Criminal Pleadings

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This outline addresses the several types of pleadings used in North Carolina criminal court; the contents of such pleadings; and amending or superseding such pleadings.

1) District court pleadings

a) Citation
   i) *See generally* G.S. 15A-302
   ii) Only officers may issue
   iii) For infractions and/or misdemeanors only
   iv) Requires probable cause
   v) Officers generally use
      (1) NC Uniform Citation, form AOC-CR-501, see attachment 1A
      (2) E-citation, see attachment 1B
   vi) Defendant may object to trial on citation, *see* G.S. 15A-922(c)
      (1) Prosecutor must file a statement of charges or obtain an arrest warrant or a criminal summons
      (2) Defendant must exercise right in district court, not on trial *de novo* in superior court. *See State v. Monroe*, 57 N.C. App. 597 (1982) (stating that the right to object "applies only to the court of original jurisdiction," i.e., in district court).
   vii) May be dismissed informally, *see* G.S. 15A-302(e)
   viii) May be less complete and/or accurate than other pleadings. *See State v. Allen*, 247 N.C. App. 179 (2016) (stating that "the standard for issuance of an indictment is not precisely the same as a citation," and upholding the validity of a citation missing an essential element). *See also State v. Jones*, 255 N.C. App. 364 (2017) (similar).

b) Criminal summons
   i) *See generally* N.C. Gen. Stat. 15A-303
   ii) Any justice, judge, magistrate, or clerk may issue
   iii) For any criminal offense or infraction
      (1) Formerly rarely used for felonies, but 2017 legislation made clear that a summons may charge a felony
   iv) Requires probable cause supported by oath or affirmation
      (1) Provided by a citizen or, more often, an officer

(2) Prosecutors generally not involved

v) Issuing authority typically generates by computer

(1) Or uses one of several AOC forms

(a) AOC-CR-113 is the general misdemeanor form, see attachment 2

(b) Specific forms exist for some crimes often charged by summons, including nonsupport and worthless check

vi) Issuance doesn't preclude the later issuance of an arrest warrant

(1) e.g., if it appears that the defendant may flee

c) Arrest warrant

i) *See generally* G.S. 15A-304

ii) Any justice, judge, magistrate, or clerk may issue

iii) For any criminal offense

iv) Requires probable cause supported by oath or affirmation

(1) Provided by a citizen or, more often, an officer

(2) Prosecutors generally not involved

v) Requires a finding that the defendant should be taken into custody

(1) This is the key distinction between a warrant and a summons

(2) Factors per G.S. 15A-304(b): flight risk, danger, seriousness of offense

(3) There is a strengthened statutory preference for issuing a summons rather than a warrant in a citizen-initiated case

vi) Issuing authority typically generates by computer

(1) Or uses one of several AOC forms

(a) AOC-CR-100 is the general form, see attachment 3

(b) Specific forms exist for a number of offenses

d) Magistrate's order

i) *See generally* G.S. 15A-511(c)

ii) Used when the defendant has been arrested without a warrant

iii) Typically brought before magistrate

(1) But law gives any justice, judge or clerk the same power

iv) For any criminal offense

v) Requires probable cause supported by oath or affirmation

(1) Virtually always provided by an officer given that an arrest has been made

vi) Issuing authority typically generates by computer

(1) Or uses one of several AOC forms

(a) AOC-CR-116 is the general form, see attachment 4

(b) Specific forms exist for a number of offenses

vii) Some magistrates issue warrants rather than magistrate's orders even when the defendant has already been arrested
(1) Technically wrong but no harm/no remedy
(2) Others do it right but call the orders "warrants"

