No. 270PA20 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

STATE OF NORTH CAROLINA )

)

v. ) From Cumberland County

)

DATORIUS LANE MCLYMORE )

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**DEFENDANT-APPELLANT’S NEW BRIEF**

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**DEFENDANT-APPELLANT’S NEW BRIEF**

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# ISSUE PRESENTED

1. Whether the Court of Appeals erred by concluding the trial court did not err in instructing the jury that Mr. McLymore was not entitled to self-defense if he was committing the felony of possession of a firearm by a felon because the instruction was not a complete and correct statement of the law?

# STATEMENT OF THE CASE

On 5 January 2015, the Cumberland County Grand Jury indicted Datorius Lane McLymore for one count each of first-degree murder, felonious speeding to elude arrest, and robbery with a dangerous weapon. (Rpp 12-16). The matter came on for trial at the 16 July 2018 session of Cumberland County Criminal Superior Court, the Honorable Claire V. Hill, presiding. (Tp 1). On 26 July 2018, the jury found Mr. McLymore guilty on all counts. (Rpp 115-17). The trial court found Mr. McLymore to be a Prior Record Level II for sentencing purposes and imposed a sentence of life imprisonment without the possibility of parole, consolidating all offenses with the conviction for murder. (Rpp 118-21). Mr. McLymore filed written notice of appeal. (Rpp 122-23).

In an unpublished opinion filed 5 May 2020, the Court of Appeals found no error in Mr. McLymore’s trial. On 10 June 2020, Mr. McLymore filed a petition for discretionary review with this Court.

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

In an order certified 12 March 2021, this Court allowed Mr. McLymore’s petition for discretionary review pursuant to N.C.G.S. § 7A-31.

# STATEMENT OF THE FACTS

### The Evidence at Trial:

In April of 2014, Mr. McLymore applied with Millennium Sales, a travelling magazine sales company, and was hired to sell magazines. (Tpp 1066-67). After “a couple of days,” Mr. McLymore decided to quit. (Tpp 1067-68). Mr. McLymore needed to wait until his direct supervisor, David Washington, returned to the hotel which was serving as the temporary base of operations for the company. (Tp 1069). Mr. McLymore knew Washington as “Biggy.” (Tp 1069).

When Biggy arrived, he sat in his car in front of the hotel with two or three other people. (Tp 1070). Biggy told his companions to get out of the car, and Mr. McLymore got in the passenger’s seat. (Tp 1071). Biggy just stared at him over his glasses with a smirk on his face. (Tp 1071).

Biggy then drove around for a while with Mr. McLymore in the car, and eventually stopped at a convenience store. (Tp 1073). Biggy asked Mr. McLymore for the $60 he had made from his magazine sale that morning, but Mr. McLymore had spent that money on laundry detergent and food. (Tp 1074). When Mr. McLymore told Biggy that he didn’t have the money, Biggy “got mad[.]” (Tp 1075). Biggy “started talking trash to” Mr. Mclymore and punched him in the face. (Tpp 1076-77).

When Biggy hit him in the jaw, Mr. McLymore was dazed. (Tp 1066). Biggy then reached over, grabbed Mr. McLymore by the shirt, and pushed him against the door. (Tp 1077). Mr. McLymore was trying to get Biggy’s hands off his neck, but “he was bigger than [Mr. McLymore]. He was stronger than [Mr. Mclymore.]” (Tp 1077). Mr. McLymore thought Biggy was trying to choke him out. (Tp 1077). Mr. McLymore was afraid and feared for his life. (Tp 1077). Though Mr. McLymore had previously been convicted of a felony, he was carrying a gun. (Tpp 1078, 1100). Mr. McLymore pulled out his gun and told Biggy to “get the fuck off [him].” (Tp 1078). Biggy was still choking him. (Tp 1078). Mr. McLymore closed his eyes and fired two or three times. (Tpp 1078-79). Mr. McLymore said he fired the gun for his “safety to get the dude off [his] neck.” (Tp 1079).

The car started moving forward and Mr. McLymore grabbed the wheel and eventually stopped the car on a side street across from the hotel. (Tpp 1079-80). He went around to the driver’s side to help Biggy out of the car Biggy fell out on top of him. (Tpp 1081-82). Mr. McLymore saw people nearby and heard screaming. (Tp 1082). He got scared. (Tp 1082). He “just hopped in the car” and drove away. (Tp 1082).

Mr. McLymore drove around for a while in Biggy’s car, trying to figure out what to do. (Tp 1082). He tried to contact his father, to let him know what happened and that “the dude tried to kill [him].” (Tp 1082). He eventually ended up returning to the hotel. (Tp 1083). Mr. McLymore had decided he would drop the car off at the hotel, make his way to his father’s house, and then go to the police station “and tell them people that he tried to kill me.” (Tp 1083). He did not want the police to think he was running from something. (Tp 1083). However, when he got to the hotel, two men approached the car, and a police car pulled into the parking lot. (Tpp 1083-84).

Eddie Ketchum, a Fayetteville Police Officer, responded to a call reporting a man who was shot and lying in the street. After speaking to witnesses and reviewing Biggy’s ID, Ketchum put an alert out on two vehicles registered to the license: a BMW and a 2003 Cadillac Deville. (Tp 226). Shortly afterwards, he observed a Cadillac drive by the scene. (Tp 227). The car drove in the center lane, with its lights off, making “erratic gestures” with its turn signals before “darting into the” hotel across the street. (Tp 227).

Ketchum drove across the street past the hotel parking lot and saw the Cadillac parked facing outward, with “a couple of individuals” speaking to the driver through the window. (Tp 228). Ketchum confirmed with his dispatch that the plate on the car matched the vehicle registered to Biggy. (Tp 228). Ketchum immediately tried to get into the parking lot near the car, and the driver pulled out into the street again. (Tp 229). Mr. McLymore was scared for his life. (Tp 1084). He drove away, and the police car followed. Mr. McLymore did not stop for the police for an hour and fifteen minutes. (Tp 230).

