

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-1000

Filed 16 September 2026

Wake County, Nos. 22CR336508-910, 22CR337107-910

STATE OF NORTH CAROLINA

v.

STANLEY LEMONT JOHNSON

Appeal by defendant from judgment entered 28 April 2025 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 May 2026.

Attorney General Jeff Jackson, by Solicitor General Nicholas S. Brod, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

ARROWOOD, Judge.

Following a jury trial in Wake County Superior Court, Stanley Lemont Johnson (“defendant”) was found guilty of possession of a firearm by a felon, not guilty of first-degree murder with malice, premeditation, and deliberation, and guilty of first-degree felony murder, with the firearm charge as the predicate felony. The trial court arrested judgment on the firearm charge but entered judgment for murder and sentenced defendant to life without parole. Defendant appeals from the judgment.

I. Background

A. Statement of Facts

In November 2022, defendant lived with his girlfriend, Tinisha Ratliff (“Ms. Ratliff”) in a rooming house on Bragg Street in Raleigh. Defendant was 44-years-old and has moderate intellectual disabilities, unable to read or write well. Defendant has a lengthy criminal record, including felonies, and is therefore forbidden from possessing any firearm.

Ms. Ratliff testified that they had been in an “off-and-on relationship” for two years, and that defendant was “mentally, physically, emotionally” abusive. In October 2022, Ms. Ratliff contacted police after defendant assaulted her and left her with injuries. Jermler Kernny (“Ms. Kernny”), Ms. Ratliff’s cousin, was aware of the ongoing abuse, including the recent incident, and had previously confronted defendant about his behavior. Ms. Kernny’s mother lived across from the Bragg Street address. At about 4:00 a.m. on 4 November 2022, defendant’s sister picked him up from Bragg Street so he could stay with family.

Late on 5 November 2022, or in the early morning hours of 6 November, Ms. Ratliff and defendant had an altercation, the details of which were disputed at trial.

Ms. Ratliff testified that she returned to the rooming house to find her door open, whereupon defendant appeared and “aggressively” asked to speak to her. She stated that over the next 25 to 45 minutes the conversation escalated to shouting; Ms. Ratliff claimed that defendant pointed a gun to her head. Ms. Kernny arrived and attempted to intervene; as defendant left the house Ms. Kernny punched him in the

back of the head and pushed him down, telling him to leave “before something else happen[s]” to him. When Ms. Kernny pushed defendant onto his back, a gun fell out of defendant’s pocket and into the street. Defendant grabbed the gun as he stood up and shot Ms. Kernny.

The State introduced a video of the shooting from a neighboring house’s security camera. It captures the sound of yelling and scuffling, which is obstructed from the camera’s view by a tree. The video shows defendant dodge a blow by Ms. Kernny as they circle each other, with defendant stumbling, and Ms. Kernny standing still for several seconds before defendant shoots her from a few feet away. In November 2022, defendant weighed 145 pounds. Ms. Kernny, who was 5’7” and 300 pounds, died from a single gunshot wound to her upper right chest. A toxicology screen indicated there was alcohol and cocaine in her system.

In his testimony, defendant admitted that he was not supposed to have a gun but claims he needed to protect himself because his environment is “violent.” Defendant denied having been physically abusive towards Ms. Ratliff. As to his mental state when he shot Ms. Kernny, he testified, “I didn’t want to pull the trigger, but I did. It was just a spur-of-the-moment thing . . . [M]y mind was racing, and I just – I reacted.”

The State called Iworthia Harris (“Ms. Harris”), who describes herself as Ms. Kernny’s “godsister,” to testify in its rebuttal evidence. She described defendant’s relationship with Ms. Ratliff as “volatile” with “a lot of physical abuse that [she]

witnessed firsthand” including a violent altercation on the day before the shooting, which left Ms. Ratliff with a black eye. On the night of the shooting, Ms. Harris was at the Kernny home for a party, which ended by 1:15 a.m., when Ms. Ratliff knocked on the door and told her and Ms. Kernny, “He said that tonight is the night that he’s going to kill me. He has a gun. I really feel like he’s going to kill me. Please, please help me.” Ms. Kernny replied that she was tired of sticking up for Ms. Ratliff because she always returned to defendant, but agreed to cross the street after finishing her video game, to help her get some clothes so she could spend the night. Ms. Harris stated that during the altercation, she saw defendant stumble backwards, catch his balance, raise his arm, fire his gun, and run away. She testified that Ms. Kernny had not posed “any imminent danger” to defendant, who was “the aggressor from the beginning.”

B. Indictments

Defendant’s indictment for murder charged that he “unlawfully, willfully, and feloniously did of malice aforethought kill and murder JerMiller Kernny.” The indictment for possession of a firearm by a felon charged that defendant “unlawfully, willfully, and feloniously did possess and have in the defendant’s control a semi-automatic pistol, which is a firearm[,]” and that defendant was previously found guilty of a felony (Obtaining Property by False Pretense) on 24 November 2020.

C. Charge Conference

At the charge conference, the trial court informed the parties that it would

instruct the jury on first-degree murder based on premeditation and deliberation, with self-defense and diminished capacity; second-degree murder, with self-defense; voluntary manslaughter, with imperfect self-defense and provocation; and possession of a firearm by a felon. The trial court also informed the parties of its intent to *sua sponte* instruct the jury on felony murder, with possession of a firearm by a felon as the underlying predicate offense.

The defense objected, arguing that our courts have never approved such a charge and that the possession offense is not encompassed by the felony murder statute. The defense also filed its objection in writing. The defense twice renewed its objections to the court's instructions and further objected to the felony murder charge on due process grounds. The defense also filed an alternative request for two instructions if the court did instruct on felony murder: (1) to define the underlying felony offense as "possession of a firearm by a convicted felon while using the firearm to threaten or assault someone other than the decedent"; and (2) to instruct on self-defense to felony murder based on *State v. McLymore*, 380 N.C. 185 (2022). The trial court denied both requests.

D. Jury Instructions and Verdict

Ultimately, the jury heard instructions on first-degree murder by malice, premeditation, and deliberation, with self-defense and diminished capacity; first-degree murder by felony murder using possession of a firearm by a felon as the underlying felony, without self-defense or diminished capacity; second-degree

murder, with self-defense; voluntary manslaughter by imperfect self-defense and by provocation; and possession of a firearm by a felon. The court's instruction for felony murder read as follows:

First, that the defendant committed the offense of possession of a firearm by a convicted felon. The felony offense of possession of a firearm by a convicted felon requires, first, that on November 24, 2020, [describes details of Mr. Johnson's obtaining property felony]; and second, that after November 24, 2020, the defendant possessed a firearm. Second, that while committing the offense of possession of a firearm by a convicted felon and with the use of said firearm, the defendant killed the victim. And third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

The jury acquitted defendant of first-degree murder on the basis of malice, premeditation, and deliberation. The jury found defendant guilty of possession of a firearm by a felon and felony murder with possession of a firearm as the underlying offense. The court entered judgment for felony murder, arrested judgment on the possession offense, and sentenced defendant to life without parole. Defendant filed written notice of appeal on 29 April 2025.