e) Statement of charges
i) *See generally* G.S. 15A-922(b)
ii) Prosecutor may file
iii) Only for misdemeanors (and presumably infractions)
iv) Presumably requires probable cause
v) Supersedes any prior charging instrument
vi) Cannot be used to initiate prosecution
vii) Presumably must be served
viii) Prosecutors typically use AOC-CR-120, see attachment 5
ix) Timing
(1) Prior to arraignment
(a) May file at your discretion
(b) May add or change charges
(2) After arraignment (or on trial *de novo* in superior court)
(a) Statute seems to say you may file only if defendant objects to sufficiency of existing process and court rules pleading "insufficient," see G.S. 15A-922(e)
(b) But the state supreme court has held that the above-quoted language is not limiting and you may file at your discretion even after arraignment in district court. *State v. Capps*, 374 N.C. 621 (2020) (so holding, and alternatively indicating that a statement of charges may be analyzed as an amendment when it is one "in substance").
(c) May not "change the nature of the offense"
x) Defendant must be given at least 3 days to prepare defense, upon request, unless the court finds that the statement of charges makes "no material change" in the allegations and additional time is not necessary. G.S. 15A-922(b)(2).

2) Superior court pleadings

a) Indictment
i) *See generally* G.S. 15A-641 *et seq.*
ii) Grand jury may issue
iii) For any criminal offense
(1) Generally used for felonies and related misdemeanors, *see* N.C. Gen. Stat. § 7A-271(a)(3)

(2) Also used for misdemeanors based on a presentment, which remain in superior court, *see* N.C. Gen. Stat. §§ 7A-271(a)(2), 15A-641(c)
(a) An indictment cannot be issued on the same day as the presentment on which it is based. *State v. Baker*, 263 N.C. App. 221 (2018).
(3) Validity for stand-alone misdemeanors not clear. If permitted, should be remanded to district court for trial. *See State v. Wall*, 271 N.C. 675 (1967); *State v. Sullivan*, 111 N.C. App. 441 (1993).

iv) Requires finding of probable cause by at least 12 grand jurors

v) Indictment may be used
(1) To initiate prosecution
(2) To continue felony cases bound over to superior court

vi) Required in felony cases unless the defendant waives right to indictment
(1) Capital defendants and pro se defendants cannot waive

vii) Submitting prosecutor may use an AOC form
(1) General form that can accommodate one or more counts is AOC-CR-122, see attachment 6
(2) There are also forms for several specific offenses
(3) Some prosecutors' offices use home-brewed forms instead

b) Information
i) *See generally* G.S. 15A-641 *et seq.*
ii) Prosecutor may file
iii) For any criminal offense
(1) Generally used for felonies and related misdemeanors
iv) Requires waiver of indictment
(1) See above for non-waivable offenses
v) District court use: necessary for felony guilty pleas in district court
(1) *See* N.C. Gen. Stat. 7A-272(c)(1), 15A-644.1
(2) Limited to Class H and Class I offenses
vi) Prosecutors typically use AOC-CR-123, see attachment 7

3) Content of criminal pleadings

a) Purpose/due process requirements. "The purpose of [a criminal pleading] is to put the defendant on notice of the offense with which he is charged and to allow him to prepare a defense to that charge." *State v. Lancaster*, 137 N.C. App. 37 (2000). A sufficiently specific pleading is required by due process. *State v. Glynn*, 178 N.C. App. 689 (2006).

b) Statutory requirements. Criminal pleadings must contain the information set forth in G.S. 15A-924, including:
i) The defendant's name

ii) A separate count for each charged offense
iii) The county in which each offense was committed
iv) When (approximately) each offense was committed
v) Allegations supporting every element of each offense
vi) A statutory citation for each offense.

c) Extensive detail not necessary. G.S. 15A-924(a)(5) requires a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense . . . with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation."
   i) "In general, [a charging document] couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon,* 130 N.C. App. 692 (1998).
   ii) North Carolina charging documents are often less detailed than, e.g., federal pleadings.

d) Lower standard for citations. Pleading standards for citations are relaxed. *State v. Allen*, 247 N.C. App. 179 (2016) (noting that "the standard for issuance of an indictment is not precisely the same as a citation," and finding sufficient a citation that omitted an element of an offense); *State v. Jones*, 255 N.C. App. 364 (2017) (similar).

