DWI:
From Charge to Sentencing

Shea Denning
School of Government
October 2022

1

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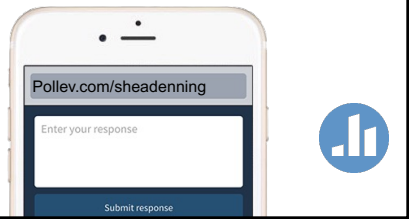

2

How many DWI cases have you defended?

3

Name one DWI issue you find tricky or that you would like to better understand.

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Sentencing under G.S. 20-179

- Separate scheme from structured sentencing
- No indefinite PJCs
- Mandatory minimums
- Good time credit
- Parole eligible
- Substance abuse assessment and education or treatment required as condition of probation

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G.S. 20-179: Covered Offenses

- G.S. 20-138.1 (impaired driving)
- G.S. 20-138.2 (impaired driving in a commercial vehicle)
- Second or subsequent conviction of
  - G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol)
  - G.S. 20-138.2B (operating a school bus, child care vehicle, emergency or law enforcement vehicle after consuming)
- A person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level 5 punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.

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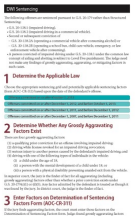

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Punishment Level Controlling Statute Factors	Imprisonment and Mandatory Probation Conditions	Fine
Aggravated Level One G.S. 20-179(f3) *Three or more grossly aggravating factors*	• 12 months minimum to 36 months maximum • If suspended – Imprisonment of at least 120 days as a condition of special probation – Requirement that defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM) system – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $10,000
Level One G.S. 20-179(g) *Grossly aggravating factor in G.S. 20-179(c)(4) or two other grossly aggravating factors*	• 30 days minimum to 24 months maximum • If suspended – Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $4,000
Level Two G.S. 20-179(h) *One grossly aggravating factor, other than the grossly aggravating factor in G.S. 20-179(c)(4)*	• 7 days minimum to 12 months maximum • If suspended – Special probation requiring (1) imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days ○ If Level Two based on prior conviction or DWLR for an impaired driving revocation and prior conviction occurred within five years, sentence must requie 240 hours of community service if no imprisonment imposed – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $2,000

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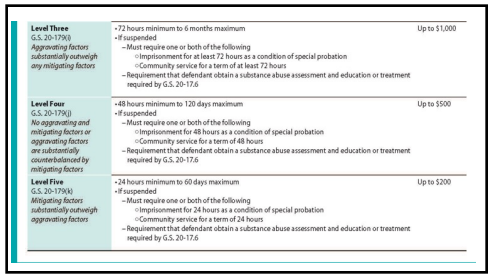


Level Three G.S. 20-179(i) *Aggravating factors substantially outweigh any mitigating factors*	• 72 hours minimum to 6 months maximum • If suspended – Must require one or both of the following ○ Imprisonment for at least 72 hours as a condition of special probation ○ Community service for a term of at least 72 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $1,000
Level Four G.S. 20-179(j) *No aggravating and mitigating factors or aggravating factors are substantially counterbalanced by mitigating factors*	• 48 hours minimum to 120 days maximum • If suspended – Must require one or both of the following ○ Imprisonment for 48 hours as a condition of special probation ○ Community service for a term of 48 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $500
Level Five G.S. 20-179(k) *Mitigating factors substantially outweigh aggravating factors*	• 24 hours minimum to 60 days maximum • If suspended – Must require one or both of the following ○ Imprisonment for 24 hours as a condition of special probation ○ Community service for a term of 24 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $200

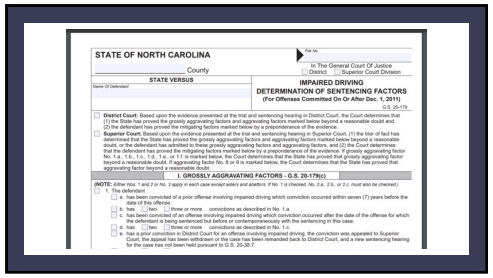
10

Grossly Aggravating Factors

1. Prior conviction for offense involving impaired driving (within 7 years)
2. DWLR while license revoked for impaired driving revocation
3. Serious injury to another person
4. *Driving with any of the following in the vehicle
   a. Child under 18, or
   b. Person with mental development of child under 18, or
   c. Person with disability barring unaided exit from vehicle

* Presence of this factor alone requires sentencing at Level One

11



STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

STATE VERSUS

Name Of Defendant

IMPAIRED DRIVING
DETERMINATION OF SENTENCING FACTORS
(For Offenses Committed On Or After Dec. 1, 2011)
G.S. 20-179

☐ **District Court:** Based upon the evidence presented at the trial and sentencing hearing in District Court, the Court determines that (1) the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt and (2) the defendant has proved the mitigating factors marked below by a preponderance of the evidence.

☐ **Superior Court:** Based upon the evidence presented at the trial and sentencing hearing in Superior Court, (1) the trier of fact has determined that the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt, or the defendant has admitted to these grossly aggravating factors and aggravating factors, and (2) the Court determines that the State has proved that the grossly aggravating factor No. 1.a., 1.b., 1.c., 1.d., 1.e., or 1.f. is marked below, the Court determines that the State has proved that grossly aggravating factor No. 1.a., 1.b., 1.c., 1.d., 1.e., or 1.f. is marked below, the Court determines that the State has proved that aggravating factor No. 8 or 9 is marked below, the Court determines that the State has proved that aggravating factor beyond a reasonable doubt.

I. GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c)

(NOTE: *Either Nos. 1 and 2 or No. 3 apply in each case except aiders and abettors. If No. 1 is checked, No. 2.a., 2.b., or 2.c. must also be checked.*)

☐ 1. The defendant

☐ a. has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense

☐ b. has ☐ two ☐ three or more convictions as described in No. 1.a.

☐ c. has been convicted of an offense involving impaired driving which conviction occurred after the date of the offense for which he/she is being sentenced but before or contemporaneously with the sentencing in this case.

☐ d. has ☐ two ☐ three or more convictions as described in No. 1.c.

☐ e. has a prior conviction in District Court for an offense involving impaired driving, the conviction was appealed to Superior Court, the appeal has been withdrawn or the case has been remanded back to District Court, and a new sentencing hearing for the case has not been held pursuant to G.S. 20-38.7.

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Duties of the Prosecutor

- Obtain full record of traffic convictions and present to judge
- Present all other appropriate GAFs and AFs of which he or she is aware
- Must present evidence of alcohol concentration from valid chemical analysis

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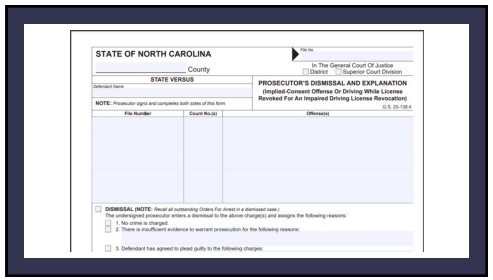

STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
District Superior Court Division

STATE VERSUS

Defendant Name

PROSECUTOR'S DISMISSAL AND EXPLANATION (Implied-Consent Offense Or Driving While License Revoked For An Impaired Driving License Revocation)

G.S. 20-138.4

NOTE: *Prosecutor signs and completes both sides of this form.*

File Number	Count No.(s)	Offense(s)

DISMISSAL (NOTE: *Recall all outstanding Orders For Arrest in a dismissed case.*)
The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:

1. No crime is charged.
2. There is insufficient evidence to warrant prosecution for the following reasons:

3. Defendant has agreed to plead guilty to the following charges.

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Special Rules

1. Judge may award credit against term of imprisonment for inpatient treatment obtained after commission of offense.
2. Judge may order special probation to be served in a treatment facility.
3. Good time credit is awarded against active sentences at all levels other than Level A1.
4. Good time credit does *not* reduce special probation sentence.
5. Imprisonment (both active and split) may be served in 48-hour intervals.
6. Level A1 sentences end 4 months before maximum to place defendant on post-release supervision.

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Special probation (split sentence) for DWI

↓

Local Jail

Active sentence for DWI

↓

Statewide Misdemeanant Confinement Program

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Resentencing After Appeal: G.S. 20-38.7(c)

- District court sentence is vacated when an appeal is withdrawn and a case remanded and the district court must hold a new sentencing hearing unless
  - Appeal is withdrawn and prosecutor certifies in writing that he/she has no new sentencing factors to offer

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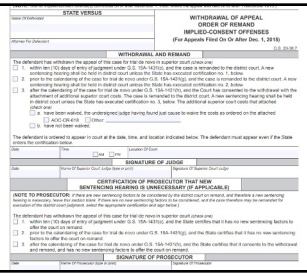
AOC-CR-321B, Side 2



STATE VERSUS

Name Of Defendant

Attorney For Defendant

WITHDRAWAL OF APPEAL
ORDER OF REMAND
IMPLIED-CONSENT OFFENSES
(For Appeals Filed On Or After Dec. 1, 2013)

G.S. 20-38.7

WITHDRAWAL AND REMAND

The defendant has withdrawn the appeal of this case for trial de novo in superior court (check one):

1. before the calendaring of the case for trial de novo under G.S. 15A-1431(g), and the case is remanded to the district court. A new sentencing hearing shall be held in district court unless the State has executed certification no. 1. below.
2. prior to the calendaring of the case for trial de novo under G.S. 15A-1431(g), and the case is remanded to the district court. A new sentencing hearing shall be held in district court unless the State has executed certification no. 2. below.
3. after the calendaring of the case for trial de novo under G.S. 15A-1431(h), and the Court has consented to the withdrawal with the attachment of additional superior court costs. The case is remanded to the district court. A new sentencing hearing shall be held in district court unless the State has executed certification no. 3. below. The additional superior court costs that attached
   a. have been waived, the undersigned judge having found just cause to waive the costs as ordered on the attached AOC-CR-616 Other
   b. have not been waived.

The defendant is ordered to appear in court at the date, time, and location indicated below. The defendant must appear even if the State enters the certification below.

Date | Time | AM PM | Location Of Court

SIGNATURE OF JUDGE

Date | Name Of Superior Court Judge (type or print) | Signature Of Superior Court Judge

CERTIFICATION OF PROSECUTOR THAT NEW SENTENCING HEARING IS UNNECESSARY (IF APPLICABLE)

(NOTE TO PROSECUTOR: If there are new sentencing factors to be considered by the district court on remand, and therefore a new sentencing hearing is necessary, leave this section blank. If there are no new sentencing factors to be considered, and the case therefore may be remanded for execution of the district court judgment, select the appropriate certification and sign below.)

The defendant has withdrawn the appeal of this case for trial de novo in superior court (check one):

1. before the calendaring of the entry of judgment under G.S. 15A-1431(c), and the State certifies that it has no new sentencing factors to offer the court on remand.
2. prior to the calendaring of the case for trial de novo under G.S. 15A-1431(g), and the State certifies that it has no new sentencing factors to offer the court on remand.
3. after the calendaring of the case for trial de novo under G.S. 15A-1431(h), and the State certifies that it consents to the withdrawal and remand, and has no new sentencing factors to offer the court on remand.

SIGNATURE OF PROSECUTOR

Date | Name Of Prosecutor (type or print) | Signature Of Prosecutor

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Sentencing Scenario 1	• Don is convicted of DWI. BAC is 0.08. He has a safe driving record under G.S. 20-179(e)(4). The State does not present aggravating factors. Dan demonstrates that he obtained a substance abuse assessment and attended ADETS, which was recommended.

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Suspended sentence?	• Must require – Imprisonment for 24 hours as a condition of special probation and/or – Community service for 24 hours – AND defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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Sentencing Scenario 2	• Danielle is convicted of DWI. She is 30. Her BAC was a 0.08. She has a safe driving record. Her 5-year-old daughter was in the car at the time of the offense. She has obtained a substance abuse assessment and has attended ADETS.

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Level One Sentencing Requirements

- 30 days minimum – 24 months maximum
- If suspended
  - Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days
  - AND defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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Sentencing Scenario 3

- Darren is convicted of DWI – his third conviction. He was previously convicted of DWI five years ago and again two years ago. At the time of the current offense, committed on a city street, his license was revoked for the latest DWI conviction.

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Aggravated Level One Sentencing Requirements

- 12 months minimum – 36 months maximum
- If suspended
  - Special probation requiring imprisonment of at least 120 days;
  - Alcohol abstinence and CAM for at least 120 days; and
  - Defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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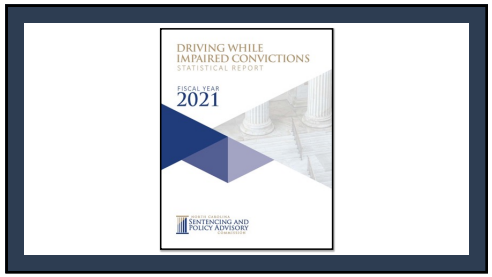
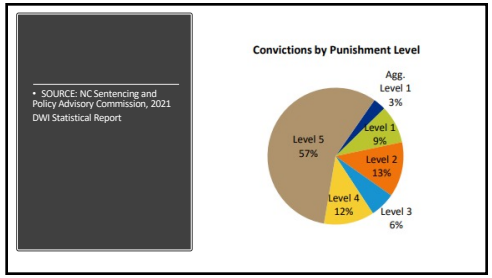
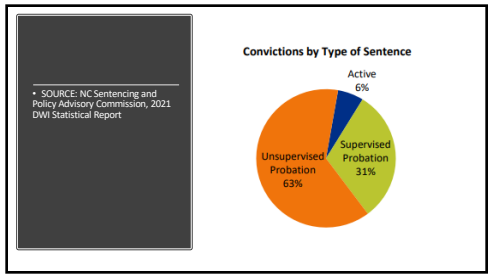

DRIVING WHILE
IMPAIRED CONVICTIONS
STATISTICAL REPORT
FISCAL YEAR
2021
SENTENCING AND
POLICY ADVISORY

25


• SOURCE: NC Sentencing and Policy Advisory Commission, 2021 DWI Statistical Report
Convictions by Punishment Level
Agg. Level 1 3%
Level 1 9%
Level 2 13%
Level 3 6%
Level 4 12%
Level 5 57%

26


• SOURCE: NC Sentencing and Policy Advisory Commission, 2021 DWI Statistical Report
Convictions by Type of Sentence
Active 6%
Supervised Probation 31%
Unsupervised Probation 63%

27

What percentage of cases involve an alcohol concentration of 0.15 or more?

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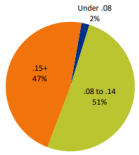
- SOURCE: NC Sentencing and Policy Advisory Commission, 2021 DWI Statistical Report

Figure F: Convictions by BAC



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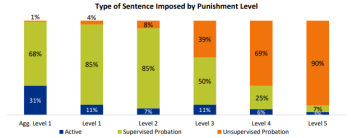
Type of Sentence Imposed by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

[1] For many of the tables and figures in this report, 16 of the 21,240 DWI convictions were excluded because the type of sentence imposed could not be determined.

ii

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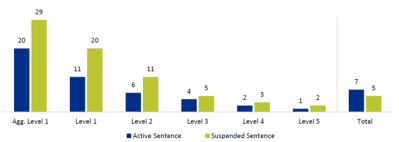
Figure M: Average Sentence Imposed (Months) by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

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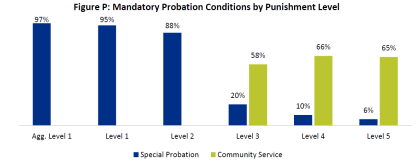
Figure P: Mandatory Probation Conditions by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

[33] Offenders sentenced in Aggravated Level 1 through Level 2 may receive community service as part of their sentence. Six percent (6%) of Aggravated Level 1 sentences, 8% of Level 1 sentences, and 9% of Level 2 sentences included community service.
[34] Special probation and community service may be imposed together in Levels 3 through 5, although this occurred in less than 1% of the convictions.

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Elements of DWI

- Drive
- Vehicle
- Street, highway or public vehicular area
- While impaired
  - Appreciable impairment;
  - BAC of 0.08 or more at any a relevant time after driving; or
  - Any Schedule I controlled substance or its metabolites in his/her blood or urine

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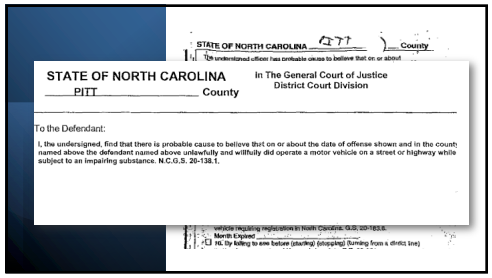

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Implied Consent Offenses

- Impaired driving (G.S. 20-138.1)
- Impaired driving in a commercial vehicle (G.S. 20-138.2)
- Habitual impaired driving (G.S. 20-138.5)
- Death by vehicle or serious injury by vehicle (G.S. 20-141.4)
- Murder (G.S. 14-17) or involuntary manslaughter (G.S. 14-18) when based on impaired driving
- Driving by a person under 21 after consuming alcohol or drugs (G.S. 20-138.3)
- Violating no alcohol condition of a limited driving privilege (G.S. 20-179.3(j))
- Impaired instruction (G.S. 20-12.1)
- Operating a commercial motor vehicle after consuming alcohol (G.S. 20-138.2A)
- Operating a school bus, school activity bus, child care vehicle, ambulance or other EMS vehicle, firefighting vehicle, or law-enforcement vehicle after consuming alcohol (G.S. 20-138.2B)
- Transporting an open container of alcohol (G.S. 20-138.7(a))
- Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f))

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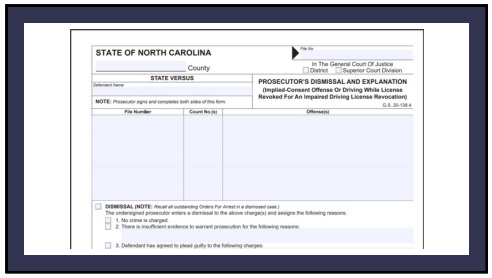

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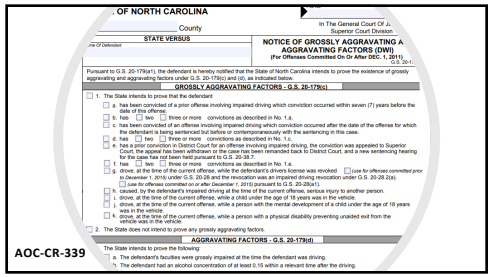

OF NORTH CAROLINA

County

In The General Court Of J
Superior Court Division

STATE VERSUS

NOTICE OF GROSSLY AGGRAVATING A
AGGRAVATING FACTORS (DWI)
(For Offenses Committed On Or After DEC. 1, 2011)
G.S. 20-1

Pursuant to G.S. 20-179(a1), the defendant is hereby notified that the State of North Carolina intends to prove the existence of grossly aggravating and aggravating factors under G.S. 20-179(c) and (d), as indicated below.

GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c)

1. The State intends to prove that the defendant

a. has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense.
b. has ☐ two ☐ three or more convictions as described in No. 1.a.
c. has been convicted of an offense involving impaired driving which conviction occurred after the date of the offense for which the defendant is being sentenced in this case.
d. has ☐ two ☐ three or more convictions as described in No. 1.c.
e. has a prior conviction in District Court for an offense involving impaired driving, the conviction was appealed to Superior Court, the appeal has been withdrawn or the case has been remanded back to District Court, and a new sentencing hearing for the case has not been held pursuant to G.S. 20-38.7.
f. has ☐ two ☐ three or more convictions as described in No. 1.e.
g. drove, at the time of the current offense, while the defendant's drivers license was revoked ☐ *(use for offenses committed prior to December 1, 2016)* under G.S. 20-28 and the revocation was an impaired driving revocation under G.S. 20-28.2(a).
☐ *(use for offenses committed on or after December 1, 2015)* pursuant to G.S. 20-28(a1).
h. caused, by the defendant's impaired driving at the time of the current offense, serious injury to another person.
i. drove, at the time of the current offense, while a child under the age of 18 years was in the vehicle.
j. drove, at the time of the current offense, while a person with the mental development of a child under the age of 18 years was in the vehicle.
k. drove, at the time of the current offense, while a person with a physical disability preventing unaided exit from the vehicle was in the vehicle.

2. The State does not intend to prove any grossly aggravating factors.

AGGRAVATING FACTORS - G.S. 20-179(d)

The State intends to prove the following:

a. The defendant's faculties were grossly impaired at the time the defendant was driving.
b. The defendant had an alcohol concentration of at least 0.15 within a relevant time after the driving.

AOC-CR-339

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Rules for implied consent testing

- Probable cause for implied consent offense
- Charged with implied consent offense
- Chemical analyst with a permit
- Designates type of test
- Advises of rights orally and in writing

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Scenario One

An officer pulls behind a vehicle at a stoplight around 3 a.m. and sees that its registration is expired.

He activates his blue lights, and the defendant turns into a nearby parking lot.

The officer smells a medium odor of alcohol coming from the defendant's breath and sees that the defendant's eyes are red and glassy.

The officer performs an HGN test, noting 5 of 6 indicators of impairment.

The defendant tells the officer that he had three beers at 6 p.m. the previous evening.

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Scenario One: Does the officer have probable cause for DWI?

Yes

No

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State v. Lindsey, 249 N.C. App. 516 (2016)

Findings that

- officer smelled a moderate odor of alcohol coming from defendant;
- officer observed defendant's eyes to be red and glassy;
- officer observed 5 of 6 clues on HGN test; and
- defendant admitted he had consumed 3 beers hours before the stop

support conclusion that there was probable cause to arrest.

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Scenario Two

Officer responds to a report of a traffic accident in a restaurant parking lot.

The defendant backed his SUV into a motorcycle that was parked (not in a parking space) directly behind the defendant's vehicle.

The motorcycle was lower than the rear window of the defendant's car.

The defendant smelled faintly of alcohol and admitted to consuming drinks at the restaurant just before the accident.

The defendant registered a positive result on the portable breath test. He performed well on field sobriety tests, though he put his foot down 15 seconds into the one-leg stand test and asked what to do next.

After the officer told him to complete the test, he raised his foot for an additional 15 seconds.

45

Scenario Two: Does the officer have probable cause for DWI?

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

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State v. Overocker, 236 N.C. App. 423 (2014)

The trial court found that while defendant had had four drinks in a bar over a four-hour time frame, the traffic accident in which he was involved was due to illegal parking by another person and was not the result of unsafe movement by defendant.

Defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment.

A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

47

Scenario 3

Two highway patrol troopers discover the driver's car in a ditch on the side of the interstate.

The driver said she ran off the road. No other vehicles were involved in the crash. The car rolled several times before coming to rest.

One of the troopers smells alcohol on the driver. He tells his fellow officer what he smelled.

Does the remaining trooper have probable cause to arrest the driver for DWI?

48

Scenario 3: Does the officer have probable cause for DWI?

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

49

Steinkrause v. Tatum, 201 N.C. App. 289 (2009), *aff'd per curiam*, 364 N.C. 419 (2010).

Probable cause for impaired driving existed based on odor of alcohol on the driver and her involvement in a severe one-vehicle accident that appeared to have resulted from swerving off the road at a high speed

50

Rules for implied consent testing

- Probable cause for implied consent offense
- Charged with implied consent offense
- Chemical analyst with a permit
- Designates type of test
- Advises of rights orally and in writing

51

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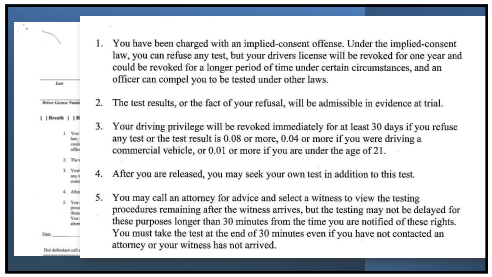

1. You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
2. The test results, or the fact of your refusal, will be admissible in evidence at trial.
3. Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
4. After you are released, you may seek your own test in addition to this test.
5. You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

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54

Remedy

If defendant was not advised of implied consent rights or afforded the rights, the test results may be suppressed.

See State v. Shadding, 17 N.C. App. 279 (1973).

Denial of statutory right to have witness present during administration of breath test bars admission of results.

See *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 735 S.E.2d 345 (N.C. App. 2012)

55

What if test is not delayed for 30 minutes?

- Is it per se inadmissible?
- No. Defendant must show that witness would have arrived within 30 minutes.
  - *See State v. Buckner*, 34 N.C. App. 447, 451 (1977) (holding that a delay of less than thirty minutes was permissible as there was no evidence "that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test an additional 10 minutes.")

56

57

G.S. 20-38.6

- Motions to suppress evidence or dismiss charges in an implied consent case must be made before trial
- Exceptions:
  - Motions to dismiss for insufficient evidence
  - Motion based on facts not previously known
- State must be given reasonable time to procure witnesses or evidence and conduct research

58

Summary Rulings

- State stipulation
- Failure to move pretrial

59

Preliminary Determination

- Hearing and findings of fact
- Written order
  - Findings of fact
  - Conclusions of law
  - Preliminary indication of granted or denied
- If indication is to DENY, judge may enter final order
- If indication is to GRANT, judge may not enter final ruling until State has opportunity to appeal

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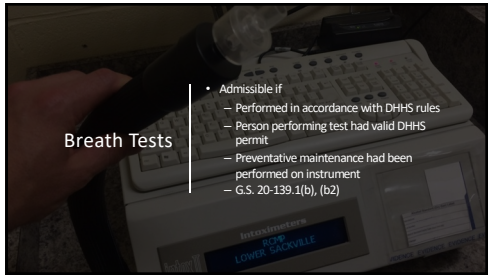

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Rules for Breath Testing

1. Observation period. Chemical analyst must observe the person to be tested to determine that the person has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. 10A NCAC 41B .0101(6), .0322.

63

Rules for Breath Testing

2. Preventative maintenance. Intoximeter EC/IR II must undergo preventative maintenance every 4 months. The ethanol gas canister must be changed before its expiration date. 10 NCAC 41B .0323.

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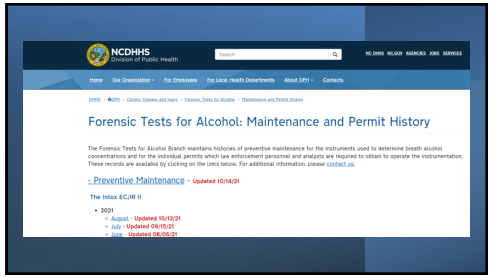

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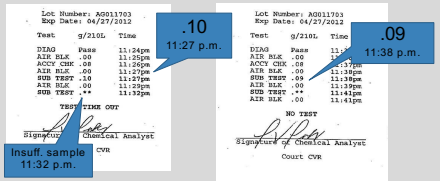
Rules for Breath Testing

3. Duplicate, sequential breath samples. Results are admissible if test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. G.S. 20-139.1(b3).

- 10A NCAC 41B .0322 ("If the alcohol concentrations differ by more than 0.02, a third or fourth breath sample shall be collected when 'PLEASE BLOW' appears.")

66

Duplicate sequential breath samples?



67

Chemical Analysis of Blood/Urine

"In any implied-consent offense . . . a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence." G.S. 20-139.1(a).

"A chemical analysis is a test or tests of the breath, blood, or other bodily fluid of substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analyses." G.S. 20-4.01(3a).

68

Chemical Analysis of Blood or Urine

- If the defendant is asked to consent to the withdrawal of blood after being asked to provide breath sample, the defendant must first be readvised of his/her implied consent rights. G.S. 20-139.1(b5).
- Person conducting analysis must have DHHS permit

69

Chemical Analysis of Blood or Urine

- Results of a chemical analysis of blood or urine reported by State Crime Lab or any DHHS-approved laboratory are admissible without further authentication and without testimony from the analyst if notice and demand procedures are followed. G.S. 20-139.1(c1).
- *Note*: There also is notice and demand procedure for use of chemical analyst's affidavit in district court. G.S. 20-139.1(e1).

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Statute	Evidence	Proceedings	Time for State's Notice	Time for D's Objection or Demand	AOC Form
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(e1), (e2)	Chemical analyst affidavit	Hearing or trial in district court	No later than 15 business days after receiving report and at least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344

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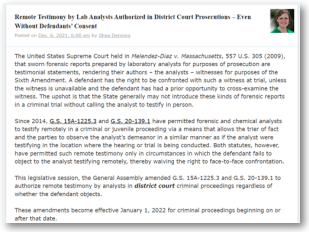


Remote Testimony by Lab Analysts Authorized in District Court Prosecutions – Even Without Defendants' Consent

Posted on Dec. 9, 2021, 9:00 am by Shea Denning

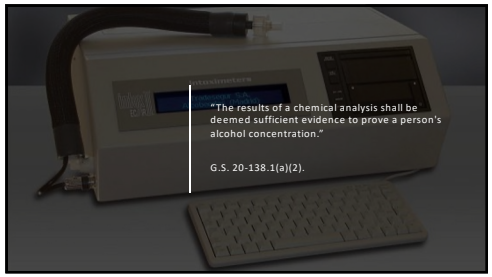
The United States Supreme Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), that sworn forensic reports prepared by laboratory analysts for purposes of prosecution are testimonial statements, rendering their authors – the analysts – witnesses for purposes of the Sixth Amendment. A defendant has the right to be confronted with such a witness at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. The upshot is that the State generally may not introduce these kinds of forensic reports in a criminal trial without calling the analyst to testify in person.

Since 2014, G.S. 15A-1225.3 and G.S. 20-139.1 have permitted forensic and chemical analysts to testify remotely in a criminal or juvenile proceeding via a means that allows the trier of fact and the parties to observe the analyst's demeanor in a similar manner as if the analyst were testifying in the location where the hearing or trial is being conducted. Both statutes, however, have permitted such remote testimony only in circumstances in which the defendant fails to object to the analyst testifying remotely, thereby waiving the right to face-to-face confrontation.

This legislative session, the General Assembly amended G.S. 15A-1225.3 and G.S. 20-139.1 to authorize remote testimony by analysts in ***district court*** criminal proceedings regardless of whether the defendant objects.

These amendments become effective January 1, 2022 for criminal proceedings beginning on or after that date.

72



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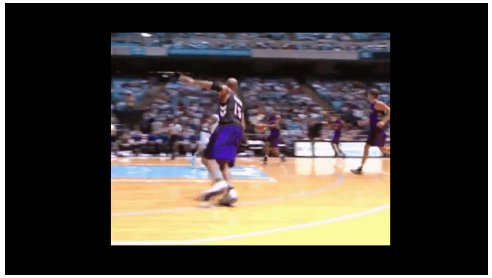

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"[T]he challenged provision does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration."

State v. Narron, 193 N.C. App. 76 (2008)

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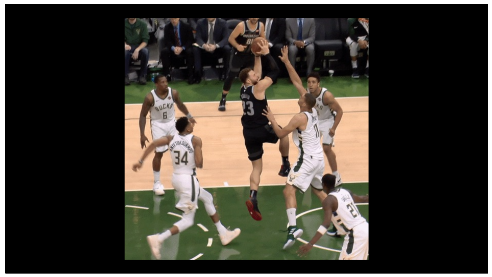

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PRETRIAL RELEASE !

77

Impaired Driving Holds

§ 15A-534.2. Detention of impaired drivers.

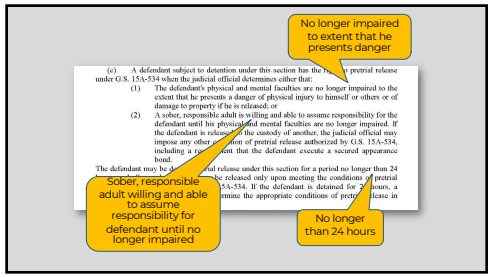
(a) A judicial official conducting an initial appearance for an offense involving impaired driving, as defined in G.S. 20-4.01(24a), must follow the procedure in G.S. 15A-511 except as modified by this section. This section may not be interpreted to impede a defendant's right to communicate with counsel and friends.

(b) If at the time of the initial appearance the judicial official finds by clear and convincing evidence that the impairment of the defendant's physical or mental faculties presents a danger [illegible] be is released, of physical injury to himself or others or damage to property, the judicial official must order that the defendant be held in custody and inform the defendant that he will be held in custody until one of the requirements of subsection (c) is met; provided, however, [illegible] judicial official must at this time determine the appropriate conditions of pretrial [illegible] ordance with G.S. 15A-534.

Offense involving impaired driving

Clear and convincing evidence that the impairment presents a danger

78



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State v. Knoll, 322 N.C. 535 (1988)

- If the State violates a defendant's statutory right to pretrial release by impermissibly holding the defendant; **and**
- The defendant is—during the crucial time period following his or her arrest—denied access to witnesses;
- The defendant may be entitled to ***dismissal*** of the charges.

80

State v. Hill, 277 N.C. 547 (1971)

- If a defendant charged with an impaired driving offense is denied access to witnesses
- He may be entitled to dismissal of the charges based on a flagrant violation of his constitutional rights
- **Even if he is lawfully detained**

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Implied Consent Offense Notice

§ 20-38.4. Initial appearance.

(a) Appearance Before a Magistrate. – Except as modified in this Article, a magistrate shall follow the procedures set forth in Article 24 of Chapter 15A of the General Statutes.

(1) A magistrate may hold an initial appearance at any place within the county and shall, to the extent practicable, be available at locations other than the courthouse when it will expedite the initial appearance.

(2) In determining whether there is probable cause to believe a person is

(4) The magistrate shall also:

a. Inform the person in writing of the established procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond; and

b. Require the person who is unable to make bond to list all persons he wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed. A copy of this form shall be filed with the case file.

(b) The Administrative Office of the Courts shall adopt forms to implement this Article. (2006-253, s. 5.)

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Procedures for the Observation of Prisoners
Charged with Implied Consent Offenses
Pursuant to N.C.G.S. 20-38.4

1. Any person seeking to observe jailed or incarcerated impaired drivers shall first check in with the Staff Duty Officer or Detention staff on duty at the Guilford County Sheriff's Office. Observations are limited to the first twenty-four hours following the defendant's admission into the jail.
2. The Staff Duty or Detention Officer shall immediately notify the arresting officer and Booking officer that a witness is present to observe the defendant. The time of this notification shall be documented by Booking in the Booking log book and by the dispatchers on the attached witness observation form.
3. Booking shall inform the jail supervisor on-duty of the witness's presence in the facility. The jail supervisor shall direct the witness to the appropriate area of the jail or the appropriate viewing area. The escorting officer shall obtain the form and complete the information concerning the name of the witness, the person to be observed, the time and date the witness was escorted to the jail and the time and date of the completion of the observation.
4. A witness seeking to observe the defendant shall be admitted to observe the defendant in an area designated by the Director for observation of the defendant. Jail staff shall note the time the witness is escorted to the jail and the time the observation begins.
5. All witnesses shall be required to submit to a search of their person and belongings prior to entry into the jail. Witnesses must comply with all jail or facility regulations prior to being admitted into any secured area
6. Guilford County Sheriff's Office staff shall not hold or retain any personal property home for the witness

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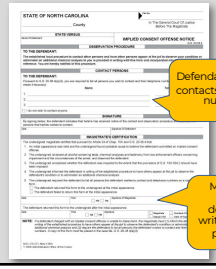
AOC-CR-271:
Implied Consent
Offense Notice


STATE OF NORTH CAROLINA

County

In The General Court Of Justice
District/Superior Court Division

STATE VERSUS

IMPLIED CONSENT OFFENSE NOTICE

OBSERVATION PROCEDURE

TO THE DEFENDANT:

CONTACT PERSONS

TO THE DEFENDANT:

Name

SIGNATURE

MAGISTRATE'S CERTIFICATION

Defendant must list contacts and phone numbers

Magistrate: I informed defendant in writing of access procedures

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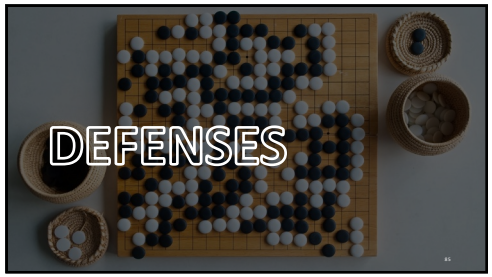

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Sufficient Evidence? Scenario One

- Officer sees car crashed car on side of road. Car registered to Don Defendant.
- LEO finds Don walking on roadway two miles from crash. Don has mark on forehead, is twitchy, and unsteady on feet. Don tells officer, "I am smoked up on meth."
- EMS takes Don to hospital.
- At hospital, Don says he was in a wreck a couple of hours ago. He says he is on meth. He does not know the date, the day of week, or the time.