II. Discussion

Defendant first contends that possession of a firearm by a felon should be categorically excluded as a felony underlying felony murder, based upon the plain language, purpose, and legislative history of North Carolina's felony murder statute, as well as additional principles of statutory construction. Defendant contends that

the court's charge and jury instructions on felony murder violated his right to due process. Defendant requests vacatur of his conviction and that his case be remanded for a new trial.

Defendant properly preserved the above issues for appellate review by objecting in open court and doing the same in writing. For the following reasons, we reject defendant's argument that the offense is categorically excluded from the statute. However, we vacate defendant's conviction on due process grounds and remand his case for a new trial.

A. The Felony Murder Statute Does Not Categorically Exclude Possession of a Firearm by a Felon as an Unenumerated Underlying Felony

The State did not expressly charge defendant with felony murder according to the court's theory in either its indictment or prosecute under a felony murder theory in its case-in-chief. Moreover, possession of a firearm by a felon has never underlain a felony murder conviction in North Carolina.

Accordingly, the trial court's *sua sponte* decision to instruct the jury on this novel and unprecedented interpretation of the felony murder statute, under which a self-defense justification is inapplicable, raises an issue of first impression in North Carolina. We begin by considering whether the statute permits this theory of felony murder or categorically forecloses such convictions. We review questions of statutory interpretation *de novo*. *State v. Adams*, 285 N.C. App. 379, 393 (2022) (citing *State v. Skipper*, 214 N.C. App. 556, 557 (2011)).

It is a felony for any convicted felon to “purchase, own, possess, or have” a gun. N.C.G.S. § 14-415.1(a). “ ‘The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm.’ ” *State v. Mercer*, 373 N.C. 459, 462 (2020) (quoting *State v. Floyd*, 369 N.C. 329, 333 (2016)). Defendant admitted both elements at trial pursuant to his defense to first-degree murder. The jury found him guilty on this charge.

Felony murder is defined in the relevant statute as a murder which was:

committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon.

N.C.G.S. § 14-17(a). Underlying felonies not expressly included must fall under the catch-all: “or other felony committed or attempted with the use of a deadly weapon.”

To interpret an individual statutory provision, “we look first to the language of the statute itself.” *Walker v. Bd. of Trs. of N.C. Loc. Gov’tal Emps. Ret. Sys.*, 348 N.C. 63, 65 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409 (1996)). If statutory language is unambiguous, we read it in accordance with its plain meaning. *State v. Steen*, 376 N.C. 469, 480 (2020) (citation omitted). Where the language is ambiguous or without a clear meaning, “legislative intent controls the interpretation of a criminal statute.” *State v. Jones*, 358 N.C. 473, 478 (2004) (citing *State v. Hearst*, 356 N.C. 132, 136–37 (2002)). To interpret ambiguous statutes, we use “judicial

construction” to “ascertain the legislative will” and carry it out “to the fullest extent.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990) (citations omitted).

The North Carolina Supreme Court has already held that this statute’s language is clear and unambiguous. *See State v. Wall*, 304 N.C. 609, 614 (1982). That holding controls and the statute’s plain meaning is straightforward, setting forth two categories. The first encompasses murders committed as the defendant perpetrates or attempts any of the enumerated felonies. *Id.* The second encompasses murders occurring during the commission or attempt of an unspecified felony in which the defendant uses a deadly weapon. *Id.* The question here is whether the second category encompasses possession of a firearm by a felon among the unspecified “other” felonies perpetrated with the “use of a deadly weapon.” But the fit between this offense and this category is neither obvious nor intuitive. The language plainly envisions a defendant who first possesses some deadly weapon and *then* uses it to bring about some “other felony.”¹

¹ Felonious child abuse may underlie a felony murder charge where “the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon.” *State v. Pierce*, 346 N.C. 471, 493 (1997) (citing N.C.G.S. § 14-17). Indeed, a defendant who, as a convicted felon, illegally possesses a firearm and is therefore already guilty of a *first* felony, properly faces a felony murder charge where he commits some *second* unenumerated felony, such as the sale of cocaine, if (1) he brings a deadly weapon to the sale and (2) during the transaction, someone is killed, either by the illegally-possessed firearm, another deadly weapon, or through some other means. *See, e.g., State v. Squires*, 357 N.C. 529, 534–36 (2003); *State v. Freeman*, 202 N.C. App. 740, 743–44 (2010). Further, if a victim dies because the felon used some *other* deadly weapon, such as a utility knife, to take felonious possession of his victim’s firearm, the felon is guilty of felony murder under the statute’s first category, with robbery as the underlying felony, as well as possession of a firearm by a felon.

Here, it is undisputed that defendant committed a felony by possessing the firearm as a felon. It is also undisputed that defendant used that deadly weapon to shoot Ms. Kernny. However, defendant did not use the firearm in furtherance of any other felony that could serve as a predicate; apart from the first-degree premeditated murder charge, defendant was not charged with any felony as to the *use* of the firearm. Nor did defendant use the firearm in furtherance of his felonious possession of the firearm.²

However, we cannot agree with defendant that the felony murder statute categorically excludes this possession offense from its “catch-all” category. It may feasibly underlie a felony murder charge, but only under a highly specific, unusual, and narrow set of facts.

For example, imagine the following hypothetical scenario: Mr. A, a convicted felon, illegally possesses a firearm. Mr. B sneaks up behind Mr. A to take the firearm. Mr. A and Mr. B begin to scuffle, and Mr. A manages to pull the trigger and shoot Mr. B, in order to re-establish felonious possession of the firearm. Mr. B later dies from his wounds. Under such a set of facts, it may be legally sound to consider the possession offense the proper underlying felony. Absent other felonious objectives,

² Unlawful use of the firearm is not an element of possession of a firearm by a felon; that crime is complete when the defendant possesses the firearm. *See Mercer*, 373 N.C. at 462; N.C.G.S. § 14-415.1(a).

Mr. A's use of the deadly weapon was in furtherance of his felonious possession of the firearm, since he killed Mr. B while taking back the gun.

