NO. **TENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Wake**
	)	
JASON LYNN YOUNG	**)**	

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STATE'S PETITION FOR DISCRETIONARY REVIEW

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina, by and through Roy Cooper, Attorney General, and Daniel P. O'Brien and Amy Kunstling Irene, Assistant Attorneys General, and Robert C. Montgomery, Senior Deputy Attorney General, and respectfully petitions this Court, pursuant to N.C. R. App. P. 15 and N.C.G.S. § 7A-31, to certify this cause for discretionary review of the published opinion filed in this case by the North Carolina Court of Appeals on 1 April 2014. See State v. Jason Lynn Young, No. COA13-586 (N.C. Ct. App. Apr. 1, 2014) (copy attached). Discretionary review is warranted because the decision of the Court of Appeals conflicts with decisions of this Court and because the cause involves legal principles of major

significance to the jurisprudence of the State. See N.C.G.S. § 7A-31(c)(2) and (c)(3).

PROCEDURAL HISTORY

On 14 December 2009, defendant was indicted by grand jury, Wake County, for the 3 November 2006 murder of his wife, Michelle Fisher Young. (R p. 4) The case was tried to a jury at the 31 May 2011 Criminal Session of Superior Court, Wake County, before the Honorable Donald W. Stephens. On 27 June 2011, a mistrial was declared upon the jury's inability to reach a verdict. (R p. 22) Retrial before Judge Stephens began at the 17 January 2012 Criminal Session of Superior Court, Wake County. (R p. 1) On 5 March 2012, the jury found defendant guilty of first-degree murder; and the court sentenced him to life without parole. (R pp. 61-63)

Defendant appealed. (R p. 64) On 26 July 2013, defendant filed his brief in the Court of Appeals along with a motion for appropriate relief asserting ineffective assistance of trial counsel. On 11 October 2013, the State responded to defendant's brief and motion for appropriate relief. On 12 December 2013, the case was argued in the Court of Appeals.

In a published opinion filed on 1 April 2014 and authored by Judge Robert N. Hunter, Jr., with Judges Stroud and Dillon concurring, the Court of Appeals vacated the judgment and remanded for a new trial. State v. Jason Lynn Young, No. COA13-586 (N.C. Ct. App. Apr. 1, 2014). The Court of Appeals reasoned that defendant was

prejudiced by the admission of default judgments in a civil wrongful death action and a child custody complaint. As to other matters, the Court of Appeals also held that there existed no error in the admission of the child's statements, id., slip op. at 53, and that the trial court's instructions on defendant's failure to speak with friends and family members was not plain error, id., slip op. at 57. The Court of Appeals did not address defendant's claims of expression of judicial opinion and sufficiency of the evidence. Id., slip op. at 44.

In an order on the same date, the Court of Appeals denied the motion for appropriate relief. State v. Young, No. 13-586 (N.C. Ct. App. Apr. 1, 2014) (order).

STATEMENT OF THE FACTS

For a summary of the evidence presented at trial, the State respectfully directs this Court's attention to the Court of Appeals' opinion, Young, slip op. at 2-27, as well as to the statement of the facts set out in State's brief in the Court of Appeals.

The facts directly pertinent to this petition are as follows:

The murder of Michelle Fisher Young occurred on 3 November 2006, in the Youngs' home in Raleigh, after defendant had left for a business trip to Virginia. Michelle was bludgeoned to death in an extremely brutal and bloody attack — her head, face, neck, and hands having received thirty or more distinct blows with a blunt object, and her body also exhibiting signs of attempted manual strangulation. (T pp.

3289-328) The Young's two-and-a-half year-old daughter Cassidy was unharmed. Michelle had been about 20 weeks pregnant with her second child.

Law enforcement received no help from defendant in solving the crime — he refused all contact with police. He was indicted on 14 December 2009. The very first statement that defendant ever made about his activities of 3 November 2006 came during his testimony in his first trial, on 22 June 2011. He gave a fairly simple account of where he was that night, saying that he was at the Hampton Inn all night in Hillsville, Virginia, beginning when he checked in on 2 November 2006 at 11 p.m. until he left the next morning; and therefore that he could not have killed Michelle in Raleigh. He said that although he left his room and left the hotel twice, to retrieve something from his car and to smoke a cigar outside, he did not allow his room door to latch shut and he exited the hotel by the western stairwell's emergency exit door, propping it open each time with a stick he broke off of a nearby bush. (See State's Ex. 187, defendant's mistrial testimony, at pp. 63-79) This explained, according to defendant's story, why the hotel's key-card system, which registers a record of each time a card unlocks any door in the hotel, had no record of him using his key card that night other than in his initial entry into his room.

The jury in defendant's first trial was unable to reach a unanimous verdict; and the trial court declared a mistrial. (R p. 22)

Despite being the beneficiary of Michelle's $4 million life insurance policy, defendant had never made a claim on the policy. (T pp. 5015-17, 5030-43, 5088-89) Michelle's family members had filed a disqualification action against him under the "slayer" statute in October 2008. The two-year statute of limitations had been about to run, too, on a wrongful death claim; and Michelle's family had also filed a wrongful death civil lawsuit against defendant in October 2008. Both civil complaints alleged that defendant had killed Michelle. Defendant did not answer either civil complaint, and had thereby defaulted. Default judgments had been entered in December 2008, precluding defendant from collecting Michelle's life insurance and allowing his assets to be seized and sold. (T pp. 5042, 5057-74, 5086)

As to the matter of child custody, defendant had taken Cassidy to Brevard and ultimately refused to allow Michelle's mother or sister to have any contact with the child, which prompted them to contact an attorney to negotiate a visitation agreement. After defendant had refused a visitation schedule, they filed a custody lawsuit, in December 2008. (T pp. 2847-49, 2987-88, 3033, 3500-04, 5146-61, 5190-91) The suit had included a request that defendant undergo a psychological examination; and it had also asked for discovery, including defendant's being deposed. At that point, defendant had agreed to a consent order voluntarily transferring custody of Cassidy to Michelle's sister, Meredith. At defendant's request, the consent order had included

a provision that no discovery or depositions would be conducted. (T pp. 5158, 5165, 5174-79; State's Ex. 96)

