No. 21-286 JUDICIAL DISTRICT ELEVEN (A)

NORTH CAROLINA COURT OF APPEALS
****

STATE OF NORTH CAROLINA,	)	
	)	From Harnett County
v.	)	File Nos. 01 CRS 920, 4612
	)	
WILLIAM MCDOUGALD		

********** ******

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, COUNCIL FOR CHILDREN'S RIGHTS, EMANCIPATE NC, AND NORTH CAROLINA JUSTICE CENTER IN SUPPORT PETITIONER-APPELLANT WILLIAM MCDOUGALD

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TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Juvenile Law Center, American Civil Liberties Union of North Carolina, Council for Children's Rights, Emancipate NC, and North Carolina Justice Center join as *amici*[2] because of their collective understanding that youth status separates children and adults in categorical ways that require courts to exercise sentencing discretion to account for these distinctions. *Amici* are committed to advancing children's rights in North Carolina and across the country. Collectively, *amici* urge this Court to strike Mr. McDougald's Violent Habitual Felon conviction and life without parole sentence because it was predicated on an offense committed as a child, a fact inherently unaccounted for in the court's mandatory sentence.

ARGUMENT

I. MR. MCDOUGALD'S MANDATORY LIFE WITHOUT PAROLE SENTENCE UNDER A VIOLENT HABITUAL FELON PROSECUTION FLOUTS CONSTITUTIONAL LIMITATIONS ON JUVENILE SENTENCING

The North Carolina violent habitual felon (VHF) statute requires that first and second offenses—not just the final offense—serve as the basis for VHF classification and sentencing. Mr. McDougald's VHF conviction was based on conduct that occurred when he was under 18 and resulted in a mandatory life without parole (LWOP) sentence. His conviction and sentence violate the Eighth Amendment's requirement to consider youth in juvenile sentencing and its prohibition on mandatory juvenile

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[1] Pursuant to N.C. R. App. P. 28(i)(2), *Amici* state that no other person or entity other than their members and counsel contributed to the writing of this brief or contributed money for its preparation.

[2] *See* accompanying Motion for Leave for individual statements of interest.

LWOP. *See Miller v. Alabama*, 567 U.S. 460, 479–80, 183 L. Ed. 2d 407 (2012); *Montgomery v. Louisiana*, 577 U.S. 190, 208–09, 193 L. Ed. 2d 599 (2016). This constitutional defect is not cured because Mr. McDougald's second and third offenses occurred during his adulthood. His initial offense—which was prosecuted in adult court but occurred when he was a child—was a necessary predicate to the mandatory LWOP sentence, and the Supreme Court has repeatedly held that courts must have discretion to account for youth in sentencing decisions. *Miller*, 567 U.S. at 479–80; *Montgomery*, 577 U.S. at 208–09; *Jones v. Mississippi*, 141 S. Ct. 1307, 1316, 209 L. Ed. 2d 390 (2021).

A. Adolescents' Developmental Characteristics Are Constitutionally Significant And Require Courts to Use Discretion When Sentencing Youth

The U.S. Supreme Court has consistently recognized that children are fundamentally different from adults. *See Roper v. Simmons*, 543 U.S. 551, 569–70, L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 68, 176 L. Ed. 2d 825 (2010); *Miller*, 567 U.S. at 471–72; *Montgomery*, 577 U.S. at 207. Because youth "have diminished culpability and greater prospects for reform . . . 'they are [categorically] less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68). In reaching these conclusions about a child's reduced culpability, courts rely upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth that contribute to their immaturity, impetuosity, susceptibility to peer influence, and greater capacity for rehabilitation. *Graham*, 560 U.S. at 68.

Adolescents have a diminished ability to perceive potential risks, *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 180 L. Ed. 2d 310 (2011), and make appropriate decisions, Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 Future Child. 15, 20 (2008) ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."), which is exacerbated by their difficulty in thinking realistically about events that may occur in the future. *See* Brief for the American Psychological Association et al. as *Amici Curiae* Supporting Petitioners at 11–12, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621). Immaturity is an essential, biological characteristic of childhood, particularly during adolescence. "[T]he parts of the brain associated with critical thinking, 'long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood.'" Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. Rev. 1586, 1600–01 (2015) (quoting Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 816 (2003)).