As noted above, there is no analogous precedent in North Carolina. However, the hypothetical represents a plausible set of facts which may fit within the statutory requirements. So long as the facts show some unbroken chain of events between the murder and the defendant's commission or attempt to commit some felony not specifically named in the statute, with the actual use of a deadly weapon, that felony can properly underlie a felony murder charge, and is encompassed by the statute's "other felony" catch-all category. This is so regardless of whether the felony typically requires the use of a deadly weapon. *State v. Freeman*, 202 N.C. App. 740, 743 (2010), *disc. rev. improvidently allowed*, 365 N.C. 4 (2011). It is so regardless of whether the felony is inherently dangerous. *State v. Davis*, 305 N.C. 400, 423 (1982). And it is so even if the deadly weapon is not *physically* used in the felony's commission. *State v. Fields*, 315 N.C. 191, 199 (1985) ("If the defendant has brought the weapon along, he has at least a psychological use for it: it may bolster his confidence, steel his nerve, allay fears of his apprehension.").

Even where a defendant's knowingly felonious possession of a firearm is uninterrupted throughout a sequence of events including a killing, his mere possession of that weapon cannot properly underlie a felony murder charge unless there is some other interrelated felony in which he *uses* the firearm. However, the charge may proceed where the State introduces sufficient evidence that the killing

occurred where the defendant used a deadly weapon to establish or assume felonious possession of his firearm and the elements of robbery are not met, as when, for example, the victim was attempting to interrupt his felonious possession. Under the statute's plain meaning, such a charge may arise out of this type of evidence, but whether the State can prove felony murder under this particular theory is a question for the jury. Nevertheless, the controlling case law requires us to reject defendant's categorical argument.

B. The Jury Charge Violated Defendant's Constitutional Right to Due Process

Although we have concluded that possession of a firearm by a felon is not categorically excluded as a predicate for felony murder, the trial court's failure to put defendant on notice prior to the charge conference violated defendant's right to due process.

A criminal defendant's right to due process in state court is ensured by both the United States and North Carolina Constitutions. *See* U.S. Const. Amends. V, XIV; N.C. Const. Art. I, § 19. "In all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him" and there can be no "due process of law where the accused is not thus informed." *State v. Hunt*, 357 N.C. 257, 271 (2003) (quoting *Hodgson v. Vermont*, 168 U.S. 262, 272 (1897)). The notice must "acquaint him with the essential particulars of the offen[s]e, so that he may appear in court prepared to meet every feature of the accusation against him." *Id.* A criminal defendant must be "allowed a reasonable time and opportunity to

investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony.” *State v. Baldwin*, 276 N.C. 690, 698 (1970) (citations omitted).

For these reasons, “[t]he purpose of a bill of indictment is to put a defendant on such notice that he is reasonably certain of the crime of which he is accused.” *State v. McGriff*, 151 N.C. App. 631, 634 (2002) (citation omitted). An indictment must assert “facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is subject of the accusation.” N.C.G.S. § 15A-924(a)(5). The elements must be alleged such that the indictment “(1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction.” *State v. Thomas*, 153 N.C. App. 326, 335 (2002) (citation omitted).

Crucially, “[i]t is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.” *State v. Jackson*, 218 N.C. 373, 376 (1940). “The failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction.” *State v. Williams*, 318 N.C. 624, 631 (1986) (citation omitted). Further, “where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict

on that theory.” *State v. Shearin*, 170 N.C. App. 222, 231 (2005) (quotes and citation omitted).

Bills of indictment may not be amended. N.C.G.S. § 15A-923(e). This provision forbids changes substantially altering the charge the indictment sets forth. *State v. Reavis*, 287 N.C. App. 322 (2022). To determine whether substantial alteration occurred, the court must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial. *State v. Silas*, 360 N.C. 377, 379–80 (2006). “A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges.” *State v. Hill*, 185 N.C. App. 216, 224 (Tyson, J., dissenting), *writ allowed*, 361 N.C. 699 (2007), *rev’d*, 362 N.C. 169 (2008). Therefore, whether defendant here received due process turns on whether the *sua sponte* jury charge on felony murder substantially altered his bill of indictment, such that defendant was either “misled” or “surprised” by the revised charge.

1. Defendant’s Indictment and the Court’s *Harbison* Inquiry

Here, the indictments charged two crimes: murder and possession of a firearm by a convicted felon. The first charged that defendant “unlawfully, willfully, and feloniously did of malice aforethought kill and murder” Ms. Kernny “in violation of N.C.G.S. § 14-17.” The second charged that he was found guilty of a felony in 2020 and later “unlawfully, willfully, and feloniously did possess and have in the

defendant's control a semi-automatic pistol, which is a firearm . . . in violation of N.C.G.S. § 14-415.1."

The State argues that this was "sufficient to charge first-degree murder without specifically alleging premeditation and deliberation or felony murder." This is correct. *See State v. Garcia*, 358 N.C. 382, 388 (2004) ("[A] short-form indictment is sufficient to charge first-degree murder on the basis of felony murder committed during an attempted rape."). In principle, it would have been lawful for the State to proceed under either theory at trial, and the court's decision to instruct on felony murder does not *in itself* substantially alter the indictment. But due process jurisprudence illustrates that practice inevitably falls short of principle, obliging the constant vigilance of appellate courts. Due process is "bound to fall differently at different times and differently at the same time through different judges[.]" but "[t]he vague contours of the Due Process Clause do not leave judges at large." *Rochin v. California*, 342 U.S. 165, 170 (1952).

In the instant case, the trial transcript illustrates that defendant was "misled [and] surprised as to the nature of the charge[]." On the first day of trial, the court conducted the standard inquiry required by the Due Process Clause and *State v. Harbison*, 315 N.C. 175 (1985) in light of defendant's admissions and his intention to argue self-defense.

"A plea decision must be made exclusively by the defendant." *Harbison*, 315 N.C. at 180. "*Harbison* applies when defense counsel concedes defendant's guilt to

either the charged offense or a lesser included offense.” *State v. Alvarez*, 168 N.C. App. 487, 501 (2005) (citing *State v. Wiley*, 355 N.C. 592, 619–20 (2002)). Any strategic concession to guilt may occur only with the defendant’s consent, and due process requires that this consent be given voluntarily and knowingly, on the record, and after a full appraisal of the consequences. *State v. Perez*, 135 N.C. App. 543, 547 (1999) (citations omitted). Accordingly, “the trial court must be satisfied that, prior to any admissions of guilt at trial[,]” the defendant offers the admission “aware of the potential consequences of his decision.” *State v. Maready*, 205 N.C. App. 1, 7, *writ denied, review denied*, 364 N.C. 329 (2010). Counsel should also ensure the record reflects whether the defendant’s consent is contingent upon presentation of a certain defense. *State v. Berry*, 356 N.C. 490, 514–15 (2002).

