rachel B.'s injuries.

b. Application to Gillard's Case

The defense argued this evidence should be excluded on the grounds that it would "deny Defendant due process . . . and would be highly prejudicial" in violation of the Fourteenth Amendment to the United States Constitution.

As it pertains to the reliability of this evidence, Rachel B. told police that "she couldn't really give a good description of their faces" and that she recognized the perpetrators' races because she could see their legs during the assault. For that reason she also recognized the tattoos on their legs. Yet when Rachel B. called the Morrisville Police Department in December of 2016, she reported she had recognized her attackers from a surveillance photo in an online news story about Holland's and Garvey's murders. This inconsistency is incongruent with "the need for reliability" in imposing the death penalty for a separate offense, *see Woodson*, 428 U.S. at 305, and raises questions about the credibility of Rachel B.'s testimony.

Moreover, the United States Supreme Court has determined that the correct photographic identification procedure involves police showing the witness "pictures of a number of individuals," without indication by

police of whom they suspect. *Simmons v. United States*, 390 U.S. 377, 383 (1968). Although the police did not conduct Rachel B.'s identification procedure, it stands to reason that the use of a single photograph identification procedure, like the one present in this case, is highly suggestive and calls into question the veracity of Rachel B.'s identification. This is especially true given that Rachel B. discovered Gillard's photo in a news article discussing the circumstances of Holland's and Garvey's murders.[6]

Furthermore, two days after making her identification, Rachel B. was arrested in Las Vegas, Nevada, and charged with capital murder in connection with a homicide that occurred in November 2016 in Dallas, Texas. Dallas authorities allowed Rachel B. to plead guilty to robbery in exchange for a sentence of probation. During the course of North Carolina's investigation into Rachel B.'s rape, law enforcement spoke with Rachel B.'s mother, who described her daughter as a pathological liar who had made prior accusations of sexual assault. Although credibility of a witness is a question for the jury, *State v. Moore*, 366 N.C. 100, 108 (2012), the same jury that previously convicted Gillard is poorly positioned to then make those credibility determinations as to Rachel B.—which poses due process problems when that same evidence is considered at sentencing. *Williams v. Lynaugh*, 484 U.S. 935, 938 (1987) (mem.) (Marshall, J., dissenting); *see also Lockhart*, 609 N.E.2d at 1101.

Additionally, Gillard has not been convicted of an offense against Rachel B. Thus, under our laws, the presumption of innocence should remain intact as to the crimes against Rachel B. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."). However, when the State introduced evidence about the offense against Rachel B. and stated that "there is no doubt" Gillard had "raped and brutalized seven other women," Gillard was stripped of that presumption of innocence. This undermined the fairness of Gillard's sentencing hearing.

2. Bessie A.

a. Testimony

During the guilt-innocence portion of Gillard's trial, Bessie A. testified that she engaged in sex work and advertised on "Backpage." While staying at America's Best Value Inn, on 16 October 2016, a man solicited

6. Single photograph identification issues are further discussed in Part VII of this opinion in relation to Keyona T.'s identification of Gillard.

her services. Although she expected a single customer to arrive at her hotel room, when she opened the door two men rushed in. One of the men pointed a gun at her. According to Bessie A., the men forced her to remove her clothes and sit on the bed while they asked her for money. The two men stole eighty dollars, a bank card, a tablet, and a cell phone. One of the men used a condom to engage in nonconsensual oral and vaginal sex with Bessie A. When Bessie A. did not have a condom for the second man, he became angry and touched her vaginal area with the gun.

Bessie A. was then tied up with a pillowcase, and the men forced her to give them the pin for her bank card by threatening to kill her and her children. The men subsequently covered her with blankets and left the room. Bessie A. testified that she believed she was going to die. After waiting several minutes, she got up and saw that the men were gone.

Bessie A. did not want to report the incident to the police and only did so after her mother and sister convinced her to. In her statement to police, Bessie A. omitted that she had been engaging in sex work and instead stated that she had been out for drinks with friends. She further explained that upon returning to her hotel room she heard a knock at the door, and when she opened the door, two black men rushed into her room.

While police did not initially investigate her case, they contacted her on 6 December 2016, and told her about what had happened to "the other girl," April Holland. Bessie A. then shared the truth about the work she was engaged in at the time of her attack. Police conducted a photo lineup and Bessie A. identified both Gillard and his co-defendant Brandon Hill. She also identified a photograph of Gillard as the man who raped her and later made an in-court identification of Gillard as well. Bessie A. confirmed the identity of her driver's license and bank card, which were found in Hill's car.

Two members of law enforcement also testified, Officer Lee and Detective Meyers. Officer Lee was at the front desk of the Raleigh Police station when Bessie A. arrived and recounted her story about being raped and robbed. Detective Meyers testified about the photo lineup Bessie A. was shown.

b. Application to Gillard's Case

The defense argued that evidence of Bessie A.'s attack should be excluded for the same reasons the evidence regarding Rachel B. should have been excluded: because "such evidence would deny Defendant due process . . . and would be highly prejudicial," in violation of the Fourteenth Amendment to the United States Constitution.

Questions regarding the reliability of Bessie A.'s testimony exist. Bessie A. provided law enforcement with differing accounts of what occurred on the night of her attack, which could not be corroborated by the friend that she was with for most of that night. Bessie A. also allegedly evaded law enforcement's attempts for follow-up interviews. Just as with the evidence regarding Rachel B.'s attack, Bessie A.'s credibility is an issue for the jury to decide. *Moore*, 366 N.C. at 108. However, the jury addressing Bessie A.'s credibility was not neutral as to Gillard, as it had already found him guilty of Holland's and Garvey's murders. *Williams*, 484 U.S. at 938; *see also Bobo*, 727 S.W.2d at 952. The "prejudice inherent" in this process, *McCormick*, 272 Ind. at 280, makes it difficult for the jury to "sort out the reliable from the unreliable evidence" presented to them, *Barefoot*, 463 U.S. at 901, thereby increasing the risk that Gillard's death sentence was erroneously imposed. *See Eddings*, 455 U.S. at 117–18 (O'Connor, J., concurring) ("Because sentences of death are qualitatively different from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." (cleaned up)).

Additionally, while Bessie A.'s driver's license was later found in Hill's car, no evidence connecting Gillard and Bessie A. was found on Gillard or his property. There is also no physical evidence linking Gillard to Bessie A.'s rape and Gillard has not been convicted of a crime against Bessie A. Thus the jury's ability to consider this evidence and base its decision to sentence Gillard to death, either in whole or in part on this offense, effectively eliminated the presumption of innocence that Gillard was entitled to. *Herrera*, 506 U.S. at 399; *see also Cook*, 369 So. 2d at 1257. Any claim that Gillard's presumption of innocence as to the offense against Bessie A.—or the six other women the State used to support the course of conduct aggravator—remained intact, is quelled by the State's closing argument, which described Gillard as a "serial rapist" who "preys on the vulnerable."

3. Kara L.

a. Testimony

Kara L. first testified during the guilt-innocence phase of Gillard's trial for the limited purpose of identifying "the person accused of committing the crime charged in this case . . . and also for the purpose of identifying firearms used in the crime charged in this case." At trial, Kara L. stated that she began engaging in prostitution at age 17. In November 2016, at the time of her interaction with Gillard, Kara L. was using a

website called "Plenty of Fish" to meet clients. There she met a man who identified himself as "Carlos." Kara L. later identified Carlos as Gillard, after seeing his identification.

Kara L. testified that after making contact with Gillard, he picked her up and took her to an apartment on Juniper Drive in Wake County, where she stayed for three or four days. Gillard's brother also stayed at that apartment. Kara L. further testified that during the time she stayed with Gillard, the two had a relationship and Kara L. developed feelings for Gillard. At one point during her stay, Kara L. borrowed Gillard's cell phone to text her mother and let her know she was okay.

Kara L. also testified that she saw another man at the residence, named "B," who carried a gun in his waistband. She also stated that Gillard had a gun, which he named "Lemon Squeeze." Kara L. recounted an incident where Gillard put the gun in her face and told her to show her teeth. She testified Gillard warned her that "[i]f you don't love me, my blood would be all over the walls." Once Kara L. returned to her mother's home, she reported the attack to the police. However, she admitted that she continued texting Gillard after the incident because she still had feelings for him.

During Gillard's sentencing hearing, the State referenced Kara L.'s trial testimony, bringing it before the jury once again. The State asserted that although Kara L. had previously only been allowed to testify about evidence that went to "identity and the firearm," Kara L. now wanted to tell the jury "the rest of the story." In response, Kara L. testified that Gillard forced her into sex trafficking by taking her to a hotel in Raleigh, to "sell[ ] my body" and "get [Gillard] money." Kara L. explained that she tried to refuse, but Gillard stated, "You're going to do it anyways."

According to Kara L., Gillard instructed her to make at least $500 and forced her to use her phone to schedule dates with clients. During Kara L.'s testimony, the State asked about the "incident with the firearm," referring to Kara L.'s trial testimony that Gillard previously put a gun in her face. Kara L. explained this incident occurred a day or two after she arrived at the hotel, because she had refused to continue engaging in prostitution. She further testified that Gillard threatened to kill her if she did not comply. Kara L. claimed that in total, Gillard forced her to have sex in exchange for money with six to seven clients and took all the money she made during those encounters.

b. Application to Gillard's Case

Similar to Rachel B.'s and Bessie A.'s testimony, the defense argued that Kara L.'s testimony should be excluded because admission of this

evidence "would deny Defendant due process . . . and be highly prejudicial." Moreover, consideration of this evidence during the sentencing phase of Gillard's trial would, *inter alia*, violate Gillard's Fourteenth Amendment rights under the United States Constitution.

Just like with Rachel B.'s and Bessie A.'s testimony, there are questions regarding Kara L.'s credibility. Namely the defense alleges that Kara L. has been diagnosed with schizophrenia and bipolar disorder, and although she has been prescribed psychiatric medication for these conditions, she has chosen not to take them because of the medication's side effects. *See State v. Whaley*, 362 N.C. 156, 160–61 (2008) (noting that evidence of a witness's psychiatric history may "cast doubt upon the capacity of the witness to observe, recollect, and recount" (quoting *State v. Williams*, 330 N.C. 711, 719 (1992))). To be sure, Kara L.'s mental illness would not render her testimony inherently unreliable. Instead, just like the existence of discrepancies or contradictions in witness testimony, it is a question for the jury to decide. *See Ward v. Carmona*, 368 N.C. 35, 37–38 (2015) ("Jurors are the sole judges of the witness's credibility and have the right to believe all, part, or none of the testimony."). The same is also true about Kara L.'s behavior following her attack, which is inconsistent with her testimony. Specifically, while her sentencing-phase testimony established that Gillard had threatened and coerced her into working as a prostitute, she subsequently sent him a Facebook message stating that she missed him. Because Kara L.'s credibility was assessed by the same jury that convicted Gillard, the fundamental fairness of Gillard's sentencing proceeding is called into question. *See Williams*, 484 U.S. at 938; *see also Bobo*, 727 S.W.2d at 952.

Despite Gillard never having been charged with a crime against Kara L., the State's use of this unadjudicated offense evidence and its description of Gillard as a "serial rapist" who had without a doubt "raped and brutalized seven other women" extinguished Gillard's presumption of innocence as to Kara L.'s attack. This was improper, as the presumption of innocence is to remain intact unless the State proves a defendant guilty beyond a reasonable doubt. *See State v. Pabon*, 380 N.C. 241, 257 (2022); *Herrera*, 506 U.S. at 399.

4. Keyona T.

a. Testimony

Keyona T. was called to testify during the penalty phase of Gillard's trial about an incident, which took place on 16 April 2016. Her testimony was provided in support of the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11). Lynda P., who Keyona T. had met through

a friend, arranged a date through Backpage. Keyona T. and Lynda P. had adjacent rooms at the Motel 6 in Durham. According to Keyona T., Gillard and another man brought Lynda P. and her brothers into Keyona T.'s room at gunpoint. Gillard made everyone sit down, and the other man pistol whipped one of the brothers. They were all made to strip and were tied up. Keyona T. also testified that Gillard put a gun in her vagina and said that he was not going to hurt her. Once the men had taken money, identifications, and other valuables, they told their victims to count to fifteen. After reaching fifteen, Keyona T. got up and found the men were gone.

Following this incident, Keyona T. was initially unable to provide police with a physical description of her attackers. However, after Holland and Garvey were killed, Keyona T. was contacted by a detective from the Raleigh Police Department, who shared information with her about the murders, and told her that the perpetrators in Holland's and Garvey's cases might be the same people who attacked her. This provided Keyona T. with the information necessary to conduct a Google search. Based on this search, Keyona T. identified Gillard as her attacker. Keyona T. noted she "read the article" and "knew it was him." Although Keyona T. did not know Gillard, she referred to him by name during her testimony.

b. Application to Gillard's Case

The defense objected to both Keyona T.'s identification of Gillard and to her testimony. Just like with the evidence concerning Rachel B., Bessie A., and Kara L., the defense indicated that the admission of the evidence pertaining to the Motel 6 robbery in Durham "would deny Defendant due process . . . and would be highly prejudicial." Additionally, introduction of this evidence was prohibited by the Fourteenth Amendment to the United States Constitution.

As will be discussed in Part VII of this opinion, the reliability of this evidence is called into question by the identification procedure used to obtain Keyona T.'s identification of Gillard. *See State v. Malone*, 373 N.C. 134, 146 (2019) (providing a two-part test to determine "whether the identification procedure [at issue] was so suggestive as to create a substantial likelihood of irreparable misidentification" (quoting *State v. Fowler*, 353 N.C. 599, 617 (2001))). Following her assault, Keyona T. was neither able to provide police with a physical description of her attackers, nor was a lineup administered. Crucially, Keyona T.'s initial identification of Gillard in an internet news article followed a conversation in which law enforcement provided Keyona T. with Gillard's name and told her that Holland's and Garvey's murders might be related to her attack.

Moreover, police allegedly had difficulty reaching any of the victims of this offense to conduct a follow-up investigation after the robbery. To the extent this speaks to Keyona T.'s credibility, procedural due process concerns exist regarding the jury's ability to make that credibility determination impartially. *See Williams*, 484 U.S. at 938.

Additionally, on 4 December 2016, two days after Holland and Garvey were killed, Hill abandoned his car in an attempt to evade police. There, law enforcement found the identification of at least one victim of the robbery. No items relating to the robbery were found on Gillard's person or at his property. As with the Rachel B., Bessie A., and Kara L. incidents, there is no physical evidence tying Gillard to the Motel 6 robbery. Although Gillard had never been convicted for a crime against Keyona T., and there was no evidence tying Gillard to these crimes, the State's position was that Gillard should be sentenced to death because he had committed crimes against Keyona T. and six other women.

Just like with the evidence relating to Rachel B., Bessie A., and Kara L., introduction of the unadjudicated offense against Keyona T. implicates Gillard's substantive due process rights because there is no guarantee that the evidence used in his case was reliable. *See Woodson*, 428 U.S. at 305. Moreover, because the Rules of Evidence do not apply at sentencing, *Warren*, 347 N.C. at 325, the risk that Gillard's death sentence was erroneously imposed is elevated. This risk was further increased by the almost inevitable assumption that attaches to unadjudicated offense evidence: that because the State introduced evidence of Keyona T.'s attack, and implicated Gillard in that offense, Gillard is in fact guilty of that crime. *Compare with In re Winship*, 397 U.S. at 363 (stating that the presumption of innocence requires that a defendant's guilt be proven beyond a reasonable doubt).

5. Serena S.

a. Testimony

Serena S. testified in support of the course of conduct aggravating factor during the sentencing phase of Gillard's trial. *See* N.C.G.S. § 15A-2000(e)(11). Serena S. testified that on 28 October 2016, while staying at the Extended Stay America in Durham, she was contacted on Backpage by a man with an island accent for a date. While she believed only one man was coming at around 5:00 or 6:00 a.m., two men showed up and rushed into her room. Both men had guns. Once in the room, the men took her phone and tied her up with a telephone cord. At the time, Serena S. only had fifty dollars with her, which the men said was not enough. To secure more money, the men used Serena S.'s phone

to respond to customers that were contacting Serena S. on Backpage. They lured the customers to the room and beat them with guns. One of the customers, Sherod M., told the men he had money in his room at a nearby hotel. One of the men left Serena S.'s hotel room to obtain Sherod M.'s money.

Another woman, Sherod M.'s girlfriend—Asia G.—also provided testimony about this incident during the sentencing portion of Gillard's trial. She had been staying in Sherod M.'s hotel room at the Econo Lodge. She testified that while she left the room before the man without the accent arrived, she was lured back to the room because the man claimed Sherod M. had been injured. Back at the hotel room, the man tied Asia G. up with a phone cord and took her pocketbook, which contained her social security card, birth certificate, driver's license, money, credit cards, and cell phone. After the man left, Asia G. called the police.

b. Application to Gillard's Case

Similarly to the evidence about the Rachel B., Bessie A., Kara L., and Keyona T. incidents, the defense argued evidence of these assaults should be excluded because its admission would violate due process, "be highly prejudicial," and violate the Fourteenth Amendment to the United States Constitution.

To be sure, there are concerns regarding the reliability of this evidence. First, the defense alleged that the police expressed skepticism of Serena S.'s account of the robbery and that the police seemed to think Serena S. was an accomplice and not a victim. Consistent with this, Asia G. testified that the man without the island accent, who had gone to her hotel room at the Econo Lodge, told her that Serena S. had set Sherod M. up to be robbed. Furthermore, the defense alleged that despite efforts to contact the victims of these robberies, police were unable to reach them in the weeks following the crime. Questions regarding Serena S.'s credibility are for the jury to decide. *See Moore*, 366 N.C. at 108. However, just like with the evidence pertaining to Rachel B., Bessie A., Kara L., and Keyona T., assessment of Serena S.'s credibility by a biased jury—one that already heard evidence on and found Gillard guilty of other offenses—does little to ensure that Gillard's death sentence was not erroneously imposed. *See Williams*, 484 U.S. at 938; *see also Lockhart*, 609 N.E.2d at 1101.

Moreover, while there is evidence linking Hill to the Extended Stay and Econo Lodge robberies, specifically that a victim's identification was found in his car, no items linking Gillard to these crimes were found on Gillard's person or on his property. In short, there is no physical

evidence linking Gillard to these robberies. Because Gillard has not been convicted of a crime against Serena S. or Asia G., he is entitled to a presumption of innocence for those offenses. *See Herrera*, 506 U.S. at 399; *Pabon*, 380 N.C. at 257. When, however, the State introduces evidence of unadjudicated offenses during sentencing, it implicitly signals to the jury that it believes the defendant committed those crimes. Here such signals were explicit: the State referred to Gillard as a "serial rapist" and implored the jury to sentence him to death because he had committed crimes against seven other women.

6. Keyana M.

a. Testimony

Keyana M. testified during the penalty phase of Gillard's trial in support of the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11). On 28 August 2016, at around 3:30 a.m., Keyana M. received a call that a client was coming. The man who arrived had a walkie-talkie, acted like a police officer, and told Keyana M. that he was with the police. Keyana M. begged the officer not to take her to jail. But Keyana M. soon realized the man was not actually a police officer when he became aggressive with her, tied her up with a phone cord, and put a pillowcase over her head. While the man searched Keyana M.'s clothing for money, another man then came into the room, put a gun to Keyana M.'s head, took her clothes off, and raped her. Once the men left, Keyana M. called the police.

After the attack, Keyana M. went to WakeMed Hospital where a rape kit was performed. A Y-STR DNA profile obtained from this exam was matched to Gillard or anyone in his paternal blood line—a particular profile that is statistically unlikely to present in other men.

b. Application to Gillard's Case

Just like with the evidence pertaining to Rachel B., Bessie A., Kara L., Keyona T., Serena S., and Asia G., the defense argued that evidence pertaining to Keyana M.'s attack should be excluded because its consideration by the jury would violate Gillard's due process rights, be "highly prejudicial" and be prohibited by the Fourteenth Amendment to the United States Constitution.

There are questions about the reliability of Keyana M.'s testimony. First, Keyana M. was convicted of numerous assaults in the two years prior to Gillard's trial, including a felony assault with a deadly weapon. She was also allegedly charged for an incident where she bit police officers, spit on them, and kicked out the window of a patrol car. Keyana

M. has also been convicted of receiving stolen goods and malicious conduct by a prisoner. And she has been charged with giving false information to a police officer. Because witness credibility is to be determined by the jury, the review of Keyana M.'s testimony by the same biased jury that convicted Gillard raises procedural due process concerns. *See Williams*, 484 U.S at 938; *see also Bobo*, 727 S.W.2d at 952; *McCormick*, 272 Ind. at 280.

