IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1235

Filed: 4 August 2015

Moore County, No. 12 CRS 51462, 1382

STATE OF NORTH CAROLINA

v.

ZACHARY DAVID THOMSEN

Appeal by the State from an Order Granting Appropriate Relief entered on 13 December 2013 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 6 April 2015.

Attorney General Roy Cooper, by Anne M. Middleton, Assistant Attorney General, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for the Defendant.

HUNTER, JR., Robert N., Judge.

The State appeals from a *sua sponte* order of the trial court granting Zachary David Thomsen ("Defendant") appropriate relief pursuant to N.C. Gen. Stat. § 15A-1420(d). The State argues the trial court erred in allowing its own motion for appropriate relief on Eighth Amendment grounds. Defendant argues this Court lacks jurisdiction to hear the case via a writ of *certiorari*, and even if this Court does have jurisdiction, the trial court did not abuse its discretion in granting Defendant appropriate relief.

For the following reasons, we vacate the trial court's order granting appropriate relief and the corresponding judgments and commitments, and remand for a new sentencing hearing.

I. Factual & Procedural History

On 11 June 2012, Defendant was indicted for statutory rape of a child less than thirteen years old, statutory sexual offense with a child less than thirteen years old, two counts of taking indecent liberties with a child, and two counts of sexual battery. At the time of the crimes for which Defendant was indicted, he was eighteen years old.

On 3 June 2013, pursuant to a plea agreement, Defendant entered a plea of guilty to first degree rape and first degree sexual offense. Under the terms of the plea agreement, the sentences for those two offenses were to be consolidated into one active sentence of 300 months minimum and 372 months maximum. In accordance with the plea agreement, the State agreed to dismiss the two indecent liberties charges and two sexual battery charges. The trial court administered the plea colloquy, and the State presented the factual basis for the plea. The evidence presented to the trial court tended to show the following facts:

At the time of the charged offenses, Defendant was working at Chick-fil-a and living in the home of his father, Brian Thomsen, and his father's fiancé, Violet James

("Ms. James").[1] The victim, Natalie James,[2] is Ms. James' eight-year-old daughter. On 31 May 2012, Ms. James was out of town, so Defendant picked up Natalie from school. Defendant took Natalie to the Chick-fil-a where he worked, then he took her to their shared home. Defendant and Natalie were at home by themselves. They played outside with a water gun and Defendant began tickling Natalie. He then brought Natalie into her bedroom and raped her vaginally and anally. Natalie told Defendant to stop, but he was too strong and overpowered her. The next day, on 1 June 2012, when Ms. James returned home, Natalie told her mother what happened. Natalie disclosed to Ms. James, and later to police, that Defendant raped her both anally and vaginally on several occasions. Ms. James immediately reported the incident to the Whispering Pines Police Department. Later, during her interview with police, Ms. James recalled that Natalie had some bleeding in her stool since December of 2011, and had several urinary tract infections during the same time period. Defendant was arrested on 1 June 2012. He admitted to the events of 31 May 2012 while he was in custody.

After the State presented the factual basis for the plea, the trial judge James M. Webb questioned Ms. James about Natalie's medical treatment before and after the 31 May 2012 rape, particularly regarding the treatment Ms. James sought for

[1] Violet James is a pseudonym used to protect the identity of Ms. James' minor daughter.
[2] Natalie James is a pseudonym used to protect the identity of the minor child.

Natalie's prior urinary tract infections. Judge Webb then announced his belief that the proposed 300-month sentence was in the aggravated sentencing range. He identified the 300-month sentence as "the most that [Defendant] could receive" and refused to accept the agreed-upon sentence. Both the prosecutor and the Defendant's attorney disagreed with Judge Webb, stating in fact the first-degree rape charge to which Defendant pled guilty carried a 300-month mandatory minimum sentence. Judge Webb held the matter open to study the sentencing statutes.

Three days later, on 6 June 2013, the trial court reconvened Defendant's plea hearing. Judge Webb ordered a presentence study of Defendant by the Department of Corrections, to gauge Defendant's mental, emotional, and physical health, and to determine whether Defendant is a sexually violent predator. The plea hearing resumed on 17 October 2013. The hearing began with further *sua sponte* questioning of Ms. James by Judge Webb. Ms. James testified that Defendant was the oldest child living in the home, and supervising the younger children was an "assumed task" for Defendant. Judge Webb then shifted his questioning of Ms. James to an incident approximately five years prior, when Natalie was three years old and was allegedly inappropriately touched by a thirteen-year-old boy who was the son of Natalie's caregiver. Judge Webb asked Ms. James about the extent of the prior abuse, and Ms. James responded adversely to this questioning, asking: "Why [do] we have to bring this up?" and "Why do we have to talk about this, sir?" and "Why is this important,

sir?" Eventually, Ms. James testified that the prior abuse of Natalie was "some touching . . . on the outside of her clothing" which Natalie reported to Ms. James immediately and Ms. James reported to the alleged perpetrator's parent and to the Fayetteville Police Department.