Defendant expressly understood that his concessions were essential to the strategic defense against the State’s first-degree murder theory. During the *Harbison* inquiry, defendant’s counsel agreed that she would “admit certain elements of the offense of first-degree murder in connection with [the] strategy to proceed on self-defense or defense of others theory[.]” Defendant responded affirmatively to the question: “If your counsel tells the jury that your actions, in fact, caused the death of this victim, she would be admitting one of the elements of the offense of first-degree murder, and that would relieve the State of its obligation to prove that element beyond a reasonable doubt. Do you understand?” He agreed that he had discussed the strategy and consented to the admission “of those things consistent with the

defense of self-defense in this case, for example, the fact that your actions, in fact, caused the death of this victim in this case.”

Moreover, on the third day of trial, the court conducted another inquiry to ensure defendant understood the consequences of his stipulation to possession of a firearm by a felon. Judge Ridgeway explained:

[As to] the offense of possession of a firearm by a felon, it is the State’s burden to prove each element of that offense beyond a reasonable doubt. You can stipulate to certain of those elements, if you wish, for strategic purposes . . . [B]y so doing, you do relieve the State of its burden to prove each of the elements that you’ve stipulated to[.]

Defendant also understood the consequences of this stipulation.

In sum, the defense admitted that defendant was a felon, that he possessed the firearm, and that he used the firearm, causing Ms. Kernny’s death. These admissions were indeed “consistent with the defense of self-defense” and, on these facts, essential to his defense against the State’s first-degree murder theory. They were knowing and voluntary admissions to every element of the charged possession offense and some elements of first-degree murder. The trial court even noted the “strategic purposes” of the stipulation.

However, the court accepted his admissions without providing notice of or opportunity to prepare for the consequences that would later arise from them. The court did not declare its *sua sponte* decision to instruct the jury on felony murder, with firearm possession as the underlying offense, until the charge conference.

Crucially, Judge Ridgeway’s decision followed the defense’s extensive impeachment of the State’s key witness, Ms. Ratliff, who testified to a version of events in stark contrast to her previous police interview and the testimony of other witnesses. The defense further impeached Ms. Ratliff’s credibility in its cross-examination of Detective Silvius, who testified that he “had to help her along to get her focused on what [he was] trying to ask,” that she had been “vague about what happened” and that it had been “difficult to make sense of her timeline . . . probably due to her impairment.” He also affirmed on cross-examination that he knew, following his interviews with neighbors, family, and friends, that “it was pretty typical for her to be intoxicated.” The defense also presented sufficient evidence and testimony to require instructions on self-defense and diminished capacity. The jury later concluded that the State failed to prove defendant’s guilt as to first-degree murder based on malice, premeditation, and deliberation, and the jury acquitted him under that theory.

Nevertheless, to convict defendant for felony murder below, the court required the State to prove only (1) that “the defendant committed the felony offense of possession of a firearm by a convicted felon,” (2) “that while committing the offense of possession of a firearm by a convicted felon and with the use of said firearm, the defendant killed the victim,” and (3) “that *the defendant’s act was the proximate cause of the victim’s death*[.]” defining proximate cause as “a cause without which the victim’s death would not have occurred.” Furthermore, as we discuss in detail below,

the State is not required to overcome a self-defense justification to prove felony murder. *State v. Juarez*, 369 N.C. 351, 354 (2016).

In the instruction quoted above as to the third element, the court did not clarify whether the “act” in question was *possessing* the gun or *pulling its trigger*. The latter reading was both natural in context and consistent with the law of felony murder. As previously discussed, North Carolina is not a proximate cause state, insofar as the underlying felony is not the “but for” cause of the death. But this does not mean that the felony murder analysis is entirely free of considerations of proximate cause. Indeed,

[a] killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the *act causing death*, so that the homicide is part of a series of incidents which form one continuous transaction.

State v. Hutchins, 303 N.C. 321, 325 (1981) (emphasis added).

Accordingly, felony murder requires the State to show a proximately causal relationship only between some act that occurs and causes the death, which are both encompassed within a larger continuous transaction that also includes the defendant’s underlying felonious conduct. Therefore, defendant’s strategic admissions, *standing alone*, were sufficient to prove beyond a reasonable doubt that defendant was guilty under the court’s theory of felony murder. No reasonable jury following the court’s instruction would have been able to acquit him under this theory.

The court's *sua sponte* charge instantly transformed defendant's successful defense against the first-degree murder case that the State prosecuted at trial into a *de facto* admission to every element of felony murder.

Defendant admitted to this novel theory of felony murder before either he or the State knew such a felony murder charge was forthcoming, or that his admitted possession offense could constitute its underlying felony. The court retroactively granted the State an illusory burden of proof and made conviction a foregone conclusion, even though defendant had no knowledge of these consequences or any ability to prepare for a trial from which such consequences could result.

The dissent claims we hold that the trial court's *Harbison* inquiry was inadequate. This is not our holding. The court's *Harbison* inquiries are not the matter at issue in this appeal, and Defendant made no argument based on either *Harbison* or an ineffective assistance of counsel claim. We address due process concerns of a different kind.

Instead, we have asked whether the court's *sua sponte* amendment to the bill of indictment after the close of evidence constituted a substantial alteration because it was not "inadvertent" and either "misled" or "surprised" defendant. The proper place to look for answers is the trial transcript, where the obvious sections of importance are the court's *Harbison* inquiries. Those inquiries clearly show what Defendant knew about the charges against him, why he made strategic admissions, and what he understood about the consequences. In doing so, we touch on the case

law underlying *Harbison* inquiries, but not to ask whether those inquiries were conducted properly at the time. We discuss *Harbison* because the court's inquiries and defendant's responses were highly relevant and helpful in our analysis of the Due Process issues.

Accordingly, our conclusion here is not, as the dissent states, that the court's *Harbison* inquiry was erroneous because the court and defense counsel failed to tell defendant he would be admitting to every element of the court's future *sua sponte* felony murder charge. By turning to *Harbison* and ineffective assistance of counsel, the dissent takes our holding and reads it backwards. We instead conclude that the jury charge was erroneous because Judge Ridgeway charged a novel felony murder charge *sua sponte* at the close of evidence, despite knowing, both from his earlier *Harbison* inquiries and the trial as a whole, that by substantially altering the bill of indictment in this way, he would blindside defendant and undermine the primary reason any defendant is entitled to an indictment in the first place: to prepare a defense strategy at trial. As we discussed above, the court and defendant both understood what his defense strategy was and that his admissions absolved the State of proving the facts admitted. But if in making those admissions, he fully admitted to felony murder and not just possession of a firearm by a felon, the State had no obligation to prove his guilt on each element of felony murder beyond a reasonable doubt, and there was no need to submit the felony murder question to a jury.