Despite Gillard never having been convicted for crimes against Rachel B., Bessie A., Kara L., Keyona T., Serena S., Asia G., or Keyana M., the State urged the jury to sentence Gillard to death for the crimes against these women. Specifically, the State implored:

> You are in the room with a serial-rapist, convicted killer. What's the appropriate punishment?
>
> He preys on the vulnerable. He doesn't go into stores and rob them. No, he finds the victims that he thinks don't matter.
>
> Sufficiently substantial,[7] let's talk about it.
>
> Forcing oral sex and raping [Bessie A.], throwing those blankets over her head. She told you, "I thought I was going to die so I started to pray." Is that sufficient? Is that substantial enough?
>
> Robbing and terrorizing [Serena S.] and [Asia G.]. You heard they had her hogtied with a cord. You saw the cord, the different cords and methods they used to bind their victims and torture their victims, all of them, leaving the marks behind.
>
> Raping. . . [Keyana M.], she talked to you, and she said they didn't just come to rob, they came to hurt.
>
> . . . .
>
> Trafficking [Kara L.], how many men did he force her to sleep with and then come and steal her money? And when she said, "I don't want to do it anymore,"

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7. The State is referring to the portion of pattern jury instruction 150.10, which instructs the jury that to recommend a death sentence it must find, among other things, "that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances." N.C.P.I.—Crim. 150.10.

> he said, "Show me your teeth." And he put the gun to her face, and he tells her, "I'm going to splatter your blood all over this room."
>
> . . . .
>
> Twirling the gun around inside of . . . [Keyona T.'s] vagina, let's talk about that. That is depraved. Why would you do that? You are torturing somebody, just sitting there twirling his gun inside her vagina? That's what this defendant did. She didn't know if he was going to pull the trigger. One can only imagine how terrifying that must have been, how scared. And that's what this defendant did to each and every one of these victims.

There is no doubt that the crimes against Rachel B., Bessie A., Kara L., Keyona T., Serena S., Asia G., and Keyana M. were horrific. Yet the horrific nature of these crimes does not vitiate a defendant's presumption of innocence. *See Herrera*, 506 U.S. at 399; *see also Pabon*, 380 N.C. at 257. Without a trial, and the substantive and procedural due process protections contained therein, it is not correct to conclude that Gillard was guilty of these offenses. Moreover, while it might be tempting to assign guilt in one case based on the DNA sample obtained from Keyana M.'s rape kit, note that this evidence has not been presented at a trial governed by the Rules of Evidence, *see Golphin*, 352 N.C. at 464, nor has an impartial jury determined the credibility of the related witness testimony, weighed alongside other contradictory evidence, and ultimately decided "what the evidence proves or fails to prove," *see Moore*, 366 N.C. at 108.

B. Conclusion Regarding Unadjudicated Offense Evidence

The admission of unadjudicated offense evidence at Gillard's sentencing (1) created a presumption that Gillard was guilty of those offenses despite never having been convicted, (2) allowed the jury to sentence Gillard to death based in whole or in part on evidence that has not been through the rigorous trial process and thus, amounted to nothing more than allegations, and (3) forced Gillard to rebut the allegations against him in a series of mini trials before the same biased jury that convicted him of first-degree murder.

The issues raised by this case, and others like it, support that North Carolina should join the states which exclude evidence of unadjudicated offenses during sentencing, or at the very least, join those states that

demand the evidence meet a reasonable doubt or clear and convincing evidence standard. As it stands, North Carolina's use of unadjudicated offense evidence is in tension with constitutional substantive and procedural due process requirements as well as a defendant's right to be presumed innocent unless convicted. "In capital cases, the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in judgment). In my view, the qualitative difference between death and life imprisonment, and the corresponding heightened need for reliability when a death sentence is imposed, *Woodson*, 428 U.S. at 305, requires that a jury refrain from considering evidence of a defendant's unadjudicated offenses. At the very least, the extensive use of such evidence in the sentencing phase of this case casts doubt on the constitutionality of Gillard's death sentence.

II. The Trial Court's Admission of Victim Impact Evidence

A. Applicable Legal Principles

Victim impact evidence has become a prevalent feature in capital sentencing since the 1970s. Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 144 (1999). This includes evidence about the victim's personal characteristics and the emotional impact of the murder on their family members. *Payne*, 501 U.S. at 827.

In 1987, the United States Supreme Court decided *Booth v. Maryland*, 482 U.S. 496 (1987), o*verruled by Payne*, 501 U.S. 808, and held that victim impact evidence was "emotionally charged" and thus its admission was "inconsistent with the reasoned decisionmaking . . . require[d] in capital cases." *Id.* at 508–09. Namely because evidence about the victim's personal characteristics, the emotional impact of the crimes on the family, and the victim's family member's opinions and characterizations of the crimes and the defendant, "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 501–03.

Two years later, the Court extended its holding in *Booth* by determining that prosecutors cannot make inferences about the victim's personal characteristics during closing arguments. *South Carolina v. Gathers*, 490 U.S. 805, 811–12 (1989), *overruled by Payne*, 501 U.S. 808. The Court again echoed the concerns it set forth in *Booth*: "allowing the jury to rely on [information about the victim's characteristics] could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 811 (cleaned up) (quoting *Booth*, 482 U.S. at 505).

Then in 1991, just two years after *Gathers*, the Court reversed course slightly in *Payne*, 501 U.S. 808. It determined that the Eighth Amendment "erects no *per se* bar" on victim impact evidence. *Id.* at 827. The Court reasoned that evidence about the victim and the impact the murder had on the victim's family could, in some cases, be relevant to the jury's decision of whether or not to impose the death penalty. *Id.* at 827, 831. At the same time, the Court acknowledged that this evidence, even if potentially relevant, could not be "so unduly prejudicial" as to "render[ ] the trial fundamentally unfair." *Id.* at 825. In cases where the evidence admitted is unduly prejudicial, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825, 831.

Furthermore, *Payne*'s holding is permissive, rather than mandatory. It does not compel states to include victim impact evidence at the sentencing phase of capital trials, and instead only provides that "a State may" allow the jury to hear this type of evidence during sentencing. *Id.* at 827. Indeed, as Justice O'Connor noted in her concurrence, *Payne* did not hold "that victim impact evidence must be admitted, or even that it should be admitted." *Id.* at 831 (O'Connor, J., concurring).

At least one state, Wyoming, has held that victim impact statements are inadmissible under its laws. *Olsen v. State*, 67 P.3d 536, 595 (Wyo. 2003). Other states, such as Florida, Indiana, Idaho, Illinois,[8] and California, have placed limits on the use of victim impact evidence. *See generally Windom v. State*, 656 So. 2d 432 (Fla. 1995) (victim impact evidence cannot be admitted as an aggravator and instead is only admissible to show the victim's uniqueness and the loss to the community); *Bivins v. State*, 642 N.E.2d. 928 (Ind. 1994) (victim impact evidence is only relevant during capital sentencing hearings if it is relevant to an aggravating circumstance); Idaho Code § 19-5306(3) (limiting testimony to the family of homicide victims); *People v. Hope*, 702 N.E.2d 1282, 1287 (Ill. 1998) (narrowing the definition of "crime victim" to a spouse, parent, child or sibling of the victim); Cal. Penal Code § 1191.1 (West 2008) (providing that only "next of kin" may testify).

As is especially relevant to Gillard's case, at least four states, Oklahoma, Colorado,[9] Illinois, and Nevada, require that victim impact

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8. Illinois is among the twenty-three states that have abolished the death penalty. *See State by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/states-landing (last accessed Dec. 10, 2024); 725 Ill. Comp. Stat. Ann. 5/119-1 (2011).

9. Colorado revised its death penalty statute on 1 July 2020 to prohibit any imposition of the death penalty from that day forward. Act Concerning the Repeal of the Death Penalty by the General Assembly in All Circumstances Charged on or After July 1, 2020, 2020 Colo. Legis. Serv. ch. 61, 204 (West).

evidence relate to the victim in the case for which the defendant is on trial. *See Gilbert v. State*, 951 P.2d 98, 117 (Okla. Crim. App. 1997) ("[T]he type of evidence contemplated by these statutes is restricted to the impact on the family members of the victim of the homicide on trial."); *People v. Dunlap*, 975 P.2d 723, 745 (Colo. 1999) ("Evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes . . . is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced."); *Hope*, 702 N.E.2d at 1289 ("[E]vidence about victims of other, unrelated offenses is irrelevant and therefore inadmissible."); *Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998) ("[W]e conclude that the impact of a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible during the penalty phase.").

North Carolina has chosen to take the *Payne* approach and has determined that "[v]ictim impact statements are relevant and admissible to aid the jury in its decision whether to recommend a sentence of death." *State v. Allen*, 360 N.C. 297, 310 (2006). Consistent with *Payne*, this Court has implicitly acknowledged that the evidence presented at sentencing must relate to the victim of the crime for which the defendant is on trial. *See State v. Thompson*, 359 N.C. 77, 124 (2004) ("While a capital defendant must be permitted to present any aspect of the defendant's character, record, or any other circumstance which a jury could deem to have mitigating value[,] [t]he feelings, actions, and conduct of third parties have no mitigating value as to defendant and, therefore, are irrelevant to a capital sentencing proceeding." (cleaned up)); *see also State v. Smith*, 352 N.C. 531, 554 (2000) (allowing testimony about the victim in the case the defendant was on trial for); *State v. Davis*, 353 N.C. 1, 19–20 (2000) (same). Moreover, the victim impact evidence presented during a capital sentencing proceeding cannot be "so prejudicial that it renders the proceeding fundamentally unfair." *Allen*, 360 N.C. at 310.

Because North Carolina allows the jury to consider all evidence during the capital sentencing phase, regardless of whether it was presented during the guilt-innocence phase or the sentencing phase of trial, evidence introduced at either stage can be prejudicial to a defendant's sentence. *See* N.C.P.I.—Crim. 150.10. Here, the State introduced evidence sure to elicit an emotional response from the jury: evidence of the sexual abuse Keyona T., Keyana M., and Rachel B. suffered as children at the hands of other perpetrators, not Gillard. This evidence was irrelevant, outside the scope of what is permissible under *Payne*, and unduly prejudicial to Gillard's death sentence.

B. Keyona T.

As previously noted, Keyona T. testified for the State at the sentencing phase of Gillard's trial to support an aggravating factor. Her testimony was offered to prove that Holland's and Garvey's murders had been "part of a course of conduct" by Gillard that "included the commission . . . of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). Despite this specific reason for Keyona T.'s testimony, she was permitted to testify about sexual abuse by her mother's boyfriend, which began in second grade and ended when she was in fifth grade. Keyona T. called the abuse "a curse" and explained that after the man was arrested, and Keyona T. testified at the trial that convicted him, her mother continued to support him. Keyona T. also experienced physical abuse by another one of her mother's boyfriends and was later removed from her mother's care by the Department of Social Services.

Keyona T.'s testimony established that while she graduated from the Durham School of the Arts and City of Medicine Academy and enrolled in college, she ultimately left college due to symptoms of PTSD, stress, and anxiety. Keyona T. was introduced to Backpage by her cousin and began advertising there for money. The defense objected to this evidence, but the trial court allowed the evidence because it determined it was relevant to Keyona T.'s credibility as she relayed the events of 16 April 2016 at the Motel 6.

First, the evidence presented about Keyona T.'s abuse was not relevant to Gillard's sentencing. In *Payne*, the victim evidence admitted was about the surviving child victim of the offense for which the defendant was on trial. *Payne*, 501 U.S. at 831–32 (O'Connor, J., concurring). The Court found that evidence relevant because it played a role in the jury's assessment of the defendant's "moral culpability and blameworthiness" in the crime. *Id.* at 825 (majority opinion). Based on this, the Court determined the statements at issue in *Payne* were relevant to the jury's decision of whether to impose a death sentence. *Id.* at 825–26. This Court has similarly allowed victim impact statements to be admitted when they relate to the victim in the case the defendant is on trial for. *See*, *e.g.*, *Smith*, 352 N.C. at 554.

However, Keyona T. is neither a victim in the case Gillard is on trial for, nor did Gillard perpetrate the abuse she suffered as a child. Thus, it stands to reason that this evidence could not help the jury assess Gillard's "moral culpability and blameworthiness" in the current case. *See Payne*, 501 U.S. at 825. Rather, just like the State suggested during closing arguments at the penalty phase, the only effect this evidence

had was to prejudice Gillard by portraying him as a man who "preys on the vulnerable."

Second, Keyona T.'s testimony is markedly different from the evidence in *Payne*, which was not considered unduly prejudicial to the defendant's sentencing procedure. *See id.* at 831. In *Payne*, the grandmother of the child victim who survived the crime gave "brief" testimony that the child "cried for his mother and baby sister and could not understand why they did not come home." *Id.* at 831–32. In contrast, here, Keyona T., who was not the victim in this case, gave testimony spanning several pages about the abuse she suffered at the hands of her mother's boyfriends, her difficulty with school, and her PTSD, stress, and anxiety. This testimony was irrelevant to Gillard's sentencing proceeding and was "so unduly prejudicial that it render[ed]" Gillard's hearing "fundamentally unfair." *Id.* at 825. This is a violation of Gillard's rights under the Fourteenth Amendment's Due Process Clause. *See id.*

Additionally, while the trial court stated it was allowing the evidence about Keyona T.'s childhood abuse because it was relevant to Keyona T.'s credibility, the court did not explain how her childhood experiences could have any bearing on the credibility of her testimony. Common factors for analyzing witness credibility are: witness demeanor or bias, a witness's motive for testifying, whether the testimony was coerced, and whether the witness has been granted immunity. *State v. Mullis*, 233 N.C. 542, 544 (1951) (witness demeanor); *State v. Singletary*, 247 N.C. App. 368, 377 (2016) (witness bias); *State v. Stoner*, 59 N.C. App. 656, 659 (1982) (witness motive); *State v. Montgomery*, 291 N.C., 235, 244 (1976) (witness coercion); N.C.G.S. § 15A-1055(b) (2023) (impact of grant of immunity on witness credibility). None of these instances apply in this case.

It is true that the Court of Appeals has previously determined that a witness's profession may be relevant in determining witness credibility. In *State v. Staton*, 33 N.C. App. 270 (1977), the Court of Appeals determined that allowing a "witness[ ] to testify as to his occupation, i.e., that he was a probation officer" was relevant because parties "have the right to enhance their witnesses' credibility." *Id.* at 272. However, the facts in that case differ substantially from the facts here. Keyona T.'s occupation is not at issue. Rather, Keyona T.'s testimony offered details on how she became involved in prostitution, and the issue was whether such details "provided a standard for judging [her] credibility." *See id.* There is no reason that a person with Keyona T.'s experiences would be more credible, nor did the defense suggest that women in Keyona T.'s profession are not credible. Rather, the defense's objection was tied to the evidence

not being probative of the reason it was offered—to prove the course of conduct aggravating factor—and because it would be unduly prejudicial to Gillard's sentence. Put simply, Keyona T.'s testimony about her childhood and her experiences of childhood abuse were not relevant to her credibility as a witness. The same is true about Keyona T.'s decisions to leave college or begin advertising on Backpage. Instead, this evidence was unduly prejudicial and violated Gillard's rights under the Fourteenth Amendment Due Process Clause.

C. Keyana M.

Keyana M. was called to testify during the penalty phase of Gillard's trial in support of the course of conduct aggravating factor. *See* N.C.G.S. § 15A-2000(e)(11). But before she testified about her experience with Gillard, she also testified about her childhood. Her testimony established that her parents had put her into foster care and that she then moved to Virginia where she was sexually assaulted. Keyana M. was twelve years old at the time of her assault, and her attacker was later convicted.

The admission of Keyana M.'s testimony poses issues similar to the admission of Keyona T.'s testimony. Namely that because she is not the victim of the crime Gillard was on trial for, her personal characteristics were not relevant to Gillard's "moral culpability and blameworthiness" in the current case. *See Payne*, 501 U.S. at 825. The Court's insistence that victim impact statements be about the victim in the crime charged is evident throughout the *Payne* opinion. The Court described victim impact evidence as a way to inform the "sentencing authority about the specific harm caused by the *crime in question*." *Id.* (emphasis added). In her concurrence, Justice O'Connor also expressly noted that victim impact evidence was designed to prevent the victim in the charged crime from being turned into "a faceless stranger at the penalty phase of a capital trial." *Id.* at 831 (O'Connor, J., concurring). It follows that, at a minimum, any victim impact evidence presented by the State must pertain to Holland or Garvey. *See id.* at 825 (majority opinion). Just like the evidence admitted about Keyona T.'s personal characteristics and her past, the evidence admitted about Keyana M.'s past is outside the bounds of what is permissible under *Payne*. Thus, this evidence served no legitimate purpose, was unduly prejudicial to Gillard's sentence, and violated Gillard's rights under the Fourteenth Amendment's Due Process Clause.[10]

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10. The majority has effectively no response to these points. On the jury's consideration of Keyona T.'s and Keyana M.'s testimony at sentencing, the majority states, without explanation, that "there is 'nothing in the instant case to suggest that the jury's decision to recommend a sentence of death was based on any unfair prejudice that may have been

D. Rachel B.

Although Rachel B.'s testimony was admitted during trial pursuant to Rule 404(b) to establish a common scheme or plan and defendant's identity and motive, the trial court also allowed Rachel B. to testify about her childhood. The evidence elicited established that at age ten, Rachel B. was removed from her mother's care because her mother was addicted to heroin and cocaine. To pay for drugs, Rachel B. testified that her mother "used to sell [her] and [her] sister out." Rachel B. explained that although she went to live with her grandmother for a period of time, the abuse she experienced did not end because her grandfather took videos of her and her cousins through hidden cameras. Rachel B. stated that she caught him masturbating to the videos of them taking showers. Ultimately, Rachel B. testified about a childhood where she ran away from group homes and foster care, began stripping at age fifteen, and got "stuck in human trafficking" at age seventeen. As a victim of human trafficking, she also recounted being beaten by pimps and being sold from one pimp to another.

Rachel B.'s testimony was compelling and emotionally powerful. She described a life replete with hardship, sexual abuse, and violence, all of which began at a young age by people who were supposed to love and care for her. But similarly to Keyona T.'s and Keyana M.'s testimony, Rachel B.'s testimony was not relevant to Gillard's "moral culpability and blameworthiness" in the crime charged and accordingly, was outside the scope of permissible victim evidence allowed under *Payne*. *See Payne*, 501 U.S. at 825. Namely because just like Keyona T. and Keyana M., Rachel B. was not the victim in the crime Gillard was on trial for. *See id.* Rachel B.'s experiences with stripping, human trafficking, and sexual abuse as a child were irrelevant to the jury's consideration of whether Gillard should receive a death sentence. Rather, this evidence was "so unduly prejudicial" that Gillard's sentence could not have been the product of a fundamentally fair proceeding. *See id.* Accordingly, this evidence was admitted in violation of the Fourteenth Amendment's Due Process Clause. *See id.*

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created by [admission of this evidence],' " quoting *State v. Moody*, 345 N.C. 563, 572 (1997) (alteration in original). But in *Moody* this Court applied standards from the rules of evidence to assess whether particular evidence was rightly considered during sentencing. *See id.* In fact, the majority's exact quote comes from a portion of *Moody* where this Court applied Rule 403 balancing to exhibits introduced during the sentencing phase. That is the very approach the majority seemingly disclaims in Part (II)(C)(2) of its opinion. In sum, the majority does not explain what standard it is applying to Gillard's claims that evidence considered during sentencing deprived him of a fair hearing or was unduly prejudicial under *Payne*, let alone what precedent justifies that standard.

Finally, I disagree with the majority that these details of Rachel B.'s abuse by others are merely "introductory evidence" that were relevant because they "provided context to the jury for how Rachel B. crossed paths with defendant on the night he attacked her." *Supra* Part II(C)(1). If that is the test, it seems to have no limiting principle. All manner of unduly prejudicial evidence can be repurposed as "introductory context" through minimally creative framing. That is why courts, including in a case cited by the majority, carefully police the line between testimony offered for "introductory and general purposes" and that which could "play[ ] upon the passions and prejudices of the jury." *E.g.*, *State v. Sports*, 41 N.C. App. 687, 690 (1979), *disc. rev. denied*, 298 N.C. 205 (1979); *see id.* at 689–90 (rejecting a challenge to testimony regarding a witness's "orphan status, epileptic history, scholarship assistance and summer employment" partly because it did not appear "that [the testimony] must be considered prejudicial"). The majority errs, as did the court below, by disregarding this important distinction.

III. The Trial Court's Admission of Repetitive Crime Scene Photos

The admission of photographic evidence pursuant to Rule 403 of the North Carolina Rules of Evidence is left to the sound discretion of the trial court. *State v. Blakeney*, 352 N.C. 287, 309 (2000). On appeal, the trial court's ruling should not be overturned unless it "was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up).

A. Photographic Evidence at Gillard's Trial

The State sought to admit sixteen photos of Holland's naked and bloody body in her hotel room. Gillard objected to ten of these. The trial court admitted all sixteen—in addition to a video of the crime scene, which similarly depicted Holland's naked body surrounded by blood. In making this determination, the court reasoned that these pieces of evidence "each have independent evidentiary value that shows the different angles or provides scale, distances, location of items of evidence, and specifically what the officers observed when they were on the scene." But the trial court's decision to admit all sixteen photos was an abuse of discretion. *See State v. Hennis*, 323 N.C. 279, 285 (1988). The photos were cumulative and served no legitimate evidentiary purpose. Instead, the only purpose these photos served was to provoke the jury's emotions, such that they would sentence Gillard to death.

There are nine photos at issue from the State's Exhibit 3. These photos were shown to the jury on a television (the record does not specify what size) in a color PowerPoint presentation. The photos are

numbered as follows: 63, 64, 66, 69, 70, 71, 72, 75, and 76. The photos were accompanied by testimony from Agent Jones who investigated the hotel crime scene.