e) Plead in the conjunctive. Generally, when a statute lists several ways in which an offense can be committed, the best practice is to join the different ways using "and," even if the statute uses "or."
   i) Example. G.S. 14-100 defines the offense of obtaining property by false pretenses to include "obtain[ing] *or* attempt[ing] to obtain" property, but it is proper to allege that the defendant did "obtain *and* attempt to obtain" property. *State v. Armstead*, 149 N.C. App. 652 (2002).
   ii) Rationale. Courts have stated that the use of the disjunctive term "or" may "leave it uncertain what is relied on as the accusation against [the defendant]." *State v. Swaney*, 277 N.C. 602 (1971) (armed robbery indictment properly alleged that the defendant "endangered and threatened" the life of the victim, even though G.S. 14-87 requires that the defendant "endangered or threatened" the victim's life).
   iii) Disjunctive pleading not necessarily improper. Although the preferred practice is to charge in the conjunctive, a pleading that charges in the disjunctive is probably not fatally defective. *State v. Haddock*, 191 N.C. App. 474 (2008) (indictment charged second-degree rape based on the theories that the victim was "mentally disabled, mentally incapacitated and/or

physically helpless"; although the use of "and/or" was not the best practice, the indictment was valid because it gave the defendant sufficient notice of the charges; the court stated that both "and" and "or" are superior to "and/or").

f) Special rules.
   i) DWI. There is specific statutory charging language for DWI. G.S. 20-138.1(c).
   ii) Allegations of previous convictions. There are special rules for recidivist allegations. G.S. 15A-924(c)-(d), 15A-928.
   iii) "Short forms." G.S. 15-144 *et seq.* provide "short form" charging language for first-degree murder, first-degree rape, and first-degree sex offense.
   iv) Nonstatutory aggravating circumstances. If the state intends to rely on a nonstatutory aggravating circumstance for felony sentencing, the circumstance must be described. G.S. 15A-924(a)(7).

g) Sign and date. A pleading must normally be signed and dated by whoever issues it. *See* G.S. 15A-301 (most charging documents), 15A-644 (indictments and informations).

h) Failure to comply with statutory requirements not necessarily fatal. Although the best practice is to comply completely with the statute, not all failures to comply are fatal. For example, G.S. 15A-924(a)(6) provides that the failure correctly to cite the statute that the defendant is charged with violating "is not ground for dismissal of the charges or reversal of a conviction."

i) Sources for charging language
   i) Jeffrey B. Welty, Christopher Tyner, Jonathan Holbrook, *Arrest Warrant and Indictment Forms* (UNC School of Government 2022)
   ii) AOC forms and computer systems
   iii) Other prosecutors and support staff

j) Further reading. For more information about charging documents, see the introduction to *Arrest Warrant and Indictment Forms,* as well as Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment* (2008), available on the School of Government website.

4) Errors in district court pleadings

a) Options. When confronted with a pleading error, you have four main choices, discussed in greater detail below:
   i) Do nothing, if the problem is very minor
   ii) Move to amend the pleading to fix the problem, if the problem is relatively minor
   iii) Supersede with a new pleading, if the problem is severe and superseding would be timely