Moreover, the dissent relies on case law that undermines its own argument, namely *United States v. Cronin*, 466 U.S. 648, 548 (1984). Therein, the Supreme Court held that a defendant is prejudiced by ineffective assistance only in infrequent and narrow circumstances “so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Cronin*, 466 U.S. at 658. Such circumstances exist when “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Id.* at 659–61. The dissent affirms that we must consider IAC claims under the Sixth and Fourteenth Amendments in North Carolina under both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984) unless a narrow *Cronin* exception applies.

However, defendant makes no claim of ineffective assistance of counsel under the Sixth and Fourteenth Amendments, and the *Cronin* exception would have been beside the point if he did so. This is because the defense counsel did indeed meaningfully test the prosecution’s case: counsel argued self-defense and the jury acquitted defendant of first-degree murder. But the prosecution never presented a felony murder case, and one cannot argue that defense counsel “entirely fail[ed] to subject” a case the State never presented “to meaningful adversarial testing.” Defendant challenged his conviction because the court charged him with an offense the State was not obligated to prove beyond a reasonable doubt, not because his defense counsel failed to contest a case that the prosecution did not make.

Accordingly, to reach its conclusion that defendant received a fair trial free from prejudicial error, the dissent ignores our actual holding to answer questions which defendant did not raise, and which are unrelated and irrelevant to either the facts of this case or the record on appeal.

2. Further Constitutional Considerations

“An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10 of the Constitution forbids.” *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.”

Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Due process bars a judge’s application of “a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed within its scope.” *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The trial court’s application of the felony murder statute to defendant’s conduct was manifestly unforeseeable. Our appellate courts have never approved the court’s construction of the felony murder statute, and as discussed above, the illegality of defendant’s conduct was “fairly disclosed” by neither the statute’s text nor any case

law interpreting it. Moreover, had either party been able to foresee the court's enlargement of this statute, the State, defendant, and his counsel likely would have prepared for a trial different in kind rather than degree, determining a different set of issues. Indeed, neither party would have proceeded with its trial strategy: any competent defense attorney would not have made these concessions, and any competent prosecutor would have avoided this jury's acquittal by prosecuting a felony murder case.

Furthermore, if the felony murder statute were "on its face [] vague or overbroad," defendant would have had "some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct." *Id.* at 352. But it is already established that the statute is neither ambiguous, vague, nor overbroad.

When a statute on its face is narrow and precise . . . it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. . . . [T]he violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

Id. This is why due process forbids "the retrospective application of an unforeseeable judicial modification of criminal law to the detriment of the defendant." *State v. Barnes*, 345 N.C. 184, 234 (1997) (citations omitted).

Here, the court’s novel and erroneous construction of the felony murder statute drastically altered this dynamic to the detriment of defendant. Where the only underlying felony possible under the facts is this possession offense and the court charges this construction of the felony murder statute, the court deprives felons, and felons in particular, of a self-defense justification.

A self-defense justification is “not available to a person who used defensive force and who . . . [w]as attempting to commit, committing, or escaping after the commission of a felony.” N.C.G.S. § 14-51.4. This is because the State has a compelling interest in “disallowing the use of self-defense *when a person’s own unprovoked, aggressive, and felonious acts set in motion an unbroken chain of events leading to a killing or other injury*[.]” *McLymore*, 380 N.C. at 197 (emphasis added).

However, depriving an individual of the right to defend his life “for other less compelling reasons would be on much shakier constitutional ground.” *Id.* Hence, outside of felony murder, to disqualify a defendant from a self-defense justification, the State must “prove the existence of an immediate causal nexus between the defendant’s disqualifying conduct and the confrontation during which the defendant used force.” *Id.* This requires evidence that “but for the defendant attempting to commit, committing, or escaping after the commission of a felony, the confrontation resulting in injury to the victim would not have occurred.” *McLymore*, 380 N.C. at 197–98 (cleaned up, quotes and citation omitted). This is in step with all theories of

felony murder previously approved in North Carolina, where “self-defense is not a defense to felony murder.” *Juarez*, 369 N.C. at 354.

Here, however, the court misplaced defendant’s conduct into the felony murder context although (1) competent evidence suggested he used the firearm in self-defense, and (2) his only other charged offense was possessing the firearm. By erroneously charging the jury on this theory, the court ensured a murder conviction by allowing the State to take advantage of a *de facto* self-defense disqualification, requiring it to show proximate cause only between defendant’s finger pulling the trigger and Ms. Kernny’s death, not between his felonious possession and the overall confrontation. And as we know, the court retroactively disburdened the State of its obligation to prove *anything at all* because defendant was a felon who had admitted to pulling the trigger in self-defense, requiring the jury to convict.

Consider the following comparison. A hypothetical defendant, Mr. S, has no criminal record, but all other circumstances and Mr. S’s active conduct are identical to the instant case. Like defendant, Mr. S carried and used a concealed handgun without a valid permit, but Mr. S is charged with first-degree murder and a firearm possession misdemeanor rather than felonious possession. Following a *Harbison* inquiry, Mr. S admits to the misdemeanor and claims self-defense. As in the instant case, the jury acquits Mr. S of first-degree murder following self-defense and diminished capacity instructions, convicting him of the possession offense. However,

because the judge could not instruct the jury on felony murder, the jury proceeds to consider whether Mr. S is guilty of second-degree murder or another lesser charge.

Crucially, every charge the jury considers in Mr. S's case permits him to raise a self-defense justification. It is for the jury, and only the jury, to determine whether the killing was justified by virtue of Mr. S's fundamental and inherent natural rights.

The first law of nature is that of self-defense. The law of this state and elsewhere recognizes this primary impulse and inherent right. One being without fault, in defense of his person, in the exercise of ordinary firmness, has a right to invoke this law and kill his assailant, if he has reasonable ground for believing or apprehending that he is about to suffer death or great or enormous bodily harm at his hands. The danger or necessity may be real or apparent. *It is for the jury, and not the party setting up the plea, to determine, under all the facts and circumstances, the reasonableness of the grounds for the belief or apprehension of the real or apparent danger or necessity.*

State v. Holland, 193 N.C. 713, 718 (1927) (emphasis added).