According to Jones, photo 63 portrayed a wound on Holland's chest, while photo 64 was "a[n] overall shot of Ms. Holland's body." Yet photos 63 and 64 appear to be the same photo. The only difference is that photo 64 is a zoomed-out version of photo 63. Similarly, photo 64 is also a zoomed-in version of photo 62. The State even observed that photo 63 was a "close up" of photo 64, at a slightly different angle.

For photos 65 and 66, Jones specifically testified that photo 66 was a "closer view" of the bloody shoe impressions depicted in photo 65. Interestingly, while photo 65 was an "overall" view of Holland's body, which also contained bloody shoe impressions, and photo 66 was a close up of those same bloody shoe impressions, the State zoomed in and enlarged photo 65 so that Jones could point out the same bloody shoe impressions from photo 66. Bloody shoe impressions were also present in photos 75 and 76, and Jones testified that these were the same photos the jury had previously been shown, with the exception of placards which had been placed to mark the evidence.

Photos 69, 70, and 71 showed Holland's two gunshot wounds. Jones's testimony noted that photo 70 depicted "Ms. Holland's head and just blood." Photo 71, according to Jones, showed the chest and neck wounds, and photo 69 was "a close-up" of the chest wound evident in other photos. When the pathologist testified, the jury was shown another photo of Holland's chest wound (State's Exhibit 30).

Once all the photos were shown and the PowerPoint presentation was finished, the State played the crime scene video for the jury. This video was displayed on a television in the courtroom while Jones narrated. This video was repetitive because it depicted much of what had already been shown in the State's still photos. The trial court then gave an instruction limiting the jury's consideration of the State's Exhibit 30, stating that it could only be used "for purposes of illustrating and explaining the testimony of a witness." The court also indicated that the State's Exhibit 3 "may be considered by [the jury] as evidence of the facts that they illustrate or show."

B. Applicable Legal Principles

Photographs can be used to explain or illustrate witness testimony. *State v. Holden*, 321 N.C. 125, 140 (1987). "The fact that [a] photograph may be gory, gruesome, revolting or horrible, does not prevent its use

by a witness to illustrate his testimony." *State v. Watson*, 310 N.C. 384, 397 (1984) (quoting *State v. Cutshall*, 278 N.C. 334, 347 (1971)). At the same time, this Court has recognized that the probative value of photographic evidence can be "eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284. This occurs in cases where photographs "that have inflammatory potential" are "excessive or repetitious." *Id.* Put simply, seeing the evidence is different from hearing testimony about it.

While this Court has not drawn a bright-line rule for when photographic evidence becomes prejudicial, a trial court is required to "examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation." *Id.* at 285. Among these considerations are "[w]hat a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, [and] the scope and clarity of the testimony it accompanies." *Id.* Consideration of these factors allows a court to determine "the illustrative value of [the] photographic evidence," which must then be weighed "against [the photograph's] tendency to prejudice the jury." *Id.* Importantly, "[w]hen a photograph adds nothing to the State's case, then its probative value is nil, and nothing remains but its tendency to prejudice." *Id.* at 286 (cleaned up). Indeed, this Court has stated that

> where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors.

State v. Mercer, 275 N.C. 108, 120 (1969).

C. Application to Gillard's Case

The photo and video evidence in this case was excessive. While color photos of Holland's body were relevant, the photos depicted substantially the same scene: Holland's body surrounded by blood, inflicted with two gunshot wounds, and almost completely naked except for her socks. The same scenes were then shown to the jury again in the crime scene video. The photos at issue served only to play on the jury's emotions and were especially excessive given that Gillard did not dispute the number of shots fired or Holland's cause of death. The photos also did not show any injuries aside from the gunshot wounds which might provide insight into what happened while Gillard was in Holland's room.

Ultimately, no evidentiary value was gained by repeatedly showing Holland's wounds in color photos on a television.[11]

The facts of this case would arouse emotion in almost any juror. The photos depicted Holland, a young pregnant woman, who was killed by a man that under the State's theory of the case had gone to rob and rape her. Garvey, the father of Holland's three children and her unborn child, was shot and killed in the hallway outside her hotel room. In emotionally charged cases such as this one, special care must be taken when admitting photographic evidence. *See Hennis*, 323 N.C. at 285. The trial court did not act in accordance with the special care required in this case and others like it. Given the other photos admitted and the crime scene video, the nine photos at issue lacked probative value, and it was an abuse of discretion for the trial court to admit them. *See id.*

Although I believe the admission of these photographs is harmless error beyond a reasonable doubt for purposes of Gillard's guilt-phase proceeding, in light of the other overwhelming evidence against him, *see State v. Temple*, 302 N.C. 1, 14 (1981), it is yet another error that affected the fairness of Gillard's sentencing hearing in regards to cumulative error review. *See infra* Part VIII.

IV. *Enmund/Tison* Instruction for Dwayne Garvey's Murder

Gillard asserts that the trial court was required to provide the jury with North Carolina Pattern Jury Instruction 150.10 (*Enmund/Tison* instruction), as it relates to the murder of Dwayne Garvey. Because the instructions given by the trial court do not establish whether the jury found Gillard eligible for the death penalty for Garvey's murder under *Enmund* and *Tison*, I agree with Gillard that this instruction should have been given at the sentencing proceeding. *See* N.C.P.I.—Crim. 150.10 (Death Penalty—Instructions to Jury at Separate Sentencing Proceeding); *Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158.

In *Gregg*, the Court explained that the death penalty serves "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U.S. at 183. Thus, in cases where the death penalty does not contribute measurably to these goals, that punishment "is nothing more than the purposeless and needless imposition

11. Contrary to the trial court's assessment, which the majority seemingly accepts at face value, *see supra* Part II(D), that a photo may have provided a different angle or view of the crime scene is insufficient to find it nonredundant or full of evidentiary value under our precedent. *See State v. Hennis*, 323 N.C. 279, 286–87 (1988).

of pain and suffering." *Enmund*, 458 U.S. at 798. In those cases, infliction of the death penalty is unconstitutional. *Id.*

For purposes of deterrence, the defendant's *mens rea* is increasingly important. Under our current laws, the death penalty cannot have its intended deterrent effect if it is imposed against a person who does not kill or intend to kill. Deterrence can likely only be effectuated "when murder is the result of premeditation and deliberation." *Id.* at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)). Similarly, for purposes of retribution, the defendant's degree of criminal culpability matters, and this rests on what the defendant's "intentions, expectations, and actions were." *Id.* at 800. Indeed, our Court has stated that "capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt." *State v. Brewington*, 352 N.C. 489, 524 (2000) (citing *Enmund*, 458 U.S. 782). Importantly, criminal penalties have been invalidated as excessive in the absence of intentional wrongdoing. *E.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962); *Weems v. United States*, 217 U.S. 349, 363 (1910).

Consistent with this, the *Enmund* Court determined it was unconstitutional to impose the death penalty on a person who did not kill, attempt to kill, or intend to kill the victim. 458 U.S. at 798. Later, in *Tison*, the Court held that defendants who are major participants in a felony and exhibit reckless indifference toward human life also "satisfy the *Enmund* culpability requirement." 481 U.S. at 158. Taken together, *Enmund* and *Tison* protect from the death penalty defendants who: (1) did not kill; (2) did not attempt to kill; (3) did not intend to kill; and (4) were not major participants in a felony and did not exhibit a reckless indifference toward human life. *Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158.

This logic is undergirded by the Eighth Amendment's "individualized consideration" requirement for imposing death sentences. *Enmund*, 458 U.S. at 798 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). This procedural safeguard, which helps guarantee that only those who are eligible for the death penalty are subjected to it, requires a focus on the "relevant facets of the character and record of the individual offender." *See id.* (quoting *Woodson*, 428 U.S. at 304). Thus, when determining whether a person is eligible for capital punishment, a reviewing court must consider whether the defendant intended to cause harm and what kind of harm was intended. *See id.*; *Tison*, 481 U.S. at 157–58.

Gillard argues that the trial court was required to provide the jury with the *Enmund/Tison* instruction because the State is seeking

a death sentence for Garvey's murder under a felony murder theory and there is evidence that Gillard did not commit the actual killing. *See* N.C.P.I.—Crim. 150.10. Specifically, Issue One-A of the *Enmund/Tison* instruction provides:

> Do you unanimously find from the evidence, beyond a reasonable doubt, that the defendant himself/herself:
>
> [a. Killed or attempted to kill the victim;] (or)
>
> [b. Intended to kill the victim;] (or)
>
> [c. Intended that deadly force would be used in the course of the underlying felony;] (or)
>
> [d. Was a major participant in the underlying felony and exhibited reckless indifference to human life.]]

Id. This instruction further states that if the answer to these questions is "no," then the jury must "recommend that the defendant be sentenced to life imprisonment." *Id.*

For Garvey's murder, Gillard was convicted under the theory of felony murder as well as the theory of malicious, premeditated, and deliberate murder. The evidence also showed that Gillard was guilty of Garvey's murder by acting in concert, and the trial court provided the jury with an acting in concert instruction during the guilt-innocence phase of trial.

Under North Carolina law, a defendant may be convicted of premeditated and deliberate murder under the doctrine of acting in concert. *State v. Fletcher*, 354 N.C. 455, 480 (2001). Indeed, "a defendant may be found guilty of premeditated first-degree murder by acting in concert without regard to which person committed which particular acts if the acts are done in pursuance of a common purpose to commit a crime or as a natural or probable consequence thereof." *Id.* (citing *State v. Barnes*, 345 N.C. 184, 233 (1997)).

Although it is true that in *Fletcher* this Court stated that an *Enmund/Tison* instruction is not required when a defendant is convicted of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule, this case is distinguishable from *Fletcher*. *See* 354 N.C. at 480–81. Namely because in *Fletcher* the defendant was convicted of premeditated and deliberate murder without any evidence to support an acting in concert theory and without the jury having received an acting in concert instruction. *Id.* at 480. Indeed, the *Fletcher* Court specifically did not decide whether a defendant convicted of premeditated

murder based on acting in concert was entitled to the *Enmund/Tison* instruction. *Id.* Its narrow holding sidestepped that issue: "[W]e hold that where the guilt-phase jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation *without an instruction on acting in concert*, an *Enmund/Tison* instruction is not required at sentencing." *Id.* at 481 (first emphasis added).

But in Gillard's case, the hotel surveillance video evidence supports a finding that Gillard was only guilty under an acting in concert theory. The evidence showed that Hill and Garvey were the only two people in the hallway at the time that Garvey was shot and that Hill fired the shot that killed Garvey. Consistent with this, the jury also found as a mitigating circumstance that Gillard "did not pull [the] trigger" in Garvey's murder. This leaves an open question: was the jury's verdict of first-degree murder based on Gillard's intent to kill Garvey or on the fact that Gillard was present during the commission of the underlying felonies and only shared Hill's purpose to commit those felonies?

This is important because under an acting in concert theory, the jury could have determined Gillard was guilty of first-degree murder without finding that he met the *Enmund/Tison* requirements for imposing the death penalty. If this is true, Gillard's death sentence for Garvey's murder is unconstitutional. *See Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158. Indeed, this Court has previously observed that a jury *can* find a defendant guilty of premeditated murder under a theory of acting in concert *while also* not imposing a death sentence pursuant to *Enmund/Tison* instructions—specifically because the defendant did not have the specific intent to kill the victim. *State v. Gaines*, 345 N.C. 647, 682 (1997) (concluding that a verdict that a defendant was guilty of "premeditated and deliberate murder either under the theory of acting in concert or by aiding and abetting . . . is not inconsistent with the jury's later indication that the defendant did not himself intend to kill the victim [under *Enmund*] as no evidence suggested that [the defendant] personally intended to inflict the fatal wound himself").[12]

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12. The *Gaines* Court did observe, without citation, that "[t]he *Enmund* rule does not apply to a defendant who has been found guilty of first-degree murder based on premeditation and deliberation," including the defendant. *State v. Gaines*, 345 N.C. 647, 682 (1997). But this overbroad observation is at most dicta because the defendant there did receive the *Enmund/Tison* instruction at sentencing and was awarded a life sentence. *Id.* This Court only reviewed that verdict for consistency with the jury's earlier guilt-phase verdict because of the defendant's challenge. *Id.*

State v. Golphin, 352 N.C. 364, 473 (2000) repeated that phrasing when holding that a defendant need not receive an *Enmund/Tison* instruction where the jury found him guilty

Gillard's case is also distinguishable from *State v. Watts*, 357 N.C. 366 (2003). In *Watts*, this Court determined an *Enmund/Tison* instruction was not required for a defendant convicted of first-degree murder under a theory of premeditation and deliberation and under the felony murder rule. *Id.* at 375–76. However, the instructions given in *Watts* differed substantially from the instructions given in Gillard's case. *See id.* at 375. Specifically, in *Watts*, the acting in concert instruction prevented the jury from finding that the defendant had committed premeditated first-degree murder without also finding that the defendant intended to kill. *Id.* (requiring the jury to find beyond a reasonable doubt that "the defendant either by himself or acting with another intentionally killed the victim . . . and that the defendant intended to kill the victim" (emphases omitted)).

By contrast, in Gillard's case, the mandate allowed the jury to convict Gillard for the first-degree murder of Garvey, based on malice, premeditation, and deliberation, if "the defendant or *someone with whom the defendant was acting in concert* intended to kill the victim." (Emphasis added.) That means the jury could find Gillard guilty of this charge without also finding he had intent to kill. Accordingly, an *Enmund/Tison* sentencing instruction was warranted, and the trial court's failure to submit this issue to the jury was error.

Despite concluding that an *Enmund/Tison* instruction was not necessary in Gillard's case, the majority elaborates in a footnote that the "trial court instructed the jury on the substance of an *Enmund/Tison*

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of first-degree murder on the basis of premeditation and deliberation under either an acting in concert theory or by committing all of the elements himself. But the *Golphin* Court also noted that there was more than enough evidence of the defendant's requisite intent to overcome the *Enmund/Tison* instruction. *Id.* at 473–74. Indeed *Fletcher* (2001) came after *Golphin* (2000) and did not interpret it to decide the issue presented here—whether a defendant convicted of first-degree murder only on an acting in concert theory must receive the *Enmund/Tison* instruction. *State v. Robinson*, 342 N.C. 74 (1995) did not decide that issue either, as it pre-dated this Court authorizing acting in concert liability for first-degree murder. *Id.* at 88; *see also Barnes*, 345 N.C. at 233 (holding that a defendant may be held liable for premeditated first-degree murder by acting in concert); *Fletcher*, 354 N.C. at 480 (summarizing this doctrinal development).

The majority reasons that no *Enmund/Tison* instruction was necessary here because Gillard was "a major participant in criminal conduct known to carry a grave risk of death" and "actively involved in planning, arranging, and perpetrating an armed, violent felony." *Supra* Part II(H). But focusing only on Gillard's participation in the underlying felony reads out *Tison* and *Enmund*'s emphasis on the requisite mental state: that the defendant "[w]as a major participant in the underlying felony *and* exhibited reckless indifference to human life." *See* N.C.P.I.—Crim. 150.10(d) (emphasis added); *Tison*, 481 U.S. at 152. The jury in this case should have been instructed accordingly to determine Gillard's mental state based on the evidence before it.

instruction" in any event because it "provided the jury with an instruction on malice." *Supra* Part II(H) & n. 7. This unwarranted observation misconstrues the jury instructions actually provided in this case. The jury here was instructed that it should find Gillard guilty if "the defendant *or* a person with whom the defendant was acting in concert intentionally *and* with malice killed the victim." (Emphasis added.) Malice is conjunctive with intent. In turn, the jury was told that acting in concert liability occurs when "two or more persons join in a common purpose to commit" a crime, and that the defendant is "not only guilty of that crime if the other person commits the crime but also guilty *of any other crime committed by the other in pursuance of the common purpose*," so long as they are "actually or constructively present." (Emphasis added.) If these instructions were enough to satisfy *Enmund/Tison*, then the getaway driver for co-defendants who shot and killed two victims while robbing them, acting in concert to commit the armed robbery, can be found guilty of first-degree murder on the basis of malice, premeditation, and deliberation and receive the death penalty. This outcome contradicts *Enmund* and the majority's own reasoning. Thus this unwarranted observation is properly disregarded as dicta.[13]

V. The Trial Court's Failure to Instruct the Jury that the Same Evidence Could Not be Used to Support More than One Aggravating Factor

A. Standard of Review and Applicable Law

Challenges to "whether a jury instruction correctly explains the law" are reviewed de novo. *State v. Copley*, 386 N.C. 111, 119 (2024) (*quoting State v. Greenfield*, 375 N.C. 434, 440 (2020)). In capital cases, "the trial court may not submit multiple aggravating circumstances supported by the same evidence." *State v. Lawrence*, 352 N.C. 1, 29 (2000) (citing *State v. Goodman*, 298 N.C. 1, 29 (1979)). However, an aggravating factor will

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13. Likewise, the majority's footnote would substantially expand what it means that the defendant got the "substance" of a required instruction. In *State v. Augustine*, 359 N.C. 709 (2005), this Court addressed a narrow circumstance where a defendant requested that a general pattern jury instruction be replaced with a context-specific instruction. *Id.* at 728–29. When the trial court failed to give the context-specific instruction verbatim, this Court held that the substance of the requested instruction was basically conveyed by the general pattern jury instruction that was given. *See id.* That case does not support the Court's conclusion here, that Gillard got the substance of the *Enmund/Tison* instruction because it got an acting in concert instruction on malicious, premeditated, and deliberate murder, for the reasons explained above. Concluding that the substance of an instruction was given when the instruction was not given at all seems to undermine that *Augustine* standard completely.

not be "considered redundant absent a complete overlap in the evidence supporting them." *Id.* (cleaned up).

B. Application to Gillard's Case

Two aggravating factors were submitted in Gillard's case. The first, the course of conduct aggravator, required the jury to find that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and that included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). The second, the felony murder aggravator, tasked the jury with determining whether the murder was committed "during the commission of, or flight after committing, the Attempted First Degree Rape of April Holland and the Attempted Robbery with a firearm of April Holland." *See* N.C.G.S. § 15A-2000(e)(5). The jury found both aggravating factors existed and recommended a death sentence for both Holland's and Garvey's murders.

The trial court gave the jury the following instructions:

> The following is the first aggravating circumstance which may be applicable to this case: Was this murder part of a course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant *of other crimes of violence against other person or persons*?
>
> . . . .
>
> The following is the second aggravating circumstance which may be applicable to this case: Was this murder committed by the defendant while the defendant was engaged in or flight after committing *attempted first-degree rape of April Holland and/or attempted robbery of April Holland with a firearm*?

(Emphases added.) Although the pattern jury instruction explicitly states, "You are instructed that the same evidence cannot be used as a basis for finding more than one aggravating factor," N.C.P.I.—Crim. 150.10, that language was omitted in the trial court's instructions to the jury in this case. The trial court's failure to give the correct jury instruction was error because it left the jury free to rely on the same evidence to find both the course of conduct aggravator and the felony murder aggravator. *See Lawrence*, 352 N.C. at 29.

When two aggravating factors that are supported by the same evidence are submitted to the jury, it amounts "to an unnecessary

duplication of the circumstances enumerated in the statute" and results "in an automatic cumulation of aggravating circumstances against the defendant." *Goodman*, 298 N.C. at 29. Stated another way, in cases like this, although there is only enough evidence to support one aggravating factor, that evidence is double-counted against the defendant and improperly used to support a second aggravating factor. This is problematic in part because the jury is required to weigh existing aggravating and mitigating circumstances together. N.C.G.S. § 15A-2000(b). If the jury finds that the aggravating factors outweigh the mitigating circumstances, then the jury recommends a death sentence. *Id.* Thus, the more aggravating factors are present in a case, the higher the likelihood a jury's final recommendation will be death.

During closing argument, the State admitted that both aggravating factors were "somewhat related" because Gillard was "committing more crimes in addition to the murder at the time the murders t[ook] place." The evidence in this case did not, on its own, support attempted rape and robbery. Instead of showing attempted rape, the evidence here showed that Holland was not tied up or injured prior to being shot. There was also no evidence of attempted robbery, as Holland's cell phone and $140 were found at the scene.

Without relying on the evidence of Gillard's other alleged crimes, the jury could not have found the attempted felony murder aggravating factor. The evidence in Holland's and Garvey's murders only showed that Holland was killed by a person who she agreed to meet with to exchange sex for money. The same is true for the course of conduct aggravating factor, which also relies heavily on evidence pertaining to attacks against other women.

Moreover, the jury found the presence of eighteen mitigating circumstances. While it ultimately decided that the mitigating circumstances did not outweigh the aggravating circumstances present, the jury might have struck a different balance if it had weighed those eighteen mitigating circumstances against only one aggravating factor. Accordingly, the trial court's failure not to instruct the jury "that the same evidence cannot be used as a basis for finding more than one aggravating factor" was error. *See* N.C.P.I.—Crim. 150.10.

VI. The Trial Court's Failure to Give a Peremptory Instruction on Three Mitigating Circumstances

During the sentencing phase of Gillard's trial, the defense requested peremptory instructions on forty of the forty-one non-statutory mitigating circumstances it submitted to the court. Although the trial court

initially stated that it would give a peremptory instruction for each of the requested mitigating circumstances, it ultimately decided not to give a peremptory instruction on nine mitigating circumstances.