After Judge Webb finished questioning Ms. James, the State called Dr. Molly Berkoff, the pediatrician who examined Natalie after the 31 May 2012 rape. Dr. Berkoff testified that she examined Natalie on 22 June 2012. She stated "[t]here was nothing remarkable" about Natalie's examination, which she testified "is not unusual in cases of non-acute sexual abuse[.]" By "non-acute sexual abuse," Dr. Berkoff meant sexual abuse occurring more than 96 hours before the time of examination. She testified that, although Natalie's hymen was intact at the time of her examination, "children can have completely unremarkable exams despite having significant penetration or repeated episodes of trauma."

When the State finished presenting its evidence, Judge Webb further questioned both Dr. Berkoff and the investigating officer, Lieutenant Rodney Dozier, of the Whispering Pines Police Department. After hearing their testimony, Judge Webb decided to continue the matter until 11 December 2013.

On 13 December 2013, the case was recalled in front of Judge Webb. Judge Webb made the following relevant findings of mitigating factors, corresponding with the numbering on the felony judgment worksheet:

4(a), The defendant['s] age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

8(b), The relationship between the defendant and the victim was otherwise extenuating.

. . . .

And 21, additional written findings of factors in mitigation:

a. That in August, 2010 Brian Lawrence Thomsen, father of the defendant, and [Ms. James] commenced cohabitation at [Ms. James'] Whispering Pines, NC, residence along with [Ms. James'] two minor children and Mr. Thomsen's three minor children, including the defendant and the victim.

b. That on May 31st, 2012 [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged defendant without responsible adult supervision.

c. That Dr. Molly Berkoff, a pediatrician and the medical director for the Child Evaluation Clinic of the UNC Hospitals reviewed the victim's June 2nd, 2012 physical examination at the UNC Hospitals emergency room conducted by a sexual assault nurse examiner within 48 hours of the incident, and conducted her own physical examination of the victim on June 22nd, 2012 and concluded that neither examination either proved nor disproved the reported misconduct.

d. That Dr. Berkoff noted the emergency department documented redness and a deep V shape to the victim's hymen which the medical field does not characterize as being definitive evidence of penetration trauma, but rather simply a description of the way the victim's hymen looks and does not prove or disprove the allegations of sexual abuse.

e. That the victim's hymen was present.

f. That the victim's anal exam showed "no lesions, no discharge, no scarring".

g. That the Static 99-R places the defendant in the moderate-low risk category for being charged or convicted of another sexual offense.

> h. That the unanimous opinion of the board of experts of the sexually violent predator panel is that the defendant does not meet the criteria to be designated a sexually violent predator pursuant to North Carolina law.
>
> i. That the defendant participated in Junior Reserve Officer Training Corps (JROTC) while attending high school.

After announcing the findings in mitigation, Judge Webb accepted the sentence agreed upon by the State and Defendant, stating "[i]t's the judgment of the Court that the defendant is to be confined for a minimum of 300 months and a maximum of 420 months in the State Department of Adult Correction." Judge Webb then stated in open court, "[t]he Court sua sponte enters an order granting appropriate relief," and proceeded to read aloud a written order, which included the following relevant findings of fact:

> 1. That on June 3rd, 2013 the Defendant, while represented by Moore County Attorney Bruce Cunningham, pled guilty to Rape of a Child, a B1 felony, and Sexual Offense of a Child, also a B1 felony, in violation of G.S. 14-27.2A and G.S. 14-27.4A respectively;
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> . . . .
>
> 4. That pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), the statutory mandatory minimum sentence for the offenses for which the Defendant pled guilty to is confinement for a minimum of 300 months (25 years) and a maximum of 420 months (35 years);
>
> . . . .
>
> 21. That when the victim was 3 years of age she immediately reported to her mother that she was touched inappropriately by the 13 year old son of the owner/operator of an in home licensed day care located in Fayetteville, N.C.;
>
> 22. That while [Ms. James] reported this incident to the

Fayetteville Police Department, no one was ever prosecuted;

23. That despite this unfortunate incident, referenced in the Child Medical Evaluation of the UNC School of Medicine conducted on June 22, 2012, [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged Defendant without responsible adult supervision;

. . . .

77. That the Defendant's paternal grandfather in his returned questionnaire correctly and accurately attributes the Defendant's criminal behavior to being left alone in the home with a child without adult supervision;

78. That the following two cases are instructive and insightful;

79. That on June 8th, 2009 the Moore County Grand Jury returned a true bill of indictment in case # 09 CRS 52230 indicting Randy Martin Baughn with the first degree murder of his wife, Abigail Baughn;

80. That on November 7th, 2012 the Moore County District Attorney and Defendant Baughn . . . entered into a plea arrangement wherein Defendant Baughn was to plead guilty to second degree murder, a B2 Felony and receive an active sentence from the mitigated range of punishments of 94 months (7.83 years) minimum to 122 months (10.16 years) maximum;

. . . .