However, in the instant case, the court erroneously introduced a charge distinct from all other categories of murder that is, by definition, inconsistent with self-defense claims, after presiding over a trial in which defendant's case relied specifically on self-defense. The court not only gave a different jury charge, against which defendant had no opportunity to defend himself, but it took the crucial determination of defendant's self-defense claim out of the jury's hands and, by issuing improper jury instructions, prevented them from considering defendant's guilt under second-degree murder or any lesser indicted charge.

Indeed, under the court's theory and the State's argument on appeal, any felon who uses a firearm to kill in self-defense can be charged with felony murder, disqualified from arguing self-defense, and automatically convicted. "To accept the State's argument on this ground would be to effectively hold that all individuals with a prior felony conviction are forever barred from using a firearm in self-defense under any circumstances. *This would be absurd.*" *McLymore*, 380 N.C. at 199 (emphasis added). Moreover, punishing a defendant for that which "the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (cleaned up, citations and quotes omitted).

"If the appellate court finds that there has been reversible error which denied the defendant a fair trial conducted in accordance with law, it must grant the defendant a new trial." N.C.G.S. § 15A-1447. Accordingly, because defendant's right to due process was violated, we must vacate defendant's conviction and grant his request for a new trial.

III. Conclusion

For the above reasons, we vacate defendant's conviction and remand this case to Superior Court for a new trial.

VACATED AND REMANDED FOR NEW TRIAL.

Judge STROUD concurs in result by separate opinion.

STATE V. JOHNSON

Opinion of the Court

Judge TYSON concurs in part and dissents in part by separate opinion.

No. COA25-1000 – *State v. Johnson*

STROUD, Judge, concurring in result.

I concur in result only. The trial court’s construction of the felony murder statute was “novel,” but it was not erroneous. This case’s prejudicial error arose from the timing of the trial court’s announcement of its intent to instruct on felony murder and Defendant’s lack of opportunity to prepare for trial, not from the substance of the law as the trial court stated in the jury instructions.

TYSON, Judge, concurring in part and dissenting in part.

I agree with the plurality’s opinions concluding possession of a firearm by a felon can serve as the predicate felony to first-degree murder for purposes of the felony murder rule. Instructing the jury on felony murder did not violate Defendant’s right to due process. The trial court did not give constitutionally-inadequate notice to Defendant. I disagree to award Defendant a new trial.

The plurality’s opinion improperly awards Defendant a new trial, after holding the trial court’s *Harbison* inquiry into possession of a firearm by a felon was inadequate. It asserts “his strategic admissions, *standing alone*, were sufficient to prove beyond a reasonable doubt that [D]efendant was guilty under the court’s theory of felony murder.” The plurality’s opinion further holds the trial court “retrospectively” applied “an unforeseeable judicial modification of criminal law to the detriment of the defendant” by “erroneously introduce[ing] a charge distinct from all other categories of murder that is, by definition, inconsistent with self-defense claims, after presiding over a trial in which [D]efendant’s case relied specifically on self-defense.”

I discern and vote no prejudicial error occurred in the jury’s verdict or in the judgment entered thereon. I concur in part and respectfully dissent in part.

I. Standard of Review

This Court reviews “a constitutional challenge to a criminal statute de novo.” *State v. Nanes*, 297 N.C. App. 863, 866, 912 S.E.2d 202, 206 (2025) (citation omitted).

II. Defendant's *Harbison* Inquiry

The trial court stated: “I do want to remind you that you have the right to remain silent, anything you say can be used against you,” during pre-trial conference before conducting the *Harbison* inquiry into Defendant’s self-defense plea and prior to Defendant stipulated to being a convicted felon.

Defendant did not seek a bill of particulars. Our Supreme Court held “when the factual basis for prosecution is sufficiently pled, a defendant must be prepared to defend against any and all legal theories which [the] facts may support.” *State v. Garcia*, 358 N.C. 382, 389, 597 S.E.2d 724, 732 (2004) (citing *State v. Holden*, 321 N.C. 125, 135, 362 S.E.2d 513, 522 (1987)).

The plurality’s opinion cites *State v. Hill*, 185 N.C. App. 216, 224, 647 S.E.2d 475, 480 (Tyson, J., dissenting), *rev’d per curiam per dissent*, 362 N.C. 169, 655 S.E.2d 831 (2008) to correctly assert “A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges.”

The plurality then asserts “In principle, it would have been lawful for the State to proceed under either theory at trial, and the court’s decision to instruct on felony murder does not *in itself* substantially alter the indictment.” From there is where the plurality’s analysis errs. The plurality’s opinion wades into a *Harbison* analysis, 315 N.C. 175, 337 S.E.2d 504 (1985), yet asserts it does not, stating “we have asked whether the court’s *sua sponte* amendment to the bill of indictment after the close of

evidence constituted a substantial alteration because it was ‘inadvertent’ and either ‘misled’ or ‘surprised’ Defendant.” The plurality goes beyond Defendant’s *Harbison* responses and cites law, but then holds constitutional error occurred based in part on its *Harbison* analysis.

The Supreme Court of North Carolina in *State v. Farook* recently examined *Harbison*’s *per se* prejudice standard from *United States v. Cronin*, 466 U.S. 648, 658, 80 L. Ed. 2d 657 (1984), and after the Supreme Court of the United States’ opinion in *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565 (2004), *Farook*, __ N.C. __, __ S.E.2d __, No. 457PA20-2, (N.C. August 14, 2026).

Our Supreme Court reiterated in order to show Ineffective Assistance of Counsel (“IAC”), a defendant must satisfy the two-pronged test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The test in *Strickland* for IAC has been adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

To show a counsel’s purported deficient performance prejudiced him, a defendant “must show that his counsel’s conduct fell below an objective standard of reasonableness.” *Id.* at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

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“counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

In *United States v. Cronic*, the Supreme Court of the United States identified “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Cronic*, 466 U.S. at 658, 80 L. Ed. 2d at 667. The Court recognized several differing examples: (1) when there is a “complete denial of counsel . . . at a critical stage of [the] trial”; (2) when “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing”; and, (3) situations, such as when the identity of the counsel is unclear or occurs too close to the start of trial to effectively prepare, in which competent counsel would be unable to provide effective assistance. *Id.* at 659–61, 80 L. Ed. 2d at 667-69 (citations omitted).