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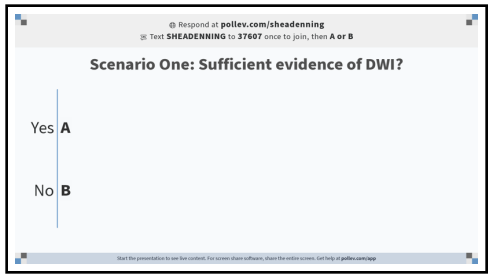

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Sufficient Evidence? Scenario 2

- Officer hears crash. Goes to scene. Car is in ditch. No one is in car.
- Driver's side door is jammed closed. There is blood between driver's seat and passenger seat, on the steering wheel, and on the back of the passenger's seat.
- Officer finds David Defendant walking on road near accident 30 minutes later. He has an injury on the left side of his cheek and blood on his hands.
- David is noticeably impaired and admits to driving the car.
- David's BAC is 0.18.

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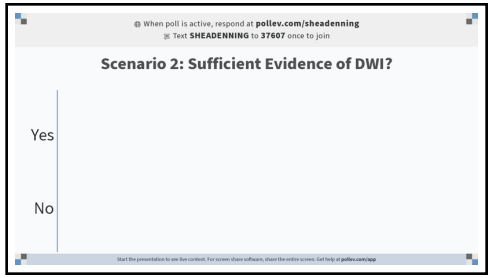

89

***State v. Eldred*, 259 NC. App. 345 (2018)**

- State failed to present evidence that Eldred was impaired *while he was driving*.
- The State presented no evidence of when the first officer found Eldred on side of the road.
- The officer did not determine whether Eldred's condition was caused by an impairing substance or instead by the physical injury that resulted in him being taken to the hospital.
- The officer who interviewed Eldred at the hospital did not see Eldred until more than 90 minutes after the accident had been reported.
- Interviewing officer did not obtain information about when or where Eldred consumed meth or any other impairing substance.
- The State did not demonstrate when the car veered off the roadway.
- No witness saw Eldred driving.

***State v. Foye*, 200 N.C. App. 37 (2012)**

- Evidence was sufficient for a reasonable jury to infer that the defendant was impaired at the time he drove the vehicle. *Id.* at 43 (citing *State v. Mack*, 81 N.C. App. 578, 583 (1986) for proposition that evidence does not have to exclude every reasonable hypothesis of innocence to be sufficient to establish guilt).

90

Involuntary Intoxication? Scenario 1.

- Defendant testifies that he went to a party where he planned to stay overnight.
- He does not remember anything after having a few drinks until regaining consciousness at the jai.
- He says this may have resulted from combination of alcohol and prescribed Zanax.

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Automatism/Involuntary Intoxication

Automatism is a complete defense	Absence of consciousness precludes the existence of any specific mental state and the possibility of a voluntary act without which there can be no criminal liability
Does not apply if unconsciousness results from voluntary intoxication	The defense applies to cases of the unconsciousness of persons of sound mind such as somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.

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Automatism/Involuntary Intoxication

- *State v. Clowers*, 217 N.C. App. 520 (2011)
  - The evidence did not support the delivery of an instruction to the jury on the defense of automatism as no evidence demonstrated that the defendant's consumption of alcohol, which resulted in an alcohol concentration of 0.25, was involuntary. Despite possible side effect of Alprazolam, the defendant testified that his ingestion of the anxiety drug also was voluntary.
- *State v. Highsmith*, 173 N.C. App. 600 (2005)
  - Defendant was not entitled to an instruction on involuntary intoxication in his trial on impaired driving charges that arose from his driving after consuming prescription medication; the defendant's voluntary consumption of prescription medication did not support such an instruction despite the defendant's claims that he did not know the substance was intoxicating).
- *State v. Rose*, 312 N.C. 441 (1984)
  - Statute defining impaired driving based on a specified alcohol concentration is not void for vagueness; while people may not know when their blood alcohol concentration reaches the per se level, they do "know the line exists" and "that drinking enough alcohol before or during driving may cause them to cross it."

94

Necessity: Scenario 1

After a bad break-up, Dan drives to a local bar, where he begins drinking.

He plans to call an Uber if he drinks too much to drive.

Dan is on his seventh drink in two hours when a man storms through the front door of the bar, waving an assault rifle and threatening to shoot up the place.

Dan bolts for the nearest exit, jumps in his car, and drives away.

Less than a half-mile away from the bar, Dan runs through a red light and is stopped by a law enforcement officer. Dan is charged with driving while impaired.

95

When poll is active, respond at **pollev.com/sheadenning**

Text **SHEADENNING** to **37607** once to join

May Dan raise the defense of necessity?

Yes

No

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

96

Necessity Defense

Necessity is an available defense for driving while impaired.

Evidence must permit the jury to reasonably infer that the defendant

took reasonable action,	to protect the life, limb or health of a person, and	no other acceptable choice was available.

97

Summary

- Six levels of punishment
- Rules for testing
- Pretrial motions
- Special rules for release
- Potential defenses

98

Representing Defendants in DWI Cases: The Law You Need to Know

Shea Denning
School of Government
November 2022

At the end of this session, you will be able to:

1. Define the term *implied consent offense*.
2. List the elements of DWI.
3. List statutory implied consent rights.
4. Identify the remedy for a violation of statutory implied consent rights.
5. State the rules governing the admissibility of tests of a defendant's breath, blood, or urine.
6. State the Fourth Amendment restrictions on the testing of a person's breath, blood or urine for evidence of alcohol or drugs.
7. Describe special pretrial release procedures that apply in cases involving impaired driving.
8. Identify the remedy for a violation of pretrial release procedures in impaired driving cases.
9. Describe the rules governing motions to suppress and dismiss in implied consent cases.
10. State the requirements for dismissing or reducing charges in an implied consent case.
11. Apply DWI sentencing laws.
12. State the rules governing issuance of a limited driving privilege and the requirement for ignition interlock.

1. **Define the term *implied consent offense*.**

What is an implied consent offense? An offense for which a person may be required to submit to testing of his or her breath, blood or urine. If the person refuses, his or her driving privileges are revoked.

The following are implied consent offenses:
1. Impaired driving (G.S. 20-138.1)
2. Impaired driving in a commercial vehicle (G.S. 20-138.2)
3. Habitual impaired driving (G.S. 20-138.5)
4. Death by vehicle or serious injury by vehicle (G.S. 20-141.4)
5. Murder (G.S. 14-17) or involuntary manslaughter (G.S. 14-18) when based on impaired driving
6. Driving by a person under 21 after consuming alcohol or drugs (G.S. 20-138.3)
7. Violating no alcohol condition of a limited driving privilege (G.S. 20-179.3(j))
8. Impaired instruction (G.S. 20-12.1)
9. Operating a commercial motor vehicle after consuming alcohol (G.S. 20-138.2A)
10. Operating a school bus, school activity bus, child care vehicle, ambulance or other EMS vehicle, firefighting vehicle, or law-enforcement vehicle after consuming alcohol (G.S. 20-138.2B)
11. Transporting an open container of alcohol (G.S. 20-138.7(a))
12. Driving in violation of restriction requiring ignition interlock (G.S. 20-17.8(f))

2. **List the elements of DWI.**

Driving while impaired (G.S. 20-138.1) is an implied consent offense. It consists of the following elements:
1. Drive (to be in actual physical control of a vehicle that is in motion or that has the engine running)
2. Vehicle
3. Street, highway or public vehicular area
4. While impaired
    a. Appreciable impairment;
    b. BAC of 0.08 or more at any a relevant time after driving; or
    c. Any Schedule I controlled substance or its metabolites in his/her blood or urine

3. **List statutory implied consent rights.**

Implied consent testing. The following requirements apply to implied consent testing (G.S. 20-16.2):
1. Law enforcement officer must have probable cause to believe defendant committed an implied consent offense.
2. Defendant must be charged with implied consent offense.
3. Defendant must be taken before chemical analyst with permit from DHHS.
4. Chemical analyst designates type of test and requests that person submit to it.
5. Chemical analyst must advise person orally and in writing of implied consent rights.
    a. You've been charged with an implied consent offense. If you refuse to be tested, your driver's license will be revoked for one year.
    b. The test results will be admissible at trial.

c. If the result is .08 or more (.04 if CMV or .01 if you are under 21) your license will be revoked for 30 days.
d. After you are released, you may seek your own test.
e. You may call an attorney for advice and select a witness to view test. But test will not be delayed longer than 30 minutes for this purpose.

6. The chemical analyst may ask the person to submit to more than one type of testing. Before a new type of testing is carried out, the person must be readvised of his or her implied consent rights. G.S. 20-139.1(b5); *State v. Williams*, 234 N.C. App. 445 (2014); *but see State v. Sisk*, 238 N.C. App. 553 (2014) (concluding that because defendant volunteered to take blood test his right to be readvised of implied consent rights was not triggered).

4. Identify the remedy for violation of implied consent rights in impaired driving cases.

Failure to advise of rights or afford rights. If defendant was not advised of implied consent rights or afforded the rights, the test results may be suppressed. *See State v. Shadding*, 17 N.C. App. 279 (1973).

What if test is not delayed for 30 minutes? Is it per se inadmissible? No. Defendant must show that witness would have arrived within 30 minutes. *See State v. Buckner*, 34 N.C. App. 447, 451 (1977) (holding that a delay of less than thirty minutes was permissible as there was no evidence "that a lawyer or witness would have arrived to witness the proceeding had the operator delayed the test an additional 10 minutes.")

5. State the rules governing the admissibility of tests of a defendant's breath, blood, or urine.

Admissibility. Results of chemical analysis admissible if performed in accordance with G.S. 20-139.1. G.S. 20-139.1(a). The results are "deemed sufficient evidence to prove a person's alcohol concentration," meaning they satisfy State's burden to introduce sufficient evidence from which finder of fact could find impairment based on BAC of .08 or more. G.S. 20-138.1(a)(2); 20-139.1(b); *State v. Narron*, 193 N.C. App. 76, 83 (2008) (holding that this clause in G.S. 20-138.1(a)(2) "does not create an evidentiary or factual presumption, but simply states the standard for *prima facie* evidence of a defendant's alcohol concentration").

Rules for breath testing.

1. **Observation period.** Chemical analyst must observe the person to be tested to determine that the person has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. May the chemical analyst observe while setting up the machine? Yes. 10 A NCAC 41B .0101(6), .0322.
2. **Preventative maintenance.** Intoximeter EC/IR II must undergo preventative maintenance every 4 months. The ethanol gas canister must be changed before its expiration date. 10 NCAC 41B .0323. A court must take judicial notice of the preventative maintenance records of DHHS. Breath test results are not admissible if a defendant objects and demonstrates that preventative maintenance was not performed within the time limits prescribed. G.S. 20-139.1(b2).
3. **Consecutive breath samples.** Results are admissible if test results from any two consecutive breath samples do not differ by more than 0.02. G.S. 20-139.1(b3).
4. **Are both results admissible?** Yes. But only the lower may prove a particular alcohol concentration. G.S. 20-139.1(b3).
5. **What if person provides one breath sample and then refuses?** That makes the result of the first breath sample or the one providing the lowest alcohol concentration admissible.

6. **Affidavit of chemical analyst.** In district court, the State may introduce an affidavit of a chemical analyst "without further authentication and without the testimony of the analyst" to prove the following matters:
    a. the defendant's alcohol concentration or the presence or absence of an impairing substance of a person
    b. the time blood, breath or urine was collected
    c. the type of chemical analysis administered and the procedures followed
    d. the type and status of the analyst's DHHS permit
    e. the date the most recent preventative maintenance was performed on the breath testing machine

    To use an affidavit in this way, the State must notify the defendant no later than 15 business days after receiving the affidavit and at least 15 business days before the proceeding at which the affidavit will be introduced that it intends to introduce the affidavit. The State must provide a copy of the affidavit to the defendant. The State may introduce the affidavit without further authentication and without testimony from the analyst if the defendant, after receiving notice of the State's intent and a copy of the affidavit, fails to file a written objection with the court, at least 5 days before the proceeding at which the affidavit will be used. If the case is continued, the notice and written objection (or lack thereof) remain effective at any subsequent calendaring of that proceeding. G.S. 20-139.1(e2).
7. **Continuance so that analyst may appear.** G.S. 20-139.1(e2), which sets for the rules for providing notice and demand for a chemical analyst's affidavit in district court, requires that the case be continued until the analyst can be present. It also states that the criminal case "shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court."

Rules for blood or urine testing.

1. **Withdrawal of blood.** When a blood or urine test is specified as the type of chemical analysis by a law enforcement officer, a physician, nurse or other qualified person must withdraw the blood sample or obtain the urine sample unless the procedure cannot be performed without endangering the safety of the person collecting the sample or the person from whom the sample is being collected. G.S. 20-139.1(c).
2. **Notice and demand.** Chemical analysis results reported by the State Crime Lab or any other laboratory approved by DHHS are admissible "without further authentication and without the testimony of the analyst" if the defendant is provided notice and fails to file a written objection. G.S. 20-139.1(c1).
    a. The State must notify the defendant no later than 15 business days after receiving the report and at least 15 business days before the proceeding at which the evidence will be used that it intends to use the report. The State must provide a copy of the report to the defendant along with the notice. G.S. 20-139.1(c1)(1).
    b. The defendant must file a written objection with the court, with a copy to the State, at least five business days before the proceeding at which the report will be used that the defendant objects to the introduction of the report into evidence. If the defendant fails to file a written objection within this timeframe, the objection is waived and the report may be admitted without the testimony of the analyst. G.S. 20-139.1(c1).
    c. If the proceeding is continued, the notice, and the written objection or the lack of written objection remain effective at any subsequent calendaring of the proceeding.

3. **Chain of custody.** Similar notice and demand rules apply to statements regarding chain of custody. G.S. 20-139.1(c3). Note, however, that the State may establish a sufficient chain of custody to support the introduction of the laboratory report without introducing the chain of custody statement. If the State introduces sufficient evidence from which the trial court can conclude that the blood analyzed was the defendants' and it was not materially altered before testing, then the results of an analysis of the blood are admissible, even without testimony from every person who participated in the chain of custody.
    a. *See State v. Campbell*, 311 N.C. 386, 388–89 (1984) ((1) establishing two-pronged test for the admission of real evidence: (a) item must be identified as being the same object involved in the incident and (b) it must be shown that the object has undergone no material change; (2) stating that trial court has discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition; (3) requiring a detailed chain of custody only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered; and (4) stating that "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility").
    b. *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' . . . this does not mean that everyone who laid hands on the evidence must be called. . . .'[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."); *State v. Andrews*, 233 N.C. App. 239 (2014) (unpublished) (finding "ample testimony presented by the two most important links in the chain of custody for the trial court to conclude the blood sample was the same as that taken from defendant and had undergone no material change" and concluding, therefore, that the trial court did not abuse its discretion in admitting the blood test results).
4. **Affidavit of chemical analyst.** In district court, the State may introduce an affidavit of a chemical analyst "without further authentication and without the testimony of the analyst" to prove the following matters:
    a. the defendant's alcohol concentration or the presence or absence of an impairing substance of a person
    b. the time blood, breath or urine was collected
    c. the type of chemical analysis administered and the procedures followed
    d. the type and status of the analyst's DHHS permit
    e. the date the most recent preventative maintenance was performed on the breath testing machine

    To use an affidavit in this way, the State must notify the defendant no later than 15 business days after receiving the affidavit and at least 15 business days before the proceeding at which the affidavit will be introduced that it intends to introduce the affidavit. The State must provide

a copy of the affidavit to the defendant. The State may introduce the affidavit without further authentication and without testimony from the analyst if the defendant, after receiving notice of the State's intent and a copy of the affidavit, fails to file a written objection with the court, at least 5 days before the proceeding at which the affidavit will be used. If the case is continued, the notice and written objection (or lack thereof) remain effective at any subsequent calendaring of that proceeding. G.S. 20-139.1(e2).

5. **Continuance so that analyst may appear.** G.S. 20-139.1(e2), which sets for the rules for providing notice and demand for a chemical analyst's affidavit in district court, requires that the case be continued until the analyst can be present. It also states that the criminal case "shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court."

Refusals. Is a person's refusal to submit to a chemical analysis admissible? Yes. G.S. 20-16.2; *State v. Davis*, 142 N.C. App. 81, 88 (2001).

What about a person's refusal to perform field sobriety tests? Yes. G.S. 20-139.1(f).

Other types of testing. G.S. 20-139.1 "does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests." G.S. 20-139.1(a). Thus, a person's alcohol concentration may be proved through the admission of hospital medical records. *See, e.g.*, *State v. Drdak*, 330 N.C. 587, 592 (1992).

6. **State the Fourth Amendment restrictions on the testing of a person's breath, blood or urine for evidence of alcohol or drugs.**

Fourth Amendment. Testing a person's breath, blood, or urine for alcohol or drugs is a Fourth Amendment search. Such testing must satisfy the Fourth Amendment's reasonableness requirement.

Probable cause + warrant = reasonable search
Exceptions: search incident to arrest, consent, special needs searches, exigent circumstances

Is Fourth Amendment reasonableness requirement satisfied by implied consent testing?
Probable cause? Yes, must have probable cause for implied consent offense.