86. That on February 2nd, 2012 the Guilford County Grand Jury in Guilford County case numbered 11 CRS 94622, indicted 32 year old Fernando Santana for the First Degree Murder of Daniel Corey Jones on November 28th, 2011;

. . . .

88. That Defendant Santana pled guilty to Second Degree Murder and pursuant to the plea arrangement was sentenced to an active sentence from the aggravated range of punishments to a minimum of 292 months (24.3 years) and a maximum of 360 months (30 years) as a prior record level 4;

. . . .

> 91. That it is unconsciousable [sic] that teenaged Defendant Thomsen under the facts and circumstances of this case should be required to serve a mandatory active sentence in the North Carolina Department of Adult Correction of a minimum of 25 years and a maximum of 35 years.

In accordance with the findings of fact, Judge Webb made the following conclusions of law:

> 1. That the Defendant's sentence pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), of confinement for a minimum of 300 months (25 years) and a maximum of 420 months (35 years) is grossly disproportionate when compared with the mitigating factors found at sentencing and the facts and unusual circumstances surrounding the crimes committed;
> 2. That the mandatory sentencing provisions of G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), as applied to the facts and circumstances of this case are in violation of the Defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and constitute cruel and unusual punishment and a denial of due process of law; and
> 3. That the Defendant's sentence imposed this date pursuant to the plea arrangement and pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f) should be vacated.

After reading the order aloud, and vacating the previously imposed sentence, Judge Webb ordered: "It's the judgment of the Court he's to be confined for a minimum of 144 months," and a maximum of 233 months in the State Department of Adult Correction. Judge Webb signed a new judgment to that effect. The State noted its objection to the court's *sua sponte* motion for appropriate relief.

On 21 March 2014, the State filed a petition for writ of *certiorari* with this Court to review Judge Webb's 13 December 2013 order granting Defendant appropriate relief. On 3 April 2014, Defendant filed a response opposing the State's petition for writ of *certiorari*, arguing this Court lacks jurisdiction to hear the case via writ of *certiorari*. On 10 April 2014 a panel of this Court granted the State's petition for writ of *certiorari*. The State filed its Record on Appeal on 17 November 2014, and both parties submitted their briefs to this Court. In his brief, Defendant restated his argument that this Court lacks jurisdiction to hear this case. The case was set to be heard on 6 April 2015.

On 24 February 2015, Defendant submitted to this Court a Motion to Hold Appeal in Abeyance Pending Determination of *State v. Stubbs* by the North Carolina Supreme Court. *Stubbs* was heard in the North Carolina Supreme Court on 13 January 2015. In his motion, Defendant contended *Stubbs* will resolve the issue of whether the Court of Appeals has jurisdiction to review an order of the trial court granting appropriate relief via writ of *certiorari*. On 9 March 2015, the State filed a response, opposing Defendant's motion to hold the appeal in abeyance. On 16 March 2015, we granted Defendant's motion, and ordered the appeal held in abeyance pending the resolution of *State v. Stubbs*.

On 10 April 2015, the Supreme Court issued its opinion in *State v. Stubbs*, 568A03-02. Following this decision we reviewed this case without further briefing from the parties.

II. Jurisdiction

The first issue is whether this Court has jurisdiction to review the trial court's *sua sponte* order granting Defendant appropriate relief via writ of *certiorari*. Because the State did not appeal the trial court's order in this case, the writ of *certiorari* is the only mechanism by which this Court could have jurisdiction.

As an initial matter, we must address whether the issue of jurisdiction is appropriate for this panel's review, given that a prior panel of this Court—the petition panel—allowed the State's petition for writ of *certiorari* on 8 April 2014. The well-settled and often-cited rule of this Court is one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. *See N. Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 563, 299 S.E.2d 629, 630 (1983). However, that rule was recently called into question by this Court in *State v. Stubbs*. In *Stubbs*, two judges stated where subject matter jurisdiction is at issue, the panel should not be compelled to follow the holding of a prior panel. *See State v. Stubbs*, ___ N.C. App. ___, ___, 754 S.E.2d 174, 183, 185 (2014) (Dillon, J., concurring in separate opinion; Stephens, J., dissenting). In her dissent, Judge Stephens pointed out "[i]f a court finds *at any stage of the proceedings* that it lacks

jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *Id*. at ___, 754 S.E.2d at 185 (quoting *McAllister v. Cone Mills Corp*., 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) (emphasis added)).