The importance of evidence showing mitigating circumstances cannot be overstated. "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (cleaned up). Evidence of mitigating circumstances humanizes the defendant and allows the jury to "gauge his moral culpability." *Id.* Thus, it stands to reason that any errors regarding the jury's proper consideration of this evidence implicate the jury's ability to place the defendant's "life history on the mitigating side of the scale" and "appropriately reduce[ ] the ballast on the aggravating side of the scale." *Id.* at 42. When errors involving mitigating circumstances exist, there is a risk that absent the error, the jury "would have struck a different balance" in favor of life, instead of death. *Id.* (cleaned up).

"Where all of the evidence in a capital prosecution, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Gay*, 334 N.C. 467, 492 (1993) (cleaned up). The trial court is only permitted not to give the requested instruction if the evidence is controverted or obviously not credible. *See State v. McLaughlin*, 341 N.C. 426, 449 (1995). Giving the peremptory instruction does not mean a jury is required to find that a mitigating circumstance exists. *Gay*, 334 N.C. at 492. Juries are free to reject a mitigating circumstance if they find the supporting evidence unconvincing or, for non-statutory mitigating circumstances like those proffered by Gillard, because they find the circumstance does not have mitigating value. *See id.*

Still, a peremptory instruction in a capital sentencing hearing serves an important purpose: it limits the sentencer's discretion by eliminating the potential that the jury will reject the mitigating circumstance on the erroneous basis that not enough evidence was offered to support that circumstance. This requirement is consistent with the Eighth Amendment, which requires a sentencer's discretion to be directed and limited to "minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. Thus, when a peremptory instruction is requested and the "defendant is otherwise entitled to it, it will be error for the trial judge not to give a peremptory instruction." *Gay*, 334 N.C. at 493 (cleaned up).

Here, Gillard presented "uncontroverted" and credible evidence to support three of the eight mitigating circumstances for which the court

failed to give a peremptory instruction. *See id.*; *McLaughlin*, 341 N.C. at 499. Those circumstances were: (1) that "Seaga Gillard's home environment made it difficult for him to succeed in school"; (2) that "Seaga Gillard's childhood asthma prevented him from participating in the same physical activities and sports as his younger brother"; and (3) that "Seaga Gillard suffers from other specified trauma and stressor related disorder."

A. "Seaga Gillard's home environment made it difficult for him to succeed in school."

There was uncontroverted and credible evidence that Gillard's "home environment made it difficult for him to succeed in school." Dr. Amy James, who testified for the defense, identified two factors present in Gillard's life that can make it difficult for a child to succeed in school. These factors were poverty and lack of a strong parental figure.

All the evidence in Gillard's case showed that he grew up in poverty and that he sometimes could not afford socks or lunch. Evidence also showed that Gillard's parents were not a consistent part of his home environment. Specifically, Gillard's mother moved away when he was "five or six years old" and was largely absent during his formative years. This left him with no parental figure because his father was not present in his life at all. After his mother left, Gillard did not have a consistent place to live. He also skipped school to get money to buy food. Gillard ultimately missed a lot of school.

Similarly, all evidence showed that Gillard's home environment made it difficult for him to succeed when he was in school. This was established by Dr. James's testimony in which she stated that a focus on "educational achievement becomes more difficult" when children do not have access to healthy nutrition. Namely because children who lack access to healthy foods exhibit decreased impulse and emotional control, which can manifest as "acting up in school."

Dr. James also testified that not having a strong parental figure can lead to similar problems. When a child lives in poverty and a parent is not present, there is a "potential to have the problems magnified." Dr. James explained that poverty contributes to problems with academic success because "[i]t's hard to focus on school when you're hungry" and "[i]f you don't have the financial means to purchase the books required for class or . . . the socks that are required for the uniform, it makes it difficult to attend [school] and participate fully." In addition, Dr. James noted that if a child does not "have a strong person guiding [them] towards [academic success], it makes it easier to skip school." Comments from Gillard's school teacher paralleled these concerns. She

stated that Gillard's home environment made it difficult for him to succeed academically because "it affects your concentration," specifically because "[i]f you are hungry, then you can't hear what I'm saying, and if you didn't sleep well last night, how can you concentrate?"

When objecting to a peremptory instruction on this mitigating circumstance, the State did not dispute the evidence or its credibility. Rather, the State's objection was based on there being evidence of problems outside of Gillard's home environment that may have affected Gillard's performance in school. It was on this basis that the trial court determined a peremptory instruction was not warranted. This was error.

According to our caselaw, "[w]here all of the evidence in a capital prosecution, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *Gay*, 334 N.C. at 492 (cleaned up). Here, Dr. James's testimony established that Gillard's home environment, specifically evidence of poverty and the lack of a strong parental figure, made it difficult for Gillard to succeed in school. This evidence was further substantiated by testimony from Gillard's teacher who explained how the two factors identified by Dr. James manifested as difficulty concentrating at school.

Whether there is evidence of other factors that also may have made it difficult for Gillard to succeed in school is unrelated to whether a peremptory instruction should be given. Instead, what matters is that all of the evidence about Gillard's home environment, if believed, tends to show that his home environment made it difficult for him to succeed in school. *See id.* Accordingly, a peremptory instruction should have been given on this mitigating circumstance.

B. "Seaga Gillard's childhood asthma prevented him from participating in the same physical activities and sports as his younger brother."

The evidence presented on this mitigating circumstance showed that Gillard's younger brother played soccer very well, both in school and on a traveling team. As a result, Gillard's younger brother received a soccer scholarship. However, Gillard was not able to play sports because he had asthma. Gillard's friend testified that he had previously witnessed Gillard have an asthma attack while playing "football" (soccer).

Although the State did not initially object to a peremptory instruction on this mitigating circumstance, it later objected and asked that the word "sometimes" be added, such that the mitigating circumstance

would read: "Seaga Gillard's childhood asthma *sometimes* prevented him from participating in the same physical activities and sports as his younger brother." In making this request, the State reasoned that "we heard testimony that he was out playing football." But the only testimony stating that Gillard played soccer was the testimony from the friend who saw Gillard have an asthma attack once while participating in the sport. The State did not dispute the credibility of this evidence. Ultimately the court left out the "sometimes" qualifier but demoted the circumstance to a non-peremptory instruction. This demotion was error.

Pursuant to our precedent, because "all of the evidence[,] . . . if believed, tend[ed] to show that [this] particular mitigating circumstance does exist," here that Gillard's asthma prevented him from participating in sports like his brother who did not have asthma, Gillard was "entitled to a peremptory instruction on that circumstance." *See Gay*, 334 N.C. at 492 (cleaned up).

C. "Seaga Gillard suffers from other specified trauma and stressor related disorder."

Testimony from Dr. James established that she had diagnosed Gillard with "other specified trauma and stressor related disorder." This disorder is different from PTSD because while PTSD requires "an identifiable stress or trauma or stressors and traumas" which are "the etiology or the cause" of the person's symptoms, other specified trauma and stressor related disorder only requires that the clinician "know that the cause of the problem is [a] stressor and trauma."

Gillard's diagnosis was related to a fear of death from his asthma, having experienced a serious injury, and "a disruption in attachment." Dr. James based her diagnosis on the following symptoms: Gillard's nightmares and "distressing dreams"; his avoidance talking about "matters that caused [his] trauma"; "[d]ifficulty remembering aspects of the trauma"; his "[i]rritable behavior and angry outbursts"; his display of "[r]eckless and self-destructive behavior, hypervigilance, [and his feelings of] being on edge"; and problems with concentration and sleep. Dr. James also testified that Gillard had previously been diagnosed with another mental health disorder related to his nightmares.

On cross examination, the State elicited testimony about a March 2012 record from the Ohio Department of Rehabilitation and Correction, which had a box checked denying "any kind of mental health problems or depression or anything." The report itself was not introduced into evidence and no other mental health experts testified at Gillard's trial or during sentencing.

Initially, the State did not object to a peremptory instruction on this mitigating circumstance. However, it later withdrew its consent to a peremptory for this mitigating circumstance. The State's reason for this seems to be based on the fact that the jury was not required to believe Dr. James's testimony. The trial court agreed with the State and denied the peremptory. But that concern is beside the point, because a jury is never required to believe the evidence when a peremptory instruction is given. *See Gay*, 334 N.C. at 492 (providing that jurors can reject a mitigating circumstance if they determine "the supporting evidence was not convincing" or if the non-statutory factor is not mitigating). In fact, this rationale skips the peremptory instruction analysis altogether. The jury's determination of whether to accept the evidence does not become a consideration until after the court rules on whether to give the peremptory instruction. This two-step process is no different for factors supported by expert witnesses, whose credibility and persuasive value are equally subject to jury scrutiny. *See* N.C.P.I.—Crim. 104.94 (instructing the jury in pattern instructions for expert witnesses that "you are not bound by" the opinion of an expert witness and that the expert's "training, qualifications, and experience," reasons given for their opinion, and the opinion's reasonableness bear on the testimony's credibility). Notably, the State made no objection to Dr. James's credibility when withdrawing its consent to the peremptory, nor was her testimony controverted by a single box checked in an extra-record document.[14]

Instead, by accepting the State's inapposite objection, the trial court failed to conduct the necessary inquiry and ask whether "all of the evidence[,] . . . if believed, tends to show that [this] mitigating circumstance does exist." *Gay*, 334 N.C. at 492. The answer to this question is "yes," and the trial court's failure to give a peremptory instruction on this mitigating circumstance was error.

VII. The Trial Court's Admission of Keyona T.'s Identification

On appeal from the denial of a motion to suppress a witness's identification, this Court must determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Malone*, 373 N.C. 134, 145 (2019) (quoting *State v. Biber*, 365 N.C. 162, 167–68 (2011)). The conclusions of law are reviewed de novo. *Id.*

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14. I do not read our caselaw to state as a per se rule that experts retained for trial or sentencing can never be "manifestly credible." *Cf. State v. Bishop*, 343 N.C. 518, 557 (1996). Instead, courts only review an expert's testimony for minimal credibility in light of the facts and circumstances before granting a peremptory, and then let the jury decide whether it is persuasive, consistent with *Gay*.

Traditionally, juries, not judges, determine the reliability of evidence. *Id.* at 146 (citing *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012)). But "due process considerations do place limitations upon the admission of eyewitness identification evidence obtained as the result of impermissible official conduct." *Id.* Accordingly, when a due process claim is raised regarding an identification procedure, the reviewing court must utilize a two-step test to determine "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *Id.* (quoting *Fowler*, 353 N.C. at 617). Step one asks "whether the identification procedures were impermissibly suggestive." *Id.* (quoting *Fowler*, 353 N.C. at 617). If the answer to this question is "yes," then the reviewing court proceeds to step two and asks "whether the procedures create a substantial likelihood of irreparable misidentification." *Id.* (quoting *Fowler*, 353 N.C. at 617).

In assessing whether the identification procedures used created a substantial likelihood of irreparable misidentification, a reviewing court must also ask whether the in-court identification "has an origin independent of the invalid pretrial procedure." *Id.* (quoting *State v. Bundridge*, 294 N.C. 45, 56 (1978)). If so, the in-court identification testimony can still be admissible, despite the witness being subjected to impermissibly suggestive identification procedures, because, in those cases, it cannot be said that the procedures used created a substantial likelihood of irreparable misidentification. *Id.* (citing *Bundridge*, 294 N.C. at 56).

Reliability of the identification "is the linchpin" of this evaluation, and "[w]here the indicators of a witness'[s] ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed." *Perry*, 565 U.S. at 239 (cleaned up).

The in-court identification at issue here is Keyona T.'s identification of Gillard at the sentencing hearing. The pertinent facts showed that Keyona T. had been assaulted with three others at a Motel 6 in Durham by two men on 16 April 2016. While the incident was reported to police, no suspects were identified, and Keyona T. was not shown a photo lineup at the time of her attack. Moreover, the only identifying information Keyona T. provided to police about her attackers was that one of the men who attacked her had "an island accent."[15]

15. While Detective Gibney testified to a "general description of the suspects," which was included in the Durham Police Department's report, Gibney also testified that he did not know which of the five witnesses at the scene gave police this description.

In December 2018, after the Holland and Garvey murders, Keyona T. was contacted by Detective Gibney from the Raleigh Police Department. Gibney told Keyona T. that a mother and father had been killed, that the woman had been pregnant, and that these murders might be related to Keyona T.'s attack. Gibney also shared that property from one of the people Keyona T. had been assaulted with in 2016 was found in the car of one of the people charged with Holland's and Garvey's murders. Gibney even gave her the name of the person charged in the murder.

The information Gibney provided led Keyona T. to run a Google search for Holland and Garvey's case, which yielded a photo of Gillard. The photo Keyona T. found on the internet showed the way Gillard looked in 2018, not in 2016 at the time of Keyona T.'s attack. Keyona T. stated that she recognized Gillard because she saw a "familiar face." As mentioned above, at the time of her attack, the only identifying information Keyona T. could provide was that one of the men who attacked her had an island accent. Additionally, her 2018 identification of Gillard did not take place until two-and-a-half years after her attack, and this identification occurred only after she had been provided with information that the person charged with Holland's and Garvey's murders may have been the person who attacked her.

In her testimony, Keyona T. referred to her attacker as "Seaga" and testified that although she did not know Gillard, she had "read the article [on the internet] and . . . knew it was him." Keyona T. also stated, "I didn't know him at all, but in connection to when I spoke to [law enforcement] . . . that was something that I heard." Over objection, Keyona T. testified to the internet research she had conducted and her findings, including Gillard's arrest photograph and photographs of Gillard from 2018.

The defense moved to suppress the identification arguing there was government action, which tainted the identification procedure, and that the identification was unreliable. Furthermore, the defense argued that allowing Keyona T.'s identification violated Gillard's constitutional rights under both the United States Constitution and the North Carolina Constitution. While the trial court acknowledged that the procedures employed could be suggestive, it ruled against Gillard because it found no government action in Keyona T. having viewed Gillard's photograph online. The trial court also determined that Keyona T. had a "significant opportunity" to view the perpetrator of the April 2016 attack, that her identification of Gillard was "relatively certain," and that the reliability of Keyona T.'s identification was "bolstered" by her testimony that her attacker had an island accent.[16]

16. It is unclear how this would have "bolstered" the reliability of Keyona T.'s identification since Keyona T.'s attacker's accent played no part in her photo or in-court identification of Gillard. Neither identification involved hearing Gillard speak.

In *Malone*, this Court determined that the identification procedures used in that case were impermissibly suggestive. 373 N.C. at 148–49. To reach this conclusion, the Court explained that "single-suspect identification procedures clearly convey the suggestion to the witness that the one presented is believed guilty by the police." *Id.* at 148 (cleaned up). There, the witnesses had been shown a photograph and video of the defendant, and although the circumstances of this case may differ, the logic underpinning *Malone* is instructive here. Namely that by being subjected to a single-suspect identification procedure, the witnesses were "effectively told" they were viewing photos of the men police believed responsible for the shooting. *Id.* Here, the information Gibney provided, including Gillard's name, led Keyona T. to find a photo of Gillard on the internet. By providing Gillard's name and that in connection with the Holland and Garvey investigation police had located the belongings of someone with whom Keyona T. had been assaulted, Gibney effectively said, "We think the man who attacked Holland and Garvey also attacked you." *See id.* This was impermissible.

Moreover, in *Malone*, this Court concluded that the identification procedures used did not give rise to a substantial likelihood of irreparable misidentification because the in-court identification in question was of independent origin and sufficiently reliable. *Id.* at 149. There, this Court reviewed five factors for each witness that had been subjected to the impermissibly suggestive identification procedure: "the opportunity of the witness to view the defendant at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the defendant, the level of certainty demonstrated by the witness at the time of the confrontation, and the time between the crime and the confrontation." *Id.* (citing *State v. Pigott*, 320 N.C. 96, 99–100 (1987)). This assessment requires the trial court to make findings of fact, because "[w]hether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *Id.* at 152 (quoting *Pigott*, 320 N.C. at 99).

Here, the trial court failed to properly consider whether the information Gibney provided Keyona T. undermined the reliability of Keyona T.'s in-court identification. Namely because the impermissibly suggestive procedures—the information Gibney provided that was the basis for Keyona T.'s Google search, Gibney telling Keyona T. Gillard's name, and Gibney saying that one of Keyona T.'s friend's belongings, which had been taken during Keyona T.'s 2016 assault, had been found during the Holland and Garvey murder investigation—must be weighed against *Malone*'s five factors to determine whether a substantial risk of misidentification exists. Here, the trial court only made three determinations: (1) that Keyona T. had a significant opportunity to view her attacker during

the 2016 April attack; (2) that Keyona T.'s identification was "relatively certain"; and (3) that Keyona T.'s identification of Gillard was bolstered by her testimony that her attacker had an island accent.

However, the complete analysis as required by *Malone* shows that while the trial court did determine Keyona T.'s "degree of attention" during the 2016 attack, her testimony supports that after the attack she was unable to provide police with a physical description of her attacker. Additionally, no lineup was conducted at the time of her attack, which could have enhanced the reliability of her identification. There was also a two-and-a-half-year gap between the April 2016 incident and Keyona T.'s internet search in December 2018. These facts magnify concerns regarding the reliability of her identification.

Weighing these factors "is not an exercise employed with mathematical precision." *Malone*, 373 N.C. at 152. "Certain factors may be more important than others depending upon the nature of the impermissibly suggestive procedure as well as the particular facts of the case." *Id.* In my view, Keyona T.'s inability to provide a physical description of her attacker immediately after the attack, the fact that no lineup was conducted following the April 2016 incident, and the two-and-a-half years between Keyona T.'s attack and her identification of Gillard bear heavily on this analysis. Accordingly, I cannot "conclude that in the totality of the circumstances" the procedures in this case did not give rise to a substantial likelihood of irreparable misidentification. *See id.* at 150, 152.

Moreover, based on the actions Gibney took, I disagree with the trial court's conclusion that there was no government action. When determining whether there was government action, the question is: Is the person taking the action acting as a private citizen or as part of a governmental entity? *Lindke v. Freed*, 144 S. Ct. 756, 762 (2024). Importantly, "[c]ourts do not ordinarily pause to consider whether [claims requiring state action] appl[y] to the actions of police officers." *Id.* at 765. This was evident in *Griffin v. Maryland*, 378 U.S. 130 (1964), where the United States Supreme Court held that a security guard working at a privately owned amusement park had engaged in state action when he enforced the amusement park's policy of segregation against black protestors. *Id.* at 132–35; *see also Lindke*, 144 S. Ct. at 765 (discussing *Griffin*'s holding). This holding was predicated on the fact that the security guard had been previously deputized as a "sheriff" in the county and had the same power and authority as any other deputy sheriff. *Griffin*, 378 U.S. at 132, 132 n.1. Here, there is no question that Detective Gibney was acting as a member of the Raleigh Police Department at the time he provided

Keyona T. with the information that formed the basis of the impermissibly suggestive identification procedure.

Police cannot provide witnesses with information they can reasonably believe will be used in a way that is inconsistent with the Constitution. While the context of *Brewer v. Williams*, 430 U.S. 387 (1977), is different from this case, the actions the officers took there are analogous to those taken by Gibney. In *Brewer*, the defendant had been charged with the murder of a ten-year-old girl and was being transported by police officers who knew the defendant was represented by counsel. *Id.* at 390, 392. Despite the constitutional impropriety of questioning a defendant who is represented and has not waived their right to counsel, one officer who knew Brewer was religious told Brewer that only he could help locate the girl's body, such that her parents could give her a proper Christian burial. *Id.* at 392–93, 397. In doing so, the officer psychologically coerced the defendant, which led the defendant to disclose the location of the child's body. *Id.* at 393, 404–05; *see also id.* at 412 (Powell, J., concurring) (discussing the detective's use of "psychological coercion that was successfully exploited").

Just like it was reasonably certain the defendant in *Brewer* would disclose the location of the child's body, it was reasonably certain that Keyona T. would take some steps, such as conducting an easily accessible Google search to see if she recognized Gillard as her attacker. This is especially true given that Gibney provided Keyona T. with Gillard's name. And just like in *Brewer*, the police in Gillard's case employed psychological tactics by telling Keyona T. they believed the man responsible for Holland's and Garvey's murders was the same person who attacked her. *See id.* at 412. They also told Keyona T. that Holland had been pregnant when she was killed, adding to the outrage of the crime. *See id.* There is no realistic attenuation here, and Gibney's actions are sufficient to show government action.

Because government action led to an impermissibly suggestive identification that was not otherwise free from a substantial likelihood of misidentification based on the totality of the circumstances, Keyona T.'s identification at the sentencing hearing was constitutional error. *See Malone*, 373 N.C. at 146, 152.

VIII. Whether Cumulative Error Denied Gillard a Fair Sentencing Hearing

Although a "trial court's errors, when considered in isolation," are insufficient to establish prejudice, "the cumulative effect of the errors" can create sufficient prejudice to deny a defendant a fair proceeding. *See*

State v. Canady, 355 N.C. 242, 246 (2002). Because "the choice to exact our state's most extreme punishment is morally infused and deeply personal," death penalty cases carry a heightened risk of cumulative error at the sentencing phase. *State v. Richardson*, 385 N.C. 101, 248 (2023) (Earls, J., concurring in part and dissenting in part) (cleaned up).