Ketchum followed the car, which sped up, almost hit another vehicle, and drove on the wrong side of the road. (Tpp 230-31). The car drove through several yards and a field, and had “no regard for any traffic signals.” (Tp 231). At one point, the car drove back by the crime scene and crossed seven lanes of traffic. (Tp 231). At another point during the pursuit, Ketchum saw what appeared to be clothes being thrown from the car. (Tp 248). Mr. McLymore admitted that he was driving erratically – making gestures, swerving the car, etc. – and explained he was behaving this way to avoid being shot by the police. (Tpp 1105-06).

The pursuit was called off when Mr. McLymore drove into a trailer park with only one means of entry. (Tp 231). The police waited. Later, Mr. McLymore attempted to exit the trailer park but was blocked by police cars. (Tp 250). When officers pulled Mr. McLymore out of the car, he was shirtless and his khaki pants and the inside of the car were covered in blood. (Tpp 251-52, 659).

Biggy died from what was determined to be multiple gunshot wounds. (Tpp 933-34) Mr. McLymore was charged with the murder and robbery with a dangerous weapon of Biggy, and with felonious speeding to elude arrest.

At trial, the State also introduced evidence that Mr. McLymore had been involved in a shooting three weeks earlier wherein he shot, but did not kill, a man named Andre Womack in Womack’s house during a purported robbery, using the same gun as was later used to shoot Washington. (Tpp 774-926).

At the charge conference, the trial court considered whether Mr. McLymore was entitled to an instruction on self-defense. Mr. McLymore requested one, but the State requested that the trial court instruct the jury, pursuant to N.C.G.S. § 14-51.4, that Mr. McLymore would not be entitled to self-defense if he was committing a felony. (Tp 1125). The State cited the Court of Appeals’ decision in *State v. Crump*, 259 N.C. App. 144, 815 S.E.2d 415 (2018) (*Crump I)*, *reversed on other grounds*,376 N.C. 375, 851 S.E.2d 904 (2020), and argued that it had showed that Mr. McLymore had prior felony convictions, and therefore the jury could find he was committing the felony of possession of a firearm by a felon. (Tp 1125). Mr. McLymore objected, arguing that he had a common-law right to self-defense, to which N.C.G.S. § 14-51.4 did not apply, and that giving the instruction under N.C.G.S. § 14-51.4 violated Mr. McLymore’s constitutional rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. (Tpp 1138-39). The trial court overruled Mr. McLymore’s objection, (Tp 1139), and repeatedly instructed the jury that “[t]he Defendant is not entitled to the benefit of self-defense if he was committing the felony of possession of a firearm by a felon.” (Tpp 1230, 1233 lines 6-9 and lines 16-19). The jury found Mr. McLymore guilty of first-degree murder, felonious speeding to elude arrest, and robbery with a dangerous weapon. (Rpp 115-17).

### The Appeal:

On appeal, Mr. McLymore argued, *inter alia*, that the trial court erred by instructing the jury that Mr. McLymore was not entitled to self-defense if he was committing the felony of possession of a firearm by a felon. Mr. McLymore argued the trial court’s instruction was inappropriate because N.C.G.S. § 14-51.4(1) cannot apply to bar a common-law self-defense claim, because Mr. McLymore had a constitutional right to act in self-defense, and because the trial court failed to also instruct the jury that Mr. McLymore might have been justified in possessing a firearm under theories such as justification, necessity or duress.

In an unpublished opinion filed 5 May 2020, the Court of Appeals rejected Mr. McLymore’s argument concerning common-law self-defense. *State v. McLymore*, No. COA19-428, 2020 N.C. App. LEXIS 333 (May 5, 2020) (unpublished, attached in appendix). The Court of Appeals held there was no error in the jury instructions because “the General Assembly intended for Section 14-51.4 to supplant common law self-defense, [and therefore] Defendant could only seek relief under statutory self-defense.” *Id*. at \*20.The Court of Appeals failed to address Mr. McLymore’s argument that the jury should have been instructed on possible defenses such as duress or necessity. *See id*.

# STANDARD OF REVIEW

This Court reviews a decision of the Court of Appeals to determine if it contains any error of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). The argument in this brief addresses the trial court’s instructions to the jury concerning self-defense as well as constitutional violations, which are both reviewed *de novo*. *State v. Mercer*, No. 257PA18, 2020 N.C. LEXIS 104, at \*5-6 (Feb. 28, 2020); *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020).

# ARGUMENT

## The Court of Appeals erred by concluding the trial court did not err in instructing the jury that Mr. McLymore was not entitled to self-defense if he was committing the felony of possession of a firearm by a felon because the instruction was not a complete and correct statement of the law.

A trial court must instruct the jury on all substantial features of a case, and the instructions the court gives must be correct statements of the law. *See, e.g.*, *State v. Snider*, 168 N.C. App. 701, 703, 609 S.E.2d 231, 233 (2005). The trial court’s self-defense instruction in this case was erroneous because the statement that Mr. McLymore “is not entitled to the benefit of self-defense if he was committing the felony of possession of a firearm by a felon” is not legally correct. (Tp 1230). Mr. McLymore was entitled to an instruction on perfect self-defense under common law, because N.C.G.S. § 14-51.4 applies only to statutory self-defense. The instruction was also error because, in the event this Court holds N.C.G.S. § 14-51.4 applicable to Mr. McLymore’s case, its application to him was unconstitutional, and the trial court failed to instruct on all substantial features of the case.