As preparations for the second trial were underway, defendant knew by the 16 December 2011 discovery hearing that the State intended to introduce evidence about the civil defaults. (12/16/11 p. 8) The court noted the following at the hearing, and reserved ruling until trial: that the civil matters had not been introduced in the first trial and that "[t]here's nothing that would preclude an inquiry about that matter" if either side believed it relevant and the court so ruled in the upcoming trial. Id. Defense counsel did not lodge any objection to this at this time or evince any belief other than that the civil matters were admissible; and indeed appeared to be preparing the strategy that they in fact carried out at trial, namely, attacking the civil attorneys for having sought the civil judgments out of greed and for basing conclusory civil allegations upon an incomplete view of the evidence. (See T pp. 5088-89, 5095-96)

In opening statements at the retrial, the State expressed the use it intended to make of the civil matters. First, it noted that everything the police learned was learned without the help of the man whose pregnant wife was murdered in his home with their two-and-a-half year old. "The information that [the investigators] were able to get was not through any information he provided, it was not through answering questions about any enemies Michelle Young may have, any problems she may have had, any

things that might be missing from the house, any of the last conversations he may have had with her." (T p. 2638) The State noted that defendant then restricted visitation between Cassidy and Michelle's sister and mother; and that when they fought him, he decided that "rather than answer questions, submit to a deposition[, rather] than talk about what questions were had about his activities, he gave up his daughter." (T p. 2639) The State noted that there was also a civil suit filed for wrongful death alleging that defendant killed Michelle; and that defendant, instead of responding to that lawsuit and those allegations, defaulted. The State contended, "He didn't answer because that would have required him to submit to a deposition, to answer questions," so "[i]nstead of responding to those allegations, he allowed a civil judgment to be entered against him." (T pp. 2639-40) The State noted that by the time defendant did finally answer questions about his activities of 3 November 2006, i.e., when he testified on 22 June 2011, it was "1,693 days after his wife's murder;" and that when he answered those questions "what he said was . . . that when he went outside the hotel it was for the purpose of smoking a cigar, that he propped open the exit door, that he propped open or didn't shut his room door all the way. 1,693 days later. That is what he tells." The State posed the question of why defendant had not said that earlier, and had not answered questions that would have helped police, earlier. (T p. 2640) The same position was expressed in closing, i.e., that defendant's

22 June 2011 statement was not credible because, if that was all defendant had to say, he would have said it at the earlier opportunities. (T pp. 5914, 5933-42)

During trial, the State called as a witness the Clerk of Superior Court, Wake County, Lorrin Freeman. It was at this point that defense counsel objected for the very first time, saying, "we object to the entire line of questioning about the wrongful death case" . . . "[a]nd we would cite basically Rule 403, that we believe that to the extent of it's probative of anything that the danger of confusing, misleading, undue prejudice to the defendant substantially outweighs the probative value." (T pp. 5045-47)

The court ruled on the Rule 403 objection as follows: "[T]he fact that the primary beneficiary elected to be defaulted . . . in response to the wrongful death action and permitted . . . a judgment disqualifying him from benefitting from the death of Michelle Young may be a factor, that is, might be relevant to any number of matters that the jury has already heard and will hear and are considering, and so I do believe it's relevant and I do believe that the probative value outweighs any prejudicial effect." The court continued, "However, since this will require the jury to fully understand and appreciate the limited nature in which the evidence can be received and since this is a situation in which a court has made some declaration, which declaration did not find the defendant guilty of any crime, I need to make sure that the

jury understands the law relating to a civil action and a civil judgment, and I intend to, before the witness testif[ies] with regard to that civil action, I do intend to give the jury some instructions" that "entry of judgment by default in civil action is not a determination of guilt by any court that the named defendant has committed any criminal offense." (T pp. 5046-47) The Court then distributed to the parties written copies of its proposed instructions, saying, "You have copies of my instructions that I intend to give and we'll proceed in like manner." (T p. 5047) Defendant did not object to the proposed instructions.

Then, before the evidence was offered, the court read the instructions to the jury. (T pp. 5057-59) The instructions explained that a defendant's failure to respond to a civil suit means that the allegations, whether actually true are not, are merely deemed in civil law to have been admitted for the purpose of allowing the plaintiff to have civil judgement entered; and that "[t]he entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense." (T pp. 5057-59) Defendant had no objection to the instructions as given.

The Clerk of Court then testified at trial that the civil suits were filed against defendant in 2008 seeking damages for Michelle's wrongful death and to disqualify him from benefitting from her insurance and estate; and that defendant was notified

to appear and answer the complaints and warned that failure to answer would result in the court ordering the relief demanded. (T pp. 5057-64) The complaints alleged that "[i]n the early morning hours of November 3rd, 2006 Jason Young brutally murdered Michelle Young at their residence." (T p. 5065) The Clerk of Court testified that defendant did not respond, and that defaults were entered on 2 December 2008. After that, the plaintiff moved to have judgments entered; a hearing was scheduled and defendant was again notified; and after the hearing, which defendant did not attend, two default judgments were entered on separate dates in December 2008: (i) by Judge Stephens declaring that by default and within the civil statutes defendant was deemed the slayer of Michelle Young and was disqualified from collecting any of her $4.2 million in insurance proceeds, and (ii) by Judge Osmond Smith awarding over $15 million against defendant for wrongful death (T pp. 5067-74), which would allow defendant's assets to be seized and sold.