Warrant or exception to warrant requirement? Breath tests are permissible as search incident to arrest. Birchfield v. North Dakota, 136 S.Ct. 2160 (2016). So no warrant is necessary.
Blood tests require a warrant or consent or exigent circumstances.

Is consent to a blood or urine test expressed after being advised of implied consent rights sufficient? Yes, it can be, depending on the totality of the circumstances. *See State v. Romano*, 369 N.C. 678, 692 (2017) (stating that "the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw" under the totality of the circumstances; noting that the State has the burden of proving voluntary consent), *overruled on other grounds*, *Mitchell v. Wisconsin*, 588 U.S. ___, 135 S. Ct. 2525 (2019) (discussed below).

Can an unconscious person consent to testing? G.S. 20-16.2(b) permits a law enforcement officer to withdraw blood from an unconscious defendant without advising the person of his or her implied consent rights or asking for his or her consent. The North Carolina Supreme Court held in *State v. Romano*, 369 N.C. 678 (2017), that G.S. 20-16.2(b) was unconstitutional as applied to the defendant, who was unconscious when his blood was drawn and where the circumstances did not establish an exigency or voluntary consent. A plurality of the United States Supreme Court subsequently held in *Mitchell v. Wisconsin*, 588 U.S. ___, 135 S. Ct. 2525 (2019), that when an officer has probable cause to believe a person has committed an impaired driving offense and the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may "almost always" order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment, based on the exigency exception to the warrant requirement. The plurality did not rule out that in an "unusual case," a defendant could show that his or her blood would not have otherwise been withdrawn had the State not sought blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties.

What are exigent circumstances? They exist when the time it would take to get a warrant would significantly undermine the search. *See, e.g.*, *State v. Granger*, 235 N.C. App. 157 (2014) (the additional 40 minutes required to get a warrant combined with the time necessary for another officer to come to hospital created exigent circumstances that justified warrantless search).

Are the results of a roadside alcohol screening test admissible in a DWI case? The number is inadmissible, but the fact that the test was positive or negative is admissible. G.S. 20-16.3(d).

7. Describe special pretrial release procedures that apply in cases involving impaired driving.

Impaired driving holds. If a magistrate finds by clear and convincing evidence that a person charged with an offense involving impaired driving is impaired to the extent he poses a danger to himself, to others, or to property, the magistrate must order the person held. G.S. 15A-534.2. The defendant must be released when the first of the following occurs:
(1) the defendant is no longer impaired to the extent he/she poses a danger;
(2) a sober, responsible adult appears who is willing and able to assume responsibility for the defendant until he/she is no longer impaired; or
(3) 24 hours has passed.

8. Identify the remedy for a violation of pretrial release procedures in impaired driving cases.

Right to secure witnesses for one's defense. North Carolina's appellate courts have held that if the State violates a defendant's statutory right to pretrial release in an impaired driving case by impermissibly holding the defendant and the defendant is, during the crucial time period following his or her arrest, denied access to all witnesses, the defendant may be entitled to dismissal of the charges. *See State v. Knoll*, 322 N.C. 535 (1988); *State v. Ham*, 105 N.C. App. 658 (1992).

Similarly, if a defendant charged with an impaired driving offense is denied access to witnesses, even though lawfully detained, the defendant may be entitled to dismissal of the charges based on a flagrant violation of his or her constitutional rights. G.S. 15A-954(a)(4); *State v. Hill*, 277 N.C. 547 (1971).

Implied Consent Offense Notice. A magistrate must inform a defendant who is unable to make bond of the established procedures to have others appear at the jail to observe the defendant or administer an additional chemical analysis. G.S. 38.4(a)(4).

The established procedures vary from county to county. They are approved by the chief district court judge, DHHS, the district attorney, and the sheriff. The magistrate must certify on form AOC-CR-271, Implied Consent Offense Notice, that he or she has informed the defendant of the procedures to access others while in jail and that he or she has required the defendant to list all persons the defendant wishes to contact and their telephone numbers.

9. Describe the rules governing motions to suppress and motions to dismiss in implied consent cases.

Pretrial requirement. In an implied consent case, motions to suppress evidence or dismiss charges must be made before trial. G.S. 20-38.6. There are two exceptions: motions to dismiss for insufficient evidence and motions based on facts not previously known.

The State must be given reasonable time to procure witnesses or evidence and conduct research. G.S. 20-38.6(b).

Rulings. The judge must summarily grant a motion to suppress if the State stipulates that the evidence will not be offered. G.S. 20-38.6(c). The judge must summarily deny a motion to suppress if the defendant failed to make the motion pretrial when the facts were known to the defendant. G.S. 20-38.6(d).

Preliminary indication. If the motion is not determined summarily, the judge must make the determination after a hearing and finding of facts. The judge must set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied.

State has right to appeal. If the judge preliminarily indicates that the motion should be granted, the judge many not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal. G.S. 20-38.6(f).

Review in superior court. If State disputes findings of fact, superior court considers the matter de novo. G.S. 20-38.7(a). Superior court remands matter to district court with instructions to grant or deny motion.

10. State the requirements for dismissing or reducing charges in an implied consent case.

G.S. 20-138.4 requires a prosecutor to enter detailed facts in the record of any case subject to the implied consent law (which includes offenses other than impaired driving, such as driving after consuming by a person under 21) or involving driving while license revoked for impaired driving explaining orally and in open court and in writing the reasons for his action if he or she takes any of the following actions:

- enters a voluntary dismissal;

- accepts a plea of guilty or no contest to a lesser-included offense;
- substitutes another charge, by statement of charges or otherwise, if the substitute charge carries a lesser mandatory minimum punishment or is not a case subject to the implied consent law; or
- otherwise takes a discretionary action that effectively dismisses or reduces the original charge in a case subject to the implied consent law.

General explanations such as interests of justice or insufficient evidence are not deemed sufficiently detailed.

The written explanation must be signed by the prosecutor taking the action on form AOC-CR-339 and must contain the following information:

1. The alcohol concentration or the fact that the driver refused.
2. A list of all prior convictions of implied-consent offenses or driving while license revoked.
3. Whether the driver had a valid driver's license or privilege to drive in North Carolina, as indicated by DMV records.
4. A statement that a check of the AOC database revealed whether any other charges against the defendant were pending.
5. The elements that the prosecutor believes in good faith can be proved, and a list of those elements that the prosecutor cannot prove and why.
6. The name and agency of the charging officer and whether the officer is available.
7. Any reason why the charges are dismissed.

A copy of AOC-CR-339 must be sent to the head of the law enforcement agency that employed the charging officer, to the district attorney who employs the prosecutor, and must be filed in the court file. The AOC must record this data and make it available upon request.

11. Apply DWI sentencing laws.

A. Defendant is convicted of DWI. His BAC was a .08. He has a "safe driving record." The State puts on no evidence of aggravating factors. The defendant demonstrates that he obtained a substance abuse assessment and attended ADETS.

a. At what level should the defendant be sentenced and why?
Level 5. The mitigating factors substantially outweigh aggravating factors.

b. What are the requirements for sentencing at this level?
24 hours minimum to 60 days maximum
If suspended,
Must require one or both of the following
Imprisonment for 24 hours as a condition of special probation
Community services for 24 hours.
And defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

c. What is the maximum length of probation?

Five years

B. Defendant is convicted of DWI. She is 30. Her BAC was a .08. She has a "safe driving record." A 5-year-old passenger was in the car at the time of the offense. The defendant obtained a substance abuse assessment and attended ADETS.

a. At what level should the defendant be sentenced and why?

Level 1. The presence of the grossly aggravating factors in G.S. 20-179(c)(2) requires sentencing at Level 1.

b. What are the requirements for sentencing at this level?

30 days minimum to 24 months maximum

If suspended

Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days

And defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

C. Defendant is convicted of DWI. His license was revoked at the time he drove for a pending DWI in another county. He was convicted last month for that DWI offense and was placed on probation. After his arrest for this offense, he completed 30 days of inpatient treatment at a facility licensed by the state.

a. At what level should the defendant be sentenced and why?

Level 1. There are two grossly aggravating factors, driving while license revoked for impaired driving and a prior conviction for an offense involving impaired driving within 7 years.

b. What are the requirements for sentencing at this level?

30 days minimum to 24 months maximum

If suspended

Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days

And defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.

c. May the defendant be awarded credit for the time spent in inpatient treatment?

The judge may credit the time spent in inpatient treatment in a facility operated or licensed by the State against the defendant's sentence if the treatment occurred after the offense for which the defendant is being sentenced. G.S. 20-179(k1).

D. Defendant is convicted of DWI – his third conviction for this offense. He was previously convicted of DWI five years ago, and again two years ago. At the time of this offense, which was committed on a city street, his license was revoked for his most recent DWI conviction.

a. At what level should the defendant be sentenced and why?

Level A1. There are 3 grossly aggravating factors: (1) DWI #1; (2) DWI #2; and (3) driving while license revoked for impaired driving.

b. What are the requirements for sentencing at this level?

12 months minimum to 36 months maximum.

If suspended

Imprisonment of at least 120 days as a condition of special probation

Requirement that the defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM)

Requirement that the defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6

c. May the judge order that the defendant complete treatment at DART-Cherry?

The judge may suspend the sentence and order that the defendant serve at least 90 days of the 120-day split sentence in DART-Cherry. Alternatively, the judge may order that the defendant complete a full term of special probation (up to 9 months in this case) followed by DART-Cherry as a special condition of probation (residential program).

d. Suppose the judge sentences the defendant to an active sentence for the minimum term. What is that sentence? How much of that sentence will the defendant serve?

The minimum sentence for an Aggravated Level One DWI is 12 months. The defendant will be released after serving 8 months to serve 4 months of post-release supervision. The defendant's sentence will not be reduced by good time credit as DAC does not apply those credits to Aggravated Level One sentences.

E. The defendant pleads guilty to two DWI offenses.

a. May the offenses be consolidated for sentencing?

No. Two or more impaired driving charges may not be consolidated for judgment. G.S. 20-179(f2).

b. May the sentences run concurrently?

Yes.

c. If the judge imposes an active sentence, where will it be served?

The sentence will be served in the Statewide Misdemeanant Confinement Program. G.S. 15A-1352(f).

d. If the judge suspends part of the sentence and imposes a split (special probation), where will it be served?

Split sentences are served in the local jail or in a designated treatment facility. G.S. 15A-1351(a).

12. State the rules governing issuance of a limited driving privilege and the requirement for ignition interlock.

Limited driving privilege. When a person is convicted of impaired driving under G.S. 20-138.1 or impaired driving in a commercial vehicle under G.S. 20-138.2 if the person's alcohol concentration was a .06 or higher, DMV must revoke the person's license. G.S. 20-17(a)(2). A judge may grant a limited driving privilege for a person whose license is revoked solely under G.S. 20-17(a)(2) or as a result of a conviction in another jurisdiction substantially similar to impaired driving under G.S. 20-138.1 if the person meets the following requirements:

- The person was sentenced at Level Three, Four, or Five;
- At the time of the offense, the person was validly licensed or had a license that had been expired for less than one year;
- At the time of the offense, the person had not, within the previous seven years, been convicted of an offense involving impaired driving;
- Subsequent to the offense, the person has not been convicted of nor had any unresolved charge lodged against him for an offense involving impaired driving;
- The person has obtained and filed with the court a substance abuse assessment of the type required by G.S. 20-17.6; and
- The person has furnished proof of financial responsibility.

Upon issuance of the privilege, the person must pay a processing fee of $100. G.S. 20-20.2.

A limited driving privilege issued pursuant to G.S. 20-179.3 may authorize driving for essential purposes related to the person's employment, maintenance of the person's household, the person's education, the person's court-ordered treatment or assessment, community service ordered as a condition of the person's probation, emergency medical care, and religious worship. If the person is not required to drive for essential work-related purposes other than during standard working hours, defined as 6:00 a.m. to 8:00 p.m. on Monday through Friday, the privilege must prohibit driving during nonstandard working hours unless the driving is for emergency medical care or is specifically authorized by the court. The holder of a limited driving privilege who violates any of its restrictions commits the offense of driving while license revoked under G.S. 20-28(a1). G.S. 20-179.3(j).

Ignition interlock. Ignition interlock is required as a condition of a limited driving privilege if the person had an alcohol concentration of 0.15 or more. A judge awarding a limited driving privilege following any other DWI conviction may require ignition interlock in his or her discretion. G.S. 20-179.3(g3).

Ignition interlock is required as a condition of license restoration following a conviction for impaired driving if the person had an alcohol concentration of 0.15 or more, a previous conviction for impaired driving within seven years of the offense leading to the license revocation, or was sentenced at Aggravated Level One. G.S. 20-17.8(a).

North Carolina Criminal Law

A UNC School of Government Blog

Remote Testimony by Lab Analysts Authorized in District Court Prosecutions – Even Without Defendants' Consent

Posted on Dec. 6, 2021, 6:00 am by Shea Denning

The United States Supreme Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), that sworn forensic reports prepared by laboratory analysts for purposes of prosecution are testimonial statements, rendering their authors – the analysts – witnesses for purposes of the Sixth Amendment. A defendant has the right to be confronted with such a witness at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. The upshot is that the State generally may not introduce these kinds of forensic reports in a criminal trial without calling the analyst to testify in person.

Since 2014, G.S. 15A-1225.3 and G.S. 20-139.1 have permitted forensic and chemical analysts to testify remotely in a criminal or juvenile proceeding via a means that allows the trier of fact and the parties to observe the analyst's demeanor in a similar manner as if the analyst were testifying in the location where the hearing or trial is being conducted. Both statutes, however, have permitted such remote testimony only in circumstances in which the defendant fails to object to the analyst testifying remotely, thereby waiving the right to face-to-face confrontation.

This legislative session, the General Assembly amended G.S. 15A-1225.3 and G.S. 20-139.1 to authorize remote testimony by analysts in ***district court*** criminal proceedings regardless of whether the defendant objects.

These amendments become effective January 1, 2022 for criminal proceedings beginning on or after that date.

Forensic analysts. Section 16.17 of S.L. 2021-180 (S 105), the 2021 Appropriations Act, enacts new G.S. 15A-1225.3(b1), which provides that a forensic analyst may testify remotely in any criminal hearing or trial in district court if: (1) The State has provided a copy of the analyst's report to the defendant's attorney of record or to the defendant if he or she is unrepresented; and (2) the State notifies the defendant's attorney or the unrepresented defendant at least 15 business days before the proceeding at which the evidence would be used of its intention to introduce the testimony regarding the results of forensic testing into evidence using remote testimony in real time. If these

procedures are followed, the testimony of each person in the associated chain of custody also may be provided remotely.

Chemical analysts. S.L. 2021-180 also enacts new G.S. 20-139.1(c6), which permits a laboratory analyst to testify remotely in a district court proceeding regarding the results of a chemical analysis of blood or urine reported by the analyst if two conditions are met. First, the State has provided a copy of the analyst's report to the defendant's attorney of record or to the defendant if he or she is unrepresented. Second, the State has notified the defendant's attorney or the unrepresented defendant at least 15 business days before the proceeding at which the evidence would be used of its intention to introduce remote testimony regarding the chemical analysis. If these procedures are followed, the testimony of each person in the associated chain of custody also may be provided remotely.

Both statutes require that the method used for remote testimony permit the trier of fact and all parties to observer the demeanor of the remote witness in a similar manner as if the witness were testifying in person. The court must ensure that the defendant's attorney or an unrepresented defendant has a full and fair opportunity to examine and cross-examine the witness.

The rationale. The legislature made fifteen findings in support of the change. The General Assembly first noted that defendants were entitled to court proceedings without undue delay – a right that is jeopardized by "perpetual district court backlog," a problem that in turn has been exacerbated by the pandemic. Next, the legislature characterized district court as functioning "essentially as a preliminary proceeding" to ensure that criminal cases are not unreasonably delayed as they would be if district courts did not exist. The legislature then reviewed a defendant's right to appeal for trial de novo before a jury in superior court as contrasted with the State's inability to appeal from a district court acquittal. The General Assembly opined that "[s]imultaneous, two-way audio and video remote testimony in real time . . . allows a defendant to observe and cross-examine a witness" and permits the district court judge to weigh the credibility and veracity of the witness's testimony. In addition, the legislature noted that forensic and chemical analysts were not responsible for initiating criminal prosecutions. And, for their part, chain of custody witnesses are merely testifying about performing a ministerial function in the course of their work.

Constitutional concerns. Whether this new statutory scheme adequately protects a defendant's right to confront the witnesses against him or her is almost sure to be litigated. As previously noted, the legislature made numerous findings in support of its view that the procedures satisfy constitutional requirements. Those findings, while relevant, do not definitively resolve the question of the measure's constitutionality. *See Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289 (2012) (stating that "[a]lthough the legislative findings and declaration of policy have no magical quality to make valid

that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute" (internal citations omitted)).

North Carolina's appellate courts have recognized exceptions to a defendant's right to face-to-face confrontation in at least two contexts: (1) permitting child witnesses to testify about abuse in criminal trials out of the presence of their alleged abusers, who could watch the testimony live on closed circuit television, *see, e.g., State v. Lanford*, 225 N.C. App. 189 (2013), and (2) permitting a seriously ill witness who was unable to travel to North Carolina to testify from another state via live closed-circuit web broadcast, *see State v. Seelig*, 226 N.C. App. 147 (2013). They have not considered whether testimony from laboratory analysts categorically may be provided via remote procedures. *Cf. State v. Rogerson*, 855 N.W.2d 495, 496 (Iowa 2014) (holding that the trial court erred in permitting two-way videoconference testimony from witnesses, including lab technicians, in the defendant's impaired driving trial absent a showing of necessity to further an important public interest); *State v. Smith*, 308 P.3d 135 (N.M. App. 2013) (district court erred in permitting an analyst from the state's laboratory to testify at trial via video conference as to the conduct and results of a blood test because it did not establish the requisite necessity for allowing video testimony rather than live testimony). Nor have they considered, post-*Crawford v. Washington*, 541 U.S. 35 (2004), whether the right to appeal for trial de novo permits the State to initially prosecute a defendant in a forum that does not afford the full right to face-to-face confrontation. *Cf. State v. Smith*, 312 N.C. 361 (1984) (reasoning that that any constitutional right the defendant had to confront the chemical analyst who conducted a breath test was guaranteed during the *de novo* trial on appeal to Superior Court "which offers the second factfinding opportunity in the continuous proceeding provided by our two-tier court system"; upholding as constitutional statutory provision that allowed introduction of chemical analyst's affidavit without live testimony from analyst). Utilization of the newly authorized remote testimony procedures for analysts will tee up both issues.