### The trial court’s self-defense instruction was not a correct statement of the law.

#### North Carolina recognizes common-law self-defense, and N.C.G.S. § 14-51.4(1) does not apply to common-law self-defense.

“The first law of nature is that of self-defense.” *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (cleaned up). Prior to 2011, self-defense in North Carolina was largely a product of common law. *See, e.g., State v. Holloman*, 247 N.C. App. 434, 439, 786 S.E.2d 328, 332 (2016) (*reversed* *by* 369 N.C. 615, 799 S.E.2d 824 (2017)). A person has a common-law right to use deadly force when: (1) he believes he is in imminent danger of death or serious bodily injury; (2) that belief is reasonable; (3) he is not the aggressor; and (4) his use of force is not more than is reasonably necessary to protect himself from death or serious bodily harm. *See* *State v. Harvey*, 372 N.C. 304, 307-08, 828 S.E.2d 481, 483 (2019).

In 2011, the General Assembly enacted statutory provisions creating enhanced rights to self-defense in N.C.G.S. §§ 14-51.2 *et seq.* In doing so, the legislature created statutory defenses commonly known as “the Castle Doctrine,” and the “Stand Your Ground law.” *See* N.C.G.S. §§ 14-51.2 and 14-51.3. In N.C.G.S. § 14-51.4, the legislature clarified that the statutory justification “described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who: (1) Was attempting to commit, committing, or escaping after the commission of a felony.” N.C.G.S. § 14-51.4.

In contrast to the Court of Appeals’ holding, the sensible reading of the statutes is that N.C.G.S. §§ 14-51.2 and 14-51.3 are statutory defenses giving additional rights beyond those provided at common law. These statutes were designed to supplement and expand the common-law defense of self-defense, not to replace it. This is expressly provided in N.C.G.S. § 14-51.2: “This section is not intended to repeal or limit any other defense that may exist under the common law.” N.C.G.S. § 14-51.2(g). It is also implicit in the overall scheme established by these statutes, which were enacted as part of a single piece of legislation, N.C. Session Law 2011-268. *See, e.g. State v. Cook*, 254 N.C. App. 150, 154-55, 802 S.E.2d 575, 578 (2017) (discussing distinction between common law and statutory self-defense and noting that “N.C. Gen. Stat. § 14-51.2 is an affirmative defense provided by statute which *supplements* other affirmative defenses that are available under our common law.” (emphasis added)), *affirmed* *per curiam* 370 N.C. 506, 809 S.E.2d 566 (2018).

The continued availability of common-law self-defense is apparent not only from the plain language of the statutes, but also from our case law. Since 2011, the decisions of our appellate courts have continued to recognize and apply common-law self-defense, and to define self-defense without reference to N.C.G.S. §§ 14-51.2 *et seq*. *See, e.g., State v. Greenfield*, 375 N.C. 434, 440-42, 847 S.E.2d 749, 754-56 (2020) (concluding the defendant was entitled to self-defense instruction based solely on common law, without any reference to N.C.G.S. §§ 14-51.2 *et seq*.); *State v. Coley*, 375 N.C. 156, 160, 846 S.E.2d 455, 458 (2020) (“In North Carolina, the right to use deadly force to defend oneself is provided both by statute and case law.”); *Harvey,* 372 N.C. at 306 n.4, 828 S.E.2d at 482; *Cook*, 254 N.C. App. at 154-55, 802 S.E.2d at 578; *accord* *State v. Fitts*, 254 N.C. App. 803, 806, 803 S.E.2d 654, 657 (2017) (continuing to apply common-law self-defense after 2011, without reference to N.C.G.S. §§ 14-51.2 or 14-51.3); *and* *State v. Rawlings*, 236 N.C. App. 437, 441, 762 S.E.2d 909, 913 (2014) (recognizing distinction between common-law self-defense and statutory self-defense). Thus, the majority of appellate court cases have continued to recognize that common-law self-defense exists as a separate legal theory, unaffected by the statutory provisions contained in N.C.G.S. §§ 14-51.2 *et seq*.

Despite the statute’s plain language and clear meaning, as well as the continued recognition of common-law self-defense by our appellate courts, the Court of Appeals incorrectly reasoned that N.C.G.S. § 14-51.4 *must* apply in Mr. McLymore’s case because the General Assembly “did not carve out a similar common law exception” such as the one found in N.C.G.S. § 14-51.2(g), providing explicitly that N.C.G.S. § 14-51.2 does not abrogate any common-law defenses. *McLymore*, 2020 N.C. App. LEXIS 333 at \*20. The lower court concluded that, “[b]ecause the General Assembly intended for Section 14-51.4 to supplant common law self-defense, [Mr. McLymore] could only seek relief under statutory self-defense.” *Id*.

The lower court’s reasoning that “the General Assembly intended for Section 14-51.4 to supplant common law self-defense” completely ignores the explicit language of N.C.G.S. § 14-51.4, which by its own terms applies only to “[t]he justification described in G.S. 14-51.2 and G.S. 14-51.3[,]” and not to any defenses available under common law. N.C.G.S. § 14-51.4. To read N.C.G.S. § 14-51.4 as applying to the common law simply because it does not explicitly say that it does not apply ignores *what the statute does say*.

In support of its reasoning, the lower court observed that, “if the General Assembly ‘as the policy[-]making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State.’” *McLymore*, 2020 N.C. App. LEXIS 333 at \*20 (quoting *News & Observer Pub. Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)). However, the mere fact that the General Assembly has enacted statutes substantially overlapping the common law of self-defense simply is not enough to abrogate the common law. *See, e.g.*, *State v. Ramirez*, 156 N.C. App. 249, 255-56, 576 S.E.2d 714, 720 (2003) (holding that the enactment of the statutory offense of assault with a deadly weapon with intent to kill, inflicting serious injury did not abrogate the common-law offense of attempted murder even though many attempted murders will also constitute the statutory offense; recognizing that the issue is one of legislative intent).