iv) Dismiss and re-charge

b) Doing nothing. Some problems are so minor that they do not affect the validity of a pleading, and you may choose not to address them at all.
   i) Examples
      (1) Misspellings. A slight misspelling of the name of the victim or the defendant does not render a pleading defective. *See*, *e.g.*, *State v. Isom*, 65 N.C. App. 223, 226 (1984) (a pleading that identified the victim as "Eldred Allison" was not invalid just because the victim's name was actually "Elton Allison"; the two names are sufficiently similar); *State v. Spooner*, 28 N.C. App. 203, 204 (1975) (same, as to pleading that identified the defendant as "Mike Spooner" when his name was "Michael Spooner").
      (2) Date or time of offense. A slight error as to the date or time of the offense normally does not affect the validity of a pleading. *See*, *e.g.*, *State v. Riggs*, 100 N.C. App. 149, 152-53 (1980) (sustaining a conviction where the pleading alleged that the offense took place on May 17, but the evidence showed that it actually took place on May 15).
         (a) However, if the error as to date misleads the defendant or prevents him from presenting a defense, such as an alibi, the error will be material.
   ii) May correct even when not legally required. You may choose to address very minor problems for a variety of reasons, such as because a judge asks you to do so or in order to ensure more accurate criminal records. In such a case, use any of the procedures described below.

c) Moving to amend. Many errors in charging documents can be fixed by amendment.
   i) Timing. A citation, criminal summons, arrest warrant, magistrate's order, or statement of charges may be amended "at any time, prior to or after final judgment." G.S. 15A-922(f).
   ii) Procedure. The statute doesn't require any particular procedure for amendment. The usual practice is for the prosecutor to move to amend, and for the court to rule on the motion. Local practice varies as to who actually marks the amendment on the court's copy of the pleading. When in doubt, ask the judge how he or she would prefer to handle it, but record in some way who sought the amendment, who approved it, and the date.
   iii) Cannot change the nature of the offense. Any amendment may "not change the nature of the offense charged." *Id*.

(1) Uncertainty of meaning. No case comprehensively explains the meaning of "does not change the nature of the offense charged," and the case law in this area is not completely consistent.[1] Other jurisdictions make a similarly difficult distinction between amendments that are permitted because they concern "merely a matter of form" and ones that are prohibited because they are "substantive" and "change[] the nature or grade of the charged offense." 42 C.J.S. *Indictments* § 267 (2018) (Amendment of Indictment, Generally).

(2) Helpful framework. Professor Wayne LaFave, a leading commentator, provides what may be a helpful framework. He explains that an amendment is permitted unless it would charge (1) a "factually different offense," or (2) a "legally separate offense." 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.5(b) (4th ed. 2015).

(3) A "factually different offense"

(a) Prohibited amendments

(i) Generally. Professor LaFave defines a "factually different offense" as one based on a "different factual event," such as one at a different time and place or involving different parties. *Id.* Further, some jurisdictions – North Carolina apparently among them – hold that even though the "basic incident remains the same," an amendment alleges a factually different offense if it changes the "theory of the prosecution." *Id.*

(ii) Examples

1. Changing the identity of the victim. *State v. Abraham*, 338 N.C. 315 (1994) ("A change in the name of the victim substantially alters the charge in the indictment. Therefore, the trial court was without authority to allow the amendment."); *State v. Hughes*, 118 N.C. App. 573 (2005) (an indictment alleged that a defendant embezzled gas belonging to "Mike Frost, President of Petroleum World, Inc."; the trial judge erred by allowing an amendment striking "Mike Frost, President of").
2. Changing the State's "theory of the case." *See, e.g., State v. Frazier*, 251 N.C. App. 840 (2017) (an indictment for negligent child abuse alleged that the defendant failed to treat wounds suffered by a child; the State amended the indictment to allege that the defendant failed "to provide a safe

[1] A few of the cases cited here concern amendments to indictments rather than citations, summonses, or other district court pleadings. In the cited cases, nothing turns on that distinction.

environment" for the child; this was an improper amendment as it allowed the State to seek a conviction on a "new theory" not contained in the original indictment); *State v. Silas*, 360 N.C. 377 (2006) (a defendant was charged with breaking or entering with intent to commit murder; the State was allowed to amend the indictment to allege that the defendant intended to commit a felony assault; although the State need not have specified the intended felony at all, once it did so the amendment substantially altered the charge because "the indictment serve[s] as notice to defendant . . . of the State's theory of the offense," and the defendant is entitled to "rel[y] upon the allegations in the original indictment . . . in preparing his case").