Our decision in *State v. Stubbs* was reviewed by the North Carolina Supreme Court based on the dissenting opinion regarding jurisdiction. In its opinion, the Supreme Court declined to address the issue of whether this Court is bound by a prior panel where subject matter jurisdiction is in question. Instead, the Supreme Court decided the case on other grounds, and held only

> [a]s for whether a second panel of the Court of Appeals can revisit a determination of subject matter jurisdiction after a previous panel has already done so, we simply note that here, both panels did have subject matter jurisdiction.

State v. Stubbs, ___ N.C. ___, ___, 770 S.E.2d 74, 76 (2015).

Although *Stubbs* also dealt with this Court's subject matter jurisdiction to hear the State's appeal of an order granting a defendant's motion for appropriate relief ("MAR") via writ of *certiorari*, the substantive law addressed in *Stubbs* is not relevant to this case. In *Stubbs*, the defendant filed an MAR pursuant to N.C. Gen. Stat. § 15A-1415, alleging his sentence violated the Eighth Amendment of the United States Constitution.[3] *Id*. at ___, 770 S.E.2d at 76. The trial court granted the defendant's

[3] N.C. Gen. Stat. § 15A-1415 allows a noncapital defendant to move for appropriate relief from the judgment against him on a number of enumerated grounds, including an alleged violation of the United States Constitution or the Constitution of North Carolina. *See* N.C. Gen. Stat. § 15A-1415 (2014).

motion and the State appealed to this Court via writ of *certiorari*. *Id*. at ___, 770 S.E.2d at 75. The Supreme Court held that the "denying" language of Rule 21 of Appellate Procedure[4] does not divest the Court of Appeals of jurisdiction to review an order of the trial court *granting* an MAR filed pursuant to N.C. Gen. Stat. § 15A-1415 via writ of *certiorari*. *Id*. at ___, 770 S.E.2d at 76. The Court of Appeals has jurisdiction to review the MAR order via writ of *certiorari*, the Supreme Court said, because such jurisdiction is specifically provided for by the legislature in N.C. Gen. Stat. § 15A-1422(c)(3). *Id*.

The rule stated in *Stubbs* is not applicable here because N.C. Gen. Stat. § 15A-1420(d) is benefitted by no similar legislative grant of appellate jurisdiction in this Court. The statute is silent as to either the State's or the defendant's ability to seek appellate review of *sua sponte* MAR orders. Had the Supreme Court in *Stubbs* decided the issue of whether we are bound by a prior panel of this Court on jurisdictional issues, *Stubbs* would have controlled our decision in this case. Because the MAR statute addressed by the Supreme Court in *Stubbs* is not instructive here, and because—absent direction otherwise—we are bound by the decision of the

[4] Rule 21 of the North Carolina Rules of Appellate Procedure dictates the circumstances under which the appellate courts may review an order of the trial court via writ of *certiorari*. Prior to the Supreme Court's decision in *Stubbs*, the rule stated in pertinent part "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court . . . for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2014) (emphasis added).

petition panel in this case, we have jurisdiction to hear this case by the extraordinary writ of *certiorari*.

III. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). The trial court's findings of fact "are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

IV. Analysis

A. Findings of Fact

"Abuse of discretion results where 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." *State v. Rollins*, ___ N.C. App. ___, ___, 734 S.E.2d 634 (2012) (citation and quotation marks omitted). In this case, the trial court abused its discretion in making the following findings: (1) findings of fact # 21 and # 23

(discussing Natalie's prior abuse); (2) finding of fact # 77 (discussing Natalie's lack of "adult supervision"); (3) statutory mitigating factor 8(b) ("The relationship between the defendant and the victim was otherwise extenuating."); and (4) non-statutory mitigating factor 21 (b) (discussing Natalie's lack of "adult supervision").

Findings of fact # 21 and # 23 state:

> 21. That when the victim was 3 years of age she immediately reported to her mother that she was touched inappropriately by the 13 year old son of the owner/operator of an in home licensed day care located in Fayetteville, N.C.;
> . . . .
> 23. That despite this unfortunate incident . . . [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged Defendant without responsible adult supervision[.]

Natalie's prior abuse is irrelevant to Defendant's sentencing in this case. Furthermore, the finding that Natalie was "without adult supervision" is wholly unsupported by the facts in the record. The record shows that Defendant *was* the adult in charge of supervising Natalie on the day of the crime. The evidence is uncontroverted that: Defendant was eighteen years old—a legal adult—on the day of the crime; Defendant was gainfully employed at Chick-Fil-A; Defendant had "no prior involvement with the law[;]" Defendant supervised the younger children in the past; Ms. James was out of town on the day of the crime and Defendant was in charge of picking Natalie up from school and bringing her home.

Similarly, finding of fact # 77 states:

> 77. That the Defendant's paternal grandfather in his returned questionnaire correctly and accurately attributes the Defendant's criminal behavior to being left alone in the home with a child without adult supervision[.]