On cross-examination of the Clerk of Court, defense counsel pursued their strategy of suggesting that the civil default judgments were (i) filed out of greed by the civil attorneys, who collected $1.1 million in fees, and Michelle's mother, who collected a $156,000 commission as executrix (T pp. 5088-89); and (ii) meaningless in any event because it takes only conclusory allegations to file a civil lawsuit and it need not address any evidence suggesting that someone other than defendant killed

Michelle. (T pp. 5080-87, 5094-96).

At the charge conference, there was no objection by defendant to the court's proposed instructions on the civil actions. (T pp. 5796-98)

In closing arguments, defense counsel tried to ameliorate the impact of defendant's failure to talk to police or provide any statement of his activities, arguing that while "[i]t's completely understandable that the police suspected Jason Young in this case. He's the husband. He's not there. He won't talk" (T p. 5851), there were many other reasons why defendant did not talk to the police or help the investigation. (T pp. 5864-74)

The State then argued in closing that the statement defendant gave on 22 June 2011, i.e., his testimony from the first trial, was untrustworthy, that it was "an attempt to match, the state would contend to you, the police reports, to explain why the defendant appears on the videos when he does, to explain why his key card is only used once, to explain why that door is found propped open, to explain it later, to go back and tell a story that there was no reason not to tell on November the 3rd." (T p. 5914) The State argued: "He had every opportunity in the world, both in family law court and in regular civil court to say to a judge or a jury the same thing he said on that video, the same thing he said last summer [i.e., his testimony that he checked in, then went outside and propped the exit door open.] He could have said that at any

time he wanted to, but he never would do that." (T p. 5942)

In the charge to the jury, Judge Stephens instructed that the State must prove defendant's guilt beyond a reasonable doubt; and that the jurors were the sole judges of credibility and weight to be given to evidence. (R p. 42) As to the civil matters, the court instructed just as it had set forth in the charge conference:

> I further instruct you that there is evidence that tends to show that a civil complaint was filed in the Civil Superior Court of Wake County against the defendant by Linda Fisher on behalf of the Estate of Michelle Young and that a civil summons was issued by the clerk for the superior court commanding the defendant to answer or otherwise respond to the allegations of that civil complaint within the time required by law. There is further evidence that tends to show that the defendant was timely served with these documents, that he did not file an answer or otherwise respond to the complaint and that a default judgment was entered against him by reason of that failure.
>
> As I have previously instructed you, when a defendant in a civil action has been properly served with a civil summons and civil complaint and fails to timely respond, upon motion of the plaintiff the Court is authorized to enter a civil judgment against the defaulting defendant. For the purpose of the civil law the allegations of the complaint which have not been denied, whether actually true or not, are deemed to be admitted for the purpose of allowing the plaintiff to have a civil judgment entered against the defendant. The burden of proof in a civil case requires only that the plaintiffs satisfy the Court or jury by the greater weight of the evidence that the plaintiff's claims are valid. This means that the plaintiff must prove that the facts are more likely than not to exist in plaintiff's favor. When there is a default that burden of

> proof is deemed in law to have been met.
>
> The entry of a civil default judgment is not a determination of guilt by the Court that the named defendant has committed any criminal offense.

(R pp. 48-49; T pp. 5963-64) There was no objection by defendant to these instructions.

REASONS WHY CERTIFICATION SHOULD ISSUE

This Court should grant discretionary review because the Court of Appeals opinion conflicts with decisions of this Court. N.C.G.S. § 7A-31(c)(3). This Court should also grant discretionary review because the case involves legal principles of major significance to the jurisprudence of the State. N.C.G.S. § 7A-31(c)(2).

In sum, the Court of Appeals decision: errs on the standard of review and conflicts with decisions of this Court that the appellate courts are not to make an appeal for defendant; conflicts with and makes an unwarranted extension of this Court's jurisprudence on the matter of whether an issue is preserved as a matter of law without objection due to violation of a statutory mandate; errs in its analysis and conflicts with this Court's decisions applying N.C.G.S. § 1-149; errs and conflicts with this Court's decisions by accepting as true a contested allegation contained in an attorney affidavit in defendant's M.A.R. alleging ineffective assistance of counsel; and finally, as to the admission of the child custody complaint, errs and conflicts with this

Court's decisions which hold that a defendant is not prejudiced where he himself previously admitted the evidence, where he did not object to it, and where it came in later without objection. The State contends that all these issues are of major significance to the jurisprudence of the State.

A. The Court of Appeals opinion conflicts with this Court's decisions on (i) the need to object and obtain a ruling in order to raise the specific ground on appeal and on (ii) the controlling standard of review. These are legal principles of major significance to the State's jurisprudence.

The Court of Appeals begins its analysis by stating that the introduction of the civil complaints and default judgments concern whether the trial court violated N.C.G.S. § 1-149, and that introduction of this evidence is reviewed *de novo*. Young, slip op. at 28. Yet defendant did not cite N.C.G.S. § 1-149 as the basis for his objection at trial. Rather, he cited only N.C.G.S. § 8C-1, Rule 403, saying, "we would cite basically Rule 403, that we believe that to the extent of it's probative of anything that the danger of confusing, misleading, undue prejudice to the defendant substantially outweighs the probative value." (T pp. 5045-47, 5092-93) Having not objected under N.C.G.S. § 1-149, defendant did not obtain a ruling on a claim under that statute.

Under Rule 10 of the North Carolina Rules of Appellate Procedure,

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

> objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2013). The trial court, for its part, ruled properly upon the objection that defendant actually made, i.e., the Rule 403 objection. The standard of review of a trial court's Rule 403 determination is the abuse of discretion standard – a Rule 403 determination is within the trial court's discretion and it will not be overturned unless arbitrary or manifestly unsupported by reason. State v. Hyde, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000), cert. denied, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001).