Category: Procedure | Tags: chemical analyst, confrontation clause, forensic analyst, legislative fact-finding, remote testimony, right to confront witnesses, S.L. 2020-80, State v. Smith

eport a Digital Access Issue

DWI Sentencing

The following offenses are sentenced pursuant to G.S. 20-179 rather than Structured Sentencing:

- G.S. 20-138.1 (impaired driving).
- G.S. 20-138.2 (impaired driving in a commercial vehicle).
- Second or subsequent conviction of
  - G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol) or
  - G.S. 20-138.2B (operating a school bus, child care vehicle, emergency, or law enforcement vehicle after consuming).
- A person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level Five punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.

1 Determine the Applicable Law

Choose the appropriate sentencing grid and potentially applicable sentencing factors (form AOC-CR-311) based upon the date of the defendant's offense.

Offenses committed on or after October 1, 2013

Offenses committed on or after December 1, 2012, and before October 1, 2013

Offenses committed on or after December 1, 2011, and before December 1, 2012

Offenses committed on or after December 1, 2007, and before December 1, 2011

2 Determine Whether Any Grossly Aggravating Factors Exist

There are four grossly aggravating factors:

(1) a qualifying prior conviction for an offense involving impaired driving;
(2) driving while license revoked for an impaired driving revocation;
(3) serious injury to another person caused by the defendant's impaired driving; and
(4) driving with one of the following types of individuals in the vehicle:
  (i) a child under the age of 18,
  (ii) a person with the mental development of a child under 18, or
  (iii) a person with a physical disability preventing unaided exit from the vehicle.

In superior court, the jury is the finder of fact for all aggravating (including grossly aggravating) factors other than whether a prior conviction exists under G.S. 20-179(c)(1) or (d)(5). Any factor admitted by the defendant is treated as though it was found by the jury. In district court, the judge is the finder of fact.

3 Enter Factors on Determination of Sentencing Factors Form (AOC-CR-311)

If the jury finds aggravating factors, the court must enter those factors on the Determination of Sentencing Factors form. Judge-found grossly aggravating factors must also be entered on the form.

4 Count the Grossly Aggravating Factors

If there are no grossly aggravating factors, skip to step 6.

5 Determine the Sentencing Level

If there are three or more grossly aggravating factors, the judge must impose Aggravated Level One punishment. (For offenses committed before December 1, 2011, Level One punishment must be imposed in any case in which two or more grossly aggravating factors are found.)

If the grossly aggravating factor in G.S. 20-179(c)(4) exists (driving while a child, person with the mental capacity of a child, or a disabled person is in the vehicle) or if two other grossly aggravating factors exist, the judge must impose Level One punishment. (For offenses committed before December 1, 2011, the presence of factor G.S. 20-179(c)(4) does not require Level One punishment.)

If only one grossly aggravating factor exists (other than the factor in G.S. 20-179(c)(4)), the judge must impose Level Two punishment.

6 Consider Aggravating and Mitigating Factors

If one or more grossly aggravating factors is found, decide whether to consider aggravating and mitigating factors in determining the appropriate sentence within the applicable level of punishment.

In district court, the judge may elect not to formally determine the presence of aggravating or mitigating factors if there are grossly aggravating factors. In superior court, the jury will determine before the sentencing hearing whether there are aggravating factors. If one or more grossly aggravating factors is found, a superior court judge may elect not to formally determine the presence of mitigating factors. If the judge elects ***not*** to determine such factors, skip to step 10.

7 Determine Aggravating Factors

If there are no grossly aggravating factors, or if the judge elects to consider aggravating and mitigating factors in a case in which there are grossly aggravating factors, determine whether aggravating factors exist. The State bears the burden of proving beyond a reasonable doubt that any aggravating factor exists.

There are nine aggravating factors, eight of them defined and a ninth "catch-all" aggravating factor:

1. Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more.
2. Especially reckless or dangerous driving.
3. Negligent driving that led to a reportable accident.
4. Driving by the defendant while his or her driver's license was revoked.
5. Two or more prior convictions of certain motor vehicle offenses within five years of the instant offense or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the instant offense.
6. Conviction under G.S. 20-141.5 of speeding to elude.
7. Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit.
8. Passing a stopped school bus in violation of G.S. 20-217.
9. Any other factor that aggravates the seriousness of the offense.

Except for the fifth factor (which involves prior convictions), the conduct constituting the aggravating factor must occur during the same transaction or occurrence as the impaired driving offense.

Note any aggravating factors found on the Determination of Sentencing Factors form.

8 Determine Mitigating Factors

Determine whether mitigating factors exist.

Mitigating factors are set forth in subsections (e)(1)–(7) of G.S. 20-179. There are eight mitigating factors (one is set forth in G.S. 20-179(e)(6a)), including a catch-all factor. The judge in both district and superior courts determines the existence of any mitigating factor. The defendant bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. Except for the factors in subdivisions (4), (6), (6a), and (7), the conduct constituting the mitigating factor must occur during the same transaction or occurrence as the covered offense.

The following are mitigating factors listed by the subdivision of G.S. 20-179(e) in which they appear.

(1) Slight impairment of the defendant's faculties, resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.

(2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.

(3) Driving that was safe and lawful except for the defendant's impairment.

(4) A safe driving record.

(5) Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of drug taken was within the prescribed dosage.

(6) Voluntary submission to a substance abuse assessment and to treatment.

(6a) Completion of a substance abuse assessment, compliance with its recommendations, and 60 days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring (CAM) system.

(7) Any other factor that mitigates the seriousness of the offense.

Record any factors found on the Determination of Sentencing Factors form.

Note: The fact that the driver was suffering from alcoholism, drug addiction, diminished capacity, or mental disease or defect is ***not*** a mitigating factor. Evidence of these matters may be received in the sentencing hearing, however, for use by the judge in formulating terms and conditions of sentence after determining the punishment level.

9 Weigh Aggravating and Mitigating Factors

If aggravating factors substantially outweigh any mitigating factors, or if there are only aggravating factors, find that the defendant is subject to Level Three punishment.

If there are no aggravating or mitigating factors, or if aggravating factors are counterbalanced by mitigating factors, find that the defendant is subject to Level Four punishment.

If the mitigating factors substantially outweigh any aggravating factors, or if there are only mitigating factors, find that the defendant is subject to Level Five punishment.

10 Select a Sentence of Imprisonment

The imprisonment, mandatory probation conditions, and fines for each level of impaired driving sentenced under G.S. 20-179 are set forth in the DWI sentencing grids. The judgment must impose a maximum term and may impose a minimum term. A judgment may state that a term is both the minimum and maximum term. G.S. 15A-1351(b).

Place of Confinement

For sentences imposed on or after January 1, 2015, imprisonment of any duration under G.S. 20-179, other than imprisonment required as a condition of special probation, is served in the Statewide Misdemeanant Confinement Program. All imprisonment imposed as a condition of special probation must be served in a designated local confinement or treatment facility—regardless of whether the imprisonment is for continuous or noncontinuous periods. *See* APPENDIX G, Place of Confinement Chart, for additional rules.

11 Review Additional Issues, as Appropriate

The section of this handbook on "Additional Issues" includes information on the following matters that may arise at sentencing:

- Fines, costs, and other fees
- Restitution
- Sentencing multiple convictions
- Jail credit
- Sentence reduction credits
- DWI parole
- Obtaining additional information for sentencing

Punishment for Covered Driving While Impaired (DWI) Offenses Committed on or after **October 1, 2013**

Punishment Level Controlling Statute *Factors*	**Imprisonment and Mandatory Probation Conditions**	**Fine**
Aggravated Level One G.S. 20-179(f3) *Three or more grossly aggravating factors*	• 12 months minimum to 36 months maximum • If suspended – Imprisonment of at least 120 days as a condition of special probation – Requirement that defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM) system – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $10,000
Level One G.S. 20-179(g) *Grossly aggravating factor in G.S. 20-179(c)(4) or two other grossly aggravating factors*	• 30 days minimum to 24 months maximum • If suspended – Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $4,000
Level Two G.S. 20-179(h) *One grossly aggravating factor, other than the grossly aggravating factor in G.S. 20-179(c)(4)*	• 7 days minimum to 12 months maximum • If suspended – Special probation requiring (1) imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days ○ If Level Two based on prior conviction or DWLR for an impaired driving revocation and prior conviction occurred within five years, sentence must require 240 hours of community service if no imprisonment imposed – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $2,000
Level Three G.S. 20-179(i) *Aggravating factors substantially outweigh any mitigating factors*	• 72 hours minimum to 6 months maximum • If suspended – Must require one or both of the following ○ Imprisonment for at least 72 hours as a condition of special probation ○ Community service for a term of at least 72 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $1,000
Level Four G.S. 20-179(j) *No aggravating and mitigating factors or aggravating factors are substantially counterbalanced by mitigating factors*	• 48 hours minimum to 120 days maximum • If suspended – Must require one or both of the following ○ Imprisonment for 48 hours as a condition of special probation ○ Community service for a term of 48 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $500
Level Five G.S. 20-179(k) *Mitigating factors substantially outweigh aggravating factors*	• 24 hours minimum to 60 days maximum • If suspended – Must require one or both of the following ○ Imprisonment for 24 hours as a condition of special probation ○ Community service for a term of 24 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6	Up to $200

Appendix G: Place of Confinement Chart

	Felony G.S. 15A-1352(b)	**Misdemeanor** G.S. 15A-1352(a)	**Driving While Impaired (DWI)** G.S. 15A-1352(f)
Active	Division of Adult Correction and Juvenile Justice (DACJJ)	*Sentences imposed on/after 10/1/2014:* ≤ 90 days: Local jail > 90 days: Statewide Misdemeanant Confinement Program (SMCP) *Sentences imposed before 10/1/2014:* ≤ 90 days: Local jail 91–180 days: SMCP > 180 days: DACJJ	*Sentences imposed on/after 1/1/2015:* SMCP, regardless of sentence length *Sentences imposed before 1/1/2015 (G.S. 20-176(c1)):* • Defendants with no prior DWI or jail imprisonment for a Ch. 20 offense: Local jail • Defendants with a prior DWI or prior jail imprisonment for a Ch. 20 offense: ≤ 90 days: Local jail 91–180 days: Local jail or DACJJ, in court's discretion > 180 days: DACJJ
Split Sentence at Sentencing G.S. 15A-1351(a)	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	Local jail or treatment facility	Local jail or treatment facility
Split Sentence as a Modification of Probation G.S. 15A-1344(e)	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility
Confinement in Response to Violation (CRV) G.S. 15A-1344(d2)	DACJJ	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence
Quick Dip G.S. 15A-1343(a1)(3) and -1343.2	Local jail	Local jail	N/A
Nonpayment of Fine G.S. 15A-1352	DACJJ	Local jail	N/A
Probation Revocation	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence

Notes

Work release. Notwithstanding any other provision of law, the court may order that a consenting misdemeanant (including DWI) be granted work release. The court may commit the defendant to a particular prison or jail facility in the county or to a jail in another county to facilitate the work release arrangement. If the commitment is to a jail in another county, the sentencing court must first get the consent of the sheriff or board of commissioners there. G.S. 15A-1352(d).

Overcrowded confinement. When a jail is overcrowded or otherwise unable to accommodate additional prisoners, inmates may be transferred to another jail or, in certain circumstances, to DACJJ, as provided in G.S. 148-32.1(b). A judge also has authority to sentence an inmate to the jail of an adjacent county when the local jail is unfit or insecure, G.S. 162-38, or has been destroyed by fire or other accident, G.S. 162-40.

DRIVING WHILE IMPAIRED CONVICTIONS

STATISTICAL REPORT

FISCAL YEAR

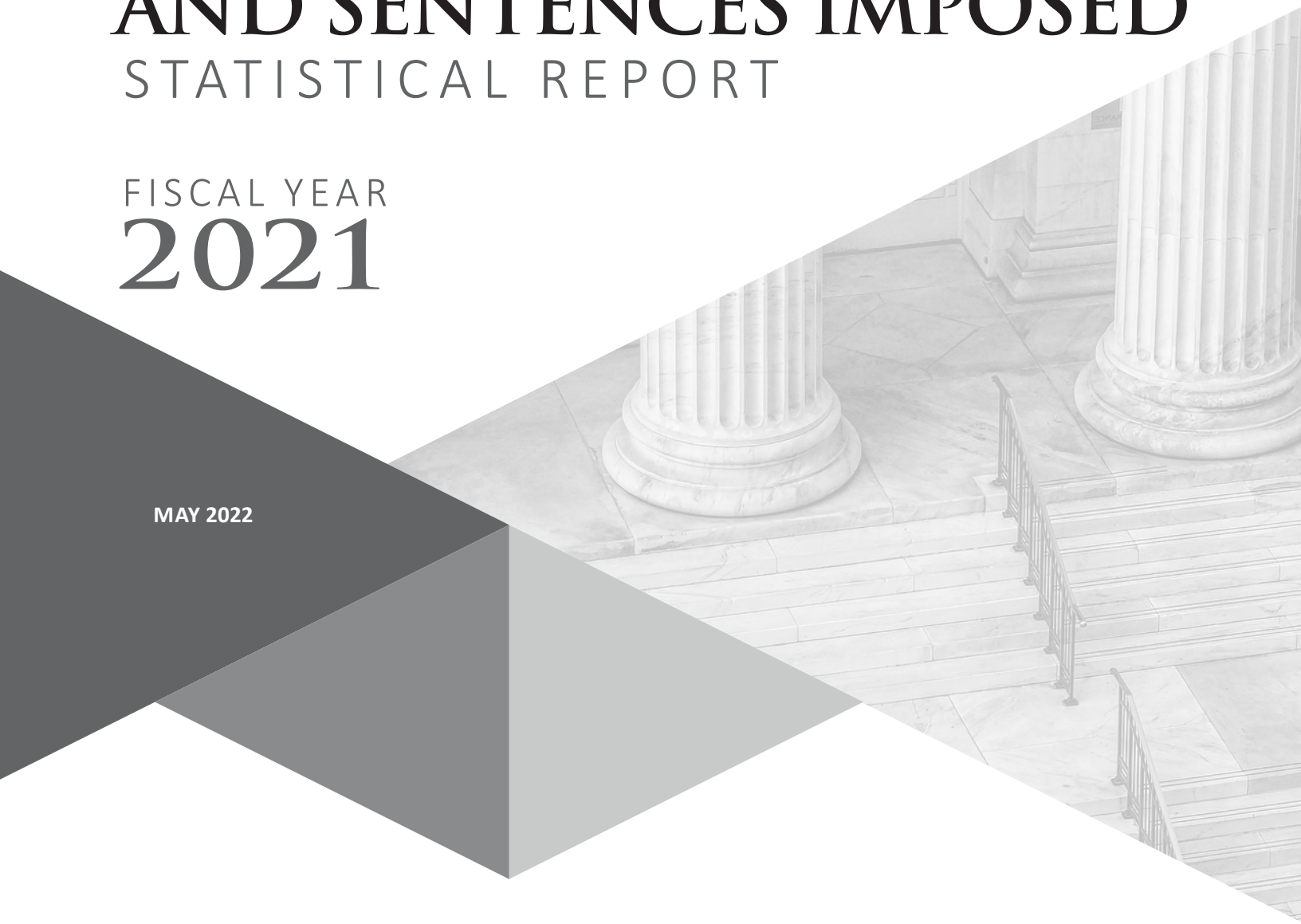
2021

NORTH CAROLINA
SENTENCING AND POLICY ADVISORY COMMISSION

DRIVING WHILE IMPAIRED CONVICTIONS AND SENTENCES IMPOSED

STATISTICAL REPORT

FISCAL YEAR
2021



MAY 2022

THE HONORABLE CHARLIE BROWN
CHAIRMAN

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APPENDICES

INTRODUCTION

This report provides detailed information about driving while impaired (DWI) convictions sentenced under N.C. Gen. Stat. (hereinafter G.S.) 20-179 during Fiscal Year 2021 (July 1, 2020 through June 30, 2021). These data reflect the laws and practices that were in place during this time period. The COVID-19 pandemic, which began in March 2020, continued to affect the volume of DWI convictions in FY 2021 due to its sustained impact on the criminal justice system and court operations.

G.S. 20-179 prescribes sentencing for convictions for impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), a second or subsequent conviction for operating a commercial vehicle after consuming alcohol (G.S. 20-138.2A), and a second or subsequent conviction for operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol (G.S. 20-138.2B). Under G.S. 20-179, offenders convicted of any of the above offenses are subject to punishment in one of six punishment levels (Aggravated Level 1, Level 1 through Level 5).

The following impaired driving offenses are excluded from this report:

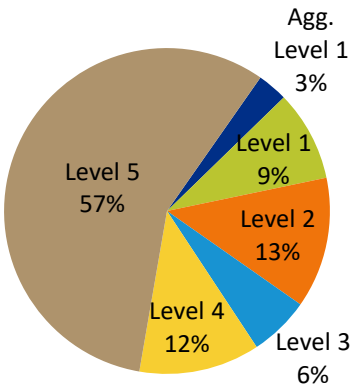
- Aiding and abetting DWI (G.S. 20-179(f1))
- Habitual Impaired Driving (G.S. 20-138.5(b))

The report presents information on the number of DWI convictions, the distribution of DWI convictions across the six punishment levels, and the types of sentences imposed, as well as data about several other issues. The Appendix includes data on DWI convictions by district and county, as well as additional analyses by punishment level.