Youth are more capable of change than adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of their adult counterparts. *Roper*, 543 U.S. at 570.

> For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only

> a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.

Id. (alteration in original) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Development Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*; *see also Graham*, 560 U.S. at 68.

In striking mandatory LWOP sentences for youth, the Supreme Court relied on these attributes—and other hallmark characteristics of youth—that cause adolescents to make different calculations than adults when they participate in criminal conduct.

1. *Miller* Requires Consideration Of The Hallmark Characteristics Of Youth

The *Miller* Court warned, "[b]y making youth (and all that accompanies it) irrelevant to the imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." 567 U.S. at 479. Thus prior to imposing a juvenile LWOP sentence, the sentencer must "follow a certain process," which meaningfully considers youth and how it impacts the juvenile's overall culpability. *Id*. at 483. The *Miller* Court delineated specific factors that sentencers must examine before imposing LWOP: (1) the child's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the child's "family

and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 477–78. A mere recitation of the age of the individual is insufficient. "[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, 560 U.S. at 76. Thus, a LWOP sentence is unconstitutional if it precludes consideration of an adolescent's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 567 U.S. at 477. North Carolina's laws reflect this understanding. *See State v. Young*, 369 N.C. 118, 125–26, 794 S.E.2d 274, 279–80 (2016) (holding that *Miller* applies retroactively and that a mandatory sentence of LWOP for juvenile conduct violates the Eighth Amendment); *see also* N.C.G.S. § 15A-1340.19A et seq. (directing courts to consider mitigating circumstances related to defendant's age at time of offense, immaturity, and ability to benefit from rehabilitation).

2. *Miller* Requires Consideration Of The Individual Circumstances Of The Child

In addition to consideration of the hallmark characteristics of youth, the *Miller* Court also reasoned that the child's individuated circumstances—their home and family environments and the impact of familial and peer pressures, "from which he cannot usually extricate himself no matter how brutal or dysfunctional"—must be accounted for in sentencing decisions. 567 U.S. at 476–77 ("[J]ust as the chronological

age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability." (alteration in original) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116, 71 L. Ed. 2d 1 (1982))). "All these circumstances go to [the juvenile's] culpability for the offense . . . . And so too does [the juvenile's] family background." *Id.* at 478. The Court had previously recognized that "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant [mitigating evidence]." *Eddings*, 455 U.S. at 115; *see also Miller*, 567 U.S. at 478–79 (noting childhood trauma diminishes a child's culpability).

Children, like Mr. McDougald, living in isolated, concentrated poverty are at highest risk for exposure to complex trauma. David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 Marq. L. Rev. 601, 610–11 (2018). When Mr. McDougald was 16, he was arrested for the first offense that formed the basis for his VHF prosecution. At the time, he was a Black child living in poverty with a physically abusive father. (ROA at 25–36, 37, 230.). Mr. McDougald witnessed his father put a gun to his mother's face and strike her with his fist. (*Id*. at 28.) His mother stated that she still remembered "the sad look on William's face, as if [his father] had struck him instead." (*Id.)* After witnessing and experiencing his father's abuse, Mr. McDougald ran away from home as a young child. (*Id*. at 34–35.) Rather than intervening with services to prevent further harm, law enforcement returned Mr. McDougald home to his abusive father. (*Id*.) The systems charged with

his protection repeatedly failed Mr. McDougald by meeting his trauma with punishment.

B. Mr. McDougald's Sentence Contradicts Constitutional Prohibitions On Mandatory Juvenile Life Without Parole Sentencing

The trial court improperly concluded that Mr. McDougald's sentence was not imposed for conduct committed before he was 18 in violation of *Graham*, *Miller* or *Montgomery* and "did not violate the constitutional prohibitions against mandatory sentences of life without parole for juveniles." (ROA at 350). This reasoning misunderstands the constitutional importance of his youth. Mr. McDougald's first conviction at age 16 was the predicate to confer VHF status. N.C.G.S. § 14-7.7. North Carolina law required Mr. McDougald be tried in adult court for his offense at age 16. Years later, after his second and third offense, the prosecutor alone had discretion to charge Mr. McDougald under the VHF statute. Once charged, the only sentence available to the court was LWOP. Thus the mandatory sentencing scheme at issue here failed to permit any individualized consideration of the mitigating qualities of youth before imposing LWOP on individuals whose predicate conviction(s) occurred before they were 18.