The Court of Appeals, nevertheless, held that the standard of review is the easier-to-meet *de novo* standard of review. In so holding, the Court of Appeals' decision conflicts with N.C. R. App. P. Rule 10; with all this Court's cases applying Rule 10, e.g., State v. Bell, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004), cert. denied, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005), and State v. Fair, 354 N.C. 131, 152, 557 S.E.2d 500, 516 (2001); with cases such as Hyde which set out the proper abuse of discretion standard that applies on appellate review of a Rule 403 determination; and with cases such as State v. Hart, 361 N.C. 309, 312-13, 644 S.E.2d 201, 203 (2007); and Viar v. N.C. DOT, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam),

which hold that "it is not the role of the appellate courts . . . to create an appeal for an appellant." All these matters are of fundamental significance to the State's jurisprudence and the proper functioning of the courts.

B. The Court of Appeals opinion greatly extends, and conflicts with, this Court's jurisprudence on what matters are preserved for appellate review absent an objection due to violation of a statutory mandate. This is a legal principle of major significance to the jurisprudence of the State.

The Court of Appeals justifies its application of a *de novo* standard of review by reference to the principle that violation of a statutory mandate is reviewable *de novo* without objection, citing State v. Young, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989), and State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (holding that when a trial court acts contrary to statutory mandate and a defendant is prejudiced thereby, the right to appeal the trial court's action is preserved, notwithstanding defendant's failure to object at trial). Yet here, there is no statutory mandate that applies; and neither Young nor Ashe controls. Young holds that N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory and that a party's failure to object to their violation does not preclude the issue being raised on appeal — those two statutes contain mandatory language specifically requiring certain behavior from judges with respect to the jury's deliberative process, i.e., that in instructing the jury, judges "shall not" express an opinion as to whether or not a fact has been proved, and

"may not" express any opinion on a question of fact. Ashe, similarly, holds that N.C.G.S. § 15A-1233(a) is mandatory, such that its violation is preserved without objection, because it provides that where a deliberating jury requests a review of evidence, all twelve jurors "must" be conducted to the courtroom, rather than the foreman alone. Ashe, 314 N.C. at 33-40, 331 S.E.2d at 656-59. Ashe analogized to precedent holding that where evidence is "specifically rendered incompetent by statute, it is the duty of the trial court to exclude it *sua sponte*." Id. at 40, 331 S.E.2d at 659.

Here, by contrast, there is no language of mandate in N.C.G.S. § 1-149 directing a judge to take some action; nor does N.C.G.S. § 1-149 deal, as the statutes involved in Young and Ashe do, with a judge's control and influence over the jury's constitutionally protected process of deliberation. Nor is there evidence in this case that is rendered incompetent by statute such that it was Judge Stephens' duty to exclude it *sua sponte*.

Section 1-149 of the North Carolina General Statutes, in Chapter 1 dealing with civil procedure, provides in pertinent part: "No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." N.C.G.S. § 1-149 (2013). The last clause of the statute is not meaningless; and this Court's cases applying the statute hold, as a body, that while civil pleadings and judgments are

not admissible when they are used as proof of facts alleged or admitted in them, see State v. Wilson, 217 N.C. 123, 7 S.E.2d 11 (1940); State v. Ray, 206 N.C. 736, 175 S.E. 109 (1934); State v. Dula, 204 N.C. 535, 168 S.E. 836 (1933), civil pleadings and judgements are admissible where they are relevant and used for some other purpose, such as to show bias or motive or intent, or to impeach or corroborate, or to show a link in the chain of circumstances, see State v. Rowell, 244 N.C. 280, 93 S.E.2d 201 (1956); State v. Phillips, 227 N.C. 277, 41 S.E.2d 766 (1947); State v. McNair, 226 N.C. 462, 38 S.E.2d 514 (1946).

Thus, there is no statutory mandate in N.C.G.S. § 1-149. What the statute triggers is not a mandatory action by the trial judge affecting jury deliberation; rather, it triggers, upon objection, an inquiry into the purpose for which a civil pleading is used in a criminal case. A civil pleading is not "incompetent," either automatically or as a matter of law, in every criminal case, as Rowell, Phillips, and McNair plainly illustrate. A trial court faced with an objection under N.C.G.S. § 1-149 must determine the purpose for which the civil matters are offered; and exclude them only if their purpose is to prove the same facts admitted or alleged in the civil matter. See Rowell, Phillips, McNair.

Since the statute contains no "judicial mandate" to take a specific action, but rather triggers an inquiry into the purpose of the evidence before any predicate action

can be taken, defendant is subject to the normal rules of this Court and this State. He must object and cite the statute specifically, and obtain a ruling on it, if he wants to be able to argue the statute on appeal.

The Court of Appeals in its decision below has thus extended the "violation of a statutory mandate" exception to Rule 10 well beyond the bounds of Ashe and Young. Almost all statutes contain some language as to which an appellant can take the position that it is arguably "mandatory;" yet very few statutes are actually mandatory, and this Court's decisions make that clear. Ashe and Young are very narrowly applicable to actions that a judge "must" take with respect to a jury's constitutionally protected process of deliberation. The Court of Appeals' decision is unwarranted, conflicts with this Court's cases, and offers a perverse incentive to litigants to not lodge objections in criminal trials in Superior Court. It will cause confusion and a proliferation of unpreserved claims in the appeals that come before the appellate courts. The purpose of Rule 10 "is to encourage the parties to inform the trial court of errors" so that it can correct and cure any potential errors before the jury deliberates on the case "and thereby eliminate the need for a new trial." State v. Cummings, 352 N.C. 600, 635, 536 S.E.2d 36, 60 (2000) (citing State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)), cert. denied, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

C. The Court of Appeals opinion misapplies the abuse of discretion standard and conflicts with decisions of this Court regarding the standard, and the effect of a proper instruction.