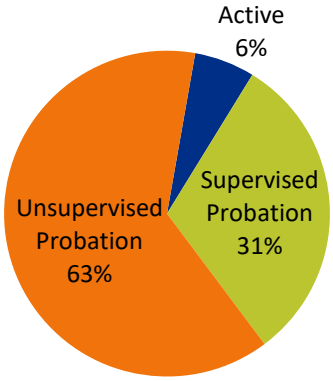
DWI STATISTICAL REPORT SUMMARY OF FINDINGS FY 2021 CONVICTIONS

During FY 2021, sentences for 21,240 DWI convictions were imposed.[1] Under G.S. 20-179, offenders convicted of DWI are subject to punishment in one of six punishment levels (Aggravated Level 1, Level 1 through Level 5). As shown in the figures below, a majority of DWI offenders were sentenced in Level 5 (57%) and a majority of offenders received unsupervised probation (63%).

Convictions by Punishment Level

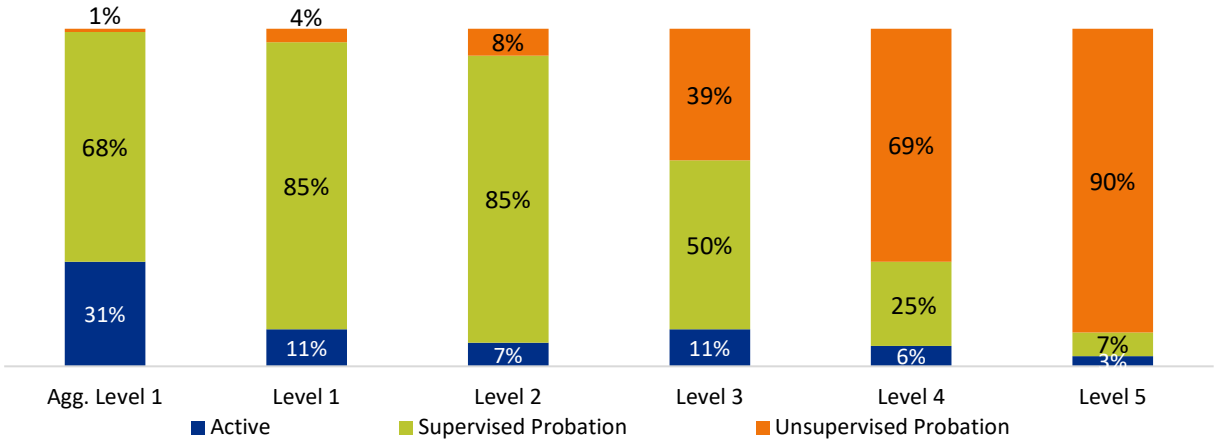


Convictions by Type of Sentence



The type of sentence imposed by punishment level is shown in the figure below. Thirty-one percent (31%) of all offenders sentenced to Aggravated Level 1 received an active sentence. Supervised probation was the most likely sentence imposed among Aggravated Level 1 (68%), Level 1 (85%), Level 2 (85%), and Level 3 (50%) convictions. Unsupervised probation was most frequently imposed among Level 4 (69%) and Level 5 (90%) convictions.

Type of Sentence Imposed by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

[1] For many of the tables and figures in this report, 16 of the 21,240 DWI convictions were excluded because the type of sentence imposed could not be determined.

DWI CONVICTIONS IN FY 2021

I. DWI CONVICTIONS IN FY 2021

A. DWI Convictions

This report contains information on DWI convictions sentenced under G.S. 20-179[2] during Fiscal Year 2021 (July 1, 2020 through June 30, 2021) and reflects the laws and practices that were in place during this time period. Overall, sentences for 21,240 DWI convictions were imposed. (This number excludes sentences imposed for aiding and abetting DWI, even though convictions for this offense are sentenced at Level 5 (G.S. 20-179(f1)).

The offense of Habitual Impaired Driving is sentenced under Structured Sentencing as a Class F felony. Information on convictions for this offense is also excluded from this report.

B. Definition of the Unit of Analysis

The report is based on data entered into the Administrative Office of the Courts' (AOC's) management information system by the court clerk following the imposition of the sentence. The report covers all North Carolina counties. The unit of analysis is convictions disposed of in a *sentencing episode*.[3]

While a sentencing episode involves one offender, in this reporting time frame an offender may be represented by more than one sentencing episode (meaning that within the fiscal year the number of offenders will be the same as or less than the number of sentencing episodes reported). For the sake of simplicity, throughout the report the unit of analysis is referred to as "conviction."

A *SENTENCING EPISODE* IS IDENTIFIED FROM COURT RECORDS AS THE SENTENCE IMPOSED FOR THE *MOST SERIOUS CONVICTION* ON A GIVEN DAY OF COURT.

C. Data Limitations

AOC data do not contain information on the factors (grossly aggravating, aggravating, and mitigating) that determine offenders' punishment levels.

D. Convictions by Punishment Level

Figure A shows the distribution of DWI convictions across punishment levels. Most convictions were in Level 5 (n=12,102 or 57%). The percentage of convictions increased from Aggravated Level 1 (3%) through Level 2 (13%), then again from Level 3 (6%) through Level 5 (57%). Aggravated Level 1 through Level 2 convictions are based on the presence of grossly aggravating factors, while Levels 3 through 5 are not.[4]

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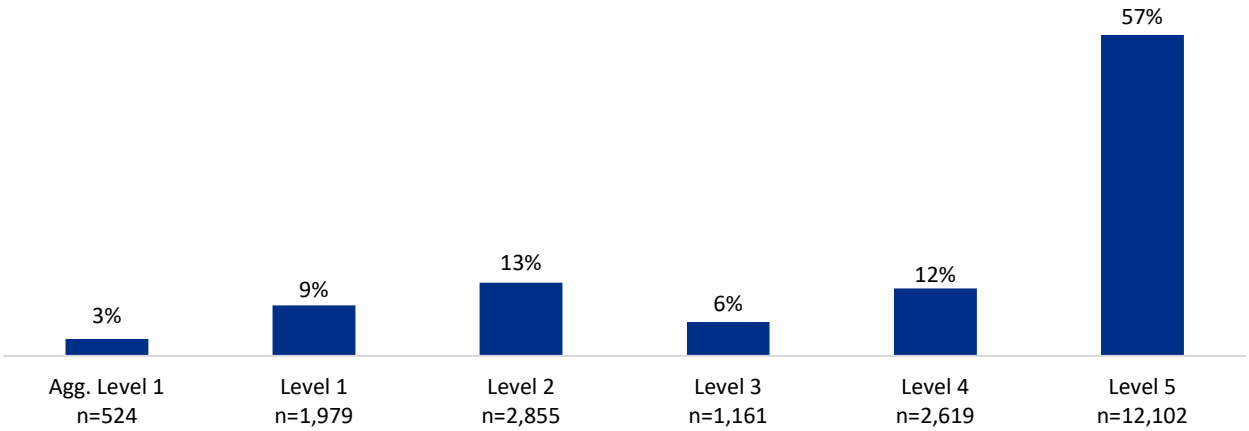
[2] In addition to convictions for impaired driving (G.S. 20-138.1), G.S. 20-179 also prescribes sentencing for impaired driving in a commercial vehicle (G.S. 20-138.2), a second or subsequent conviction for operating a commercial vehicle after consuming alcohol (G.S. 20-138.2A), and a second or subsequent conviction for operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol (G.S. 20-138.2B). Convictions for these offenses are also included in this report.

[3] The report's unit of analysis differs from the unit of analysis used in the AOC's Trial Court Caseload Statistics. *See A Comparison of Trial Court Caseload Statistics and the Structured Sentencing Statistical Report* available at www.NCSPAC.org for detail.

[4] For a list of the four grossly aggravating factors, *see* G.S. 20-179(c).

Figure A: Convictions by Punishment Level

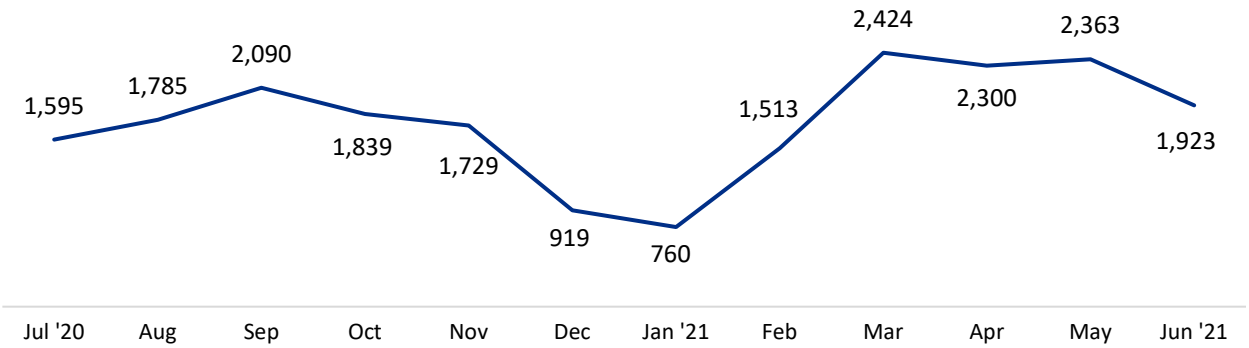


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

E. Convictions by Month of Sentencing

Figure B shows the number of convictions by month of sentencing during FY 2021. Convictions generally increased during the first quarter then experienced a substantial decrease in the second quarter. Convictions begin to increase again in February and were highest in March.

Figure B: Convictions by Month of Sentencing

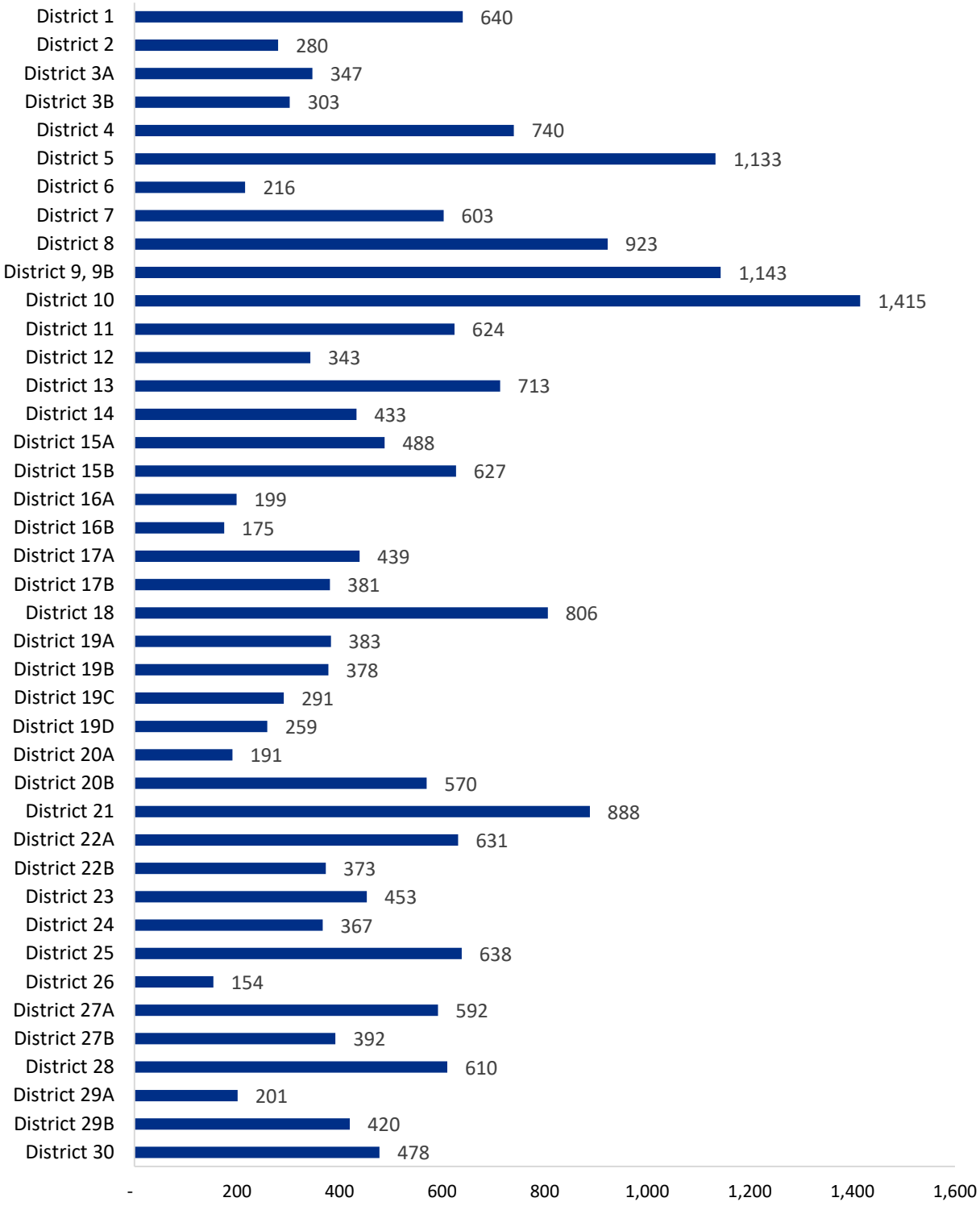


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

F. Convictions by Judicial District

Figure C shows the total number of convictions by judicial district (N=21,240). The districts with the most DWI convictions were District 10 (Wake County, n=1,415) and District 9, 9B (Franklin County, Granville County, Person County, Vance County, and Warren County, n=1,143). Additional information about DWI convictions by district and county can be found in Appendix C.

Figure C: Convictions by Judicial District



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

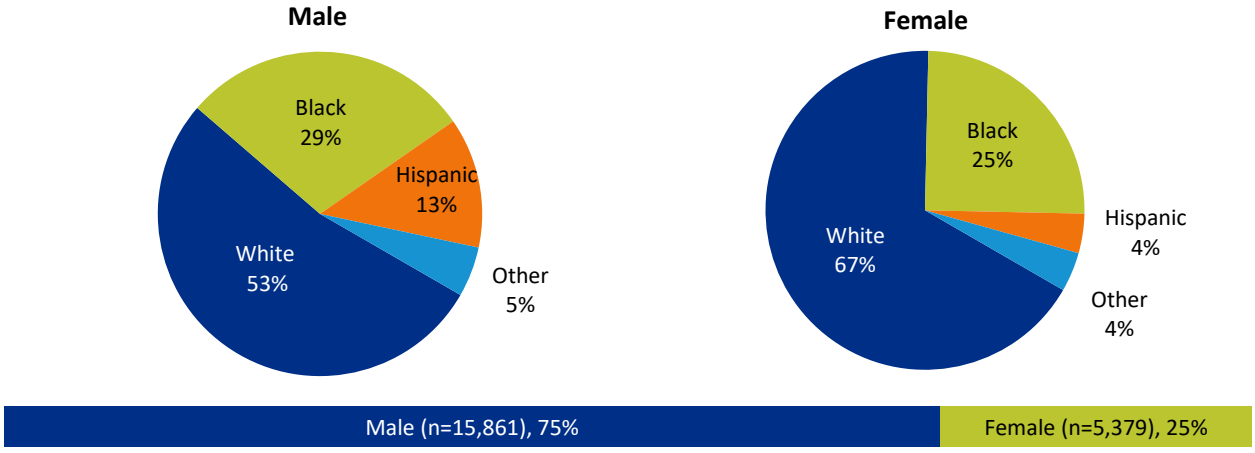
II. CHARACTERISTICS OF OFFENDERS

This section provides information about convictions by offenders' sex, race, age at offense, and blood alcohol concentration (BAC).

A. Convictions by Sex, Race, and Age at Offense

Of the 21,240 DWI convictions in FY 2021, 75% were for males (*see* Figure D). The majority of DWI offenders were white (56%). White females made up a larger percentage of female convictions (3,591 or 67%) than white males did for male convictions (8,381 or 53%). Black males and females comprised the second largest racial category for each sex (29% and 25% respectively, and 28% overall).

Figure D: Convictions by Sex and Race



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Table 1 shows convictions by offenders' age at offense and punishment level. Overall, the average age of DWI offenders was 37, with Level 5 offenders being slightly younger on average (36) than offenders sentenced in the other punishment levels. Except for Level 2 through Level 4, at least 60% of convictions were accounted for by offenders aged 21-40 at the time of offense. Just under half (44%) of all Level 5 convictions were for offenders aged 30 and younger.

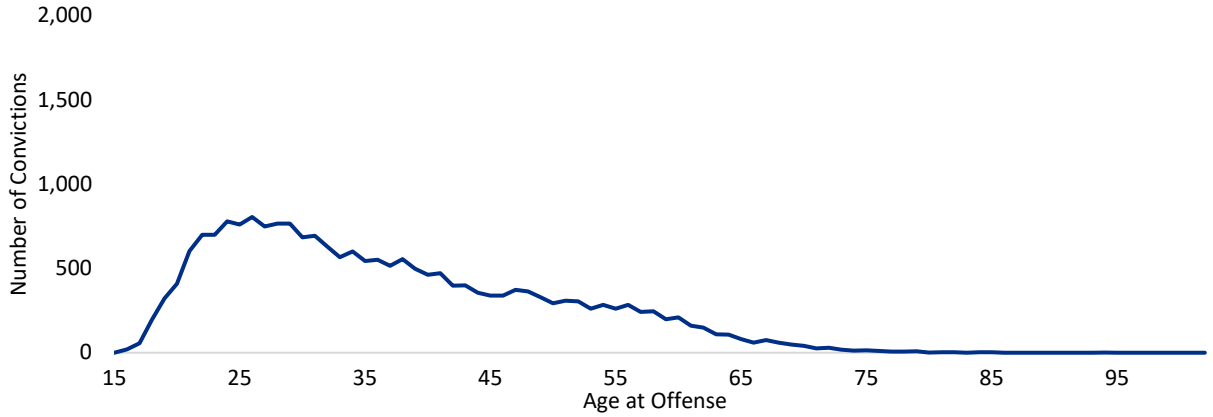
Table 1: Convictions by Age at Offense and Punishment Level

Punishment Level	#	Average Age	Age at Offense				
			<21	21-30	31-40	41-50	>50
			%	%	%	%	%
Agg. Level 1	524	38	1	30	33	18	18
Level 1	1,976	37	3	32	32	18	15
Level 2	2,852	39	2	29	29	20	20
Level 3	1,160	40	3	24	28	23	22
Level 4	2,615	38	5	29	27	19	20
Level 5	12,099	36	6	38	24	16	16
Total	**21,226**	**37**	**5**	**34**	**27**	**17**	**17**

Note: Of the 21,240 DWI convictions in FY 2021, 14 convictions with missing values for offender's age were excluded from this table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

The volume of offenders peaked at age 26, and then generally declined as age increased (*see* Figure E).