The *Miller* Court emphasized that "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." 567 U.S. at 476.

> When the *only* inquiry made by the sentencing court is to consult the legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate

> for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.

Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. Rev. 457, 490–91 (2012).

The *Miller* Court required consideration of the salient characteristics of youth, *see* Part I.A.1 *supra*, so a LWOP sentence is only imposed on the "rare juvenile offender whose crime reflects irreparable corruption." 567 U.S. at 479–80 (quoting *Roper*, 543 U.S. at 573). Moreover, the *Graham* Court established a categorical rule against LWOP for youth convicted of nonhomicide offenses because youth "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Graham*, 560 U.S. at 79.

"Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* at 68 (quoting *Roper*, 543 U.S. at 569). Because adolescents are still developing and capable of change, an irrevocable penalty that affords no opportunity for release is developmentally inappropriate and constitutionally disproportionate; thus, making clear that the legal system should reserve the harshest punishments for the "rare," "uncommon" and irreparably corrupt child. *Miller*, 567 U.S. at 479–80 (quoting *Roper,* 543 U.S. at 573); *Montgomery*, 577 U.S. at 208 (quoting *Miller*, 567 U.S. at 479–80).

It is inconsistent with the logic of *Graham* and *Miller*—which mandate proportionality and gradation of sentences based on culpability and the nature of the offense—to sentence an individual convicted of a juvenile nonhomicide offense to mandatory LWOP. *Graham*, 560 U.S. at 59 ("Embodied in the Constitution's ban on

cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (alteration in original) (citing *Weems v. United States*, 217 U.S. 349, 367, 54 L. Ed. 793 (1910))). Moreover, *Miller* requires individualized consideration of a child's "distinctive (and transitory) mental traits and environmental vulnerabilities" as well as a consideration of the circumstances of the offense and the precise nature of the youth's involvement to ensure that the punishment fits both the offense and the offender. *Miller*, 567 U.S. at 473, 477.

In its most recent decision on juvenile sentencing, the Supreme Court underscored *Miller*'s holding, reasoning that,

> the Court allowed life-without-parole sentences for defendants who committed homicide when they were under 18, but only so long as the sentence is not mandatory—that is, only so long as the sentencer has discretion to 'consider the mitigating qualities of youth' and impose a lesser punishment.

Jones, 141 S. Ct. at 1314 (emphasis omitted) (quoting *Miller*, 567 U.S. at 476); *see also* Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes after Miller v. Alabama*, 52 Am. Crim. L. Rev. 293, 306–09 (2015). The only available sentencing option for Mr. McDougald was LWOP, violating the core tenets of *Graham* and *Miller*. By categorically equating children and adults when imposing a mandatory LWOP sentence, the VHF statute violates the "foundational principle: . . . that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474. The North Carolina VHF statute mandates LWOP on any person who has received three eligible

offenses, ignoring the long recognized constitutionally significant distinction between children and adults.

II. MR. MCDOUGALD'S SENTENCE CONTRAVENES CURRENT LEGISLATIVE UNDERSTANDING OF 16-YEAR-OLDS AND EXTENDS THE RACIALLY DISPARATE TREATMENT OF BLACK YOUTH IN NORTH CAROLINA

As set forth above, individuals who commit crimes before age 18 are less culpable than adult offenders and are presumed to have the capacity for rehabilitation. *Miller*, 567 U.S. at 472–74. Yet, Mr. McDougald's youth was not taken into consideration because the state jurisdictional laws required the court to treat him as an adult at age 16. Moreover, Mr. McDougald is one of a majority of Black men in North Carolina who are disproportionately sentenced under the VHF statute. The data demonstrates that the statute's discriminatory effect is consistent with the racial disparities pervasive in North Carolina's criminal and juvenile court systems.