The Court of Appeals, on p. 29 of the opinion, seems to indicate that all three standards of review — de novo, abuse of discretion, and plain error — apply to the admission of the default judgments in this case. Young, slip op. at 29. It is one of the main tasks of an appellate court, however, to select and apply the correct standard of review. Further, none of the cases cited in that paragraph of the Court of Appeals' opinion even deal with the admission of civil matters in a criminal case; and none of them supports the proposition that the standard of review for the admission of civil default judgments in a criminal case, where the State's purpose was manifest and the only objection was under Rule 403, is anything other than abuse of discretion.

As to the Court of Appeals' analysis under the abuse of discretion standard specifically, it appears to rely, conclusorily and without support from the record, upon the assertion that Judge Stephens was under a "misapprehension of the law," id., slip op. at 30, that he "made no inquiry concerning N.C. Gen. Stat. § 1-149," and that he "disregarded a statute," id., slip op. at 44.

First, however, defendant did not even mention the statute when he objected under Rule 403. Unless a party objects, it is not the role of a trial court to make a party's case for him.

Second, although the Court of Appeals seems to infer that Judge Stephens was not aware of N.C.G.S. § 1-149, the record suggests the opposite inference — that despite defendant's failure to cite N.C.G.S. § 1-149, Judge Stephens was well aware of it. Judge Stephens noted at a pretrial discovery hearing that although the civil matters had not been introduced in the first trial, "[t]here's nothing that would preclude an inquiry about that matter" if either side believed it relevant and the court so ruled in the upcoming trial. (12/16/11 p. 8) The court reserved ruling on the matter; and counsel said nothing. Then in opening statements, the State properly forecast its purpose for introducing the civil matters, asserting that defendant's 22 June 2011 testimony made no sense and was likely fabricated in light of his lack of response to the civil suits, a time when all reason suggests he would have told his story, if it were true. (T pp. 2638-40) Then, during trial when the evidence was about to come in, defendant objected on the ground most likely to achieve success, namely Rule 403 — had defendant objected and cited N.C.G.S. § 1-149, there would have been a full discussion of the statute (along with its case annotations in the statute volume, which contain several of the important cases) and the State would have reiterated its purpose as set out in opening statement; and defendant's objection would have been overruled under Rowell, Phillips, and McNair, given that the State's explicit purpose was not to tell the jury that it must convict because defendant had already been found in a civil

suit to have killed Michelle, but rather, to show to the jury that defendant's 22 June 2011 statement was not credible given his behavior in not telling his story earlier.

Third, Judge Stephens' Rule 403 determination on the admission of the civil matters was not "manifestly without reason" or "so arbitrary that it could not have been the result of a reasoned decision" as this Court has defined the standard. It was, rather, measured and correct and well-reasoned:

> [T]he fact that the primary beneficiary elected to be defaulted . . . in response to the wrongful death action and permitted . . . a judgment disqualifying him from benefitting from the death of Michelle Young may be a factor, that is, might be relevant to any number of matters that the jury has already heard and will hear and are considering, and so I do believe it's relevant and I do believe that the probative value outweighs any prejudicial effect. However, since this will require the jury to fully understand and appreciate the limited nature in which the evidence can be received and since this is a situation in which a court has made some declaration, which declaration did not find the defendant guilty of any crime, I need to make sure that the jury understands the law relating to a civil action and a civil judgment, and I intend to, before the witness testif[ies] with regard to that civil action, I do intend to give the jury some instructions . . . that entry of judgment by default in a civil action is not a determination of guilt by any court that the named defendant has committed any criminal offense.

(T pp. 5046-47) Defendant never objected to the instructions as proposed or as given to the jury. There is a presumption under this Court's jurisprudence that the jury follows the trial court's instructions; and that it is the defendant's burden to overcome

that presumption and show otherwise. State v. Tirado, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004), cert. denied, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). The Court of Appeals in this case fails to address Tirado and the extent to which defendant had approached the meeting of his burden to show that the jury in this case could not follow the instructions. It also fails to address the fact that Judge Stephens' instructions and his demonstrated forethought about the matter and its effect on the jury showed that his Rule 403 determination was not "manifestly without reason." This Court's cases that uphold the admission of civil matters in a criminal case where the purpose is not to prove the facts established in the civil case but to show something else relevant to the criminal case, Rowell, Phillips, and McNair, do so without discussion of any limiting instructions having been given to the juries in those cases. Thus by an even stronger argument here, where Judge Stephens took care to properly explain the nature of default judgments and instruct directly that such judgments could not be used as proof of guilt in the criminal case (T pp. 5057-59, R pp. 48-49), the trial court's actions cannot be said to have been arbitrary or manifestly without reason. The Court of Appeals appears to have simply substituted its own judgment as to how it would have ruled had defendant raised an objection citing N.C.G.S. § 1-149, thereby nullifying the deference due to the trial court's decision on a matter within its discretion. This is a matter of great significance to the

jurisprudence of the States.

Finally, the Court of Appeals' statement below that "[t]he jury instructions did not explicitly prohibit the jury from using the default judgment or child custody complaint filed against Defendant as proof of Defendant's guilt in the criminal case," slip op. at 40, does not square with the plain text of Judge Stephens' instructions, which carefully explained the different burden of proof in civil cases; explained the fact that a default means only that the civil burden is merely "deemed in law to have been met" for the purpose of allowing a civil judgment to be entered; explained that a civil default judgment has nothing to do with whether the allegations were true or not; and instructed explicitly that "[t]he entry of a civil default judgment is not a determination of guilt by the Court that the named defendant has committed any criminal offense." (T pp. 5963-64)

D. The Court of Appeals' analysis of N.C.G.S. § 1-149, to the extent that the statute even comes into play given defendant's failure to object based upon it, conflicts with this Court's cases applying the statute; further, the Court of Appeals opinion purports to create new law by requiring that the State meet procedural requirements that this Court does not require.