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), our Supreme Court held: where “counsel admits his client’s guilt without first obtaining the client’s consent, the client’s rights to a fair trial and to put the State to the burden

of proof are completely swept away.” The Court stated the practical effect is the same as if defense “counsel had entered a plea of guilty without the client’s consent.” *Id.*

Our Supreme Court in *Harbison* requires a defendant’s “on the record” consent to allow his counsel's concession of defendant's guilt of one or more of the offenses for which he is charged. An “[IAC], per se in violation of the Sixth Amendment, [is] established in every criminal case in which the defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent.” *Id.* at 180, 337 S.E.2d at 507-08.

The defendant in *Garcia*, asserted error occurred in a first-degree murder trial where he had sought a bill of particulars and requested the State to identify “which predicate felony it intended to prove at trial” by arguing before the trial court “[w]e asked what is the *state’s theory*, whether it be premeditation, deliberation, or felony murder, and if it is felony murder, what are the felonies upon which they rely?” *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732.

Our Supreme Court reasoned “[s]uch legal theories of the prosecution are not ‘factual information’ within the meaning of N.C.G.S. § 15A-925.” *Id.* The Court held “[t]he State is not required to choose its theory of prosecution prior to trial.” *Id.* at 389-90, 597 S.E.2d at 732.

In *Nixon*, the defendant was indicted for first-degree murder, kidnapping, robbery, and arson. *Nixon*, 543 U.S. at 180, 160 L. Ed. 2d at 574. The defendant’s counsel attempted to arrange a plea deal for the defendant to avoid the potential

death penalty because the State's evidence against the defendant was "overwhelming and his guilt "was not subject to any reasonable dispute." *Id.* at 180-81, 160 L. Ed. 2d at 574. The prosecutors refused the proposed deal. *Id.*

Based upon his extensive experience in capital trials, the defendant's attorney "feared that denying [the defendant's] commission of the kidnapping and murder during the guilt phase would compromise [his] ability to persuade the jury, during the penalty-phase, [the defendant]'s conduct was the product of his mental illness." *Id.* at 181, 160 L. Ed. 2d at 574. The defendant's attorney "concluded . . . the best strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty-phase." *Id.*

However, when the defendant's attorney attempted to explain this strategy to the defendant, the defendant was "generally unresponsive" and never verbally approved or protested" this strategy. *Id.* The defendant's counsel proceeded with this strategy, the defendant was convicted of all charges, and the trial proceeded to the sentencing phase where the jury's verdict and the court sentenced defendant to death. *Id.* at 184, 160 L. Ed. 2d at 576.

In a motion for post-conviction relief, relying on *Cronic*, the defendant argued a "presumption of prejudice ineffective-assistance of counsel claim." *Id.* at 185, 160 L. Ed. 2d 577. Following an evidentiary hearing at the trial court, the Florida Supreme Court held "no competent, substantial evidence . . . establish[ed] that [the defendant] *affirmatively* and *explicitly* agreed to counsel's strategy" and reversed and

remanded for a new trial. *Id.* (citation omitted).

The Supreme Court of the United States granted *certiorari* to decide “whether counsel’s failure to obtain the defendant’s express consent to a strategy of conceding guilt in a capital trial automatically renders counsel’s performance deficient, and whether counsel’s effectiveness should be evaluated under *Cronic* or *Strickland*.” *Id.* at 186-87, 160 L. Ed. 2d at 578.

Writing for a *unanimous* court, Justice Ginsburg observed:

The Florida Supreme Court’s erroneous equation of [the defendant’s attorney]’s concession strategy to a guilty plea led it to apply the wrong standard in determining whether counsel’s performance ranked as ineffective assistance. The court first presumed deficient performance, then applied the presumption of prejudice that *United States v. Cronic*, 466 U.S. 668, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984), reserved for situations in which counsel has entirely failed to function as the client’s advocate. The Florida court therefore did not hold [the defendant] to the standard prescribed in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), which would have required [the defendant] to show that [his] counsel’s concession strategy was unreasonable.

Id. at 189, 160 L. Ed. 2d at 579-80.

Justice Ginsburg distinguished the facts and holding in *Cronic* from those in *Strickland*, holding:

Cronic recognized a narrow exception to *Strickland*’s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney’s performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in

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circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. The Court elaborated: “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” [S]ee *Bell v. Cone*, 535 U.S. 685, 696–97, [152 L. Ed. 2d 914, 928,] 122 S. Ct. 1843, 1851 (2002) (for *Cronic*’s presumed prejudice standard to apply, counsel’s “failure must be complete”). We illustrated just how infrequently the “surrounding circumstances justif[ies] a presumption of ineffectiveness” in *Cronic* itself.

Id. at 190, 160 L. Ed. 2d at 580 (citations and quotation marks omitted). The Court in *Nixon* concluded unless the narrow exception in *Cronic* applies, IAC based upon a defense counsel’s concession of guilt without consent must be viewed through a *Strickland* analysis. *Id.*

In *State v. Farook*, Chief Justice Newby examined the continued viability of *Harbison* and *McAlister* and held:

On the facts of *Harbison*, the defendant’s counsel did precisely what *Cronic* forbade: failed to function as his client’s advocate or to meaningfully test the State’s case by “expressing his personal opinion that his client should not be found innocent but should be found guilty of manslaughter,” despite the defendant’s contention throughout trial that he acted in self-defense. This Court held that “when counsel to the surprise of his client admits his client’s guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.” Although this “surprise” concession fell within the “narrow exception” of *Cronic*, *Harbison* went a step further and drew every instance of a counsel’s unconsented-to concession of his client’s guilt under the umbrella of *Cronic*: “ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case

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in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507–08 (emphasis added). This broad, blanket rule cannot be maintained following *Nixon*; instead, *Harbison*'s *per se* prejudice rule may only apply where *Cronic* permits.

Because the United States Supreme Court is the final arbiter of federal law, we are compelled to follow that Court's guidance when considering IAC claims under the Sixth and Fourteenth Amendments. Therefore, IAC claims asserting that defense counsel conceded guilty without the defendant knowing and voluntary permission are evaluated under both prongs of *Strickland*, unless the narrow exception recognized by *Cronic* applies.

Farook, __ N.C. at __, __ S.E.2d at __. *State v. McAlister* 375 N.C. 455, 847 S.E.2d 711 (2020).

The Court recognized in a footnote, "Infrequently, a defense counsel's concession of guilt without the defendant's knowing and voluntary permission may amount to a complete failure to function as the defendant's advocate. On those uncommon occasions, the "narrow" *Cronic* exception may be invoked, and the prejudice prong may be presumptively satisfied." *Id.* at __ n.5, __ S.E.2d at __ n5.

The plurality's opinion here concludes its rule section relying on a concept and reasoning similar to what the Court did in *McAlister*, 375 N.C. 455, 847 S.E.2d 711 (2020).