A. North Carolina's Legislative Changes Demonstrate Its Recognition Of 16- And 17-Year-Olds As Children And Not Adults

Statutes across the country treat "youth" as individuals under 18; North Carolina historically failed to treat 16- and 17-year-olds as such. In 2017, North Carolina passed H.B. 280, increasing the age of juvenile court jurisdiction to include 16- and 17-year-olds accused of misdemeanors and non-violent felonies. Juvenile Justice Reinvestment Act of 2017, H.B. 280, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017). When this bill passed, North Carolina was the only state in the nation that

automatically charged 16-year-olds as adults, regardless of the offense.[3] Taylor Knopf, *NC House Passes "Raise the Age" Bill with Broad Support*, N.C. Health News (May 18, 2017), https://www.northcarolinahealthnews.org/2017/05/18/north-carolina-house-passes-raise-age-bill-broad-support/.

The General Assembly was explicit about the goals and rationale for this legislation. In support of the bill, Representative Chuck McGrady noted it was based on the final report of the North Carolina Commission on the Administration of Law and Justice (NCCALJ). Audio: Legislative Day 65, held by Gen. Assemb. House Chamber, at 00:18:13-23 (May 17, 2017), https://www.ncleg.gov/DocumentSites/HouseDocuments/2017-2018%20Session/Audio%20Archives/2017/05-17-2017.mp3. The NCCALJ noted that raising the age of criminal jurisdiction to 18 was "supported by scientific research" and "will make North Carolina safer and will yield economic benefit to the state and its citizens." NCCALJ, *Final Report: Recommendations for Strengthening the Unified Court System of North Carolina* 44 (2017), https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf?xahbJ_Q8O_XYD2w.IGCrOOoBeMSeDv2i.

Rather than automatically conferring criminal court jurisdiction on all 16- and 17-year-olds, the law now provides some young people the opportunity for a transfer

[3] Today only three states fail to include 17-year-olds in juvenile court jurisdiction: Georgia, Texas, and Wisconsin. *See* Anne Teigen, Juvenile Age of Jurisdiction and Transfer to Adult Court Laws, Nat'l Conf. of State Leg. (2021), https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.

hearing to determine whether treating the youth as an adult will serve "the protection of the public and the needs of the juvenile." N.C.G.S. §§ 7B-2203(b), 7B-2200.5(b) (conferring prosecutorial discretion for transfer to youth charged with a Class H or Class I felony). After the prosecution has met its burden to show probable cause that the youth committed the charged offense, N.C.G.S. § 7B-2200.5(a)(2), (b), (c), the court considers several factors such as the age and intellectual functioning of the youth. N.C.G.S. § 7B-2203(b). Even assuming under current law Mr. McDougald's charge would require prosecution in adult court, North Carolina's treatment of 16-year-old children who engage in criminal conduct now reflects a deeper understanding of the cognitive and developmental differences of children.

The VHF statute inequitably treats children as adults and exposes youth to the harsh consequences of the adult criminal justice system—specifically with the automatic imposition of lengthy sentences—without any individualized determination of their culpability or amenability to treatment at the time of their offense. *See* Parts I.A., I.B., *supra*.

B. Criminal Justice Laws Are Applied In A Racially Discriminatory Manner, Exacerbating North Carolina's Disparities In Lengthy Sentences

At every stage of the criminal justice system, from interrogation through arrest, prosecution and plea negotiation, trial, and sentencing, people of color—particularly Black males—are treated more harshly than white individuals. *See, e.g.*, Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 Prison J. 87S, 91S-95S (2011).

The cause of these disparities has been attributed to policies and practices, implicit biases, and the structural disadvantage of communities of color. *See, e.g.*, John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 584–85 (2016) ("racially biased political appeals played an important role in creating the climate that led to the enactment of . . . legislation" that increased the criminalization of Black youth). Black children are more likely to be prosecuted as adults and incarcerated with adults. Nationally, Black youth comprise 14% of the general population, but 47.3% of the youth transferred to adult court by juvenile court judges. Nat'l Assoc. Social Workers, *The Color of Juvenile Transfer: Policy & Practice Recommendations* 1 (2017), https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0. Black youth are 53.1% of young people transferred for offenses against persons despite the fact that Black and white youth make up an equal percentage of youth charged with offenses against persons. *Id.* The greater number of Black youth tried in the adult criminal justice system results in the systematic, long-term incarceration of thousands of Black youth. Nationally, Black youth account for over 65% of juvenile LWOP sentences. Mills et al., *supra*, at 575–76.