For the reasons stated above, this finding is manifestly unsupported by reason. Defendant was an eighteen year old *adult* at the time of the crime. Defendant had no prior criminal record and nothing in this record indicates Defendant was prone to this type of criminal behavior when he was left alone with Natalie.

We also find the trial court abused its discretion in two of its findings of mitigating factors, one statutory and one non-statutory. Although "the trial judge has wide latitude in determining the existence of aggravating and mitigating factors," *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988), findings of mitigating factors may be stricken for abuse of discretion. *See State v. Spears*, 314 N.C. 319, 322–23, 333 S.E.2d 242, 244 (1985).

Judge Webb found statutory mitigating factor 8(b): "[t]he relationship between the defendant and the victim was otherwise extenuating." "An extenuating relationship should be found if circumstances show that part of the fault for a crime can be 'morally shifted' from defendant to the victim." *State v. Mixion*, 110 N.C. App. 138, 151, 429 S.E.2d 363, 371 (1993) (citation omitted). Here, it was a manifest abuse of discretion to regard Defendant's role as Natalie's caretaker as an extenuating circumstance warranting sentence mitigation. There is no competent evidence in this

record tending to show any facts which could reasonably support a finding of an extenuating relationship between Natalie and Defendant.

Finally, Judge Webb found non-statutory mitigating factor 21(b):

> b. That on May 31st, 2012 [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged defendant without responsible adult supervision.

For the reasons stated above, this non-statutory mitigating factor constitutes a manifest abuse of discretion. We therefore will not consider the aforementioned findings of fact in our analysis of Defendant's Eighth Amendment claim.

B. Conclusions of Law: Eighth Amendment

The trial court's conclusions of law are fully reviewable on appeal. *See Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35. We now review the trial court's conclusion that Defendant's 300-month minimum and 420-month maximum sentence violated his rights under the Eighth and Fourteenth Amendments.

The Eighth Amendment applies to the states by virtue of the Fourteenth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991). The Eighth Amendment prohibits cruel and unusual punishment; specifically, it forbids "extreme sentences that are grossly disproportionate to the crime." *Id.* at 1001 (internal quotation marks omitted). To determine whether a sentence for a term of years is grossly disproportionate to a particular crime, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham v. Florida*, 560 U.S.

48, 60 (2010). "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* Our Supreme Court has held "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment[.]" *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983).

In this case, Defendant pled guilty to rape of a child, in violation of N.C. Gen. Stat. § 14-27.2A, and sexual offense with a child, in violation of N.C. Gen. Stat. § 14-27.4A. Each of those crimes carry a mandatory minimum sentence of 300 months imprisonment. *See* N.C. Gen. Stat. § 14-27.2A(b) ("[I]n no case shall the person receive an active punishment of less than 300 months[.]"); N.C. Gen. Stat. § 14-27.4A(b) (same). The State and Defendant agreed to a consolidated minimum sentence of 300 months' imprisonment. A 300-month sentence is not grossly disproportionate to the two crimes to which Defendant pled guilty. Furthermore, Defendant's 300-month sentence in this case is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction. *See State v. Agustin*, ___ N.C. App. ___, 747 S.E.2d 316 (2013) (holding sentence of 300 to 369 months' imprisonment was appropriate for rape of a child); *State v. Bailey*, 163 N.C. App. 84, 592 S.E.2d 738 (2004) (holding consecutive prison terms of 300 to 369 months for

first-degree rape was not unconstitutional); *State v. Stallings*, 107 N.C. App. 241, 419 S.E.2d 586 (1992) (holding life sentence for first-degree sexual offense was not cruel and unusual punishment); *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585 (1990) (holding sentence of life imprisonment for first-degree rape was not unconstitutional).

We are unpersuaded by the trial court's comparison of the sentence imposed in this case with the sentences imposed in other, unrelated, second-degree murder cases. We follow our precedent, holding the original 300-month sentence imposed by the trial court does not violate the Eighth Amendment.

V. Conclusion

For the foregoing reasons, we vacate the 13 December 2013 order of the trial court granting Defendant appropriate relief and the corresponding judgments and commitments. We remand for a new sentencing hearing.

VACATED AND REMANDED.

Judge Dietz concurs.

Chief Judge McGee dissents in a separate opinion.

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Filed: 4 August 2015

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STATE OF NORTH CAROLINA,

v.

ZACHARY DAVID THOMSEN

McGEE, Chief Judge, dissenting.

Because I do not believe the State had authority to seek review of the trial court's *sua sponte* grant of its MAR, I dissent.

I. In re Civil Penalty

The majority opinion holds that we are bound by this Court's prior ruling granting the State's petition for writ of *certiorari*, pursuant to *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). I disagree.