Viewed in the aggregate, the cumulative effect of the trial court's errors and the accompanying prejudice impacting Gillard's death sentence is evident, and it becomes harder to guarantee that his sentence was not imposed out of "passion, prejudice, or any arbitrary factor." *See Sanderson*, 336 N.C. at 9. In cases such as this, where cumulative error strips a defendant of a fair sentencing hearing, the proper remedy is a new sentencing hearing. *See State v. Rogers*, 355 N.C. 420, 465 (2002).

Without the cumulative effect of these errors, the jury may have chosen to sentence Gillard to life imprisonment without parole instead of death. Because the death penalty requires unanimous agreement among jurors, N.C.G.S. § 15A-2000(b), all that was needed for the jury to reach a different result was for one juror to strike a different balance in favor of life. *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *McCollum*, 558 U.S. at 42. Gillard's sentencing jury was allowed to consider Keyona T.'s unreliable identification, improper and irrelevant victim impact statements, and repetitive photos of Holland's almost naked body surrounded by blood, which had no probative value. The trial court also failed to provide an *Enmund/Tison* instruction, *see Enmund*, 458 U.S. at 798; *Tison*, 481 U.S. at 158, gave an incomplete instruction regarding aggravating factors, and did not provide a peremptory instruction on three mitigating circumstances where all the evidence tended to show that those factors existed. Additionally, the use of unadjudicated offense evidence during the sentencing phase of Gillard's trial not only implicates Gillard's substantive and procedural due process rights but also increases the risk that his death sentence was arbitrarily and capriciously imposed. *See Godfrey*, 446 U.S. at 428.

The majority refuses to engage with the consequence of these compounding errors while it denies Gillard a new sentencing. Instead, it concludes that "there can be no cumulative error because the trial court did not err." *Supra* Part II(L). That holding contradicts this Court's precedent because it conflates "error" for purposes of cumulative error review with other, higher standards of "error" review—namely plain error and abuse of discretion.

Despite what it says, the majority's own analysis does not support that it finds the proceedings below "free from error." Rather it finds none

prejudicial enough, standing alone, to overturn Gillard's conviction or sentence. For example, it announces there was no "error" because the trial court did not abuse its discretion[17] and because the trial court is entitled to deference.[18] Elsewhere it pronounces "no error" while in reality applying a more exacting test. For example, the majority determines there was "no error" in the trial court's failure to instruct the jury that it was prohibited from using the same evidence to support more than one aggravating factor. *Supra* Part II(I). But it bases that conclusion on the existence of "substantial additional evidence" to support the varying factors, which is in actuality the plain error test.[19] Even when it concedes an "arguable error" committed by the trial court for failing to give an *Enmund/Tison* instruction, the majority again relies on the absence of a plain error to dismiss any effect this had on Gillard's claim of cumulative error.[20]

That conflation, treating all "errors" alike, defies the purpose and operation of cumulative error review as articulated in numerous precedents. "Regardless of whether any single error would have been prejudicial in isolation," this review asks whether the "cumulative effect" of the trial court's errors "deprived defendant of a fair trial." *State v. Hembree*, 368 N.C. 2, 20 (2015); *accord Richardson*, 385 N.C. at 187 (majority opinion); *Canady*, 355 N.C. at 246; *State v. Wilkerson*, 363 N.C. 382, 426 (2009); *Thompson*, 359 N.C. at 106. By summarily concluding it found "no errors" despite the varied, demanding tests underlying its analysis, the majority breaks from that precedent. That is unfortunate. If the majority wishes to overrule and discard such bedrock law, it should do so explicitly and explain its rationale for doing so.

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17. *See supra* Part II(A)(2) (concluding no abuse of discretion in the Rule 403 balancing for the Rule 404(b) evidence by Bessie A. and Rachel B. admitted at trial); Part (II)(B)(2) (declining to review for plain error whether the trial court abused its discretion under Rule 403 in admitting Kara L.'s testimony of the prior firearm assault); Part II(D) (no abuse of discretion in decision to admit inflammatory photos).

18. *See supra* Part II(C)(2)(a) (concluding no "error" in allowing testimony on Keyona T.'s and Keyana M.'s abusive backgrounds unrelated to Gillard at sentencing because the trial court is entitled to "considerable leeway").

19. *See supra* Part II(I) (noting that a failure to give this instruction "does not rise to the level of plain error . . . [when there is] *substantial separate evidence* supporting each aggravating circumstance" (emphasis added) (quoting *State v. Conaway*, 339 N.C. 487, 531 (1995))).

20. *See supra* Part II(N) n. 8 ("The only arguable error committed by the trial court concerns the *Enmund-Tison* instruction. As we have discussed above, there can be no cumulative error."); Part II(H) ("Therefore, even if we assume that the trial court erred, defendant has not demonstrated plain error because a rational juror could find that defendant was not merely a minor participant in the crimes detailed herein.").

Finally, the Court's insistence on finding the proceedings below "free from error" has the further consequence of subtly changing the underlying applicable law. For example, as discussed in Part II(D) of this opinion, the majority appears to expand the definition of general, introductory testimony to include testimony that is unfairly prejudicial so long as it is sufficiently framed as "context." As discussed in Part VI and footnote thirteen of this opinion, the majority appears to expand substantially our precedent on what it means that a defendant received the "substance" of a requested instruction. That may limit future defendants' rights to receive jury instructions to which they are entitled. While purporting not to reach cumulative error review since it found no error, the majority injects new language seemingly aimed at amplifying a defendant's burden in a cumulative error challenge: it stresses that there must be "multiple significant errors" for a defendant to meet "the high bar." It does not explain what distinguishes a "significant" error from a "prejudicial" one. These substantive changes would have the effect of granting further leeway to State prosecutors while undermining meaningful appellate review of criminal convictions. That is especially unfortunate for our capital sentencing system, where appellate review "serves as a check against the random or arbitrary imposition of the death penalty." *See Gregg*, 428 U.S. at 206.

IX. Conclusion

I agree with the majority's judgment affirming Gillard's convictions for the first-degree murders of Dwayne Garvey and April Holland. But because Gillard's trial and sentencing were replete with errors, which when taken together denied Gillard a fair sentencing hearing, I dissent from the part of the majority opinion upholding Gillard's death sentence and would remand this case to the trial court for a new sentencing hearing.

Justice RIGGS joins in this concurring in part and dissenting in part opinion.

STATE v. WILKINS

[386 N.C. 923 (2024)]

STATE OF NORTH CAROLINA
v.
JAMEY LAMONT WILKINS

No. 44A23

Filed 13 December 2024

Appeal and Error—preservation of issues—criminal defendant's right to competency hearing—statutory—waiver

In a prosecution for multiple charges arising from defendant's involvement in a scheme to throw footballs containing illegal drugs into a prison yard, where a competency evaluation was ordered for defendant but he posted bond and was released approximately two weeks later without having been evaluated, defendant waived his statutory right to a competency hearing under N.C.G.S. § 15A-1002 by failing—over the course of several years between entry of the evaluation order and his conviction—to assert the issue at trial or beforehand by, for example, remaining in pretrial custody for the evaluation, moving to amend the evaluation order in light of his release, or checking himself into a hospital for the ordered evaluation after his pretrial release. Further, nothing in the record since entry of the evaluation order suggested any competency concerns, defendant repeatedly represented himself as competent at trial, and defendant specifically disclaimed any constitutional competency challenge on appeal.

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 287 N.C. App. 343 (2022), finding no error in a judgment entered on 29 July 2021 by Judge Edwin G. Wilson Jr. in Superior Court, Caswell County. Heard in the Supreme Court on 25 September 2024.

Joshua H. Stein, Attorney General, by Keith T. Clayton, Special Deputy Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for defendant-appellant.

NEWBY, Chief Justice.

In this case we decide whether defendant waived his statutory right to a competency hearing when he failed to assert the right at trial. The statutory right, which this Court has considered waivable for nearly half a century, is different from the nonwaivable right to a competency hearing under the Federal Constitution. *See*, *e.g.*, *State v. Young*, 291 N.C. 562, 566, 231 S.E.2d 577, 580 (1977). Defendant concedes that his appeal is based solely on the statutory right and that he did not raise the issue of competency at trial despite ample opportunity to do so. We therefore hold that defendant waived his statutory right to a competency hearing and affirm the decision of the Court of Appeals.

On 11 February 2018, deputies with the Caswell County Sheriff's Office stopped an SUV upon suspicion that its occupants had thrown contraband over the walls of a nearby prison yard. The deputies ordered both the driver and the passenger, defendant, to step out of the SUV. The driver consented to a search of the vehicle, which revealed two footballs that had been split open, filled with drugs, and duct-taped back together. During the stop, defendant became "irate" with the deputies for searching the vehicle and with the driver for consenting to the search. Defendant was arrested and charged with several offenses, including possession with intent to sell or distribute the seized drugs, attempting to provide contraband to an inmate, and habitual felon status. He was detained at the Caswell County Jail while awaiting trial.

After about three weeks in custody, defendant was involved in an altercation at the jail. A detention officer reported defendant for approaching him with clenched fists and threatening "to whip [his] a[--]." Defendant was charged with assaulting a government employee and communicating threats.

Ten days after the incident at the jail, defendant's court-appointed counsel filed an unopposed motion questioning defendant's competency to stand trial. The motion, which counsel filed at defendant's request, stated that defendant believed he was "losing his grip on reality." Counsel referenced defendant's "odd behavior while in custody" and noted that defendant experienced rapid mood swings, spoke to him in elevated tones, and "[did] not completely comprehend his situation." No record evidence suggests that defendant suffered from mental health issues before or after these events.

At a hearing on 15 March 2018—the same day defendant's counsel filed his motion—the trial court granted defendant's request to have his

competency evaluated. Because defendant remained in custody, the trial court noted that he would need transportation to and from the evaluation.

That same day, the trial court signed a form ordering a medical evaluation of defendant's competency and designating Central Regional Hospital in Butner as the evaluating facility. Paragraph 6 of the form order provided two options for defendant's transportation, each of which was listed next to a blank box for marking the appropriate selection:

> a. The Sheriff is Ordered to transport the defendant and all relevant documents to the Certified Local Forensic Evaluator designated by the Local Management Entity and return the defendant afterwards.
>
> b. The defendant shall present himself/herself to the Certified Local Forensic Evaluator designated by the Local Management Entity for evaluation.

Because defendant was still in custody, the trial court selected the first option.

Following the entry of the order, defendant continued to threaten the safety of officers, other inmates, and himself. At this point, defendant had not posted bond. Accordingly, on 20 March 2018, the trial court ordered the sheriff's office to transport defendant to Central Prison in Raleigh for safekeeping. The sheriff's office completed the transfer the next day.

On 28 March 2018—one week after the transfer to Central Prison and roughly two weeks after the trial court ordered a competency evaluation—defendant posted bond and was released from custody. Defendant did not undergo a competency evaluation prior to his release, nor did he seek one after.

Almost a year later, on 19 March 2019, the trial court held a hearing on the State's proposed plea offer. Defendant's counsel, the same court-appointed attorney who filed the motion for a competency evaluation, rejected the State's offer and entered a not guilty plea on defendant's behalf. Counsel did not mention the unfulfilled evaluation order, address defendant's mental health, or otherwise acknowledge the competency issue. The State did not raise the issue either.

The State subsequently offered another plea deal. On 13 May 2019, two months after the first hearing, the trial court held a hearing on the new offer. At the second hearing, defendant's counsel again rejected the deal without any mention of the outstanding evaluation order, defendant's competency, or defendant's mental health in general. Defendant's

counsel instead seemed focused on securing the return of defendant's two cell phones, which the State had seized as evidence.

Defendant's trial began on 28 July 2021, nearly three-and-a-half years since his arrest and more than two years after the second hearing. Nothing in the record indicates that defendant took any steps to seek a competency evaluation or address his mental health whatsoever over his three-plus years out on bond. He did, however, make an independent choice to replace his court-appointed counsel with a team of private attorneys about two months before the trial started.

Over the course of trial, neither defendant nor his new attorneys mentioned defendant's competency. When the State rested its case-in-chief, defendant moved to dismiss the charges for lack of sufficient evidence, again making no reference to competency. The trial court denied the motion. Defendant presented no evidence of his own and chose not to testify. In confirming that choice, the trial court and defendant had the following exchange:

> THE COURT: Stand up just a minute, Mr. Wilkins. So this is your time to testify if you'd like. You need to talk to your attorney and think about that. . . . Do you have any questions about your decision to testify or not testify?
>
> THE DEFENDANT: No, sir. I made the decision.
>
> THE COURT: You're firm in your decision not to testify?
>
> THE DEFENDANT: I made a decision. I thought about it before I made it.
>
> THE COURT: And that's what you'd like to do[,] is not testify?
>
> THE DEFENDANT: No, sir, I don't want to testify.

Once again, neither defendant nor his counsel raised the question of defendant's competency.

The jury found defendant guilty on four of seven charges. Following the verdict, defendant stipulated to being a habitual felon in exchange for a reduced sentence, again confirming to the trial court that he had consulted with counsel and understood the charges, his rights, his possible defenses, and the proceedings before him.

Defendant acted similarly during sentencing. The trial court noted that defendant had "carr[ied] [him]self in a pleasant way" at trial, citing his good conduct as one reason for imposing the minimum sentence of fifty-one months. The trial court expressed optimism that defendant "w[ould] take advantage [of opportunities in prison] and . . . be out in four years." In response, defendant stated, "I hope to be out next year[,] but I understand, sir, and I appreciate you."

Defendant appealed to the Court of Appeals. He argued that the trial court's original competency evaluation order prevented him from being tried without first determining his competency under section 15A-1002 of the North Carolina General Statutes. *See generally* N.C.G.S. § 15A-1002(a)–(b)(1) (2023) (governing a criminal defendant's right to a competency hearing). The majority below rejected that argument, relying on this Court's decisions in *Young* and its progeny. *State v. Wilkins*, 287 N.C. App. 343, 348, 882 S.E.2d 454, 457 (2022); *see Young*, 291 N.C. at 566, 231 S.E.2d at 580 (holding that a criminal defendant could waive his statutory right to a competency hearing).

The dissent, however, agreed with defendant that *Young* and its progeny were distinguishable from his case. *Wilkins*, 287 N.C. App. at 356, 882 S.E.2d at 462–63 (Inman, J., dissenting). Instead, the dissent looked in part to this Court's decision in *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020), in which this Court held that a trial court's failure to conduct a competency hearing for a potentially incompetent defendant sua sponte violated her constitutional right and required a new trial. *Wilkins*, 287 N.C. App. at 355–56, 882 S.E.2d at 462 (citing *Sides*, 376 N.C. at 466, 852 S.E.2d at 182). Defendant appealed to this Court based on the dissent.[1]

The issue presented is whether defendant waived his statutory right to a competency hearing.[2] Section 15A-1002 of the North Carolina General Statutes governs that right. It provides, in relevant part:

> (a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel,

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1. *See* N.C.G.S. § 7A-30(2) (2023), *repealed by* Current Operations Appropriations Act of 2023, S.L. 2023-134, § 16.21(d). The repeal of subsection 7A-30(2) only applies to cases filed with the Court of Appeals on or after 3 October 2023. *See* Current Operations Appropriations Act § 16.21(e).

2. Defendant disclaimed a constitutional challenge at the Court of Appeals, *Wilkins*, 287 N.C. App. at 346, 882 S.E.2d at 456, and did so again before this Court. Therefore, our review only considers whether defendant waived his statutory right.

> or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.
>
> (b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered[,] . . . the hearing shall be held after the examination.

N.C.G.S. § 15A-1002(a)–(b)(1). We review questions of law de novo, considering the matter anew and freely substituting our own judgment for those of the lower courts. *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008).

As this Court explained in *Young*, a defendant may generally waive a statutory right through "express consent, failure to assert it in apt time, or . . . conduct inconsistent with a purpose to insist upon it." *Young*, 291 N.C. at 567, 231 S.E.2d at 580 (quoting *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970)). Ordinarily, a defendant waives a right if he fails to assert it to the trial court. *Id.* The record must show affirmative evidence of the defendant's assertion. *Id.*

In the instant case, defendant waived his statutory right to a competency hearing. He had several chances—over several years, with several attorneys, and in several procedural contexts—to assert the right, but never did so. Rather than remain in pretrial custody and wait for a competency evaluation, he instead chose to post bond and leave.[3] Even while defendant was out on bond, he and his counsel had several options at their disposal. For example, counsel could have moved to modify the competency order, or defendant could have checked himself into the hospital. But they did not take any of these actions.

Further, defendant repeatedly presented himself as competent at trial by making affirmative statements to that effect in the presence of counsel. Defendant stated, among other things, that he could hear and understand the trial court, was not under the influence of alcohol

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3. Of course, defendant had a right to leave pretrial custody once he satisfied the trial court's conditions of release. *See* N.C.G.S. § 15A-537(a) (2023) ("Following any authorization of release of any person [in pretrial custody], . . . any judicial official must effect the release of that person upon satisfying himself that the conditions of release have been met."). But as the State points out, defendant's decision to leave cuts both ways: once he posted bond, the State could not hold him in custody against his will. Upon choosing to leave custody, defendant became solely responsible for pursuing his competency evaluation.

or drugs, and thought about his trial decisions before making them. He assured the trial court that he had spoken with counsel and understood the charges, his rights, and his possible defenses. Nothing in the record indicates that defendant had any mental health issues before or after his pretrial custody in 2018, and nothing supports concluding that he was incompetent at the time of trial in 2021. *See State v. Allen*, 377 N.C. 169, 181, 856 S.E.2d 494, 504 (2021) (holding that a defendant is competent to stand trial if he is competent at the time of trial itself). To the contrary, the record affirmatively demonstrates that defendant's hearing, which occurred just one month after his arrest, was the only time his mental health was ever in controversy. For the next three-plus years, defendant interacted with his multiple lawyers and several judges. Not one questioned his competency.

These facts clearly indicate that defendant waived his statutory right to a competency hearing by "fail[ing] to assert it in apt time" and otherwise acting "inconsistent with a purpose to insist upon it." *See Young*, 291 N.C. at 567, 231 S.E.2d at 580. Rather than contest his competency with the trial court, defendant instead proceeded with trial and waited for a jury verdict. Only after the jury ruled against him did defendant raise the issue on appeal. As the majority at the Court of Appeals observed:

> If [defendant]'s counsel believed the competency evaluation was necessary[,] . . . there was ample opportunity to raise the issue and have the trial court act on it. By saving this argument for appeal, [defendant] was able to await the jury's verdict and then, after the verdict was unsatisfactory, seek a second bite at the apple by arguing for a new trial.

Wilkins, 287 N.C. App. at 348, 882 S.E.2d at 458. Defendant's conduct squarely indicated that he was competent and ready to move forward with trial. Thus, he waived his statutory right to a competency hearing.

Our precedent over the last half century confirms that defendant waived his statutory right. For example, the trial court in *Young* ordered the defendant to undergo a competency evaluation, the competency hearing was not held, and the defendant never raised the issue at trial. *Young*, 291 N.C. at 566–67, 231 S.E.2d at 580. This Court concluded that the defendant waived his statutory right. *Id.* at 568, 231 S.E.2d at 581. Similarly, this Court held in *State v. King* that the defendant had waived his statutory right to a competency hearing when his counsel discussed competency at a pretrial hearing but did not pursue the issue beyond

that initial mention. *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584–85 (2001). Other cases citing *Young* reached similar conclusions. *See, e.g.*, *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007); *State v. Dollar*, 292 N.C. 344, 350–51, 233 S.E.2d 521, 525 (1977).

Like in *Young*, the trial court granted defendant's motion for a competency hearing, but the hearing was never held. Like in *King*, defendant's competency was briefly questioned before trial but subsequently abandoned. And like both of those cases, defendant waited until appeal to argue that the trial court violated his statutory right. The result is the same: defendant waived his right when he failed to assert it at trial.

Defendant argues that this Court effectively overruled the *Young* line of cases in 2020 when it issued the *Sides* decision. But defendant's reliance on *Sides* is misplaced. The Court there explicitly limited its holding to the right to a competency hearing under the Federal Constitution, making only passing references to the statutory right protected by section 15A-1002. *See Sides*, 376 N.C. at 457–58, 852 S.E.2d at 176. As the Court explained, it "need not resolve the parties' dispute regarding the [statutory] issue" because "[the] defendant possessed a constitutional due process right."[4] *Id.*

This distinction is important because the constitutional and statutory rights to a competency hearing are not equivalent. Though defendants can generally waive constitutional rights in the same way as statutory rights, *see Young*, 291 N.C. at 567, 231 S.E.2d at 580, the Supreme Court of the United States has explained that the constitutional right to a competency hearing cannot be waived, *see, e.g.*, *Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 841 (1966). But for the constitutional right to apply, there must be substantial evidence of the defendant's incompetency. *See Young*, 291 N.C. at 568, 231 S.E.2d at 581 (citing *Crenshaw v. Wolff*, 504 F.2d 377, 378 (8th Cir. 1974)). In contrast, the statutory right under section 15A-1002 does not specify an evidentiary requirement. *See* N.C.G.S. § 15A-1002.

In recognition that the two sources of the right are governed by different criteria, our caselaw has carefully delineated between the statutory and constitutional analyses. *See, e.g.*, *Badgett*, 361 N.C. at 259–60,

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4. The dissent at the Court of Appeals in this case acknowledged the limited holding in *Sides* as well. *See Wilkins*, 287 N.C. App. at 355, 882 S.E.2d at 462 (Inman, J., dissenting) ("[O]ur Supreme Court has most recently erred on the side of vindicating a defendant's right to a competency determination—albeit on constitutional rather than statutory grounds . . . .").