Further, misinterpreting N.C.G.S. § 14-51.4 in contradiction to the statute’s plain language violates the rule of lenity. The statute does *not* say common-law self-defense is no longer available to a person committing a felony. Interpreting this section as applying outside the statute, silently abrogating centuries of common law, is vast overreaching beyond the plain language of the statute. This is especially so given the rule of lenity that requires the court to construe any ambiguity in a statute in favor of a criminal defendant. *See State v. Conley,* 374 N.C. 209, 213, 839 S.E.2d 805, 807 (2020).

Moreover, the lower court’s holding is that the *only law of self-defense* in North Carolina is that set forth by statute in N.C.G.S. §§ 14-51.2 and 14-51.3, and therefore N.C.G.S. § 14-51.4 applies in all cases where a defendant claims to act in self-defense. That line of reasoning fails when reading N.C.G.S. § 14-51.2(g), which explicitly refers to defenses remaining available at common law. N.C.G.S. § 14-51.2 would have no need to refer to remaining common-law defenses if common-law defenses no longer existed. This Court has repeatedly recognized that, “where more than one statute is implicated, the Court must construe the statutes *in pari materia* and give effect, if possible, to all applicable provisions.” *State v. Fields*, 374 N.C. 629, 633, 843 S.E.2d 186, 190 (2020) (cleaned up). It is also well established that “a statute may not be interpreted ‘in a manner which would render any of its words superfluous.’” *State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) (citations omitted). “[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.” *Id.* (citation omitted).

Reading the statutes *in pari materia*, it is clear that the General Assembly contemplated the continued availability of common-law self-defense. If the General Assembly intended to do away with common-law self-defense, it certainly could have said so. *See* *Fabrikant v. Currituck County*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 28 (2005) (“Had the General Assembly intended [a particular application,] it knew how to say so.”). Likewise, if the General Assembly specifically intended N.C.G.S. § 14-51.4 to apply to common-law self-defense, it could have said so – instead of saying that it applies only to two specific defenses provided by statute. *Id.* Rather, the sensible reading of the statutes is that N.C.G.S. §§ 14-51.2 and 14-51.3 are statutory defenses giving additional rights beyond those provided at common law. Those additional statutory rights are limited by N.C.G.S. § 14-51.4, but common-law rights remain available to any person who would have had them before 2011.

#### The lower court’s interpretation of the statute unconstitutionally deprives people convicted of a felony of their right to exercise their inherent rights.

Finally, “[w]here one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question.” *State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). “A corollary to this right is the defendant’s right to establish a defense.” *State v. Marshall*, 105 N.C. App. 518, 525, 414 S.E.2d 95, 99 (1992). Where there is sufficient evidence to support an instruction on a defense, due process requires that the trial court instruct the jury on the defense. *Id.* “To hold otherwise would unconstitutionally relieve the State of its burden of proving beyond a reasonable doubt that the defendant did not act [lawfully] when defendant has met his burden of going forward to produce evidence that he did.” *Id.* (cleaned up).

Interpreting N.C.G.S. §§ 14-51.2 *et seq.* as abrogating the common law, would remove the ability of any person previously convicted of a felony from using a firearm in self-defense in North Carolina. This interpretation of the statutes would raise serious constitutional questions and would severely impede upon the rights of North Carolinians to act in accordance with “the first law of nature[.]” *Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (cleaned up).

The effect of the lower court’s decision is to deprive Mr. McLymore of his constitutional rights to due process by limiting his ability to establish a defense. As noted above, this Court has recognized that “‘the first law of nature is that of self-defense[;]’” it is “a ‘primary impulse’ that is an ‘inherent right’ of all human beings.” *Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (quoting *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927)). Almost 100 years ago, when this Court described self-defense as [“t]he first law of nature[,]” it also observed: “One cannot be expected to encounter a lion as he would a lamb.” *Holland*, 193 N.C. at 718-19, 138 S.E. at 10-11 (cleaned up). Here, the lower court’s decision deprives persons convicted of felonies the right to use a firearm when faced with imminent harm or death. The lower court thus requires persons convicted of felonies to encounter lions as they would lambs, and thereby deprives them of their natural, primary, and inherent right to defend themselves. This interpretation should be avoided.

#### Conclusion

Mr. McLymore presented evidence from which a jury could conclude he acted in self-defense under the common law, and he did not claim to have acted in self-defense under any statutory scheme. The trial court erred by instructing the jury pursuant to N.C.G.S. § 14-51.4 over Mr. McLymore’s objection. The Court of Appeals decision that common-law self-defense was completely abrogated is the result of an erroneous interpretation of inapplicable statutes and must be reversed.

### This Court should overrule or clarify the precedential value of *Crump I*.

Even if N.C.G.S. §§ 14-51.2 et seq. did completely abrogate common-law self-defense, it is inappropriate to instruct the jury on the felony bar in N.C.G.S. § 14-51.4(1) without also requiring the jury to find a causal nexus between the alleged felony and the circumstances giving rise to the defensive act. The trial court wrongly decided to instruct the jury pursuant on N.C.G.S. § 14-51.4 despite Mr. McLymore’s claim of a right to use defensive force under the common law, based in part on the Court of Appeals’ decision in *State v.* *Crump*. In *Crump*, the Court of Appeals held that there need be no “causal nexus between the disqualifying felony and the circumstances giving rise to the perceived need for the use of force[,]” and that N.C.G.S. § 14-51.4(1) applies as a bar to a claim of self-defense if the defendant is coincidentally committing the unrelated felony of possession of a firearm by a felon. *Crump I*, 259 N.C. App. at 145, 815 S.E.2d at 417. *Crump* *I* was wrongly decided, and this Court should either overrule *Crump* *I* or clarify that *Crump I* was incorrect and no longer has precedential value.