The Court of Appeals' analysis of N.C.G.S. § 1-149 errs and conflicts with this Court's decisions applying the statute.

Dula and Wilson are the earliest cases and are the two main cases that contain the fact pattern that violates the principle set out in N.C.G.S. § 1-149; but the Court

of Appeals makes key errors in its analysis of the cases and discounts this Court's decisions indicating that this case does not fit that pattern. In Dula, a criminal trial for embezzlement of thirteen pianos, a civil judgment was admitted that settled a dispute over who owned the same thirteen pianos. This Court held that the trial court should have sustained the defendant's objection since the civil pleadings and judgment were used in the criminal trial as proof of the same facts that were admitted or alleged in the civil matter, i.e., who owned the pianos. Dula, 204 N.C. at 536, 168 S.E. at 836-37. Similarly in Wilson, in a criminal trial for the defendant's embezzlement of the property of his wards, civil proceedings and orders were admitted which had removed the defendant as a public guardian due to his making loans to himself and mismanaging funds. Further, the prosecutor cross-examined the defendant about the truth of certain allegations of fact from the civil complaints. This Court held that the rule that "[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged" was violated by the State's use of the civil matters to prove the same facts as in the criminal case. Wilson, 217 N.C. at 126-27, 7 S.E.2d at 13-14.

Notably, the Court in Wilson goes on to approve of other civil matters being admitted in the criminal case "for the purpose of impeachment" or to "throw light on the question of fraudulent intent." Id. The Court of Appeals opinion does not mention

this portion of this Court's opinion in Wilson.

The next cases are McNair, Phillips, and Rowell — and all three exhibit the opposing fact pattern, in which the civil matters are used not to prove the facts admitted or alleged in them but rather are offered for some other purpose. In McNair, 226 N.C. at 463-64, 38 S.E.2d at 516, this Court recognized that to offer a civil judgment in a criminal case is "not necessarily to use the pleading as proof of any fact therein alleged;" and established that the test for whether a civil matter is admissible in a criminal one is the purpose and intent for which it is offered. Id. In McNair, the defendant was prosecuted for larceny of an automobile. A woman had purchased the car with defendant as surety and took title in her name; defendant without permission took it one day and refused to bring it back to her. He then brought a civil action against her over possession of the car, alleging that he had bought the car with his own funds and allowed her to take title in her name only for financing purposes. The prosecutor in the criminal larceny trial then cross-examined the defendant about the civil suit. Addressing on appeal whether introduction of the civil complaint was error, this Court said:

> It is provided by G.S. 1-149, that no pleading in a civil action "can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it." . . .
>
> The solicitor announced that the object of the cross-examination relative to the complaint in the civil action, was "to impeach the witness or to contradict him," and not

> to prove any of the facts alleged therein, as they were at variance with the theory of the State's case. The purpose of the solicitor was to use the allegations of the complaint in the civil action, not "as proof of a fact admitted or alleged in it," but to show that the defendant had made two contradictory statements about the matter, neither of which was correct. To offer an allegation in a pleading simply as evidence of its existence, or that it was made, is not necessarily to use the pleading as proof of any fact therein alleged. The motive of the solicitor was quite the opposite in the instant case. He was seeking to discredit the testimony of the defendant given on the trial by showing that the defendant had made a different statement about the same matter on a prior occasion. . . . Thus it appears that no impingement upon the statute was intended or resulted from the cross-examination.

McNair, 226 N.C. at 463-64, 38 S.E.2d at 516 (citations omitted)

In Phillips, 227 N.C. 277, 41 S.E.2d 766, in a prosecution for the murder of his first wife, in which the defendant's statements were entered that he had gotten rid of his second wife and "I'm going to get rid of the other one [i.e., the first wife], I don't need any woman in my business," the State presented the testimony of the second wife and a civil complaint in an action by her to annul her bigamous marriage with the defendant. This Court held, citing N.C.G.S. § 1-149, that the civil complaint "was not offered against the party 'as proof of a fact admitted or alleged in it,'" i.e., it was not offered as proof that the defendant had a bigamous marriage. Id. at 278, 41 S.E.2d at 767. Rather, it was offered to show a motive for the killing of his first wife, to show "a proper link in the chain of circumstances tending to show motive," and "to

corroborate the witness." Id.

In Rowell, 244 N.C. 280, 93 S.E.2d 201, the defendant was tried for involuntary manslaughter arising out of a vehicle collision in which he was the driver and Ivey was the passenger/decedent, and Goins was the driver of the large truck with which the defendant collided. The State called Goins as a witness. Defense counsel tried to cross-examine Goins about a wrongful death suit that had been brought against him by Ivey's family; but the trial court disallowed the question. On appeal, this Court reversed, holding that the existence of the civil matter should have been admitted because it was relevant to the bias or interest of the witness. Rowell, 244 N.C. at 281-82, 93 S.E.2d at 202. That is to say, the civil matter was admissible not to show that the decedent's family was right about who caused the wrongful death, but rather, to show possible bias or interest by the witness. Id.

The Court of Appeals in this case faults the State and distinguishes Rowell, Phillips, and McNair on the ground that "[n]one of these cases involve default judgments against a defendant, wrongful death judgments against a defendant, or non-testifying defendants." Young, slip op. at 33. Yet the same criticism applies to Wilson and Dula, since neither of them involves such specific matters either. Further, for the Court of Appeals to demand a case precisely fitting the facts of this one is not reasonable, given that there are only six or seven cases in total in which North

Carolina's appellate courts have even applied N.C.G.S. § 1-149. Moreover, the cases closest to this case in any event are Phillips and Rowell, as they both involve homicides, and the latter involves a wrongful death suit that should have been admitted because it was offered to show something relevant to the case and was not offered as proof of facts alleged in the civil matter.