644 S.E.2d at 221 (holding first that the defendant waived his statutory right because he never raised the issue at trial, then separately concluding that his constitutional right was not violated because there was not substantial evidence of incompetency). *Sides*—a case decided on purely constitutional grounds—did not overrule *Young*, which addressed both the constitutional and statutory standards. Thus, *Sides* has no bearing on the entirely statutory argument defendant raises here, and *Young* continues to control. Under *Young*, defendant waived his statutory right.

Defendant waived his statutory right to a competency hearing and did not raise a constitutional challenge on appeal. The decision of the Court of Appeals is affirmed.

AFFIRMED.

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

Justice EARLS dissenting.

Because the majority faults Mr. Wilkins for the State's failure to follow its duties, I respectfully dissent. This case turns on a distinct statutory issue: the State's obligation to carry out, and the trial court's duty to oversee, a court-ordered competency evaluation. Section 15A-1002 places unmistakable obligations on the trial court and automatically preserves Mr. Wilkins's claim for appellate review. The majority's unflinching reliance on past cases misses the mark—those decisions differ in critical ways, both factually and legally, from this one. Finally, the majority improperly treats Mr. Wilkins's conduct as evidence of his competence, a circular argument that presumes the very competence that remains unresolved due to the State's failure to act. For these reasons, I dissent from this Court's judgment and would reverse the decision of the Court of Appeals.

I. The Statutory Protections for Mentally Ill Defendants

The General Assembly has instructed the courts of this state to take special steps to protect an acutely vulnerable group of defendants—those who suffer from mental illness. Indeed, our statutes recognize that

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature

> and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2023). The statutory framework for competency evaluations is as clear as it is essential. When a defendant's competence to stand trial is questioned, N.C.G.S. § 15A-1002(b)(1) directs the trial court to act. The court "shall hold a hearing to determine the defendant's capacity to proceed" or, when more evidence is necessary, order a forensic assessment. N.C.G.S. § 15A-1002(b)(1), (1a) (2023). This mandate exists for a critical reason: when capacity is disputed, a defendant's ability to meaningfully participate in their defense must be established by evidence rather than blithely assumed. A trial conducted without resolving genuine concerns about competence imperils fundamental principles of fairness. *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) ("Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." (cleaned up)).

Mr. Wilkins's case falls squarely within this statutory scheme. But the issue before this Court is more specific—and more nuanced—than the majority acknowledges. Mr. Wilkins focuses on the State's failure to comply with, and the trial court's failure to enforce, a judicial order requiring a competency evaluation. That order was not issued lightly—it was grounded in credible worries about Mr. Wilkins's capacity to stand trial.

The facts confirm that these concerns were real. While in custody, Mr. Wilkins began exhibiting conduct that alarmed both the jail staff and him. Jail employees flagged his "odd behavior" and urged that he be evaluated. Mr. Wilkins seconded those worries, telling his attorney that he was "losing his grip on reality." Defense counsel observed troubling signs, too. So troubling, in fact, that on 15 March 2018, defense counsel moved for a competency evaluation under N.C.G.S. § 15A-1002(a), outlining specific conduct that raised questions about Mr. Wilkins's capacity. Echoing others' concerns, defense counsel recounted Mr. Wilkins's rapid mood swings, elevated speech, and confusion about his circumstances.

That same day, the trial court held a hearing on the motion. At the hearing, defense counsel explained that, beyond his own observations, "[t]here's been some reports from the jail, Judge, that Mr. Wilkins has been exhibiting some odd behaviors." The State did not oppose the

motion for an evaluation. In fact, defense counsel noted that an evaluation was in everyone's interests, as it "was something that the staff at the jail ha[d] been requesting" for about a week. Based on this evidence, the trial court found that Mr. Wilkins's competence was in question and ordered an evaluation.

The trial court's order was clear and specific. It required a forensic evaluator to submit a written report with "findings and recommendations" on Mr. Wilkins's capacity to proceed. It also directed the sheriff's office to transport Mr. Wilkins to Central Regional Hospital in Butner for the evaluation and to return him to custody afterward. The court even acknowledged during the hearing that transportation was necessary because Mr. Wilkins was in jail.

But the State disregarded the court's order. The sheriff's office failed to transport Mr. Wilkins to Central Regional Hospital as directed, leaving the "Return of Service" section of the order blank. Instead, the State, acting on an ex parte order, transferred Mr. Wilkins to a "safekeeping" unit at Central Prison in Raleigh on 21 March 2018.

The trial court, meanwhile, compounded this failure. Despite statutory deadlines for completing evaluations, the court failed to follow up. It did not ask whether Mr. Wilkins had been transported, whether the evaluation had been conducted, or why the State ignored its directive. Then, on 28 March 2018, Mr. Wilkins posted bond and was released from custody—without ever receiving the court-ordered evaluation.

This sequence of events reveals the scope of the statutory failure. The State defied a direct court order. The trial court, in turn, neglected its duty to enforce compliance. As a result, Mr. Wilkins, whose competence remained in question, was denied the professional evaluation needed to determine whether he could meaningfully participate in his defense. These facts reveal a breakdown of statutory duties at every level—duties designed to protect precisely the type of defendant whose capacity to proceed is in doubt.

II. Section 15A-1002 automatically preserves Mr. Wilkins's appeal because it mandates that the trial court oversee and complete judicially ordered competency evaluations.

In its haste to discard Mr. Wilkins's appeal, the majority overlooks the distinct statutory right at issue and the trial court's unique role in enforcing it. A closer look at the statutory regime shows that Mr. Wilkins did not waive his claim because the right to a court-ordered competency evaluation is automatically preserved for appeal. As this Court has long

recognized, when "a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations as issues for appellate review." *In re E.D.*, 372 N.C. 111, 117 (2019) (cleaned up) (quoting *State v. Hucks*, 323 N.C. 574, 579 (1988)). Our cases have identified two classes of statutory mandates: (1) laws that "require[ ] a specific act by a trial judge," or (2) laws that "leave[ ] no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct." *Id.* at 121 (cleaned up). Section 15A-1002 satisfies both conditions. Its plain language assigns the trial court—not the defendant—the duty to ensure that a court-ordered evaluation is completed and to resolve the competency concerns that prompted it.

The statute makes the court's obligations clear. When competence is questioned and the trial court orders an evaluation under subsections (b)(1a) or (b)(2), the court "shall" defer a competency hearing until after the evaluation is done. N.C.G.S. § 15A-1002(b)(1). These provisions are phrased in mandatory terms. If a defendant's capacity is so disputed that the trial court seeks professional input, then the court must see the evaluation through.

Section 15A-1002 reinforces the court's responsibility at every turn. Subsection (b)(1a) speaks to evaluations for defendants charged with a misdemeanor or felony, allowing the court to appoint "impartial medical experts" to "examine the defendant and return a written report describing the present state of the defendant's mental health." N.C.G.S. § 15A-1002(b)(1a). As well, the court may "call any expert so appointed to testify" at the post-evaluation competency hearing. *Id.* Felony defendants may be detained before an evaluation for up to sixty days in a state mental health facility, so long as the trial court makes a specific finding that a facility-based evaluation is more suitable than an outpatient examination under subsection (b)(1a). N.C.G.S. § 15A-1002(b)(2) (2023). Subsection (b)(4) inserts the trial court into the mechanics of the evaluation, instructing that a judge who mandates an evaluation "shall order the release of relevant confidential information to the examiner." N.C.G.S. § 15A-1002(b)(4) (2023). The same provision places control over confidential records in the trial court's hands, ensuring that the court—not the parties—determines what information examiners may access and how they may do so. *See id.*

To make sure evaluations happen promptly, the statute sets firm deadlines for when "[r]eports made to the court pursuant to this section shall be completed and provided to the court." N.C.G.S. § 15A-1002(b2) (2023). Subsection (b2) imposes timelines for filing evaluation reports

after the examination is completed: ten days for in-custody misdemeanants, twenty days for out-of-custody misdemeanants, and thirty days for felony defendants, regardless of custody. N.C.G.S. § 15A-1002(b2)(1)–(2). Subsection (d) directs that all reports "shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge." N.C.G.S. § 15A-1002(d) (2023). And the contents of the report are confidential and "kept under such conditions as are directed by the court." *Id.*

When the evaluation is complete, the court must resolve the competency questions that prompted it to act. Subsection (b)(1) mandates a post-evaluation hearing, N.C.G.S. § 15A-1002(b)(1), and subsection (b1) requires the court to make findings of fact to support its determination of a defendant's capacity, N.C.G.S. § 15A-1002(b1) (2023). The legislature made clear that competency decisions belong exclusively to the court—the parties "shall not be allowed to stipulate that the defendant lacks capacity to proceed." *Id.* Section 15A-1002's provisions are unmistakably directed at the trial court and itemize the court's central role and specific duties to manage competency evaluations from start to finish.

The majority nonetheless faults Mr. Wilkins for bonding out of prison. It asserts that when he "cho[se] to leave custody," he became "solely responsible for pursuing his competency evaluation."[1] But section 15A-1002 does not key its statutory mandate to a defendant's custody status.

The statutory timeframes make this clear. Subsection (b2)(1) sets deadlines for when an evaluator must file their report with the court after examining the defendant. N.C.G.S. § 15A-1002(b2)(1). Critically, the statute accounts for custody status—it allows ten days to file when a misdemeanant defendant is in state custody but extends the deadline to twenty days when the defendant is not. *Id.* For a felony defendant, the deadline is thirty days, regardless of custody. N.C.G.S. § 15A-1002(b2)(2). These timeframes show that the legislature recognized practical challenges, like scheduling evaluations for defendants who are no longer confined. The statute thus gives courts some flexibility based on the custody status and type of charge. Yet it imposes no lesser duty on the trial court to see the process through. Custody may affect logistics—but not the court's core responsibility.

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1. This assertion rests on circular reasoning because it assumes that Mr. Wilkins was competent even though he was never evaluated. This point is addressed in more detail below, but I underscore the perverse logic of placing the burden on a person potentially suffering from mental illness to obtain a competency examination mandated by a court. In some cases, people who are mentally ill may not realize that they need treatment or understand the value of an evaluation.

Subsection (c) confirms this by authorizing temporary confinement orders while the competency issue is being resolved, allowing the trial court to ensure the process is not disrupted. N.C.G.S. § 15A-1002(c) (2023). This provision confirms that overseeing competency determinations is the court's obligation—not something that shifts based on a defendant's custody status. For if custody relieved the court of its duty, as the majority claims, subsection (c) would be unnecessary. Together, these statutory directives show that custody status does not affect the trial court's mandate to ensure the completion of the competency examinations it orders.

Section 15A-1002's comprehensive framework leaves no room for doubt: when a trial court orders a competency evaluation, it must see the process through. A defendant's release on bond does not shift that burden. The statute's timelines, its grant of authority to secure defendants temporarily, and its instructions for channeling reports to the presiding judge all reflect the legislature's intent to keep responsibility with the trial court. In short, section 15A-1002 requires "specific act[s]" by the trial court and confirms its central role and singular responsibility to oversee judicially ordered competency evaluations. *See In re E.D.*, 372 N.C. at 121. Because of that statutory mandate, the trial court's failure to secure an examination of Mr. Wilkins's competence—an examination that it ordered—was automatically preserved for appeal, and Mr. Wilkins did not forfeit his right to challenge that dereliction of duty.

III. Legally and factually, Mr. Wilkins's case differs from the precedents cited by the majority.

The majority resolves this appeal by mechanically importing the framework used in past competency cases. That black-and-white approach ignores the unique facts and distinct statutory mandate involved in Mr. Wilkins's case. Unlike *Young*, *King*, *Dollar*, and *Badgett*—cases where capacity was either never raised or where a professional examination found the defendant competent—this appeal involves a breakdown in the statutory framework and the defiance of a judicial mandate. Because the State and the trial court neglected their obligations, Mr. Wilkins's competency was never assessed, leaving the question unresolved both before and during trial. This failure separates Mr. Wilkins's case from our prior decisions in this realm and places the blame squarely on the State and the trial court.

Begin with *Young* and *Dollar*. In *Young*, the trial court ordered a competency evaluation, and the examiner deemed the defendant competent. *State v. Young*, 291 N.C. 562, 566–67 (1977). No evidence suggested

otherwise, and neither the defendant nor his counsel challenged the findings or sought a post-evaluation hearing. *Id.* at 567–68. Similarly, in *Dollar*, a court-ordered evaluation confirmed the defendant's capacity to proceed, and the defense raised no objections. *State v. Dollar*, 292 N.C. 344, 350–51 (1977). In both cases, we held that the defendants waived their right to a post-evaluation hearing by failing to contest the diagnostic findings or request further proceedings. In both cases, too, we emphasized that the completed evaluations provided professional assessments, unchallenged and uncontradicted, finding the defendants were "competent to stand trial, understood the charges and w[ere] able to cooperate with [their] attorney[s]." *See Young*, 291 N.C. at 568.

Not so here. In Mr. Wilkins's case, the trial court ordered an evaluation, but that order went unfulfilled. Unlike in *Young* or *Dollar*, the court developed no evidence on the issue of competence. Without the evaluation, no professional assessment was available to either confirm or dispute Mr. Wilkins's ability to proceed. The defense had no diagnostic finding to challenge—or accept—because no evaluation ever occurred. What happened here, unlike in *Young* and *Dollar*, was a dissolution of the statutory process by the State and court's compounded inaction.

The majority's reliance on *King* and *Badgett* fares no better. In *King*, the trial court asked defense counsel whether competence was an issue. *State v. King*, 353 N.C. 457, 466 (2001). Neither counsel nor the defendant questioned the defendant's capacity to stand trial, sought an evaluation, or asked for a competency hearing. *Id.* In *Badgett*, too, nothing in the record prompted the "prosecutors, defense counsel, defendant, or the court" to "raise[ ] the question of defendant's capacity to proceed at *any* point during the proceedings." *State v. Badgett*, 361 N.C. 234, 259 (2007) (emphasis added). Nor did the defendant or his attorney move for an evaluation or request a hearing. *Id.* In both cases, this Court found that the defendants waived the issue by failing to assert their rights. *See id.*

Again, that is not what happened here. Mr. Wilkins's lawyer filed a detailed motion, flagging serious concerns about his client's competence. Those concerns were supported by observations from jail staff. The trial court agreed that an evaluation was warranted and issued an order accordingly. Unlike in *King* and *Badgett*, Mr. Wilkins's defense counsel did not passively accept the status quo. Counsel brought the issue of competence to the court's attention and sought the necessary evidence to resolve it. The failure in this case lies with the State, which disregarded the court's directive, and with the court itself, which failed to enforce compliance.

These distinctions are crucial. In *Young* and *Dollar*, the trial courts followed through on their orders, obtaining professional evaluations that settled the issue of competence. In *King* and *Badgett*, the defendants never raised their statutory rights and thus forfeited them. But here, the system collapsed at the hands of those tasked with upholding it. The trial court recognized the need to evaluate Mr. Wilkins's capacity, ordered an examination, and then failed to ensure that its directive was carried out. The State's noncompliance with that order, coupled with the court's inaction, left Mr. Wilkins without the statutory protections meant to safeguard defendants in situations like this. The majority's comparison to other cases cannot paper over the fundamental breakdown that happened here.

IV. Inferring waiver from Mr. Wilkins's conduct puts the cart before the horse.

The majority infers waiver from Mr. Wilkins's behavior during trial, concluding that his actions "squarely indicated that he was competent and ready to move forward with trial." That conclusion rests on a circular premise. Waiver requires competence. *See State v. Harvin*, 382 N.C. 566, 585 (2022) (defining "waiver" as "an intentional relinquishment or abandonment of a known right or privilege" (cleaned up)); *State v. Sides*, 376 N.C. 449, 459 (2020) ("Logically, competency is a necessary predicate to voluntariness."). A defendant who lacks the capacity to understand the proceedings or assist in his own defense cannot knowingly relinquish a statutory right. *See id.* ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial." (cleaned up) (quoting *Pate v. Robinson*, 383 U.S. 375, 384 (1966))).

That is true regardless of whether competence is raised under a statutory or constitutional standard. For both types of legal interests, voluntariness is an essential ingredient to waiver. *Cf. State v. Saldierna*, 369 N.C. 401, 405–07 (2016) (examining whether "defendant knowingly and voluntarily waived" both his constitutional and statutory rights); *see also State v. Gibson*, 342 N.C. 142, 148–50 (1995) (same); *In re K.M.W.*, 376 N.C. 195, 208–10 (2020) (assessing whether the respondent-parent voluntarily waived their "statutory right to counsel for parents involved in termination proceedings").

Here, by ordering the evaluation, the trial court acknowledged doubts about Mr. Wilkins's competence—doubts that required professional assessment. Without that examination, those doubts remain unanswered. By pointing to Mr. Wilkins's conduct to prove his capacity,

the majority assigns dispositive weight to conduct that may itself be the product of incompetence. This is circular in the extreme. Much like a snake eating its own tail, inferring waiver from Mr. Wilkins's actions assumes the very competence the evaluation was supposed to determine. The majority's analysis is not just illogical; it turns section 15A-1002 on its head, allowing conduct that may well reflect incompetence to override the statutory duties to ensure a defendant's capacity to stand trial.

V. Conclusion

To conclude that Mr. Wilkins waived his right is to overlook the trial court's responsibility to enforce its own order and the State's duty to follow it. It was not Mr. Wilkins who ignored the court's directive, nor was it his responsibility to hold the State and the court to their lawful duties. The majority's reasoning effectively absolves the State and the trial court of their obligations and shifts the burden onto the very person whose competence was in question. Here, section 15A-1002's mandates are clear, and their violation is even more so—not by Mr. Wilkins, but by the State and the trial court. I respectfully dissent.

Justice RIGGS joins in this dissenting opinion.

MARTIN B. STURDIVANT, EMPLOYEE
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, EMPLOYER,
SELF-INSURED (CCMSI, THIRD-PARTY ADMINISTRATOR)

No. 130PA23

Filed 13 December 2024

Workers' Compensation—temporary total disability payments—"total loss of wage-earning capacity"—plain language analysis—capacity for any type of work

On discretionary review of a workers' compensation case, the Supreme Court modified a Court of Appeals decision by rejecting its interpretation of the plain language of N.C.G.S. § 97-29(c)—which ends, in most cases, temporary total disability payments after 500 weeks unless an employee has sustained a "total loss of wage-earning capacity"—instead holding that the quoted portion of the provision, both as originally drafted and after subsequent

amendments that emphasized the legislature's intent, refers to the total loss of an employee's personal capacity to earn wages in any type of employment and, thus, does not share a meaning with "total disability" as that term of art is used in workers' compensation case law. However, the Court affirmed the lower appellate court's ultimate holding—which in turn affirmed the Industrial Commission's conclusions of law—that the employee, despite ongoing back pain that was sometimes severe enough to prevent him from working at all, was nevertheless capable of some part-time work and thus was subject to the cessation of temporary total disability payments after 500 weeks.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of a divided panel of the Court of Appeals, 288 N.C. App. 470 (2023), affirming an opinion and award entered on 28 February 2022 by the North Carolina Industrial Commission. On 13 December 2023, the Supreme Court allowed plaintiff's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 24 September 2024.

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Lennon Camak & Bertics, PLLC, by Michael W. Bertics; and The Harper Law Firm, PLLC, by Richard B. Harper and Joshua O. Harper, for North Carolina Advocates for Justice, amicus curiae.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier; and Nelson Mullins Riley & Scarborough, LLP, by Andrew Heath, for North Carolina Association of Self-Insurers, North Carolina Forestry Association, North Carolina Retail Merchants Association, North Carolina Home Builders Association, American Property Casualty Insurance Association, and North Carolina Chamber Legal Institute, amici curiae.

DIETZ, Justice.

In 2011, the General Assembly amended our workers' compensation laws with the stated aim of putting people back to work. The amendment ended an employee's temporary total disability payments after 500 weeks unless the employee had sustained a "total loss of wage-earning capacity." Protecting and Putting North Carolina Back to Work Act, S.L. 2011-287, § 10, 2011 N.C. Sess. Laws 1087, 1094.

After the Court of Appeals in this case interpreted the phrase "total loss of wage-earning capacity" in a manner inconsistent with its plain meaning, the General Assembly amended the law again to clarify that total loss of wage-earning capacity means "the complete elimination of the capacity to earn any wages." Current Operations Appropriations Act of 2023, S.L. 2023-134, § 31.3.

That clarification controls in cases going forward, but its impact on this case (and other cases pending at the time) led us to allow discretionary review. As explained below, the General Assembly's clarification was not necessary because it reflects what the statute's plain language meant all along: "total loss of wage-earning capacity" in the 2011 amendment means the total loss of the employee's personal capacity to earn wages in any type of employment. We therefore modify the Court of Appeals opinion to reject that court's erroneous statutory interpretation but otherwise affirm the court's decision.

Facts and Procedural History

The facts of plaintiff Martin Sturdivant's underlying workplace injury are not particularly relevant to the legal issues in this case. No one in this case disputes that Sturdivant is an honest, hard-working person who spent most of his adult life employed in jobs ranging from drywall laborer to poultry farm hand to industrial machine operator.