In the light most favorable to Mr. McLymore, the evidence showed there was no causal nexus between Mr. McLymore’s felonious possession of a firearm and the circumstances giving rise to the need to act in self-defense. If this Court determines N.C.G.S. §§ 14-51.2 *et seq* completely abrogated the common law, this Court should take this opportunity to overrule or clarify *Crump I* and grant Mr. McLymore a new trial at which the jury is properly and completely instructed.

#### Preservation, Rule 2, and request for plain error review

This argument was not raised at the trial court, nor at the Court of Appeals. However, Mr. McLymore requests that this Court consider the issue under N.C. R. App. P. 2 due to the fundamental importance to both the present case and the law of our state. In *Crump I*, the defendant filed a petition for discretionary review by this Court of two issues: one pertaining to the instruction on self-defense and the other pertaining to an unrelated jury selection issue. *State v. Crump (Crump II)*, 376 N.C. 375, 380, 851 S.E.2d 904, 909-10 (2020). This Court reversed the Court of Appeals based solely on the defendant’s jury selection argument, and thus did “not reach his argument regarding the trial court’s jury instruction” on self-defense. *Id*.

The fact that this Court accepted the self-defense issue for discretionary review in *Crump II* is indicative of the importance of the issue to the law of our state, and yet that issue remained unresolved. Indeed, the Court of Appeals has already issued at least one unpublished decision following the reasoning in *Crump I* since this Court’s reversal on other grounds in *Crump II*. *See State v. Benner,* 2021-NCCOA-79, at ¶27 (“We are bound by *Crump*.”) (unpublished, attached in appendix). As Mr. McLymore noted in his own petition for discretionary review before this Court, filed while *Crump II* was pending, the present case is an ideal companion to *Crump*, as the two cases together would allow this Court to fully explain and clarify the current state of the law of self-defense in North Carolina. After this Court’s decision in *Crump II*, Mr. McLymore’s case remains the ideal vehicle for this Court to address both the issue argued below and the related issue for which the Court of Appeals’ decision *Crump I* appears to remain binding authority.

Undersigned recognizes the extremely unusual request, but it is within the appellate division’s supervisory authority to consider arguments not raised below. *See, e.g.,* N.C. R. App. P. 2*; State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981) (“This Court may, however, pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction.”) (citing Rule 2); *and State v. Jones*, 265 N.C. App. 644, 649-50, 829 S.E.2d 507, 511-12 (2019) (invoking Rule 2 to consider unpreserved argument). Rule 2 may be invoked to “prevent manifest injustice to a party, or to expedite decision in the public interest, . . .[to] suspend or vary the requirements or provisions of any of these rules in a case pending before” this Court. N.C. R. App. P. 2. To the extent that either trial counsel or undersigned counsel erred by failing to raise this argument below, the argument could have been raised at most for preservation purposes because *Crump I* was binding authority when the case was being litigated in the trial court and the Court of Appeals. Therefore, the failure to include the argument before had no effect on the decision-making process in either the trial court or the Court of Appeals. This argument thus arrives at this Court in the same posture it would have if it had been raised solely for preservation purposes below. The importance of the issue is clear and resolution of the question in this case would serve the interests of justice and judicial economy, and it would prevent manifest injustice to Mr. McLymore and expedite the resolution of this important issue in the public interest.

#### Crump I was wrongly decided.

In *Crump I*, the defendant argued in favor of a construction of N.C.G.S. § 14-51.4 that would eliminate the absurd results that come from literal application of its language. The defendant argued the statute should be read to make self-defense unavailable to a person committing a felony *only* when the commission of the felony precipitated the circumstances that necessitated the person’s use of force in self-defense. *Crump I*, 259 N.C. App. at 149-51, 815 S.E.2d at 420. The Court of Appeals rejected that argument, instead holding that the absence of any qualifying language requiring a causal nexus between the felony and the assault that the defendant was defending against was evidence of the legislature’s intent that the commission of any felony would disqualify a person from a claim of self-defense, even if the felony had nothing to do with precipitating the assault giving rise to the perceived need to use force in self-defense. *Id.*

In support of its interpretation of N.C.G.S. § 15A-51.4, the Court of Appeals asserted that statutory construction begins and ends with the plain language in the statute which is free from ambiguity. *Id. at* 150, 815 S.E.2d at 420. However, in applying a hyper-literal interpretation of the statute, the Court of Appeals ignored the equally well-founded principle of statutory interpretation that “where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.” *State v. Holloman*, 369 N.C. 615, 628, 799 S.E.2d 824, 833 (2017) (cleaned up).

The Court of Appeals cited *Holloman* in its decision in *Crump*, but failed to properly apply it. In *Holloman*, this Court explicitly rejected the plain language of a statute in favor of one which did not lead to absurd results. There, this Court interpreted N.C.G.S. § 14-51.4(2)(a), which provides that the statutory self-defense justifications are not available to a person who:

Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:

1. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

N.C.G.S. § 14-51.4(2)(a).

This Court recognized, and the State conceded, that the language of this section indicated that “the General Assembly, by enacting this legislation, appears to have allowed an aggressor to regain the right to utilize defensive force under certain circumstances.” *Holloman*, 369 N.C. at 627, 799 S.E.2d at 832. This Court and the State also both recognized that “N.C.G.S. § 14-51.4(2)(a) does not, when read literally, appear to distinguish between situations in which the aggressor did or did not utilize deadly force.” *Id.*

However, this Court ultimately rejected both the plain language of the statute and the defendant’s argument thereon because it “would create a situation in which the aggressor utilized deadly force in attacking the other party, the other party exercised his or her right to utilize deadly force in his or her own defense, and the initial aggressor then utilized deadly force in defense of himself or herself, thereby starting the self-defense merry-go-round all over again.” *Id*. at 628, 799 S.E.2d at 833. This Court observed that, despite the plain, unambiguous language of the statute: “We are unable to believe that the General Assembly intended to foster such a result, under which gun battles would effectively become legal, and hold that the provisions of N.C.G.S § 14-51.4(2)(a) allowing an aggressor to regain the right to use defensive force under certain circumstances do not apply in situations in which the aggressor initially uses deadly force against the person provoked.” *Id*.