(b) Permitted amendments

(i) Generally. Professor LaFave states that amendments may change other factual details, such as "the identification of the property stolen, the description of the sexual contact with the victim of a sexual assault or [the] means of committing the offense." WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 19.5(b) (4th ed. 2015).

(ii) Examples

1. Changes to date or time. *State v. May*, 159 N.C. App. 159 (2003) (the State was properly permitted "to amend the date appearing on the indictments to accurately reflect the date of the offense rather than the date of arrest" as time was not of the essence and the amendment did not substantially alter the offense).
2. Changes to means or instrumentalities. *State v. Joyce*, 104 N.C. App. 558 (1991) (amending an armed robbery indictment to allege that the defendant used a "firearm" rather than a "knife" was not material and did not prejudice the defendant). *But cf. State v. Moore*, 162 N.C. App. 268 (2004) (amendment of drug paraphernalia indictment from a "can designed as a smoking device" to a "brown paper container" substantially altered the charge because "common household items . . . may be classified as drug paraphernalia" depending on their use, so "in order to mount a defense to the charge of possession of drug paraphernalia, a defendant must be

apprised of the item or substance the State categorizes as drug paraphernalia").

(4) A "legally separate offense"

(a) Generally. Whether an amendment results in a legally separate offense requires consideration of "the traditional double jeopardy standard that looks to the elements of crime." WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 19.5(b) (4th ed. 2015).

(b) Examples

(i) Amending a pleading that charges one crime into one that charges another crime. *In re Davis*, 114 N.C. App. 253 (1994) (a juvenile petition charged burning a public building; the trial judge "essentially amended the juvenile petition by allowing the State to proceed on a theory of burning of personal property"; this improperly changed the nature of the offense charged); *State v. Carlton*, 232 N.C. App. 62 (2014) (defendant was charged by citation with a violation of G.S. 14-291 [acting as an agent of a lottery]; the charge was amended in district court to a violation of G.S. 14-290 [possessing lottery tickets]; this was improper because the latter "is a different crime" than the former so the amendment "effectively charge[d] Defendant with a different offense").

(ii) Amending a pleading that fails to charge a crime into one that does charge a crime. *State v. Madry*, 140 N.C. App. 600 (2000) (a warrant purported to charge a defendant with a bear-baiting crime, but there are several such offenses and the warrant was ambiguous as to which the defendant had committed; the warrant was "fatally deficient" because it failed to "notify the defendant of the nature of the crime charged and fail[ed] to contain even a defective statement of the offense"; therefore, it could not be amended); *State v. Williams*, 242 N.C. App. 361 (2015) ("This Court has held that . . . amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration and is therefore impermissible."); *State v. Staten*, 32 N.C. App. 495 (1977) (a "magistrate's order fail[ed] to charge . . . three necessary elements of [going armed to the terror of the people] . . . [it failed to provide adequate notice], fail[ed] to contain even a defective statement of the offense . . . is fatally defective and cannot be

cured by amendment"). *But cf. State v. Bohannon*, 26 N.C. App. 486 (1975) (warrant purported to charge defendant with driving while license suspended, but originally alleged "after" rather than "while"; properly amended at beginning of trial; "the original warrant contained a defective statement of the offense charged, [but it] adequately notified the defendant of the offense charged, and, therefore, was properly cured by amendment").