In 2007, Sturdivant took a job as a corrections officer at the North Carolina Department of Public Safety. Several years later, Sturdivant injured his back on the job. The State agreed to accept responsibility for Sturdivant's workplace injury and paid temporary total disability payments though the workers' compensation system. To this day, Sturdivant still suffers from chronic back pain and that pain becomes severe roughly one day each week.

When our State created its workers' compensation system in the 1920s, the law contained a provision limiting injured employees' temporary total disability payments to 400 weeks. *See* The North Carolina Workmen's Compensation Act, ch. 120, § 29, 1929 N.C. Pub. Laws 117, 129.

In the early 1970s, the General Assembly removed that limitation. *See* An Act to Amend the Workmen's Compensation Act Regarding the Duration of Benefits, ch. 1308, § 1, 1973 N.C. Sess. Laws (2d Sess. 1974) 609, 609. As a result, for much of the last fifty years, an employee who suffered a temporary total disability as defined in the statutes could receive benefits indefinitely.

Over time, concern grew that our state's extended disability benefits hurt the ability to attract and retain businesses in the state. As one legislator explained in committee hearings contemplating further amendments, "North Carolina hurts its ability to compete by turning our workers' comp system into a retirement system." *Workers' Compensation: Putting North Carolina Back to Work*, *Hearing on H.B. 709 Before the S. Comm. on Insurance*, 2011-2012 Sess. 338 (N.C. 2011).

Ultimately, in 2011, the General Assembly enacted a new law titled the "An Act Protecting and Putting North Carolina Back to Work by Reforming the Workers' Compensation Act." *See* S.L. 2011-287. The act amended N.C.G.S. § 97-29 to create a 500-week limit on temporary total disability benefits. *Id.* § 10. After 500 weeks, an employee could receive "extended compensation" only if the employee could "prove by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity." *Id.*

In 2020, as Sturdivant approached 500 weeks of total temporary disability payments, he applied for extended compensation under N.C.G.S. § 97-29(c). The Industrial Commission rejected his claim, concluding that Sturdivant had not sustained a "total loss of wage-earning capacity" as required by the statute. In reaching this decision, the Commission interpreted "total loss of wage-earning capacity" to mean "a total loss of the ability to earn wages in any employment."

Sturdivant appealed the Industrial Commission's opinion and award to the Court of Appeals. The Court of Appeals rejected the Commission's interpretation of section 97-29(c) and held that the phrase "total loss of wage-earning capacity" was synonymous with "total disability" and thus incorporated a long line of court-created legal tests that went beyond merely assessing whether the employee had the ability to earn wages in any employment. *Sturdivant v. N.C. Dep't of Pub. Safety*, 288 N.C. App. 470, 474–75 (2023).

The remaining portion of the Court of Appeals opinion was quite fractured. The authoring judge held that Sturdivant was not entitled to extended benefits under section 97-29(c) because Sturdivant failed to show that he sustained a "total disability." *Id.* at 476–79 (Dillon, J.). A

second judge concurred "in result only" without explaining the portions of the lead opinion with which the judge agreed or disagreed. *Id.* at 480 (Stroud, J., concurring in result only). A third judge dissented from the "total disability" analysis, reasoning that "the Commission did not make specific findings of fact as to 'the crucial questions necessary to support a conclusion' as to whether Plaintiff remains totally disabled so as to qualify for extended benefits." *Id.* at 482 (Hampson, J., concurring in part and dissenting in part).

The State filed a petition for discretionary review of the Court of Appeals' first holding, seeking review of whether the Court of Appeals erred "in its interpretation of the legal standard to be applied under Section 97-29(c) of the North Carolina Workers' Compensation Act." Sturdivant filed a response containing a conditional petition for discretionary review of the Court of Appeals' second holding, seeking review of whether the Industrial Commission's findings were supported by the record and whether the matter should be "remanded for findings of fact to be made based on the correct application of the law." This Court allowed both petitions.[1]

After the parties filed their petitions for discretionary review, the General Assembly again amended N.C.G.S. § 97-29(c), this time to "clarify, in response to Sturdivant v. N. Carolina Dep't of Pub. Safety, 887 S.E.2d 85 (N.C. Ct. App. 2023), that an employee has a different standard for establishing the burden of proof for extended compensation pursuant to G.S. 97-29(c) to reflect the intent of the General Assembly when it enacted S.L. 2011-287." S.L. 2023-134, § 31.3(b).

The new amendment states that, for purposes of N.C.G.S. § 97-29(c), "the term 'total loss of wage-earning capacity' shall mean the complete elimination of the capacity to earn any wages." *Id.* § 31.3(a). The amendment further emphasized that the term "disability" as defined by N.C.G.S. § 97-2(9) "shall not apply to this provision." *Id.*

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1. Both Sturdivant and his supporting amicus now assert that we should dismiss this appeal because the case is moot. It is not. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398–99 (1996). Sturdivant and his supporting amicus contend that he "has already lost under the Court of Appeals' standard" and "stands to gain no ground through this appeal." That is wrong. If we were to reject the State's arguments and agree with Sturdivant's argument, he would receive a remand to the Industrial Commission where he might win relief that he previously lost at every earlier stage of this appeal. That is as live a controversy as can exist in the law. *See In re A.K.*, 360 N.C. 449, 452–53 (2006).

Analysis

I. Interpretation of "total loss of wage-earning capacity"

The heart of this appeal is the meaning of the phrase "total loss of wage-earning capacity" in a 2011 statutory enactment titled "An Act Protecting and Putting North Carolina Back to Work by Reforming the Workers' Compensation Act." *See* S.L. 2011-287, § 10. Throughout this case, the parties and the lower courts have arrived at starkly different interpretations of this statute's meaning. Statutory interpretation is a legal question that we review de novo. *JVC Enters. v. City of Concord*, 376 N.C. 782, 785 (2021). We therefore begin our analysis by engaging in our own interpretation of the statute.

The goal of statutory construction is to carry out the intent of the legislature. *Wynn v. Frederick*, 385 N.C. 576, 581 (2023). When construing a statute, we first examine "the plain words of the statute" because the text of the statute is "the best indicia of legislative intent." *Id.* (cleaned up). "If the plain language of the statute is unambiguous, we apply the statute as written." *Id.* (cleaned up). "If the plain language of the statute is ambiguous, however, we then look to 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." *Id.* (cleaned up).

The Industrial Commission determined that the statute's text was plain and unambiguous and that the phrase "total loss of wage-earning capacity" means "a total loss of the ability to earn wages in any employment." This is a sound analysis. After all, the words in this phrase are not unusual or technical. "Total" means entire, complete, absolute, or utter. *Total*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). "Loss" means the deterioration, destruction, separation, or absence of something. *Loss*, *Merriam-Webster*. Capacity means the mental or physical ability to do something. *Capacity*, *Merriam-Webster*.

Combining these definitions, then, the ordinary English meaning of the phrase "total loss of wage-earning capacity" is an employee's complete or utter loss of the ability to earn any wages by working.

Moreover, the phrase is part of a larger provision requiring the employee to prove "by a preponderance of the evidence that the employee *has sustained* a total loss of wage-earning capacity." N.C.G.S. § 97-29(c) (2022) (emphasis added); *id.* § 97-29(c) (2023). In this context, "sustain" means to "suffer" or "undergo" a condition, typically an unpleasant one such as an injury. *Sustain*, *Merriam-Webster*. This confirms that

the "loss of wage-earning capacity" is focused on the employee's personal capacity to earn wages as a consequence of a workplace injury, detached from the economic environment that exists at the time and from the willingness of employers to extend a job offer. In other words, the employee's "wage-earning capacity" in this context concerns the capacity of the employee to do wage-earning work, not the likelihood of actually finding a job.

This interpretation is further confirmed by another portion of the act's text—its title. "Even when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature." *State v. James*, 371 N.C. 77, 87 (2018) (cleaned up). Here, the title of the act confirms the plain meaning of its text. The act is titled "An Act Protecting and Putting North Carolina Back to Work by Reforming the Workers' Compensation Act." This title indicates that a key purpose of the act is to reform the workers' compensation system to get people back into the job market.

To carry out this intent, the text of the act limits temporary disability compensation to 500 weeks and provides that, after that time, an employee can receive "extended compensation" only if the employee's injury caused a total loss of wage-earning capacity. The title indicates that, after 500 weeks of compensation, if an employee is capable of reentering the job market—that is, has the capacity to do so—the General Assembly intended for workers' compensation benefits to end regardless of whether the employee found a job. Were this Court to interpret the statute otherwise, it would not be reforming workers' compensation to put North Carolina back to work; it would be cementing the existing system in which employees with a temporary total disability too often received permanent benefits. Accordingly, we hold that the plain text of "total loss of wage-earning capacity" means the total loss of the employee's personal capacity to earn wages through any type of employment.

Finally, the lack of a statutory definition for "total loss of wage-earning capacity" itself confirms that the phrase has its plain and ordinary meaning. The Workers' Compensation Act is complex. Because of that complexity, many words and phrases that have an ordinary English meaning are given more specialized definitions in the Act. For example, the terms "employee," "injury," "disability," and "compensation" all have specialized definitions in the Act. N.C.G.S. § 97-2(2), (6), (9) & (11) (2023). The General Assembly used all of these specially defined terms in the 2011 amendment. S.L. 2011-287, § 10. If the General Assembly had intended to give the phrase "loss of wage-earning capacity" a specialized meaning as well, it could have done so. It did not. This further

demonstrates that the phrase should be given its plain meaning. *Cf. In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219–20 (1974).

In sum, when the Industrial Commission interpreted the phrase "total loss of wage-earning capacity," it did so correctly. The Commission properly concluded that the phrase means an employee's "total loss of the ability to earn wages in any employment."

Why, then, did the Court of Appeals reject the Commission's statutory analysis? The answer lies in the way in which our appellate courts analyze and discuss workers' compensation cases.

As noted above, many of the key terms in the Workers' Compensation Act are defined terms with specialized meaning. Among those terms is "disability." N.C.G.S. § 97-2(9). The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." *Id.* This definition has existed since the Workers' Compensation Act's inception in 1929. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 420 (2014).

Over the years, this Court and the Court of Appeals have been repeatedly called on to interpret the meaning of this statutory definition of "disability." *See, e.g., id.* at 419–22. In doing so, our opinions did not always repeat this full statutory wording over and over—after all, our opinions are long enough as it is.

Instead, we have often used shorthand references to describe the statutory definition. One such reference that appears in a handful of our cases over the years is the phrase "loss of wage-earning capacity." *See, e.g., Wilkes v. City of Greenville*, 369 N.C. 730, 745 (2017). We have used this phrase as a substitute for the full definition of the term "disability" when repeatedly referencing that definition in our analysis. *Id.*

But importantly, we have also used many other, similar shorthand references. These include "incapacity to earn wages," "loss of wage-earning power," and "incapacity for work." *See Morrison v. Burlington Indus.*, 304 N.C. 1, 11, 13 (1981); *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 105 (2000); *Little v. Anson Cnty. Schs. Food Serv.*, 295 N.C. 527, 532–33 (1978).

None of these phrases carries any talismanic power to change the ordinary meaning of words in the Workers' Compensation Act. Yet that is precisely what the Court of Appeals in this case believed. The court noted that this Court "uses the phrase 'loss of wage-earning capacity' synonymously with 'disability.' " *Sturdivant*, 288 N.C. App. at 475. Thus, the court reasoned, the phrase "loss of wage-earning capacity" in the

statute must share the same legal meaning with the defined statutory term "disability" and all its years of case-law development.

This analysis fails for two reasons. First, the Court of Appeals' belief that this Court treats "loss of wage-earning capacity" synonymously with "disability" is simply wrong—we have never held those terms synonymous. The term "disability" is a legal term of art created by the General Assembly with specialized meaning in the context of workers' compensation. *See* N.C.G.S. § 97-2(9); *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 763 n.1 (2010). Phrases like "loss of wage-earning capacity" and "incapacity to earn wages," by contrast, are simply language this Court uses when assessing how that defined term applies to the facts of a particular case.

Moreover, the Court of Appeals' reasoning ignores *why* our statutes so often include defined terms. The legislature defines terms in statutes so that those definitions can then be used in place of repeated, lengthy explanations of the term's meaning. *See Unemployment Comp. Comm'n v. Jefferson Standard Life Ins. Co.*, 215 N.C. 479, 486–87 (1939). This allows a statutory scheme such as the Workers' Compensation Act to remain as clear and concise as possible by condensing complicated technical meanings into defined terms.

By contrast, when this Court analyzes the meaning of those same terms, we do the opposite. We unpack the defined term and thoroughly analyze the full meaning as set out in the statutory definition. *See*, *e.g.*, *Medlin*, 367 N.C. at 420–23.

The important point here is that, unlike this Court, the General Assembly does not interpret laws. It writes them. When doing so, it would be quite abnormal for the General Assembly to define a term and then decline to use that definition, instead opting for an entirely different phrase that it nevertheless intended to convey the same precise, technical meaning of the term it chose to define. Doing so undermines the very reason that the General Assembly would add a statutory definition in the first place.

This is particularly true here because the 2011 amendment used the defined term "disability" repeatedly in the changes and additions to N.C.G.S. § 97-29, but then chose *not* to use that same term in the key portion of N.C.G.S. § 97-29(c) at issue in this case. The 2011 amendment first rewrote subsection (a) to begin with the new phrase: "When an employee *qualifies for total disability*. . . ." *See* S.L. 2011-287, § 10 (emphasis added). Then, in the newly added subsection (b), which applies to the first 500 weeks of workers' compensation, the amendment

again uses the terms "disability" and "total disability" to describe the applicable standard for receiving compensation. *Id.*

Finally, even in subsection (c) itself, the amendment uses the term "disability" as it describes the difference between the initial 500-week period and the period that comes after: "An employee may qualify for extended compensation in excess of the 500-week limitation on *temporary total disability* as described in subsection (b) of this section only if . . . the employee has sustained *a total loss of wage-earning capacity.*" *Id.* (emphasis added).

Simply put, the General Assembly chose *not* to use the term "total disability" in the key portion of subsection (c) although it used that defined term even in that same sentence. Instead, the General Assembly used a different term. It is a long-standing rule of statutory construction "that a change in phraseology when dealing with a subject raises a presumption of a change of meaning." *Latham v. Latham*, 178 N.C. 12, 14 (1919). Here, in light of the glaring change from the use of the defined term "total disability" over and over in the amendment to the entirely new term "total loss of wage-earning capacity," it is simply unreasonable to interpret the latter as synonymous with the former. *Id.*

In sum, we reject the Court of Appeals' interpretation of N.C.G.S. § 97-29(c) in this case. The phrase "total loss of wage-earning capacity" does not share the same legal meaning as the term "total disability" and all its years of case-law development. Instead, as the Industrial Commission properly concluded, the phrase means the total loss of the employee's personal ability to earn wages in any type of employment.

Finally, as we conclude this statutory analysis, we cannot ignore that the General Assembly amended N.C.G.S. § 97-29(c) in response to the Court of Appeals' ruling in this case. In that amendment, the legislature explained that, for purposes of N.C.G.S. § 97-29(c), "the term 'total loss of wage-earning capacity' shall mean the complete elimination of the capacity to earn any wages." S.L. 2023-134, § 31.3(a). The amendment further emphasized that "disability" as defined by N.C.G.S. § 97-2(9) "shall not apply to this provision." *Id.* The General Assembly also stated that it was amending the statute "to clarify" the existing law, directly in response to the Court of Appeals decision in this case. *Id.* § 31.3(b).

For the reasons explained above, this clarification did not change the meaning of the provision. The term "total loss of wage-earning capacity" in the 2011 version of the statute already meant what the 2023 amendment now says. Accordingly, we need not address whether the

2023 amendment was a "clarifying" amendment as that term is described in our case law. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8–12 (2012). Because the plain meaning of both amendments is the same, there is nothing to clarify.

II. Application of N.C.G.S. § 97-29(c) in this case

In addition to reviewing the Court of Appeals' interpretation of N.C.G.S. § 97-29(c), we also allowed discretionary review in this case to consider Sturdivant's argument that the case should be remanded because the Industrial Commission improperly applied the standard for evaluating total loss of wage-earning capacity.

In its opinion and award, the Industrial Commission described various testimony and evidence that it received with respect to Sturdivant's workplace injury, physical and mental limitations, education, vocational skills, and work experience. Based on this evidence, the Industrial Commission found that, given Sturdivant's "work history, his educational level—high school with some community college experience—transferable skills, communication skills, restrictions, and chronic low back pain," Sturdivant "would be able to obtain some employment, at a minimum, part-time work in a sedentary position." The Commission therefore concluded that Sturdivant "failed to meet his burden to establish by the preponderance of the evidence that he has experienced a total loss of wage-earning capacity" because he "has the capacity to earn wages."

Sturdivant contends that the Commission, in reaching this conclusion, discussed evidence that should not be considered in assessing total loss of wage-earning capacity. First, Sturdivant points to the testimony of his medical providers, who explained that some of their patients with similar chronic back pain conditions were able to find employment. Sturdivant contends that this testimony was impermissible because the Commission cannot rely on "the oblique generality 'that at least some of [their] patients with conditions similar to [Sturdivant's] condition have been able to return to work.' " To support this argument, Sturdivant relies on decisions from this Court that rejected these sorts of generalities when assessing "disability" as that term is defined in N.C.G.S. § 97-2(9). *See Little*, 295 N.C. at 531.

As explained at length above, the General Assembly chose not to incorporate the "disability" legal doctrine into N.C.G.S. § 97-29(c) and instead applied a new standard examining whether the employee sustained a complete loss of the ability to earn any wages in any type of employment. Under this new standard, evidence that similarly situated

people are capable of earning wages through employment is a permissible factor for the Commission to consider in making its findings and conclusions.

Sturdivant also argues that there was insufficient evidence to support the Commission's finding that, despite Sturdivant's severe chronic back pain which occurs "approximately once per week," Sturdivant "retains some wage earning capacity on days where his pain is less severe" and was therefore capable of "some employment, at a minimum, part-time work in a sedentary position."

We hold that there was competent evidence to support this finding. As noted above, Sturdivant's physicians testified that other patients with similar conditions were able to return to work. Moreover, Sturdivant's employer presented expert testimony from a vocational rehabilitation specialist who opined that there was part-time work Sturdivant could perform even with his need for "greater scheduling flexibility" because of his back pain.[2] This is competent evidence to support the Commission's finding that Sturdivant was capable of some part-time work. Accordingly, we hold that the Industrial Commission's findings of fact are supported by competent evidence and those findings, in turn, support the Commission's corresponding conclusions of law.

Conclusion

The Court of Appeals was correct to affirm the Industrial Commission's opinion and award but erred when it interpreted the phrase "total loss of wage-earning capacity" in N.C.G.S. § 97-29(c) as synonymous with "total disability." We reject that interpretation for the reasons explained above but otherwise affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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2. Sturdivant also contends that this expert's testimony was inadmissible under Rule 702(a) of the Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 702(a) (2023). As the Court of Appeals decision observed, this issue is not preserved for appellate review because Sturdivant did not object to this testimony. *Sturdivant*, 288 N.C. App. at 478. The Industrial Commission also expressly noted the lack of any objection in its opinion and award.

ELIZABETH ZANDER AND EVAN GALLOWAY
v.
ORANGE COUNTY, NC AND THE TOWN OF CHAPEL HILL

No. 426A18-2

Filed 13 December 2024

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 289 N.C. App. 591, 890 S.E.2d 793 (2023), affirming in part and reversing in part an order entered on 17 June 2022 by Judge Allen Baddour in Superior Court, Orange County, and remanding the case. This matter was calendared for argument in the Supreme Court on 30 October 2024 but determined on the record and brief without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William A. Robertson, Robert J. King III, Daniel F.E. Smith, and Matthew B. Tynan, for plaintiff-appellants.

No brief for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion at the Court of Appeals, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals with instructions to remand to the trial court for further proceedings.

REVERSED AND REMANDED.

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

Justice EARLS dissenting.

I would affirm the decision of the Court of Appeals for the reasons stated in the majority opinion of the Court of Appeals. Therefore, I respectfully dissent.

IN RE K.C.

[386 N.C. 952 (2024)]

IN THE MATTER OF

K.C.

From N.C. Court of Appeals
22-396

From Durham
20JA116

No. 142A23

ORDER

In addition to the issues addressed in this Court's order allowing the petition for discretionary review on additional issues, the Court intends to address the following issue: Whether respondent properly preserved this constitutional issue for appellate review.

The parties are directed to submit supplemental briefs to this Court within thirty days addressing this issue and, in particular, whether the Court of Appeals' reliance on its decision in *In re B.R.W.*, 278 N.C. App. 382, 399 (2021), conflicts with this Court's holding in *In re J.N.*, 381 N.C. 131, 133 (2022).

By order of the Court in Conference, this the 9th day of July 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of July 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

TELIA KIVETT; WANDA NELSON FOWLER; THE REPUBLICAN NATIONAL COMMITTEE; AND THE NORTH CAROLINA REPUBLICAN PARTY

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY OF CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA BOARD OF ELECTIONS; STACY EGGERS IV, KEVIN N. LEWIS, AND SIOBHAN O'DUFFY MILLEN IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

From N.C. Court of Appeals
P24-735

From Wake
24CV031557-910

No. 281P24

ORDER

The Court directs defendants and intervenor-defendant to file their responses, if any, to plaintiffs' petition for a writ of supersedeas no later than 4 November 2024 at 12:00 PM.