In *Crump I*, the Court of Appeals held that the plain language of N.C.G.S. § 14-51.4(1) made manifest clear that the General Assembly “intended to limit the invocation of self-defense in this instance solely to the lawabiding.” *Crump I*, 259 N.C. App. at 151, 815 S.E.2d at 420. The Court declined to “impose a causal nexus requirement and frustrate legislative intent.” *Id.* However, this interpretation leads to absurd results. The absurdity of the results is only compounded by the lower court’s elimination of the common law in the present case. If common-law self-defense has been completely abrogated by statute, and if N.C.G.S. § 14-51.4(1) applies to bar any person from acting in self-defense if they are also committing a felony, the absurd consequences are obvious.

A person who becomes addicted to opiates and has a felonious amount of illegally obtained prescription drugs in her pocket would be unable to defend herself from a deadly attack on the street*. See, e.g.,* N.C.G.S. § 90-95(h)(4). A person who is sitting at home, speaking on the phone with his accountant attempting tax evasion, would be unable to defend himself against an armed assailant who breaks into his house. *See, e.g.,* N.C.G.S. § 105-236(7). A previously convicted felon, now reformed and working as speaker advising students to avoid a life of crime, would be unable to take the gun from a school shooter and use it to save his own life or the lives of others. *See, e.g.,* N.C.G.S. § 14-415.1. A notary knowingly notarizing a false statement in a bank would be unable to act in self-defense if the bank were to be robbed, nor would a person passing a worthless check for more than $2,000 at the same bank when the robbery occurred. *See, e.g.,* N.C.G.S. § 10B-60(d); N.C.G.S. § 14-107. A person who is neglecting their live-in elder parent would be unable to defend themselves or that parent against an armed intruder to the house. *See, e.g.,* N.C.G.S. § 14-32.3(b). There is nothing in N.C.G.S. §§ 14-51.2 et seq. to suggest that the legislature intended the absurd result of completely depriving citizens of their right to defend themselves or others simply because of the coincidental commission of an unrelated offense.

The courts of other states have recognized the absurdity of a literal interpretation of similar statutes. For example, the Indiana Supreme Court interpreted a self-defense statute which provided that a person is not justified in using force “if . . . [h]e is committing a crime.” *Mayes v. State*, 744 N.E.2d 390, 392 (Ind. 2001). The Indiana Supreme Court noted that if the statute were “to be taken literally, then no person may claim self defense if that person at the time he acts is coincidentally committing some criminal offense. For example, possession of a marijuana cigarette or the failure to have filed one’s income tax returns could deny one the defense no matter how egregious, or unrelated, the circumstances that prompted the action.” *Id*. at 393. The Court held that “because a defendant is committing a crime at the time he is allegedly defending himself is not sufficient standing alone to deprive the defendant of the defense of self-defense. Rather, there must be an immediate causal connection between the crime and the confrontation.” *Id*. at 394. “Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.” *Id.*

Other jurisdictions have historically treated self-defense in the same way. *See, e.g., State v. Doris*, 94 P. 44, 53 (Or. 1908) (“[T]o hold that the mere fact that a person accused of a homicide was armed at the time, and that because of the misdemeanor resulting therefrom he shall be deprived of any right of self-defense, would lead to the absurd and unjust consequence in practically all cases of depriving the accused of any defense[.]”); *State v. Leaks*, 103 S.E. 549, 551 (S.C. 1920) (“The causal connection between the unlawful act of gambling and the encounter arising during the progress of the game between the participants is too remote to destroy the right of self-defense.”); *State v. Foley*, 35 S.E.2d 854, 861 (W.Va. 1945) (“Whether [the defendant] had a license to carry a pistol on the occasion he was armed is not relevant in the least to the common law right to arm for self-defense.”).

Indeed, a recent unanimous decision of this Court suggests that unrelated felonious conduct, including possession of a firearm by a felon, should not be used to prevent a defendant from claiming self-defense. *Coley*, 375 N.C. at 159, 846 S.E.2d at 458. In *Coley,* the defendant was charged with attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. The victim in the case had repeatedly entered the defendant’s house and physically assaulted the defendant, who was a convicted felon who required the use of a wheelchair. *Id.* at 157, 846 S.E.2d at 456. The final time the victim entered the house, the defendant feared the victim would assault him and possibly kill him. *Id.* The defendant reached down beside his wheelchair, retrieved a gun, and shot the victim. *Id.* The defendant requested an instruction on self-defense but none was given. *Id.* at 158, 846 S.E.2d at 456.The defendant was convicted of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. *Id.*

On appeal, the Court of Appeals reversed. *Id.* at 156, 846 S.E.2d at 455. On appeal by the State based upon a dissent, this Court unanimously concluded that the defendant was entitled to self-defense instructions under the statutory theories provided in N.C.G.S. §§ 14-51.3 and 14-51.2. *Id*. at 163-64, 846 S.E.2d at 459-60. Notable in this Court’s decision is that, despite the defendant being a felon who used a firearm in his defense, and despite his actually being convicted of possession of a firearm by a felon for this conduct, this Court still held he was entitled to instructions on self-defense under the relevant statutory provisions. *Id.* There is no mention in this Court’s decision in *Coley* that the defendant should have been barred from exercising his rights to statutory self-defense because he was a felon possessing a firearm at the time he acted. *Id.* While this Court did not explicitly overrule *Crump I* in *Coley*, the holdings of the two cases are seemingly irreconcilable.