Figure E: Distribution of Convictions by Age at Offense



Note: Of the 21,240 DWI convictions in FY 2021, 14 convictions with missing values for offender's age were excluded from this table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

B. Convictions by Blood Alcohol Concentration (BAC)

BAC levels were recorded for 75% of the 21,240 convictions.[5] Figure F shows the percentage of convictions by BAC. The greatest percentage of convictions were in the .08 to .14 category (51%), followed closely by the .15+ category (47%). Figure G illustrates the distribution of BAC for offenders convicted of DWI in FY 2021. A BAC of .13 was the most frequent (n=1,278), followed by .11 (n=1,271) and .12 (n=1,266), accounting for a combined total of 24%.

Figure F: Convictions by BAC

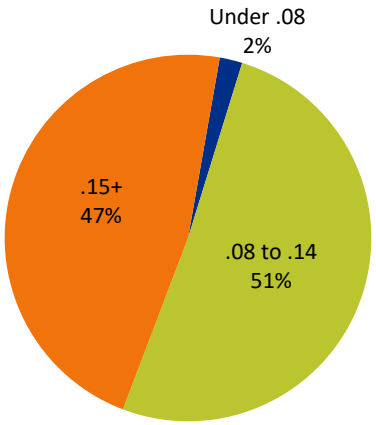
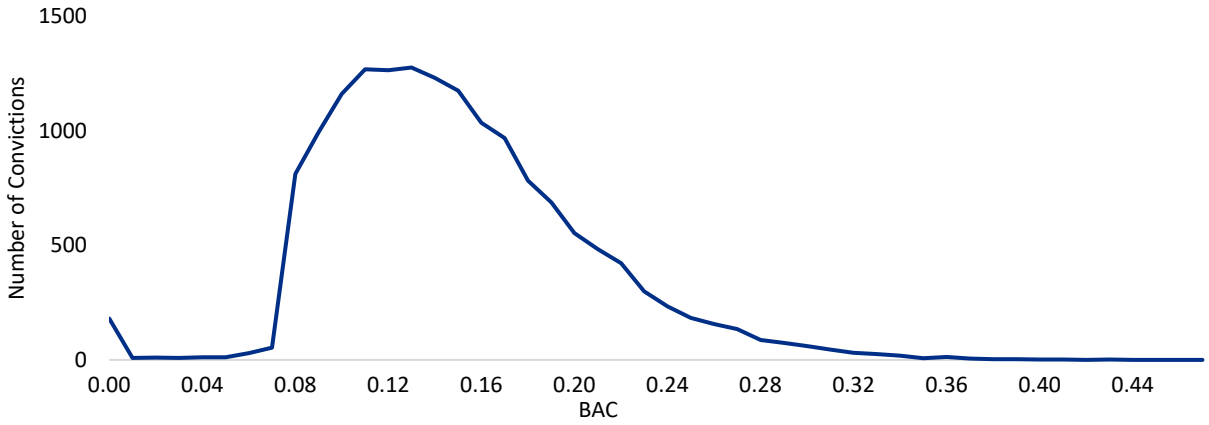


Figure G: Distribution of BAC



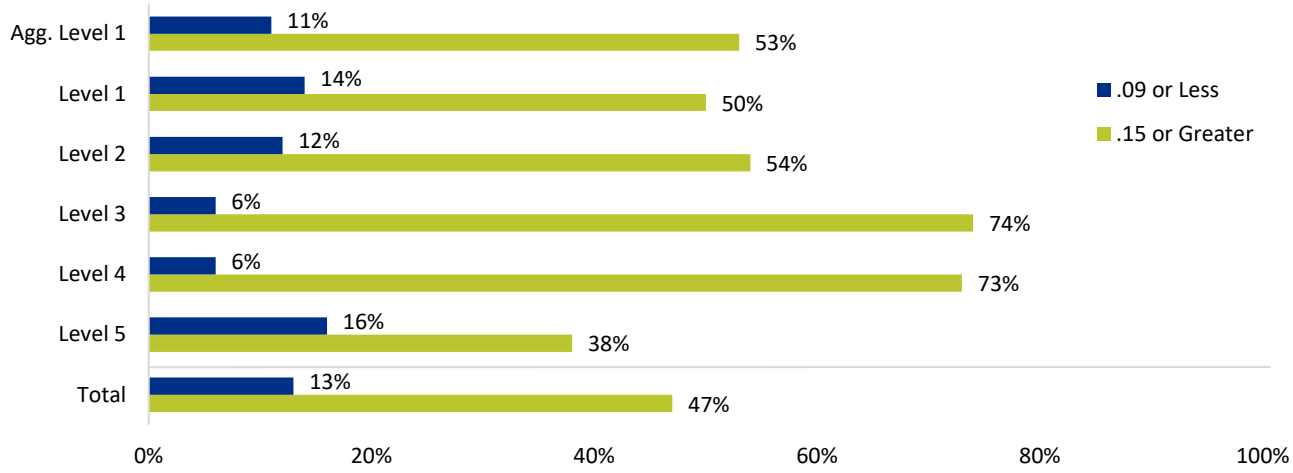
Note: Of the 21,240 DWI convictions in FY 2021, 5,400 convictions without BAC levels were excluded from these figures.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

[5] This section examines data contained in the AOC's BAC field at sentencing. The AOC's BAC data include information beyond numeric BAC values. Clerks use the same field to record refusals, blood tests, and whether the DWI charge stemmed from drugs or controlled substances other than alcohol. Data on these occurrences were incomplete, however, because clerks may overwrite initial data (e.g., blood test) with information that becomes available later (e.g., the BAC result of the blood test). The FY 2021 data showed refusals occurred in 11% of convictions, blood tests occurred in 5% of convictions, DWI under controlled substances other than alcohol occurred in 3% of convictions, and BAC was unknown in 7% of convictions. However, given the possibility of overwriting, the actual percentages of convictions involving refusals and blood tests were not known.

G.S. 20-179(e)(1) defines an alcohol concentration that does not exceed .09 as a mitigating factor in terms of sentencing; likewise, G.S. 20-179(d)(1) establishes alcohol concentrations of .15 or more as an aggravating factor. A weighing of aggravating and mitigating factors determines whether offenders, who do not have any grossly aggravating factors, will be sentenced in Levels 3, 4, or 5.[6] Aggravating and mitigating factors may also be used in determining the type and length of sentences of offenders receiving Aggravated Level 1, Level 1, and Level 2 punishments.[7]

Figure H shows the percentage of convictions by punishment level with a BAC of .09 or less and those with a BAC of .15 or more. Level 3 and Level 4 convictions had the highest percentage of convictions with BACs greater than .15 (74% and 73% respectively). Correspondingly, these same punishment levels also had the lowest percentage of convictions with BACs .09 or less (6% each).

Figure H: Convictions by Mitigating and Aggravating BAC Levels and Punishment Level



Note: Of the 21,240 DWI convictions in FY 2021, 5,400 convictions without BAC levels were excluded from this figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

III. SENTENCES IMPOSED AND METHOD OF DISPOSITION

This section provides information on DWI convictions by the type of sentence imposed (active sentence, supervised probation, or unsupervised probation) and the method of disposition (guilty plea, bench trial, or jury trial).[8]

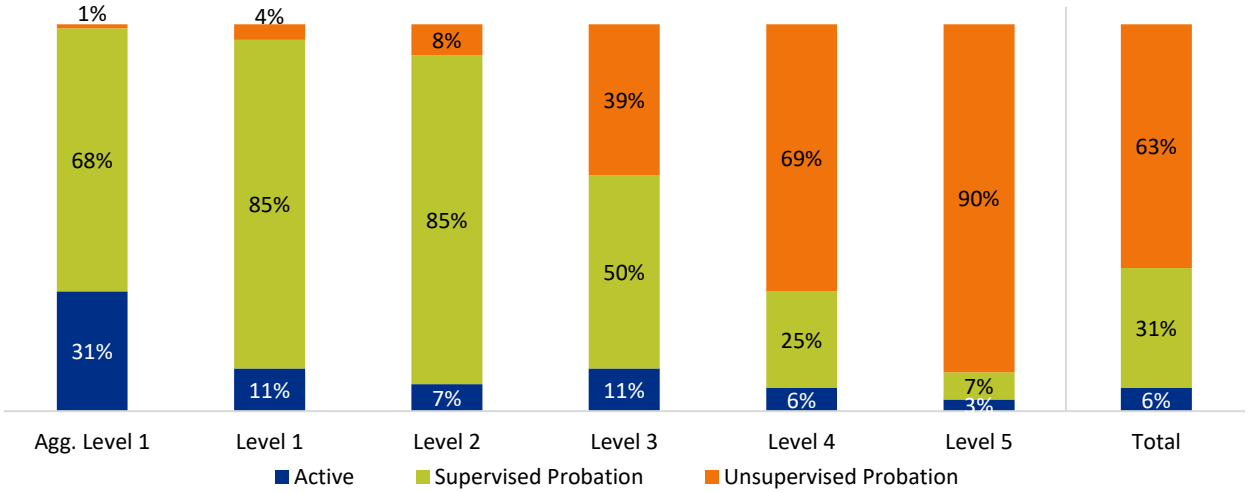
A. Convictions by Type of Sentence Imposed and Punishment Level

Figure I and Table 2 show that 6% of DWI convictions in FY 2021 resulted in an active sentence, 31% resulted in supervised probation, and 63% resulted in unsupervised probation. Thirty-one percent (31%) of all offenders sentenced to an Aggravated Level 1 punishment received an active sentence. Supervised probation was the most frequent sentence imposed among Aggravated Level 1 (68%), Level 1 (85%), Level 2 (85%), and Level 3 (50%) convictions. Unsupervised probation was most frequently imposed among

[6] G.S. 20-179(f)(1)-(3)
[7] G.S. 20-179(c)
[8] Section III excludes 16 of the 21,240 DWI convictions in FY 2021 for which the type of sentence imposed could not be determined.

Level 4 (69%) and Level 5 (90%) convictions. Despite being a lower punishment level, the percentage of convictions that resulted in an active sentence for Level 3 punishments was higher (11%) than for Level 2 punishments (7%). As noted previously, Aggravated Level 1 through Level 2 punishments are based on the presence of grossly aggravating factors while Levels 3 through 5 are not.

Figure I: Convictions by Type of Sentence Imposed and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Table 2: Convictions by Type of Sentence Imposed and Punishment Level

Punishment Level	Type of Sentence Imposed						Total
	Active		Supervised Probation		Unsupervised Probation		
	#	%	#	%	#	%	
Agg. Level 1	164	31	356	68	3	1	523
Level 1	221	11	1,685	85	73	4	1,979
Level 2	190	7	2,437	85	227	8	2,854
Level 3	124	11	577	50	458	39	1,159
Level 4	152	6	649	25	1,817	69	2,618
Level 5	376	3	858	7	10,857	90	12,091
Total	**1,227**	**6**	**6,562**	**31**	**13,435**	**63**	**21,224**

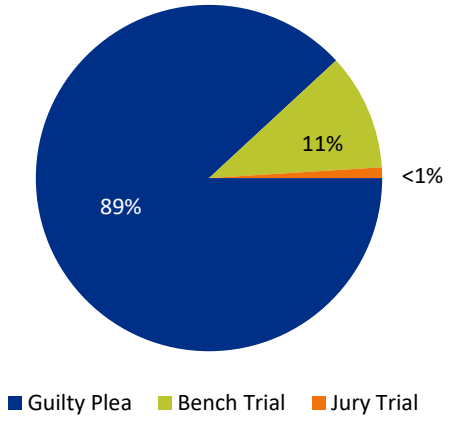
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

B. Convictions by Method of Disposition

Figure J shows that 89% of DWI convictions in FY 2021 were disposed by guilty plea and 11% by bench trial. Jury trials occurred in less than 1% of convictions (n=32). Across all punishment levels, Aggravated Level 1 convictions had the highest percentage of guilty pleas (93%) and Level 5 convictions had the lowest

percentage (88%). Conversely, Level 5 convictions had the highest percentage of bench trials (12%) and Aggravated Level 1 had the lowest percentage (7%).

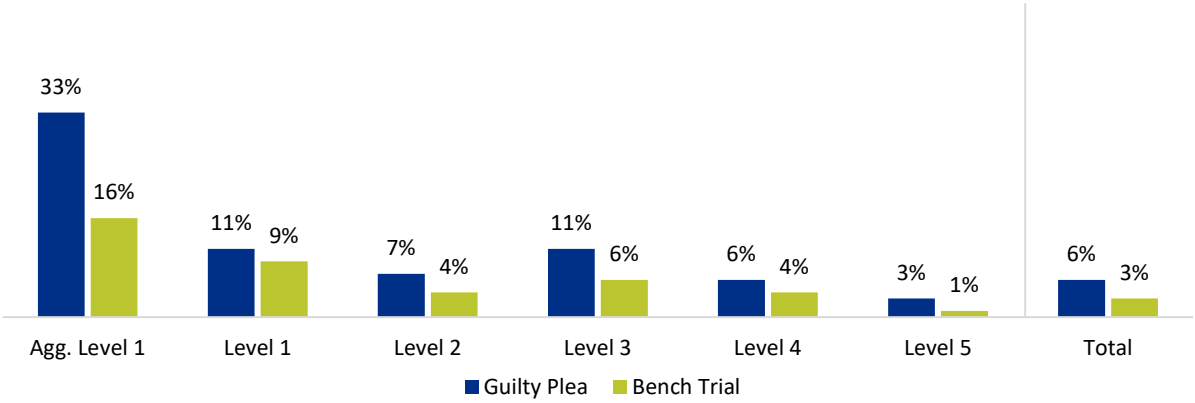
Figure J: Convictions by Method of Disposition



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Figure K shows the percentage of convictions that resulted in an active sentence for each punishment level by method of disposition. In FY 2021, 6% of all convictions obtained by guilty plea resulted in an active sentence compared to 3% of all convictions disposed by bench trial. Higher rates of active sentences for guilty plea convictions than for bench trials were found across all punishment levels except Aggravated Level 1. The overall rate of active sentences for jury trials (n=4) was 13% and is not depicted in this figure due to the limited number of observations.

Figure K: Rate of Active Sentences by Method of Disposition and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

C. Average Sentence Length

Under G.S. 15A-1351(b), judges must impose a maximum term of imprisonment and may impose a minimum term. For the purpose of this analysis, sentence length refers to the maximum term imposed.[9]

[9] For more information on the use of minimum and maximum terms, *see* Figure T in Section IV.

Table 3 examines active sentences only and shows the average active sentence within the context of the statutory minimum and statutory maximum possible sentences. When an active sentence was imposed (n=1,227), the average length was 7 months. Among convictions in Level 2 through Level 5, the average active sentence length was about half of the statutory maximum.

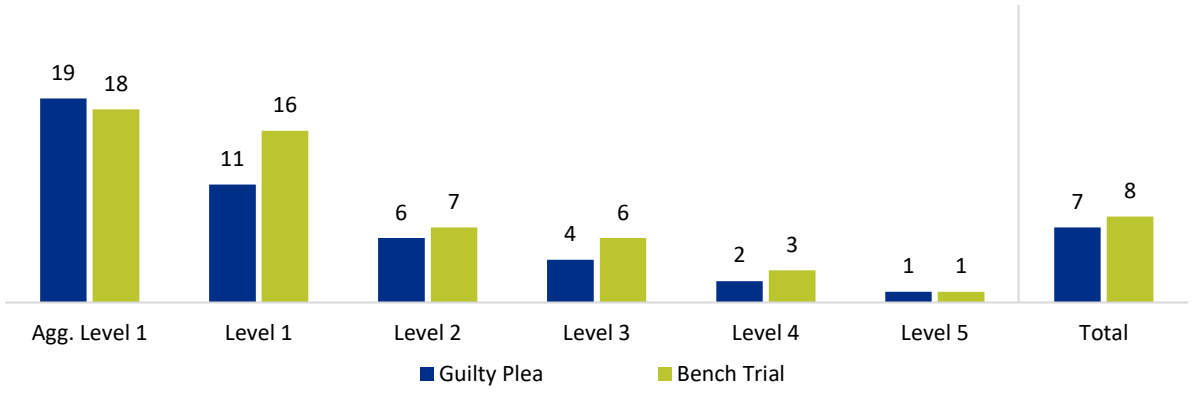
Table 3: Average Length of Active Sentences Imposed by Punishment Level

Punishment Level	Statutory Minimum	Average Active Sentence	Statutory Maximum
Agg. Level 1	12 months	20 months	36 months
Level 1	30 days	11 months	24 months
Level 2	7 days	6 months	12 months
Level 3	72 hours	4 months	6 months
Level 4	48 hours	2 months	120 days
Level 5	24 hours	1 month	60 days
Total		**7 months**	

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Among active sentences, there was little variation in average active sentence length by method of disposition overall, as well as by punishment level (*see* Figure L).