By order of the Court in Conference, this the 1st day of November 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. CHEMUTI

[386 N.C. 954 (2024)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 24-393
v.	
CHARLOTTE CHEMUTI	From Iredell 23CR445997

No. 282P24

ORDER

Upon consideration of the Town of Mooresville's motion for a temporary stay filed herein on 14 November 2024, pursuant to N.C. R. App. P. 8(a) and 23(e), seeking a stay of the 10 October 2024 Order of the Court of Appeals pending this Court's decision on Mooresville's petition for writ of certiorari, the motion is DISMISSED without prejudice to refile with an accompanying petition for a writ of supersedeas.

By order of the Court in Conference, this the 20th day of November 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of November 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

MARY BETTS, EMPLOYEE

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES - CHERRY HOSPITAL, EMPLOYER, SELF-INSURED (CCMSI, THIRD-PARTY ADMINISTRATOR)

From N.C. Court of Appeals
22-324

From N.C. Industrial Commission
X59367

No. 193P23

ORDER

Defendant, North Carolina Department of Health and Human Services – Cherry Hospital's petition for discretionary review and conditional motion to vacate opinion of the Court of Appeals are allowed for the limited purpose of vacating the opinion and remanding to the Court of Appeals to reconsider its holding in light of this Court's decision in *Sturdivant v. N.C. Department of Public Safety*, 130PA23, filed on 13 December 2024.

Plaintiff's conditional petition for discretionary review and The North Carolina Association of Self-Insurers, North Carolina Forestry Association, North Carolina Retail Merchants Association, North Carolina Home Builders Association, American Property Casualty Insurance Association, and North Carolina Chamber Legal Institute's conditional motion for leave to file amicus brief are dismissed as moot.

By order of the Court in Conference, this the 11th day of December 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 13th day of December 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

N.C. STATE BAR v. MUSINGUZI

[386 N.C. 956 (2024)]

THE NORTH CAROLINA STATE BAR v. MARTIN MUSINGUZI, ATTORNEY	From N.C. Court of Appeals P24-92 From Disciplinary Hearing Commission 22DHC21

No. 159P24

ORDER

Defendant filed a motion for temporary stay and petition for writ of supersedeas with this Court seeking a stay of a disciplinary order. This Court allowed the temporary stay on 14 June 2024. Defendant's petition for writ of supersedeas is allowed for the limited purpose of staying enforcement of the disciplinary order, and the matter is remanded to the Court of Appeals for resolution of all remaining issues.

By order of the Court in Conference, this the 11th day of December 2024.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of December 2024.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

13 DECEMBER 2024

11P24	David Bayne Alexander, et al., Petitioners v. Jeffrey M. Burkey, et al., Respondents v. Diane K. Becker and Thomas H. Becker, Co-Trustees of the Diane K. Becker Revocable Living Trust Dated December 19, 2006, et al., Third Party Respondents v. The Courtyards of Huntersville Condominium Association, Inc., Third-Party Respondent	1. Petitioners' PDR Under N.C.G.S. § 7A-31 (COA23-179) 2. Petitioners' (Frances M. Clairmont and Joe L. Dominguez) Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
24P23-6	SCGVIII Lakepointe, LLC v. Vibha Men's Clothing, LLC; Kalishwar Das	1. Def's Pro Se Motion for Petition for Notice of Appeal Based on Constitutional Question 2. Def's Pro Se Petition for Writ of Mandamus to Compel Scrutiny/Audit of Judgment Amid New Facts	1. Dismissed 2. Dismissed **Dietz, J., recused** **Riggs, J., recused**
31P14-3	State of North Carolina v. Rodney E. Jones	1. Def's Pro Se Motion to Vacate Habitual Felon Status 2. Def's Pro Se Motion for Resentencing to Avoid Racial Bias	1. Dismissed 2. Dismissed
41P24	State v. Joseph Ball	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-1029) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
44P24	Jean Hill and James Hill v. The Division of Social Services and The Division of Health Benefits of the North Carolina Department of Health and Human Services	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA23-197)	Denied
56PA24	State v. Eric Ramond Chambers	State's Motion to Set Matter for Oral Argument During October 2024 Session	Denied **10/21/2024**

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

13 DECEMBER 2024

57A21-2	Calvin Lee Miller v. Todd E. Ishee, Secretary N.C. Department of Adult Corrections	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/28/2024** **Dietz, J., recused**
64P24	State v. Damarlo Jamon Perry	1. State's Motion for Temporary Stay (COA23-375) 2. State's Petition for Writ of Supersedeas 3. State's Motion to Amend Petition for Writ of Supersedeas and Motion for Temporary Stay 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/15/2024** 2. Allowed 3. Allowed **03/15/2024** 4. Allowed
68A24	State v. Julie Ann Mincey	1. Def's Notice of Appeal Based Upon a Dissent (COA23-447) 2. State's Notice of Appeal Based Upon a Dissent 3. State's PDR as to Additional Issues 4. State's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. --- 2. --- 3. Allowed 4. Allowed
70P24	Richard C. Hanson, Fred Allen, Richard Burgess, Vernon L. Cathcart, Angie Cathcart, Christopher L. Davis, James J. Flowers, Kenneth C. Lynch, Larry F. Matkins, Thomas Roddey, Daryl Sturdivant, Alvester W. Tucker, and Carlos Valentin v. Charlotte-Mecklenburg Board of Education	Def's PDR Under N.C.G.S. § 7A-31 (COA22-1044)	Allowed
90P24	State v. Gabriel James McDowell	Def's PDR Under N.C.G.S. § 7A-31 (COA23-277)	Denied
102P19-13	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/30/2024**
102P19-14	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/31/2024**
102P19-15	State v. Christopher Lee Neal	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **12/04/2024**

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

13 DECEMBER 2024

103P24	State v. George Lee Allison	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA23-635) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Allowed
108P24	In re 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 and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/07/2024** 2. Allowed 3. Allowed
112P24	Franklin Garland, Plaintiff v. Orange County, Orange County Board of Commissioners, Defendants and Terra Equity, Inc., Defendant-Intervenor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-588) 2. Plt's Motion for Temporary Stay 3. Plt's Petition for Writ of Supersedeas	1. Denied 2. Allowed **05/23/2024** Dissolved 3. Denied
113P24	603 Glenwood, Inc. and Glenpeace, LLC, Plaintiffs v. 616 Glenwood, LLC, Timothy S. Wood, and Michael Lore, Defendants 616 Glenwood, LLC, Counterclaimant v. 603 Glenwood, Inc., Glenpeace, LLC, and Daniel A. Lovenheim, Counterclaim & Third Party Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-943)	Denied
118P17-2	Herbert Lee Stroud v. Todd E. Ishee, Secretary NCDAC	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/04/2024**
119A23	State v. Jason William King	1. Def's Motion to Clarify and/or Withdraw and Amend Opinion 2. Def's Motion to Stay the Court's Mandate	1. Denied **11/08/2024** 2. Denied **11/08/2024**
123P24	Craig Schroeder and Mary Schroeder v. The Oak Grove Farm Homeowners Association a/k/a The Oak Grove Farm Homeowners Association, Inc.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA22-919) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed

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136P24	State v. Phil Jay Heyne	Def's PDR Under N.C.G.S. § 7A-31 (COA23-224)	Denied
138P24	State v. James Edward Glendening	Def's PDR Under N.C.G.S. § 7A-31 (COA23-366)	Denied
148P24	Myra Wenninger v. Lee Arthur Wenninger	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-741)	Denied
149P24	State v. Matthew Thomas Primm	1. Def's Motion for Temporary Stay (COA23-949) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/12/2024** Dissolved 2. Denied 3. Denied
152P24	Wilson Ratledge, PLLC v. JJJ Family, LP, a Nevada Limited Partnership, and Loftin Enterprises, LLC, General Partner of JJJ Family, LP	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA23-959) 2. Defs' Motion to Withdraw PDR	1. --- 2. Allowed
154P23	In re M.S., S.L., T.H., S.H.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-401)	Denied **Riggs, J., recused**
159P24	The North Carolina State Bar v. Martin Musinguzi, Attorney	1. Def's Motion for Temporary Stay (COAP24-92) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/14/2024** 2. Special Order
160P24	State v. Patrick O'Neill Cochran	Def's PDR Under N.C.G.S. § 7A-31 (COA22-885)	Denied
161P24	State v. Zachary Lynn Johnson	Def's Petition for Writ of Certiorari to Review Order of the COA (COA23-307)	Denied
162P24	State v. Bardomiano Martinez	1. Def's Pro Se Motion for Notice of Appeal (COAP23-718) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion for Amended PDR	1. Dismissed 2. Dismissed as moot 3. Dismissed 4. Dismissed

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175PA24	State v. Demistrus McKinley Ingram	1. State's Motion for Temporary Stay (COA23-748) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Hold Case in Abeyance Until Court Decides *State v. Chambers*	1. Allowed **07/01/2024** 2. Allowed **10/16/2024** 3. Allowed **10/16/2024** 4. Allowed **11/15/2024**
179P24	State v. William Mack Frizzell	Def's PDR Under N.C.G.S. § 7A-31 (COA23-237)	Denied
183P24	State v. Kimberly Cable	1. State's Motion for Temporary Stay (COA23 192) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR	1. Allowed **07/08/2024** Dissolved 2. Denied 3. Denied 4. Dismissed as moot
186P24	Richard Keith Mashburn, Linda Fay Mashburn, and Calvin James Mashburn v. Michelle L. Chandler and Billy Scott Chandler	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA23-1042) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
188PA24	In re E.H. & R.H.	1. Petitioner's Motion for Temporary Stay (COA23-864) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Respondent-Parents' PDR Under N.C.G.S. § 7A-31 5. Guardian ad Litem's Petition for Writ of Certiorari to Review Decision of the COA 6. Guardian ad Litem's Motion to Proceed as an Appellant 7. Guardian ad Litem's Motion for Extension of Time to File Brief	1. Allowed **07/15/2024** 2. Allowed **10/16/2024** 3. Allowed **10/16/2024** 4. Denied **10/16/2024** 5. Allowed **11/15/2024** 6. Dismissed as moot **11/15/2024** 7. Allowed **11/15/2024**

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193P23	Mary Betts, Employee v. North Carolina Department of Health and Human Services - Cherry Hospital, Employer, Self-Insured (CCSMI, Third-Party Administrator)	1. Def's (North Carolina Department of Health and Human Services - Cherry Hospital) PDR Under N.C.G.S. § 7A-31 (COA22-324) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional Motion to Vacate Opinion of the Court of Appeals 4. North Carolina Association of Self-Insurers, North Carolina Forestry Association, North Carolina Retail Merchants Association, North Carolina Home Builders Association, American Property Casualty Insurance Association, and North Carolina Chamber Legal Institute's Conditional Motion for Leave to File Amicus Brief	1. Special Order 2. Special Order 3. Special Order 4. Special Order **Dietz, J., recused**
197P24	State v. Arnold Travis Clark	Def's Motion for Temporary Stay	Denied **10/22/2024**
203P24	Java Warren and Jannifer Warren v. Cielo Ventures, Inc. d/b/a Servpro North Central Mecklenburg County	1. Def's Motion for Temporary Stay (COA22-926) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/26/2024** 2. Allowed 3. Allowed
206P24	Paul K. Brooks v. Scott Cunningham	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-1074)	Denied
208P23-3	Kalishwar Das v. State of North Carolina	1. Plt's Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COA24-491) 2. Plt's Pro Se Motion for Appeal Based on a Constitutional Question for Relief	1. Dismissed 2. Dismissed **Dietz, J., recused** **Riggs, J., recused**
208P24	Jackie Neal Grubb v. Walda Kindley Grubb	Plt's Petition for Writ of Certiorari to Review Order of the COA (COA24-399)	Denied
210A24	Charles Schwab & Co., Inc. v. Lauren Elizabeth Marilley and Peter Joseph Marilley	Plt's Motion to Admit Neil S. Baritz Pro Hac Vice	Allowed
213P24	State v. James Christopher Gizzi	Def's PDR Under N.C.G.S. § 7A-31 (COA23-733)	Denied

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215P24	Micandria Darroux, on behalf of herself and others similarly situated v. Novant Health, Inc. d/b/a Novant Health Presbyterian Medical Center, and Does 1 Through 25, Inclusive	Plt's PDR Under N.C.G.S. § 7A-31 (COA23-947)	Denied
222P24	In re Robert Lee Hayes, III	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA22-1058) 2. Petitioner's Motion to Deem PDR Timely Filed or to Treat Petition as Petition for Writ of Certiorari 3. Petitioner's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Denied 3. Denied
225A24	State v. Blaine Dale Hague	Def's Motion to Hold State's Appeal in Abeyance	Allowed **10/23/2024**
235PA23	Thurman Crofton Savage v. N.C. Department of Transportation	Petitioner's Motion for Supplemental Briefing	Denied
249P24	Calista Inman Reiss v. Loren Blair Reiss	Def's PDR Under N.C.G.S. § 7A-31 (COA23-950)	Denied
255P24	J.Z. v. CCR Mooresville Wellness, LLC, et al.	Defs' PDR Under N.C.G.S. § 7A-31 (COA23-789)	Denied
256P24	Adventure Trail of Cherokee, Inc., a North Carolina Corporation v. Ruth A. Owens and William Frederick Owens	Def's PDR Under N.C.G.S. § 7A-31 (COA23-1043)	Denied
258P24	State v. Brian Christopher Legette	1. Def's Motion for Temporary Stay (COA23 1153) 2. Def's Petition for Writ of Supersedeas (COA23-1153) 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/01/2024** Dissolved 2. Denied 3. Denied
258PA23	State v. Eric Wayne Wright	American Civil Liberties Union and the American Civil Liberties Union of North Carolina's Motion to Admit Bridget Elaine Lavender Pro Hac Vice	Allowed **Riggs, J., recused**

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260P24	State v. Alexander Thomas	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-558)	Denied
262P24	State v. Quantez Lashay Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA23-774)	Allowed
263P24	State v. Brindell Wilkins	1. State's Motion for Temporary Stay (COA23-839) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/07/2024** Dissolved 2. Denied 3. Denied
268P24	State v. Joshual Lamar Davis	Def's Pro Se Motion for Appeal (COA22-938)	Dismissed **Riggs, J., recused**
270P24	Hope Swicegood Byrd, et al. v. Avco Corporation, et al.	Defs' (Avco Corporation and Lycoming Engines) Motion for Temporary Stay (COAP24-630)	Allowed **10/18/2024**
271P24	State v. Maurice Deon Rivers	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **10/18/2024**
273P24	State v. Rafiel Foreman	Def's Pro Se Motion for Notice of Appeal (COAP23-232)	Dismissed
276P24	KPLuxury, LLC v. KB Holdings LLC and Kenneth Michael Bell	1. Defs' Motion for Temporary Stay (COAP24-220) 2. Defs' Petition for Writ of Supersedeas 3. Defs' Petition for Writ of Mandamus to Direct Superior Court Judge 4. Defs' Petition for Writ of Mandamus to Direct Superior Court Clerk 5. Defs' Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 6. Defs' Motion for Expedited Review and Shortened Response Time	1. Denied **10/31/2024** 2. Denied **10/31/2024** 3. Denied **10/31/2024** 4. Denied **10/31/2024** 5. Denied **10/31/2024** 6. Denied **10/31/2024**

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278P24	State v. Gromoka J. Carmichael	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-886)	1. Dismissed **11/25/2024**
		2. Def's Pro Se Motion for Temporary Stay	2. Dismissed **11/25/2024**
		3. Def's Pro Se Petition for Writ of Supersedeas	3. Dismissed **11/25/2024**
		4. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Mecklenburg County	4. Dismissed **11/25/2024**
		5. Def's Pro Se Petition for Writ of Habeas Corpus	5. Denied **11/25/2024**
279A24	Kenya Teasley v. Harris Teeter, LLC and Edward Sweeney	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA24-537)	Dismissed *ex mero motu*
280A24	State v. Grant Lee Hunt	1. State's Motion for Temporary Stay (COA23-890)	1. Allowed **11/01/2024**
		2. State's Notice of Appeal Based Upon a Dissent	2. ---
281P24	Kivett, et al. v North Carolina State Board of Elections, et al.	1. Plts' Petition for Writ of Supersedeas (COAP24-735)	1. Special Order **11/01/2024**
		2. Plts' PDR Under N.C.G.S. § 7A-31	2.
		3. Secure Families Initiative and Count Every Hero's Motion for Leave to File Amicus Brief	3.
		4. Secure Families Initiative and Count Every Hero's Motion to Admit Corey Stoughton, Elizabeth Snow, Alexandra G. Butler, Andrew L. Azorsky, Danielle Lang, and Alexandra Copper Pro Hac Vice	4.
		5. Secure Families Initiative and Admiral Steve Abbot, et al.'s Amended Motion for Leave to File Amicus Brief	5.
		6. Honorable Jefferson Griffin, et al.'s Motion for Leave to File Amicus Brief	6.
282P24	State v. Charlotte Chemuti	1. Town of Mooresville's Petition for Writ of Certiorari to Review Order of the COA (COA24-393)	1. Allowed
		2. Town of Mooresville's Petition in the Alternative for Writ of Certiorari to Review Decision of District Court, Iredell County	2. Allowed
		3. Town of Mooresville's Motion for Temporary Stay	3. Special Order **11/20/2024**

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284P24	State v. Thomas Michael McNeil	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/05/2024**
285A24	State v. Michael John Moore, Sr.	1. State's Motion for Temporary Stay (COA23-816) 2. Def's Motion for Extension of Time to File PDR 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Notice of Appeal Based Upon a Constitutional Question 5. Def's PDR Under N.C.G.S. § 7A-31 6. State's Motion to Dismiss Appeal	1. Allowed **11/06/2024** 2. Denied **11/18/2024** 3. --- 4. 5. 6.
286P24	Angelo R. Whitehurst v. Benjamin Carver, Warden, et al.	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion for Reversal	1. Denied **11/15/2024** 2. Dismissed as moot **11/15/2024**
287P24	Karen M. Tibedo v. Charles R. Tibedo	1. Def's Pro Se Notice of Appeal (COAP24-737) 2. Def's Pro Se Petition for Writ of Certiorari 3. Def's Pro Se Motion to Expedite Consideration of the Petition for Writ of Certiorari 4. Def's Pro Se Motion to Stay Proceedings 5. Def's Pro Se PDR Under N.C.G.S. § 7A-31 6. Def's Pro Se Petition for Writ of Mandamus 7. Def's Pro Se Motion to Expedite Review of PDR and Writ of Mandamus 8. Def's Pro Se Motion to Stay Lower Court Proceedings	1. Dismissed **11/13/2024** 2. Denied **11/13/2024** 3. Dismissed as moot **11/13/2024** 4. Denied **11/13/2024** 5. Denied **11/13/2024** 6. Denied **11/13/2024** 7. Dismissed as moot **11/13/2024** 8. Dismissed as moot **11/13/2024**
289P22-2	Keith Cureton, Jr. v. North Carolina Department of Public Safety, et al.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **12/10/2024**
291P24	State v. Donnie Lee Cherry, Jr.	Def's Pro Se Motion for Bond Reduction	Dismissed

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292P24	TKAB Investments v. Lei Luxe LLC	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Wake County	1. Dismissed **11/15/2024** 2. Dismissed **11/15/2024** 3. Dismissed **11/15/2024**
293P24	Juan Carlos Osorio Cruz v. Todd E. Ishee, Secretary NCDAC	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **11/13/2024**
295P24	State v. Rodney Eugene Jones	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion for Judicial Conference and Appointment of Special Counsel Representation	1. Denied **11/22/2024** 2. Denied **11/22/2024**
296P24	State v. Raji Mills	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA23-1097)	Denied
310P23-4	State v. Rocky J. Bryant	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/06/2024** **Riggs, J., recused**
310P23-5	State v. Rocky J. Bryant	Def's Pro Se Motion for Reconsideration and for the Court to Correct Error	Dismissed **12/10/2024** **Riggs, J., recused**
312A19-2	Ha, et al. v. Nationwide General Insurance Company	1. Plt's Notice of Appeal Based Upon a Dissent (COA21-793) 2. Amicus Curae's Motion for Leave to Participate in Oral Argument 3. Plts' Petition for Rehearing	1. --- 2. Allowed **03/05/2024** 3. Denied **10/18/2024**
334A23	Jackson, et al. v. Home Depot U.S.A., Inc	1. Third-Party Plt's Motion to Admit Brian W. Warwick Pro Hac Vice 2. Third-Party Plt's Motion to Admit Janet R. Varnell Pro Hac Vice	1. Allowed 2. Allowed
346P23	Lois McLamb Miller v. Town of Chapel Hill	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA23-230) 2. Def's Motion to Dismiss Appeal	1. Denied 2. Dismissed as moot

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414P04-2	State v. Cornelius Ray Jackson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **11/14/2024**
584P99-8	Harry James Fowler v. Todd E. Ishee, Secretary of NC Department of Adult Corrections and Brett Bullis, Warden Avery-Mitchell Correctional Institution	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Motion to Arrest Judgment and Dismiss Prosecution	1. Denied **10/29/2024** 2. Dismissed as moot **10/29/2024** 3. Dismissed **10/29/2024**

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