This Court has held:

> A judgment or order that is void, as opposed to voidable, is subject to collateral attack. *See Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 24 (1925) (holding that void judgments "yield to collateral attack, but [voidable judgments] never yield to a collateral attack . . ."). A lack of subject matter jurisdiction renders the judgment or order void. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001) ("'A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea.'"

In re Webber, 201 N.C. App. 212, 220, 689 S.E.2d 468, 474-75 (2009) (citation omitted). I do not believe *In re Civil Penalty* serves to prevent this panel from addressing the issue of subject matter jurisdiction. I concur with the analyses of Judge Stephens and Judge Dillon concerning this issue in *State v. Stubbs*. *State v. Stubbs*, __ N.C. App. __, __, and__, 754 S.E.2d 174, 182 and 184-85 (2014) ("*Stubbs I*").

Two of the three judges in *Stubbs I* agreed that this Court is not bound by the prior rulings of this Court when the issue is lack of subject matter jurisdiction. *Stubbs I*, __ N.C. App. at __ and __, 754 S.E.2d at 182 and 185; *see also State v. Stubbs*, __ N.C. __, __, 770 S.E.2d 74, 75 (2015) ("*Stubbs II*") ("The concurring and dissenting opinions disagreed with the lead opinion on that point, believing that each panel of the Court of Appeals has the authority and ability to address subject matter jurisdiction anew."). Because our Supreme Court did not rule on the jurisdictional issue raised in *Stubbs II* related to *In re Civil Penalty* – whether this Court can address lack of subject matter jurisdiction if a prior panel of this Court has already purported to grant *certiorari* in the same matter – the majority decision of this Court in *Stubbs I*, as related to jurisdiction, has not been overruled and informs my position on this issue. I do not believe we are bound by the actions of the prior panel granting *certiorari* in this matter, as I find that the prior panel lacked jurisdiction to enter that order, and it is therefore a nullity, of no effect, and subject to collateral attack at any time. *Webber*, 201 N.C. App. at 220, 689 S.E.2d at 474-75.

II. N.C. Gen. Stat. § 15A-1422 and the State's Right to Certiorari

A.

The trial court *sua sponte* granted its own MAR in this matter. Trial courts have this authority pursuant to N.C. Gen. Stat. § 15A-1420(d), which states: "**Action on Court's Own Motion**. – At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion." N.C. Gen. Stat. § 15A-1420(d) (2013). This Court possesses only that authority granted it by statute to review actions of the trial court.

> The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: "The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A–32(c) (2014). *More specifically, and also relevant here, the General Assembly has specified when appeals relating to MARs may be taken[.]*

Stubbs II, __ N.C. at __, 770 S.E.2d at 75-76 (emphasis added).

N.C. Gen. Stat. § 15A-1422 provides the authorization for review of the grant or denial of an MAR. Review of a ruling on an MAR is limited by N.C. Gen. Stat. § 15A-1422 to two instances: (1) where the relief was sought pursuant to N.C. Gen. Stat. § 15A-1414 and (2) where the relief was sought pursuant to N.C. Gen. Stat. §

15A-1415. N.C. Gen. Stat. § 15A-1422(b) and (c) (2013). There is no provision in N.C. Gen. Stat. § 15A-1422 for review of an MAR granted pursuant to N.C. Gen. Stat. § 15A-1420(d) – the statute allowing the trial court to move for appropriate relief on its own motion. Similarly, there is no provision for a defendant to seek review of an MAR granted upon the request of the State pursuant to N.C. Gen. Stat. § 15A-1416:

> First, we note that defendant does not have a right to appeal from the order of the superior court to this Court. Article 91 of the North Carolina General Statutes, entitled "Appeal to Appellate Division," indicates when a defendant in a criminal action may appeal to the appellate division. It provides that "[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A–1422." N.C. Gen. Stat. § 15A–1444(f) (1997). While N.C. Gen. Stat. § 15A–1422 (1997) indicates that a defendant, in certain instances, may appeal the denial of his own motion for appropriate relief, *it gives no indication that a defendant may appeal the granting of the State's motion for appropriate relief as is the case here.*

State v. Linemann, 135 N.C. App. 734, 735, 522 S.E.2d 781, 782 (1999) (emphasis added). I see no reason why a defendant can be denied the right to appeal an MAR granted to the State pursuant to N.C. Gen. Stat. § 15A-1416, but the State could not be denied the right to appeal an MAR granted to the defendant pursuant to § 15A-1420(d). In addition, N.C. Gen. Stat. § 15A-1444 – "When defendant may appeal; certiorari," specifically provides that for a defendant, "[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422." N.C. Gen. Stat. § 15A-1444(f) (2013). The

corresponding statute related to the State's right to appeal, N.C. Gen. Stat. § 15A-1445 – "Appeal by the State," contains no provision related to appeal or petition for writ of *certiorari* following the grant of an MAR in Defendant's favor, and contains no provision at all providing the State authority to seek review by writ of *certiorari*. N.C. Gen. Stat. § 15A-1445 (2013). I do not believe the State had any statutory authority to petition this court for review of the trial court's *sua sponte* grant of the MAR.