#### Overruling or clarifying Crump I would require a new trial in Mr. McLymore’s case.

For the foregoing reasons, *Crump I* should either be overruled or clarified. This Court should make explicit what is implicit in its holding in *Coley*, and clarify that there must be a direct causal nexus between the felonious conduct and the circumstances giving rise to the need to act in self-defense in order for the bar in N.C.G.S. § 14-51.4(1) to apply.

Here, as Mr. McLymore testified, Mr. McLymore was a passenger in Biggy’s car when Biggy demanded money from Mr. McLymore, and “got mad.” (Tpp 1073-75). Biggy began physically assaulting Mr. McLymore and began to choke him. (Tpp 1076-77). Mr. McLymore feared for his life and he shot Biggy with a gun he was carrying in order to stop Biggy from choking him. (Tpp 1077-79). Viewed in the light most favorable to Mr. McLymore, this evidence was sufficient for a jury to conclude there was no causal nexus between Mr. McLymore’s possession of a firearm as a felon and Biggy’s assault on him. Therefore, it was error for the trial court to provide the instruction under N.C.G.S. § 14-51.4 as given, without also instructing the jury that it must find a causal nexus between the felonious conduct and the circumstances giving rise to Mr. McLymore’s defensive act. Mr. McLymore is entitled to a new trial. As discussed below in Argument I(D), the trial court’s instructions were plainly erroneous in that they “had a probable impact on the jury’s finding that [Mr. McLymore] was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

### Even if an instruction under N.C.G.S. § 14-51.4 was appropriate, the instructions were incomplete and unconstitutional.

Even if this Court holds an instruction under N.C.G.S. § 14-51.4 was proper, the instruction given was still erroneous because it was incomplete.

#### A trial court has a duty to instruct on all aspects of a case.

“It is the duty of the [trial] court to charge the jury on all substantial features of the case arising on the evidence without special request . . . . [and all] defenses presented by defendant’s evidence are substantial features of the case.” *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); *accord* *Fitts*, 254 N.C. App. at 803, 803 S.E.2d at 656-57. “A defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction.” *Coley*, 375 N.C. at 159-60, 846 S.E.2d at 458 (cleaned up, emphasis in original). As described above in Argument I(A)(ii), supra, “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers*, 410 U.S. at 294. Where there is sufficient evidence to support an instruction on a defense, due process requires that the trial court instruct the jury on the defense, lest it “unconstitutionally relieve the State of its burden of proving beyond a reasonable doubt that the defendant did not act [lawfully] when defendant has met his burden of going forward to produce evidence that he did.” *Marshall*, 105 N.C. App. at 525, 414 S.E.2d at 99 (cleaned up).

#### Defenses to possession of a firearm by a felon were a necessary part of the instructions.

Though Mr. McLymore was not charged with possession of a firearm by a felon, the State was required to prove the elements of that offense beyond a reasonable doubt to prove he was not entitled to self-defense. However, the trial court did not instruct the jury on any of the elements of this uncharged offense that the State was required to prove. Likewise, the trial court failed to instruct the jury on any defenses which might have been available to Mr. McLymore on the uncharged felony of possession of a firearm by a felon. Because there are defenses which the jury could have found based on the evidence, and which would have rendered Mr. McLymore’s possession of the firearm non-felonious during the moment of his defensive act, the trial court was required to instruct on these defenses as well. For example, this Court has recently recognized that the defense of justification is available to people charged with being felons in possession of firearms when acting in self-defense. *Mercer*, 2020 N.C. LEXIS 104, at \*8. There was evidence in the present case which would have allowed the jury to conclude that Mr. McLymore was justified in possessing the firearm, at least during the time he was acting in self-defense. *See id.* (listing elements of justification defense).

Though this Court has not yet recognized the availability of other defenses, such as necessity or duress, *see id.*, several other states have held that even a felon is entitled, at least momentarily, to possess a firearm in order to exercise his natural right to self-defense. *See, e.g., State v. Blache*, 480 So.2d 304, 308 (La. 1985) (“We hold that when a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession of a weapon for a period no longer than is necessary or apparently necessary to use it in self-defense, or in defense of others. In such situations justification is a defense to the charge of felon in possession of a firearm.”); *Marrero v. State*, 516 So.2d 1052, 1056 (Fla. Dist. Ct. App. 1987) (“We have no difficulty in concluding that the jury must be instructed that where the defendant retains the weapon after the necessity ends, he may not be convicted unless the jury finds that he continued to possess the weapon after he had sufficient time to reflect on the consequences of his possession.”); *People v. Pepper*, 48 Cal.Rptr.2d 877, 878 (Cal. Ct. App. 1996) (“As we shall explain, section 12021 prohibits convicted felons from possessing a firearm even momentarily except in self-defense, in defense of others, or as a result of necessity.”). These cases recognize that, while a felon may be criminally liable for their possession of a firearm before or after the moment of self-defense, during the time a felon reasonably believes their life is in danger, they may be entitled to take up arms.

Though no North Carolina case has yet recognized and affirmed the availability of these additional defenses for a charge of possession of a firearm by a felon, Mr. McLymore has found none explicitly concluding they are not available either. *Mercer* itself is an example of this Court for the first time recognizing and applying a defense which had “never been recognized” before. *Mercer*, 2020 N.C. Lexis 104, at \*6-7. The evidence in the present case also supported giving these instructions. *See*, *e.g.,* *State v. Miller*, 258 N.C. App. 325, 333, 812 S.E.2d 692, 698 (2018) (listing elements of defenses of duress and necessity).