In North Carolina, 80.9% of the young people sentenced to life without the possibility of parole between 1994 and 2018 are Black. Ben Finholt et al., *Juvenile Life Without Parole in North Carolina*, 100 J. Crim. L. & Criminology 141, 158 (2020). Yet, as of 2019, 70.6% of the state's population is white and 22.2% are Black. U.S.

Census Bureau, QuickFacts: North Carolina, https://www.census.gov/quickfacts/fact/table/NC/PST045219 (last visited July 20, 2021). Black individuals are arrested 2.5 times more often than their white counterparts, with many agencies reporting higher rates. Jonah Kaplan et al., *Black North Carolinians Arrested More Often Than White Counterparts, I-Team Investigation Shows*, 11 ABC Eyewitness News (June 11, 2020), https://abc11.com/arrest-data-naacp-police-brutalityblack-people-arrested-more-often/6243206/. And while Black youth make up 24.4% of the overall youth population, they account for 74.4% of youth in secure confinement. Jacquelyn Greene, *Race and Ethnicity in Juvenile Justice: North Carolina's Numbers*, N.C. Crim. L. Blog (Aug. 24, 2020, 4:54 PM), https://nccriminallaw.sog.unc.edu/race-and-ethnicity-in-juvenile-justice-north-carolinas-numbers/. In 2019, the rate of placement for Black youth was 250 per 100,000 individuals yet for white youth the rate was 37 per 100,000—meaning Black youth in North Carolina are nearly 6.8 times more likely to be placed than their white peers. Sentencing Project, *Black Disparities in Youth Incarceration* (2021), https://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf?eType=EmailBlastContent&eId=3678cc76-dab8-418b-b5cf-faa89e6baec9. The racial disparities are stark for individuals convicted under both North Carolina's VHF statute and Habitual Felon (HF) statute, a similar statute requiring mandatory minimum sentencing for conviction of three non-violent felonies. On May 31, 2021, 3,953 men were incarcerated under the VHF or HF

statutes; 2,364 were Black men. N.C. Dept. Public Safety, DPS Research & Planning (A.S.Q. Doc 3.0b), https://webapps.doc.state.nc.us/apps/asqExt/ASQ (last visited July 20, 2021).[4] On the same date, 42 of the 54 individuals serving life in prison as violent habitual felons or habitual felons were also Black. *Id.*[5]

Associate Justice Anita Earls recently noted that the "Judicial Branch has a crucial role to play in eliminating racial disparities in the criminal justice system." North Carolina Judicial Branch, *North Carolina Task Force for Racial Equity in Criminal Justice Meets July 10* (July 9, 2020), https://www.nccourts.gov/news/tag/general-news/north-carolina-task-force-for-racial-equity-in-criminal-justice-meets-july-10. Ensuring the fair application of the VHF statute is just one way to do this as Black men who have been disproportionately sentenced as VHFs and serving life sentences are the individuals who have been most aggrieved by North Carolina's sentencing scheme. To sentence Mr. McDougald to LWOP under a statute based on a youthful conviction would compound the system's racially discriminatory and unjust impact.

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[4] Change second dropdown query to "population"; click "define report"; select "crime category," "race," and "sex"; select "habitual felon" for crime category and "male" for sex category; click "view report."

[5] Change second dropdown query to "population"; click "define report"; select "crime category," "race," and "tot. max. cons. sent. len."; click "continue"; select "habitual felon" for crime category and "life" for tot. max. cons. sent. len.; click "view report."

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court vacate the VHF conviction and remand for resentencing on the underlying charges.

Respectfully submitted, this the 22nd day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, below counsel hereby certifies that the foregoing brief, which is prepared using a proportionally spaced font, is less than 3,750 words (excluding those parts excluded by the rules), as reported by a word-processing software.

(Electronically Submitted)
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CERTIFICATE OF SERVICE

I certify that today a copy of the foregoing has been duly filed pursuant to Rule 26(a)(2) of the North Carolina Rules of Appellate Procedure. I further certify that I have served all counsel by transmitting a copy via e-mail to the following persons at the following e-mail addresses:

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