B.

The State argued in its petition that this Court has subject matter jurisdiction based upon the North Carolina Constitution and N.C. Gen. Stat. § 7A-32(c), which provides that this Court may issue writs of *certiorari* "as provided by statute or rule of the Supreme Court," or "according to the practice and procedure of the common law." The State's argument is apparently that N.C. Gen. Stat. § 7A-32(c) provides this Court with jurisdiction to issue a writ of *certiorari* in any instance in which to do so would be "in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts[.]" N.C. Gen. Stat. § 7A-32(c) (2013). The State ignores the portion of N.C. Gen. Stat. § 7A-32(c) limiting issue of writs of *certiorari* by this Court to what is "provided by statute or rule of the Supreme Court[.]" N.C. Gen. Stat. § 7A-32(c). Because the General Assembly has provided for instances in which this Court may issue a writ of *certiorari* to review the grant of an MAR in N.C. Gen. Stat. § 15A-

1422, we are bound by and limited to the authority granted therein. The State did not reference N.C. Gen. Stat. § 15A-1422 in its petition, nor did it ask this Court to issue a writ of *certiorari* pursuant to Rule 21 of the Rules of Appellate Procedure based upon failure to timely appeal, as required by N.C. Gen. Stat. § 15A-1422.[5]

In reviewing N.C. Gen. Stat. § 15A-1422, we must follow the established rules of statutory interpretation.

> "In resolving issues of statutory construction, we look first to the language of the statute itself." It is a well-established rule of statutory construction that "'[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.'"

Walker v. Bd. of Trustees of the N.C. Local Gov't. Emp. Ret. Sys., 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998) (citations omitted). Furthermore, "'Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.'" *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 307, *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014) (citation omitted).

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[5] We note that prior opinions of this Court have held that when, as in the present case, the State has no right to appeal the underlying judgment (because there was no alleged error in the underlying judgment), the State cannot appeal a subsequent grant of an MAR in the defendant's favor. *See State v. Starkey*, 177 N.C. App. 264, 266-67, 628 S.E.2d 424, 425-26 (2006); *State v. Griffin*, 215 N.C. App. 391, 716 S.E.2d 87 (2011) (unpublished opinion). It is my belief that *Stubbs II* implicitly overrules those portions of the opinions of this Court limiting review in this manner.

I believe the language of the statute is clear and requires no interpretation. Furthermore, because N.C. Gen. Stat. § 15A-1422 includes provisions for review of MARs granted pursuant to N.C. Gen. Stat. §§ 15A-1414 and 1415, but not pursuant to N.C. Gen. Stat. § 15A-1420(d), if statutory construction is required, I believe we are constrained to find that N.C. Gen. Stat. § 15A-1422 provides no basis for review pursuant to N.C. Gen. Stat. § 15A-1420(d). See *Linemann*, 135 N.C. App. at 735, 522 S.E.2d at 782 (because N.C. Gen. Stat. § 15A-1422 includes no right of review from the grant of an MAR pursuant to N.C. Gen. Stat. § 15A-1416, no such right exists). Although the omission of an avenue for review of an MAR granted pursuant to N.C. Gen. Stat. § 15A-1420(d) – and pursuant to § 15A-1416 – perhaps constitutes an oversight, it is the province of the General Assembly, and not this Court, to rectify any deficiency in the statute, assuming one exists.

III. The Effect of Stubbs II

In *Stubbs II*, our Supreme Court stated the following:

> The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: "The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A–32(c) (2014). More specifically, and also relevant here, *the General Assembly has specified when appeals relating*

to MARs may be taken:

> (c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A–1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
> (2) If an appeal is pending when the ruling is entered, in that appeal.
> (3) *If the time for appeal has expired and no appeal is pending, by writ of certiorari.*

Id. § 15A–1422(c) (2014). Here, *given the timing*, appeal of the MAR *would fall under subdivision (c)(3): by writ of certiorari*. Notably, subsection 15A–1422(c) does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails. Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id*. § 7A–32(c), and given that the General Assembly has placed no limiting language in subsection 15A–1422(c) regarding which party may appeal a ruling on an MAR, we hold that *the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court*.