Curiously, too, the Court of Appeals has this to say about Rowell, Phillips, and McNair (as well as one Court of Appeals holding in the State's favor, State v. Fred D. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, disc. rev. denied, 306 N.C. 563, 294 S.E.2d 375 (1982)): "Additionally, these cases involve admitting pleadings and/or judgments from a civil case at a subsequent criminal trial for a different purpose than as proof of a fact alleged in the criminal trial." Young, slip op. at 33. Yet this is exactly the State's point — in this case, the civil complaints and judgments were offered not to prove the facts alleged in them, but were offered for a different purpose, the explicitly-stated purpose of showing that defendant's 22 June 2011 statement was not credible because if it were, defendant would have provided it at his earlier opportunities when he had so much to lose. If defendant's position was simply that he was at the hotel the whole time but that the card readers did not register him because he propped the hotel doors open to go out and get something from his vehicle and smoke a cigar, he could have said that at the civil proceedings. He had incentives

to do so: millions of dollars and custody of his daughter. Yet because he did not want to give any statement under oath at a time when he did not have all the State's evidence, he gave up without a fight a wrongful death judgment allowing his assets to be sold and a disqualification suit preventing him from receiving any insurance money. He testified that the reason he could not fight to keep custody of his daughter was because he did not have money (State's Ex. 187 at 139); yet he had never made a claim as primary beneficiary and he had allowed the civil judgments to be entered without even responding. In short, the State used the civil matters to show that defendant's decision to not give any statement until 22 June 2011 was an effort, against his many other interests, to receive all the evidence against him in discovery and then fit his testimony about his acts to that evidence.

The Court of Appeals faults the prosecution for not "*explicitly* announc[ing]" that it was introducing the civil matters in order to discredit defendant's statement. Young, slip op. at 35 (emphasis in original). Yet, first, the prosecution did explicitly announce its purpose for introducing the civil matters, in both opening statements (T pp. 2639-40) and closing argument (T pp. 5914, 5942); and the only reason it did not do so additionally during trial just prior to offering the evidence was because defendant did not even object under N.C.G.S. § 1-149 or cite any of the cases establishing that the test for whether a civil matter is admissible in a criminal one is

the purpose and intent for which it is offered. McNair, 226 N.C. at 463-64, 38 S.E.2d at 516. Without an objection from defendant, there was no reason for the State to have offered its purpose additionally at that time; the trial court and the defense already knew from opening statements what the State's intended purpose for the evidence was. And second, although the prosecutor in McNair "announced the object" of the introduction of the evidence, this is not part of the test that this Court established in McNair. It is not part of any of this Court's other cases dealing with N.C.G.S. § 1-149. For the Court of Appeals to hold here that explicit announcement of the State's purpose for introducing civil matters is part of the test is to (i) ignore the State's explicitly-stated purpose in the record here and (ii) make an extension of the test as set out in McNair beyond that which this Court established. The Court of Appeals' holding thus conflicts with McNair and with well-established principles of this Court's jurisprudence that it is up to the party who wants to keep evidence out to object to it and to state grounds for the objection and obtain a ruling on it; it is not the duty of the proffering party to "explicitly announce" grounds for admission every time it wants to admit a piece of evidence. Under this Court's well-established law, even where evidence is admissible and competent for only a limited purpose, if the opposing party does not both object and request a limiting instruction, the evidence is admissible for general purposes. State v. Jones, 322 N.C. 406, 414, 368 S.E.2d 844,

848 (1988); State v. Maccia, 311 N.C. 222, 228-29, 316 S.E.2d 241, 245 (1984); State v. Goodson, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968). The Court of Appeals decision turns these principles on their head and shifts the procedural burden onto the State contrary to this Court's cases — both those dealing with N.C.G.S. § 1-149 specifically, and those dealing with the general duties and burdens of parties seeking to admit and contest evidence. These are matters that are of great significance to the jurisprudence of the State and the orderly conduct of trials. Further, although the admission of civil matters appears to occur rarely in criminal trials and there exists only a handful of cases on the matter, the decision in this case will, for that very reason, command disproportionate influence over the issue when it does occur, making this case a matter of great significance to the State's jurisprudence.

E. As to the child custody complaint, the Court of Appeals opinion conflicts with this Court's holdings that there can be no prejudice to defendant where defendant introduced the evidence himself, a matter of fundamental importance to the State's jurisprudence.

As to the admission of the child custody complaint, the Court of Appeals decision errs and conflicts with this Court's decisions holding that a defendant is not prejudiced where he himself previously admitted the evidence.

Defendant in his brief to the Court of Appeals argued the admission of the child custody matters separately, in his Issue III, perhaps recognizing that the procedural

barriers to raising the issue on appeal were even greater than those facing the civil default judgments, which were at least objected to on Rule 403 grounds. The Court of Appeals, however, analyzed the child custody matters together with the other civil matters, as if there were no difference and no procedural barrier at all. This conflicts with the entire body of this Court's precedent regarding how an issue can be preserved for appellate review.

A defendant is not harmed by evidence when he himself has introduced the same or similar evidence, N.C.G.S. § 15A-1443(c); and even if a defendant objects once, the benefit of the objection is lost where the same evidence has come in already or is introduced without objection later. State v. Alford, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995); State v. Whitley, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). A defendant who has allowed evidence to be admitted with no objection has "waived his right to raise on appeal" a later objection to the same evidence. Whitley, 311 N.C. at 661, 319 N.C. at 588.

Defendant here never objected to admission of the custody complaint. His objection at T pp. 5045-47 was only to the wrongful death case: "[W]e object to the entire line of questioning about the wrongful death case."