The Court in *Farook*, specifically mentions and chastises the reasoning in *McAlister* as an example wherein the Supreme Court of North Carolina and this Court have "continued to apply *Harbison* following the Supreme Court's decision in

Nixon.” *Farook*, __ N.C. at __ n.4, __ S.E.2d at __ n4. This “*per se*” standard was expressly overruled and the applicability of *McAlister* was severely limited, if not overruled, in *Farook*. *See Id.* at __, __ S.E.2d at __ (Berger, J. concurring) (“If the Court is searching for clarity, we should simply state that North Carolina follows existing federal law in this sphere and overturn *Harbison* and *McAllister* to the extent they presume prejudice from uncontested concessions because they insert a separate question often unanswerable from the record: whether defendant knowingly consented in advance?”).

Defendant was cautioned and warned by the trial court prior to purportedly allowing his counsel to admit to him being a felon in possession of a firearm. “[T]his Court engages in a presumption that trial counsel’s representation is within the boundaries of acceptable professional conduct.” *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). Applying *Farook* and *Strickland*, Defendant cannot show prejudice from the stipulations and admissions to necessitate a new trial.

Our Supreme Court also stated it “ordinarily do[es] not consider it to be the function of an appellate court to second-guess counsel’s tactical decisions[.]” *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). Defense counsel’s stipulation may well have been a strategic decision to keep the jury from hearing Defendant’s extensive criminal history, as he was found to have accumulated 22 prior record points and a prior record level VI at sentencing.

III. Self-Defense and Felony Murder

The plurality concludes:

Accordingly, felony murder requires the State to show proximately causal relationship only between some act that occurs and causes the death, which are both encompassed within a larger continuous transaction that also includes the defendant's underlying felonious conduct. Therefore, defendant's strategic admissions, *standing alone*, were sufficient to prove beyond a reasonable doubt that defendant was guilty under the court's theory of felony murder. No reasonable jury following the court's instructions would have been able to acquit him under this theory.

A. *State v. Richardson*

The tension and interplay between self-defense and the felony murder rule was extensively examined by our Supreme Court in *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). Our Supreme Court also reasoned "By not requiring the State to prove the elements of murder, the legislature has, in essence, established a *per se* rule of accountability for deaths occurring during the commission of felonies." *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994). The Court held self-defense is available in felony murder cases only to the extent the assertion of self-defense relates to and applies to the "underlying felonies." *Richardson*, 341 N.C. at 668, 462 S.E.2d at 499.

Defendant was free to argue a defense to the felon in possession of a firearm charge. *Id.*; See N.C. Gen. Stat. § 15A-905(c)(1) (2025). The plurality holds "the State

is not required to overcome a self-defense justification to prove felony murder” citing *State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016). However, the Court in *Juarez*, re-affirms *Richardson*’s holding, “[p]erfect self-defense, however, may be a defense to the underlying felony, which would thereby defeat the felony murder charge.” *Id.* (citations omitted).

B. *State v. Mercer*

Our Supreme Court has also allowed the common law defense of justification to be an affirmative defense to possession of a firearm by a felon. *See State v. Mercer*, 373 N.C. 459, 463, 373 S.E.2d 359, 363 (2020) (“We now hold that in narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1.”).

IV. Unforeseen Judicial Enlargement

The plurality’s opinion views this case as an “unforeseen judicial enlargement” of the felony murder rule. The plurality cites *Bouie v. City of Columbia*, 378 U.S. 347, 353, 12 L. Ed. 2d 894, 899 (1964). In *Bouie*, the Supreme Court of the United States examined a challenge to the application of a South Carolina trespassing statute by two college students at a civil rights “‘sit-in’ demonstration” at a lunch counter in an Eckerd’s Drug Store. *Id.* at 348, 12 L. Ed. 2d at 896.

The Supreme Court of South Carolina affirmed the convictions for trespass where the statute in question defined the prohibited conduct as “entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry[.]” *Id.* at

349, 12 L. Ed. 2d at 897 (citation omitted). “The South Carolina Supreme Court, in affirming petitioners’ convictions, construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave.” *Id.* at 350, 12 L. Ed. 2d at 898.

The Supreme Court of the United States reversed, holding:

There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drugstore or the restaurant department. Indeed, they knew they would not receive any such notice before entering the store, for they were invited to purchase everything except food there. So far as the words of the statute were concerned, petitioners were given not only no “fair warning,” but no warning whatever, that their conduct in Eckerd's Drug Store would violate the statute.

Id. at 355, 12 L. Ed. 2d at 901.

The plurality’s opinion cites *Bouie* for the well-trodden maxim: “[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates like an *ex post facto* law, such as Art. I, § 10 of the Constitution forbids.” *Id.* at 353, 12 L. Ed. 2d at 899. Justice Brennan, writing for the majority in *Bouie* examined the application of vague statutes to expound the rule: “If a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given

retroactive effect.” *Id.* at 354, 12 L. Ed. 2d at 900. The plurality’s opinion does not square this analysis with the Supreme Court of the United States’ language.

Here the plurality acknowledges the felony murder statute is clear and unambiguous. *See State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982). The U.S. Court of Appeals for the Second Circuit acknowledged “The first use of a longstanding statute to prosecute defendants engaged in a particular type of conduct . . . does not necessarily violate the Constitution.” *United States v. Moseley*, 980 F.3d 9, 24 (2d Cir. 2020). “[A]ll the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.” *State ex rel. Gilchrist v. Hurley*, 48 N.C. App. 433, 442, 269 S.E.2d 646, 652 (1980) (citation omitted).

The provisions of the felon in possession of a firearm, and underlying felonies not expressly included in N.C. Gen. Stat. § 14-17(a), falls under “or other felony committed or attempted with the use of a deadly weapon”, are straightforward, and applies here. N.C. Gen. Stat. § 14-17(a)(2025). Defendant’s argument is properly overruled.

V. Conclusion

The plurality’s opinion awards Defendant a new trial by improperly applying *Harbison*, and the reasoning from the discredited *McAlister*, and their progeny. Their opinions further erroneously conclude the trial court “retrospectively” applied “an unforeseeable judicial modification of criminal law to the detriment of the defendant.

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The pluralities' opinions erroneously vacates Defendant's jury conviction and remands for a new trial.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. No reversible error occurred or is shown in the jury's verdicts or in the judgments entered thereon. I concur in part to hold possession of a firearm by a felon is a permissible "catch all" predicate felony under first degree felony murder, and respectfully dissent from the award of a new trial.