Stubbs II, __ N.C.at __, 770 S.E.2d at 75-76 (emphasis added). I believe that N.C. Gen. Stat. § 15A-1422, as interpreted by our Supreme Court, provides the State with the statutory authority required for direct appeal of an MAR *when requested by a defendant pursuant to N.C. Gen. Stat. §§ 15A-1414 or 15A-1415*. In my opinion, the language in *Stubbs II* clearly implies that, when a defendant moves for appropriate relief, any of the enumerated avenues of appeal are available to the State, depending

on when the MAR is ruled upon. *Certiorari* was the only avenue available in *Stubbs* because "*given the timing*, appeal of the MAR would fall under subdivision (c)(3): by writ of certiorari." *Id.* at __, 770 S.E.2d at 76 (emphasis added). In the present case, because the trial court granted the MAR immediately following sentencing, the State, assuming *arguendo* Defendant had moved for the MAR, would have been required to directly appeal the order granting the MAR. Pursuant to N.C. Gen. Stat. §§ 15A-1422(b) and (c)(1), there was no authority granting jurisdiction to this Court to proceed pursuant to writ of *certiorari*. As stated above, I do not believe there is any right of review in the General Statutes for an MAR granted pursuant to N.C. Gen. Stat. § 1420(d). However, even assuming *arguendo* there is such a right of review, the State would have been required by N.C. Gen. Stat. § 15A-1422 (b) or (c) to directly appeal the MAR, which it failed to do. *Certiorari*, pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) is only available if the trial court grants or denies an MAR *after the time for appeal of the underlying judgment has expired and no appeal is pending*. *Id.* There was no avenue that was available to the State to challenge the trial court's *sua sponte* granting of the MAR in favor of Defendant over three months after the MAR was granted. N.C. Gen. Stat. § 15A-1422; N.C.R. App. P. 4 (2015).

Assuming, *arguendo*, this Court could appropriately review the State's petition as if the trial court proceeded pursuant to N.C. Gen. Stat. § 15A-1415, because the trial court ruled on the MAR before "the time for appeal from the conviction [had]

expired," the State was still required to challenge the trial court's ruling "by appeal." N.C. Gen. Stat. § 15A-1422(c)(1). Even assuming *arguendo* that N.C. Gen. Stat. § 15A-1422(c)(3) could provide an avenue for review by *certiorari* in this instance, I do not believe N.C. Gen. Stat. § 15A-1422(c)(3) allows a petitioner – in this case the State – to sit on its right to seek review indefinitely. N.C. Gen. Stat. § 15A-1422(c)(3) states: "The court's *ruling* on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:" "If the *time for appeal has expired* and no appeal is pending, by writ of certiorari." N.C. Gen. Stat. § 15A-1422(c)(3) (emphasis added). Rule 21 of the North Carolina Rules of Appellate Procedure, entitled "Certiorari," states in relevant part:

> (c) *Same; Filing and service; Content*. The petition [for writ of *certiorari*] *shall* be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties.
>
> . . . .
>
> (e) *Petition for Writ in Postconviction Matters; to Which Appellate Court Addressed*. Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. *In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court*.

N.C.R. App. P. 21 (2015) (some emphasis added). Review by *certiorari* is not available in the present case because "the time for appeal [had *not*] expired" when the ruling on the MAR was made, *and* the State failed to timely appeal or petition for writ of *certiorari* within a reasonable time following the ruling granting the MAR. N.C. Gen. Stat. § 15A-1422(c)(3) (emphasis added); N.C.R. App. P. 21; *see also State v. Foreman*, 364 N.C. 328, 701 S.E.2d 669 (2010) (unreasonable delay in petitioning for writ of certiorari will result in denial of the petition); *In re L.R.*, 207 N.C. App. 264, 699 S.E.2d 479 (2010) (unpublished opinion) ("The 'Rules of Appellate Procedure do not set forth a specific time period in which a [petitioner] must file a petition for *writ of certiorari*,' but the court must in its discretion determine what constitutes an unreasonable delay in relation to the circumstances in each case. In our discretion, we decline to review the adjudication order of 7 July 2009 because [the petitioner] has not shown any reason for her delay in appealing that order and her failure to timely assert her right of appeal. [The petitioner] waited ten months after the 7 July 2009 adjudication order before filing a petition for writ of *certiorari*. [The petitioner] gives no reason for this long delay. Therefore, the 7 July 2009 order remains valid and final, and we do not address [the petitioner's] arguments regarding that order.") (citation omitted).

I would therefore hold: (1) This Court is not bound by the order of the prior panel of this Court granting *certiorari* because the prior panel lacked subject matter

jurisdiction and, therefore, its order is a nullity; (2) this Court has not been granted jurisdiction by the General Assembly to review the grant or denial of an MAR pursuant to N.C. Gen. Stat. § 15A-1420(d); and (3) even assuming, *arguendo,* this Court could have jurisdiction pursuant to N.C. Gen. Stat. §§ 15A-1422 (b) or (c), the State has failed to act in a timely manner in either appealing or petitioning for review and has not shown any reason for the delay. The State's petition for writ of *certiorari* and appeal should be dismissed.