Defendant here was the first to mention the custody complaint at trial; he introduced the fact that a custody lawsuit was filed and that one of its demands was

that defendant be psychologically evaluated. (T pp. 2987-88) The same evidence came in later with no objection. (T pp. 3504, 5163-65) Defendant and his civil lawyers negotiated a consent order to avoid defendant's being deposed under oath about what he did on 3 November 2006 and being psychologically evaluated. (T pp. 5177-79; State's Ex. 187 at 139-42)

Nor did defendant assert plain error as to the child custody matters. He has therefore waived review entirely. Cummings, 352 N.C. at 637, 536 S.E.2d at 36.

Nor, even if the matter could be analyzed in the abstract and ignoring the lack of preservation of the issue for appellate review, was there violation of N.C.G.S. § 1-149, as the State did not use the custody complaint as proof of the facts alleged in it; rather, the State used it for the explicitly-stated purposes (see opening statements T pp. 2639-40, closing arguments T pp. 5914, 5933-42) of showing that defendant's response to the suit, i.e., his not contesting it, was to avoid being deposed and psychologically evaluated, and to demonstrate that the statement he made on 22 June 2011 was not to be believed.

In sum, the Court of Appeals' treatment of the child custody complaint conflicts with this Court's decisions, and does so on a matter of great significance to the jurisprudence of the State. Where a defendant admits evidence himself and does not object to the same evidence later, he is not prejudiced and he cannot raise the matter

on appeal.

F. The Court of Appeals opinion improperly accepts as true an allegation in defendant's M.A.R.

The Court of Appeals decision errs and conflicts with this Court's decisions by accepting as true an allegation contained in the affidavits of defendant's trial attorneys in defendant's M.A.R. The Court of Appeals in its analysis stated, as if it were an established fact, that "Defendant's counsel did not research whether this evidence [the civil actions] was admissible . . ." Young, slip op. at 36. Yet the only source for this assertion, as it is nowhere in the record on appeal or transcript, is the attorney affidavits that were submitted as part of defendant's motion for appropriate relief alleging ineffective assistance of counsel. It is a contested point in the motion for appropriate relief, it is not of record. The Court of Appeals may not simply accept it as true with no findings of fact, and deny the motion for appropriate relief, see State v. Jason Lynn Young, No. 13-586 (N.C. Ct. App. Apr. 1, 2014) (order).

Litigants on direct appeal are of course barred from arguing matters outside the record on appeal, according to statute and this Court's precedents. See, e.g., State v. Waring, 364 N.C. 443, 517, 701 S.E.2d 615, 661 (2010), cert. denied, ___ U.S. ___, 181 L. Ed. 2d 53 (2011). Likewise, the Court of Appeals must not, upon the direct appeal of a case, support its reasoning by resort to matters that are outside the record on appeal and, worse, to matters that constitute contested allegations of fact from a

separate motion for appropriate relief.

G. The Court of Appeals opinion conflicts with the fundamental principle that the State can introduce a defendant's statement in order to discredit it.

The Court of Appeals opinion conflicts with this Court's decisions that a party that introduces a defendant's statement is not "vouching" for its veracity such that it is not permitted to discredit it.

The Court of Appeals states that "the State's argument that the civil suits were used to cast doubt on Defendant's 22 June 2011 testimony concerns testimony that the State actually introduced at the second trial. . . . Essentially, the State is requesting to impeach evidence it offered." Young, slip op. at 39.

There exists, however, no barrier to the State's introducing a defendant's earlier testimony or statement in order to attack it or discredit it. A defendant's statement of his acts at the time of the crime is always going to be relevant; and the State here did not introduce defendant's testimony to show that it was truthful, but rather, to demonstrate the opposite — as examples, the State pointed out that (i) defendant did not, as he said in his 22 June 2011 testimony, do sales-related work on his laptop, but rather surfed sports-related websites; (ii) that, given that he did not like smoking, it was not likely that he went outside near midnight, on the night before an important sales call, when it was 34ºF with wind blowing at 21 mph with gusts up to 30 mph,

and having no substantial outerwear in his luggage, in order to smoke a cigar; (iii) that his testimony that he did not have enough money to contest the custody suit makes little sense given that he did not seek Michelle's insurance money and allowed civil judgments against him that seized his assets; and (iv) that given his failure to respond to the civil actions and describe his activities then, his testimony in 2011 appeared to be a fiction designed to fit with the body of evidence that by the time of trial he knew the State had against him.

The Court of Appeals cites no source of law for its statement that the State cannot impeach its own evidence; but the State believes it must be referring to the old common law rule that a party "vouches" for a witness by calling him and therefore may not impeach him. See State v. Covington, 315 N.C. 352, 357, 338 S.E.2d 310, 314 (1986). The anti-impeachment rule, however, was abolished with the adoption of the North Carolina Rules of Evidence. State v. Hosey, 318 N.C. 330, 339-40, 348 S.E.2d 805, 810-11 (1986); N.C.G.S. § 8C-1, Rule 607 (2013).

The Court of Appeals decision here conflicts with these precedents and, since a defendant's statements are frequently introduced by the State in criminal matters in order to discredit the statements, will cause confusion on a matter of major significance to the jurisprudence of the State and the conduct of criminal trials.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for discretionary review.

ISSUES TO BE BRIEFED

I. Did the Court of Appeals err by ordering a new trial due to the admission of civil default judgments against defendant where defendant did not object under N.C.G.S. § 1-149 and where the State's purpose was to use defendant's lack of response to the civil suits to show that the story he eventually told on 22 June 2011 was not trustworthy?

II. Did the Court of Appeals err by ordering a new trial due to the admission of a child custody complaint against defendant where defendant did not object on any ground and where the State's purpose was to use his lack of response to show that the story he eventually told on 22 June 2011 was not trustworthy?

WHEREFORE, the State respectfully requests that this Court accept this case for review.

Electronically submitted this the 16th day of April, 2014.

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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing **STATE'S PETITION FOR DISCRETIONARY REVIEW** upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his **ATTORNEY OF RECORD** as follows:

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This the 16th day of April, 2014.

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