d) Superseding the charging document. When an amendment will not work because it would change the nature of the offense, a prosecutor may choose to supersede the pleading.
   i) Statement of charges. In district court, a statement of charges is normally used to supersede.
   ii) Timing
      (1) Before arraignment. A prosecutor may file a statement of charges at any time prior to arraignment, and because the statement of charges completely supersedes the prior charging document, it can make any necessary changes. *See* G.S. 15A-922(d).
      (2) After arraignment. Under G.S. 15A-922(e), "[i]f the defendant . . . objects to the sufficiency of a [charging document] at the time of or after arraignment in the district court or upon trial de novo in the superior court, and the judge rules that the pleading is insufficient, the prosecutor may file a statement of charges . . . [which] may not change the nature of the offense." The state supreme court has held that this language is not limiting and a prosecutor may file a statement of charges at his or her discretion even after arraignment in district court. *See State v. Capps*, 374 N.C. 621 (2020) (so holding, and alternatively indicating that a statement of charges may be analyzed as an amendment when it is one "in substance"). However, because such a statement of charges "may not change the nature of the offense," it does not appear to give the state the ability to do anything that it could not do by amendment.

e) Dismiss and re-charge. Sometimes it is not practical or possible to amend or to supersede an existing charging document. In such a case, you may dismiss and re-charge the defendant. *See generally State v. Friend*, 219 N.C. App. 338 (2012) (affirming the State's authority to dismiss and re-charge, even when the need to do so is based on a judge's denial of the State's request for a continuance).
   i) Double jeopardy. There is no double jeopardy problem if the state dismisses the original pleading before jeopardy attaches, i.e., before the first witness begins to testify. *State v. Ward*, 127 N.C. App. 115 (1997) ("[I]n non-jury

trials, jeopardy does not attach until the court begins to hear evidence or testimony."). Even if trial has begun, there is no double jeopardy problem if the original pleading was fatally defective. *State v. Blakney*, 156 N.C. App. 671 (2003).

ii) Statute of limitations. G.S. 15-1 creates a two-year statute of limitations for misdemeanors, and G.S. 15A-931(b) provides that "[n]o statute of limitations is tolled by charges which have been dismissed [by the State]." Thus, dismissing and re-charging is not an available option two years after the date of the offense, absent unusual circumstances.

iii) Procedure. An officer may issue a new citation, or a magistrate or judge may issue a new summons or arrest warrant. A statement of charges should not be used to re-charge the defendant, as it is a superseding document that is not intended to be used to initiate prosecution.

5) Errors in indictments and informations

a) Generally. The rules for amending indictments and informations are similar to the rules that apply to the district court pleadings discussed above: very minor problems with pleadings may be ignored; amendments are available at any time, but cannot fix all problems; and obtaining a superseding charging document can fix even the most serious problems but cannot be done after the case has moved to a dispositional stage.

b) Differences from district court. While the general rules are similar, superior court practice is different in certain respects. Key differences include:

i) While there is express statutory authority for amending misdemeanor pleadings even *after* trial, *see* G.S. 15A-922(f), there is no similar statutory authority for felony pleadings.

ii) Amendments may be permitted slightly more liberally in district court than in superior court. In district court, the question is whether an amendment "change[s] the nature of the offense charged." By contrast, while G.S. 15A-923(e) provides that indictments may not be amended, the courts have held that amendments are allowed so long as they do not "substantially alter" the charge.[2] The substantial alteration standard may be somewhat more restrictive than the "change the nature of the offense" standard. *See State v. Bohannon*, 26 N.C. App. 486 (1975) (suggesting that a defect that is "fatal" for an indictment may not be "fatal" for a warrant). Still, the general rules discussed above in connection with district court pleadings are reasonable

[2] Likewise, although G.S. 15A-923(d) provides that an information may be amended only with the defendant's consent, the Court of Appeals has held that the defendant's consent is not needed for an amendment that does not substantially alter the charge. *See State v. Jones-White*, 2007 WL 2034115 (N.C. Ct. App. July 17, 2007) (unpublished).

guides in superior court cases as well. That is to say, amendments tend to be viewed as substantial alterations if they would result in a factually different offense or a legally different offense.

iii) There is no superior court equivalent to a statement of charges. In superior court, the state must supersede with a new indictment, or, if the defendant consents, with a new information. The state may supersede only prior to a guilty plea or the beginning of trial. G.S. 15A-646. Importantly, counts in the initial indictment or information that have no correlates in the superseding document are retained. *Id.* This is contrary to the rule in district court that a statement of charges completely supplants all counts of the original charging document.