Here, though Mr. McLymore was not charged with possession of a firearm by a felon, he was deprived of his right to exercise self-defense because the jury was instructed he was not entitled to defend himself if he was committing the felony of possession of a firearm by a felon. Due process requires that the jury also be instructed on potential justifications that may have rendered Mr. McLymore’s possession of a firearm non-felonious.

Mr. McLymore requested an instruction on self-defense, and the trial court agreed to give it. However, the trial court limited Mr. McLymore’s self-defense instruction by also instructing the jury pursuant to N.C.G.S. § 14-51.4. Assuming, without conceding, the trial court was right to instruct on N.C.G.S. § 14-51.4, it did so improperly by failing to instruct the jury as to every essential feature of the case.

#### Preservation, rule 2, and request for plain error review

Though Mr. McLymore raised this argument before the Court of Appeals, arguing the issue was preserved, requesting the court to invoke Rule 2 to address the issue if it were not preserved and arguing plain error, the Court of Appeals failed to address this portion of the argument in its decision.

Mr. McLymore objected to the trial court’s intended instruction on self-defense as inapplicable due to his common-law right to self-defense and as unconstitutionally depriving him of his due process rights. (Tp 1212). However, because Mr. McLymore was not charged with possession of a firearm by a felon, the jury was not instructed on any of the elements of that charge, and no defenses to that charge were raised or considered. Likewise, Mr. McLymore did not request an instruction on any defenses to the uncharged conduct of possession of a firearm by a felon. Though the trial court maintains a duty to instruct on all substantive features of a case, to the extent any of these instructional issues were not preserved by Mr. McLymore’s objection, Mr. McLymore requests this Court exercise its discretion under N.C. R. App. P. 2 to consider the issue, under plain error review if necessary, to prevent manifest injustice in this case: depriving a person of his right to self-defense and his constitutional rights to due process. *See discussion of Rule 2 in Argument I(b)(i), supra.*

As discussed in Mr. McLymore’s pleadings below, the error here was prejudicial. The instructions in this case were both unconstitutional and violated North Carolina law, and they effectively prevented the jury from finding that Mr. McLymore acted in self-defense, which was his sole defense offered at trial. Under these circumstances, the error was prejudicial even under the plain error standard in that it “had a probable impact on the jury’s finding that [Mr. McLymore] was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up).

### The trial court’s instructional error was prejudicial.

Mr. McLymore admitted that he shot Biggy. (Tp 1078). Thus, self-defense was his only defense to the murder charge. Under the instructions in this case, which were both unconstitutional and violated North Carolina law, the State cannot prove that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). Moreover, under the circumstances of this case, there is more than a reasonable possibility that the trial court’s erroneous instruction caused Mr. McLymore to improperly lose the benefit of self-defense. N.C.G.S. § 15A-1443(a). Even under the more stringent plain error standard, to the extent that standard is applicable, “the error had a probable impact on the jury verdict.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up).

Because there were no witnesses inside the car with Biggy and Mr. McLymore, this case hinged entirely on the jury’s assessment of Mr. McLymore’s credibility. Moreover, because the State had the burden of proof, the jury had to find Mr. McLymore’s version of events less credible beyond a reasonable doubt than the version of events the State argued was suggested by the circumstantial evidence in order to convict him. However, because the jury was instructed that self-defense was unavailable to Mr. McLymore if he was committing the felony of possession of a firearm by a felon when he shot and killed Biggy, it was prevented from deciding the dispositive factual question in this case.

The jury was instructed on voluntary manslaughter, and it was instructed that it could find Mr. McLymore guilty of voluntary manslaughter if he was acting in self-defense while committing the felony of possession of a firearm by a felon. (Tp 1230). However, the inclusion of this instruction does not correct the error in the instructions here, because the jury was clearly and repeatedly told that self-defense was not a defense to the charge of murder several times prior. (Tpp 1230, 1233 lines 6-9 and lines 16-19). Following the instructions, if the jury found that Mr. McLymore committed first-degree murder, for which he could not claim self-defense, the jury would not have even considered voluntary manslaughter.

Moreover, even if the jury was correctly instructed on self-defense when the trial court instructed on voluntary manslaughter, it was incorrectly instructed on self-defense several times with respect to both first and second degree murder. This Court has stated that “[i]t must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect.” *State v. Castaneda*, 196 N.C. App. 109, 117, 674 S.E.2d 707, 713 (2009) (cleaned up). “[B]ecause it cannot be assumed that the jury was more discriminating than the judge and ignored the erroneous instruction while applying the correct one, we hold that the court’s error was prejudicial and award a new trial.” *State v. Vaughn*, 227 N.C. App. 198, 204, 742 S.E.2d 276, 280 (2013) (cleaned up). These considerations are equally applicable in this case, and Mr. McLymore is entitled to a new trial on his murder charge.

# CONCLUSION

For the foregoing reasons and authorities, Mr. McLymore respectfully requests this Court reverse the Court of Appeals.

Respectfully submitted this, the 12th day of May 2021.

Electronically Submitted

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# CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original New Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the Supreme Court of North Carolina.

I further certify that a copy of the foregoing New Brief has been served upon Marc X. Sneed, Special Deputy Attorney General, by sending it electronically to the following current email address, msneed@ncdoj.gov.

This, the 12th day of May 2021.

Electronically Submitted

Sterling Rozear

Assistant Appellate Defender

No. 270PA20 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

)

v. ) From Cumberland County

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DATORIUS LANE MCLYMORE )

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**APPENDIX TO DEFENDANT-APPELLANT’S NEW BRIEF**

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*State v. McLymore*,

No. COA19-428, 2020 N.C. App. LEXIS 333 (May 5, 2020)

(unpublished) App. 1-19

*State v. Benner*,

2021-NCCOA-79 (unpublished) App. 20-34