6) Variances: when the proof and the pleadings don't match

a) Generally. A variance occurs when the charging document is sufficient on its face but the evidence at trial does not match the allegations of the pleading. The defense will normally raise this by moving to dismiss at the close of the state's case, based on insufficient evidence. The defense will argue that the failure to support the allegations of the pleading constitutes a "fatal variance." Whether this is so depends on whether any unproven allegations are essential elements of the offense, or whether they are "mere surplusage."

b) Surplusage. The state is not bound to surplusage in the charging document. Allegations that are not necessary to charge the offense properly are normally considered surplusage. For example, in *State v. Pickens***,** 346 N.C. 628 (1997), the defendant was indicted for discharging a firearm into occupied property. The indictment alleged in part that the defendant discharged a shotgun, a firearm, into an occupied dwelling. The evidence showed that the defendant actually used a handgun. The court held that the essential element of discharging a *firearm* was alleged, and that the specification that the firearm was a shotgun was not necessary, making it mere surplusage. Thus, the conviction stood, notwithstanding the variance.

i) Legal theories, as well as factual allegations, may be surplusage. In *State v. Westbrooks*, 345 N.C. 43 (1996), the defendant was indicted for first-degree murder. The indictment alleged that the defendant unlawfully, willfully, and feloniously did, *acting in concert* with named others, of malice aforethought kill and murder the victim. At trial the state proved that the defendant was guilty of first-degree murder based on the theory of *accessory before the fact*. The court ruled that the indictment's acting-in-concert language did not allege an element of first-degree murder and therefore was surplusage. Thus

the state was not barred by this language from proving the defendant guilty of first-degree murder based on the theory of accessory before the fact.

ii) A related issue sometimes arises when an indictment or other criminal pleading alleges more than one way to commit an element of a criminal offense. In such a case, the state only has to prove one of the alternatives. *See State v. Birdsong*, 325 N.C. 418 (1989) (corrections officer charged with failing to discharge official duties in connection with an inmate's death; indictment alleged failure to follow orders *and* failure to investigate the death; state introduced evidence only of one failure; court held that specifying the particular failure was surplusage, and that in any event proof of a single theory among several conjunctively alleged theories was sufficient); *State v. Stokes*, 174 N.C. App. 447 (2005) (when indictment charging felony eluding arrest alleged three aggravating factors, state was only required to prove two aggravating factors).

c) Fatal variance. If the variance concerns an essential element of the charged offense, the variance is fatal. For example, if a defendant were charged with rape, but the state's evidence showed that he penetrated the victim anally rather than vaginally, there would be a fatal variance.

i) *Silas.* In *State v. Silas*, 360 N.C. 377 (2006), the trial judge at the jury charge conference allowed the state to amend a felonious breaking and entering indictment to change the felony intended to be committed from murder to two felonious assaults, reasoning that the indictment need not specify the felony intended to be committed, and that it was therefore surplusage that could be amended at any time. The reviewing court agreed that a felonious breaking or entering indictment need not allege the specific felony intended to be committed. However, it held that if such an indictment alleges a specific felony, the state may not amend it to allege another felony because the amendment is a substantial alteration of the indictment and prohibited by G.S. 15A-923(e). Thus, the court rejected the state's argument that the language alleging intent to commit murder was surplusage. *Silas* indicates that in some cases, the state may be bound by its pleadings, i.e., that a variance with respect to a fact that is not required to be included in a pleading may nonetheless be fatal. The case law in this area is not uniform, but *Silas* counsels caution in alleging unnecessary detail in criminal pleadings.

d) No double jeopardy bar to re-charging. When a charge has been dismissed due to a fatal variance, double jeopardy does not bar the state from re-charging the defendant with the correct offense, i.e., the one that is supported by the evidence. *State v. Mason*, 174 N.C. App. 206 (2005).