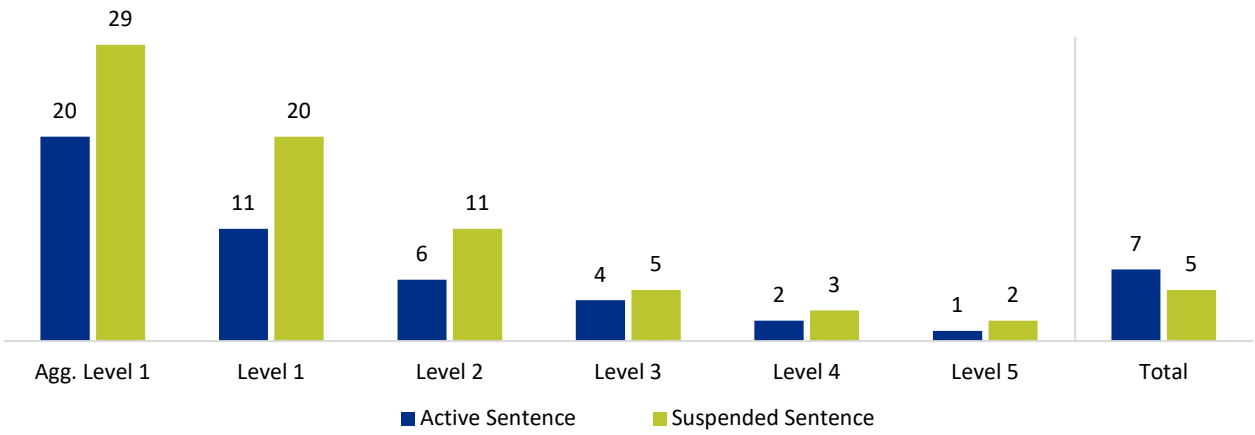
Figure L: Average Active Sentence by Method of Disposition (Months) and Punishment Level



Note: The average active sentence for jury trial convictions (n=4) was 16 months and is not depicted in this figure due to the limited number of observations. The average active sentence for bench trials for Aggravated Level 1 through Level 5 was each based on fewer than 25 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Figure M provides a comparison of the average sentence imposed for active sentences and suspended sentences. As the punishment level decreased, the average sentence length decreased. Aggravated Level 1 DWIs had the longest average sentence imposed. For each punishment level, the average sentence for offenders who received a suspended sentence was longer than the average sentence for those who received an active sentence. However, the overall average sentence for active sentences was longer than the average sentence imposed for suspended sentences due to the large volume of Level 5 suspended sentences (n=11,715).

Figure M: Average Sentence Imposed (Months) by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

D. Probation Sentences

This section summarizes information about suspended (i.e., probationary) sentences. Pursuant to G.S. 20-179, a suspended sentence may be imposed in each of the six levels of DWI punishment if the sentence contains certain conditions of probation (e.g., special probation). For all punishment levels receiving a suspended sentence, the defendant must obtain a substance abuse assessment and complete any recommended treatment or education. Unless a judge determines that supervised probation is necessary, an offender who receives a suspended sentence for DWI and meets certain conditions[10] must be placed on unsupervised probation. The precise length of a probation term for a DWI conviction is not prescribed by statute. The court may place a convicted offender on probation for a period not to exceed five years.[11]

Probation was imposed for 19,997 DWI convictions in FY 2021 with a suspended sentence. Figure N summarizes the type of probation – supervised or unsupervised – for probation sentences. Overall, unsupervised probation was imposed for two-thirds (67%) of all probation sentences. Of those with probation, nearly all Aggravated Level 1 and Level 1 offenders (99% and 96% respectively) received supervised probation. Level 5 offenders accounted for over half of all probation sentences imposed (i.e.,

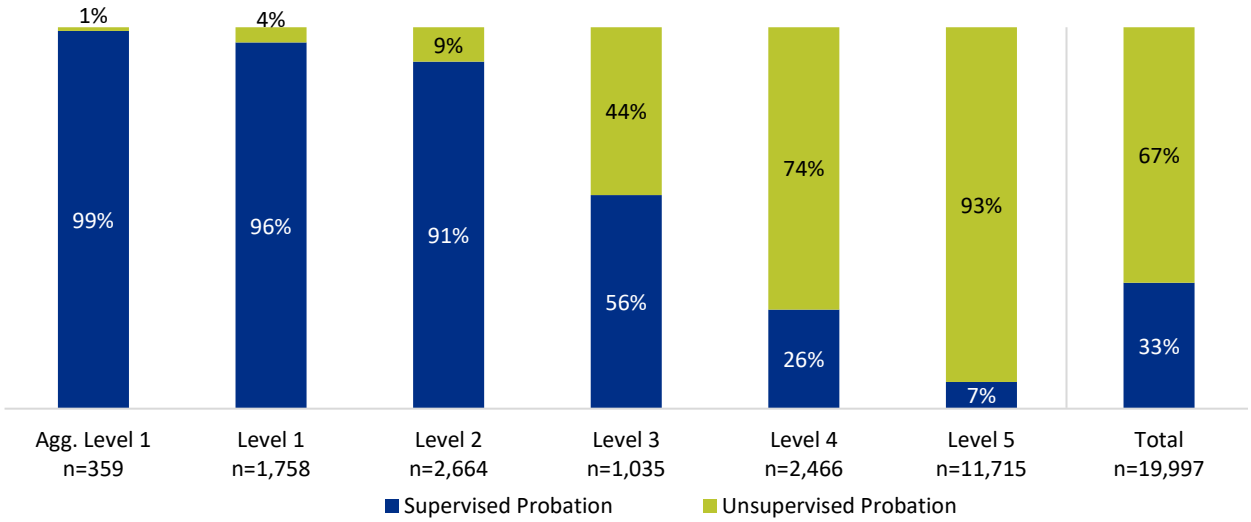
[10] Absent a judge's determination that supervised probation is necessary, unsupervised probation must be imposed if the following conditions are met: 1) if the person has not been convicted of an offense of impaired driving within the seven years preceding the date of the offense for which the defendant is being sentenced, 2) if Level 3, Level 4, or Level 5 punishment is imposed, and 3) if the defendant has obtained a substance abuse assessment and completed any recommended treatment or education.

[11] Pursuant to G.S. 15A-1342.

11,715 of 19,997 probation sentences). As the punishment level decreased, a greater percentage of offenders received unsupervised probation.[12]

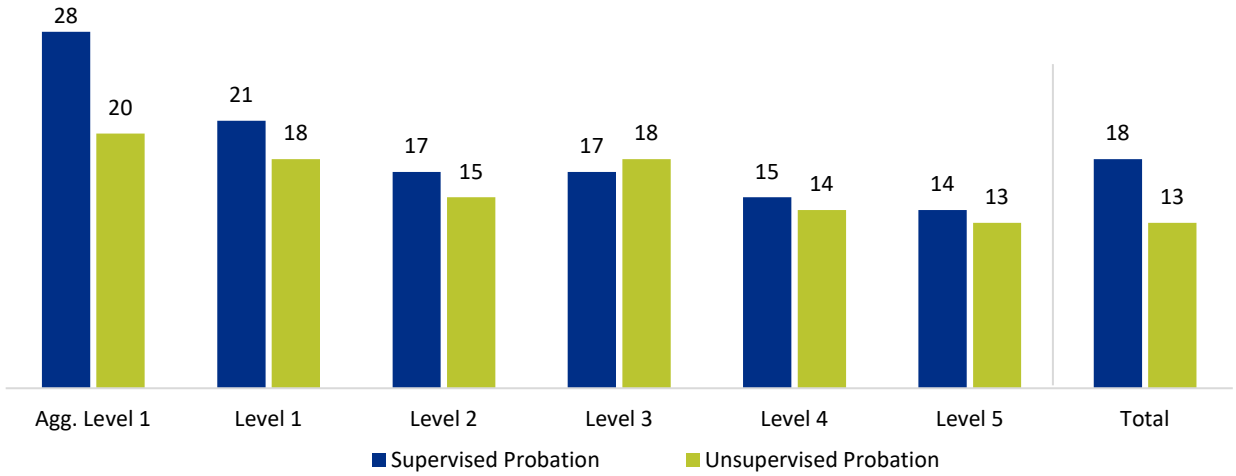
Figure O provides the average length of probation by punishment level and type of probation. The average length of probation was 18 months for supervised and 13 months for unsupervised probation. Offenders with supervised probation received longer probation terms than offenders with unsupervised probation. Generally, as the punishment level decreased, the average length of probation supervision decreased.

Figure N: Probation Sentences by Type of Probation and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Figure O: Average Length of Probation by Type of Probation (Months) and Punishment Level



Note: The average length of probation for unsupervised probation in Aggravated Level 1 was based on fewer than 10 observations.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

[12] G.S. 20-179(r) outlines the circumstances in which offenders sentenced to Levels 3, 4, and 5 should receive unsupervised probation.

Table 4 explores the most frequently imposed probation length (mode) for each punishment level by type of probation. Except for Aggravated Level 1 convictions, among offenders who received unsupervised probation, 12 months of probation was the most frequently imposed probation length. More variation in probation length occurred among offenders who received supervised probation.

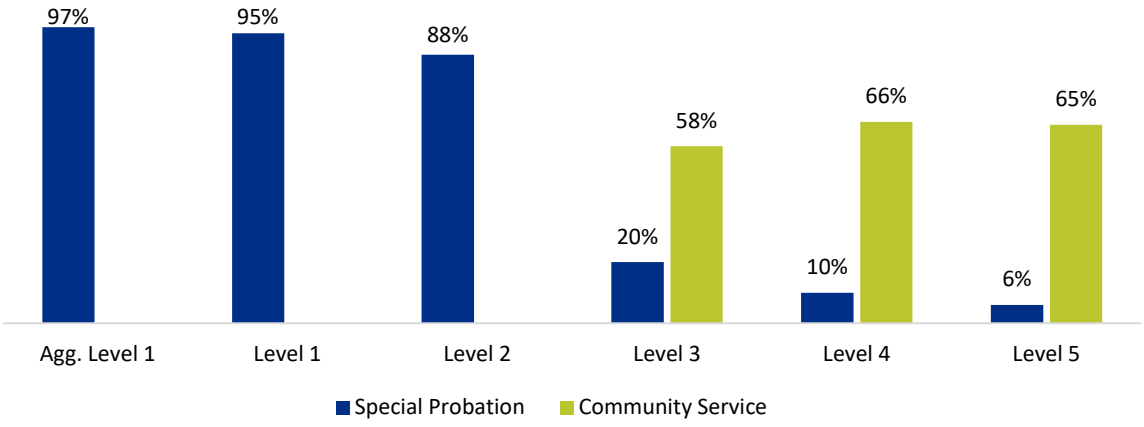
Table 4: Most Frequently Imposed Probation Length (Mode) by Type of Probation and Punishment Level

Punishment Level	Total	Type of Probation					
		Supervised Probation			Unsupervised Probation		
		#	Mode	%	#	Mode	%
Agg. Level 1	359	356	36	40	3	18	67
Level 1	1,758	1,685	24	46	73	12	41
Level 2	2,664	2,437	18	40	227	12	57
Level 3	1,035	577	18	45	458	12	47
Level 4	2,466	649	12	65	1,817	12	75
Level 5	11,715	858	12	74	10,857	12	87
Total	**19,997**	**6,562**	**12**	**39**	**13,435**	**12**	**83**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Special probation is required for Aggravated Level 1 through Level 2 offenders sentenced to probation,[13] while either special probation or community service is required for Level 3 through 5 offenders sentenced to probation.[14] Mandatory probation conditions by punishment level is shown in Figure P.

Figure P: Mandatory Probation Conditions by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

[13] Offenders sentenced in Aggravated Level 1 through Level 2 may receive community service as part of their sentence. Six percent (6%) of Aggravated Level 1 sentences, 8% of Level 1 sentences, and 9% of Level 2 sentences included community service.
[14] Special probation and community service may be imposed together in Levels 3 through 5, although this occurred in less than 1% of the convictions.

Table 5 shows the number, percent, and average days of special probation ordered within the context of the statutory requirements for the duration of special probation. Of all probation sentences, 28% (n=5,546) had special probation ordered (*see* Table 5). The average number of special probation days was highest for Aggravated Level 1 DWI offenders and decreased as the punishment level decreased.

Table 5: Probation Sentences with Special Probation by Punishment Level

Punishment Level	Probation Sentences # Days	Special Probation Ordered % Days	Average Special Probation Days Days	Statutory Condition Days Days
Agg. Level 1	359	97	125	At least 120
Level 1	1,758	95	32	At least 30 or at least 10 (if CAM)
Level 2	2,664	88	10	At least 7
Level 3	1,035	20	8	At least 3
Level 4	2,466	10	4	2
Level 5	11,715	6	2	1
Total	**19,997**	**28**	**22**	**N/A**

Note: All probation sentences with special probation ordered are shown regardless of whether the lengths of special probation are consistent with the terms in G.S. 20-179(f3), (g)-(k). CAM stands for continuous alcohol monitoring.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Table 6 provides information on fines imposed for probation sentences by punishment level. Fines were imposed for the majority of DWI convictions (84%), ranging from a low of 67% for Aggravated Level 1 offenders to a high of 88% for Level 4 offenders. For each punishment level, the average fine amounts were much lower than the statutory maximum. Nearly all fines imposed (96%) were $500 or less. The average fine amount decreased as the punishment level decreased.

Table 6: Probation Sentences with a Fine Imposed by Punishment Level

Punishment Level	#	Fine Imposed %	Statutory Maximum	Average	Most Frequent Amount
Agg. Level 1	359	67	$10,000	$739	$500
Level 1	1,758	79	$4,000	$486	$500
Level 2	2,664	85	$2,000	$360	$300
Level 3	1,035	85	$1,000	$282	$200
Level 4	2,466	88	$500	$175	$100
Level 5	11,715	85	$200	$110	$100
Total	**19,997**	**84**	**N/A**	**$201**	**$100**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

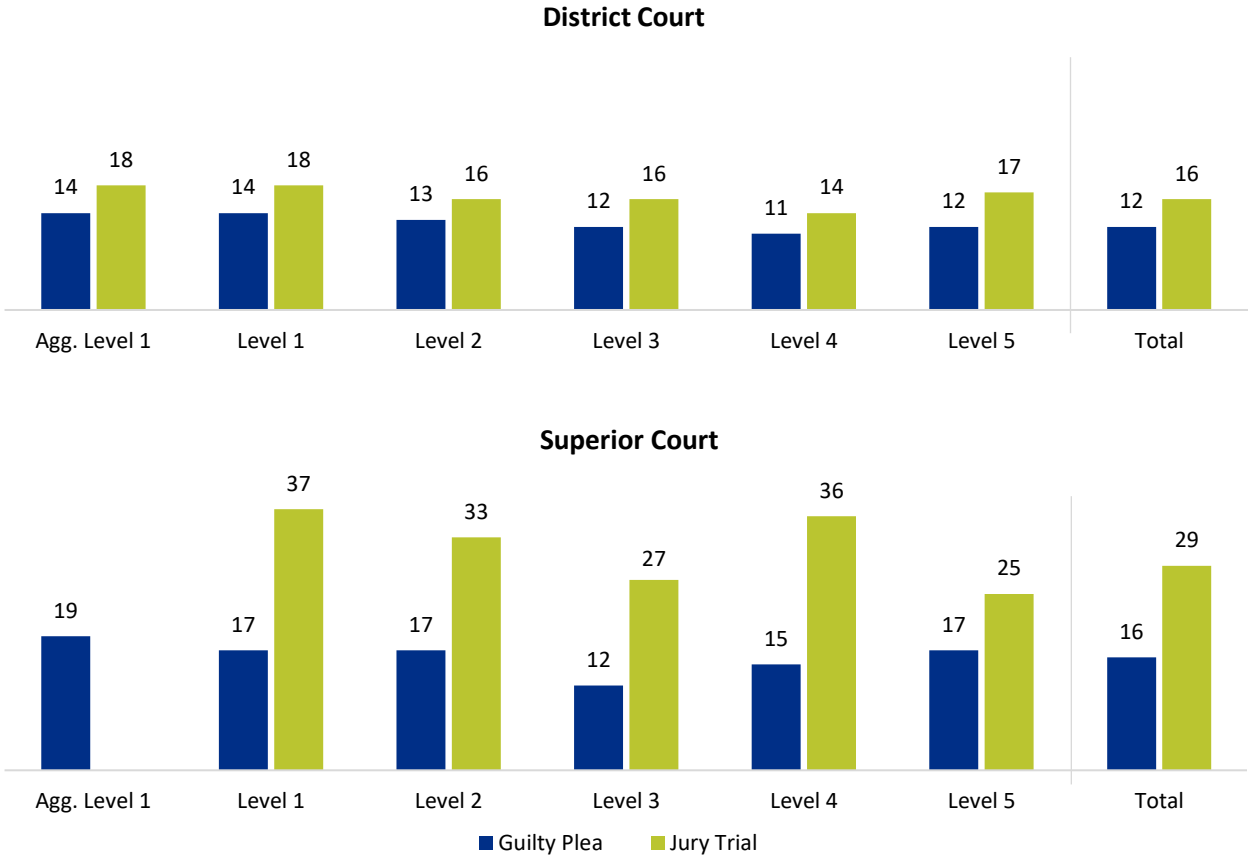
IV. SPECIAL ISSUES

This section reviews issues of special interest including time to sentencing, sentence length relative to the statutory minimum and maximum sentences, and credit for time served.

A. Time to Sentencing

Time to sentencing refers to the amount of time between the date the offender was charged with DWI and the date the sentence was imposed. Figure Q examines the median time to sentencing by punishment level and method of disposition for District Court and Superior Court. The median time to sentencing for DWI convictions disposed in District Court was 13 months. District Court bench trials took 4 months longer to dispose of than guilty pleas (16 months compared to 12 months). The median time to sentencing for DWI convictions disposed in Superior Court was 16 months. Guilty pleas entered in Superior Court took 13 months less time to sentencing than jury trials (16 months compared to 29 months). No distinct pattern emerged when examining time to sentencing by punishment level.

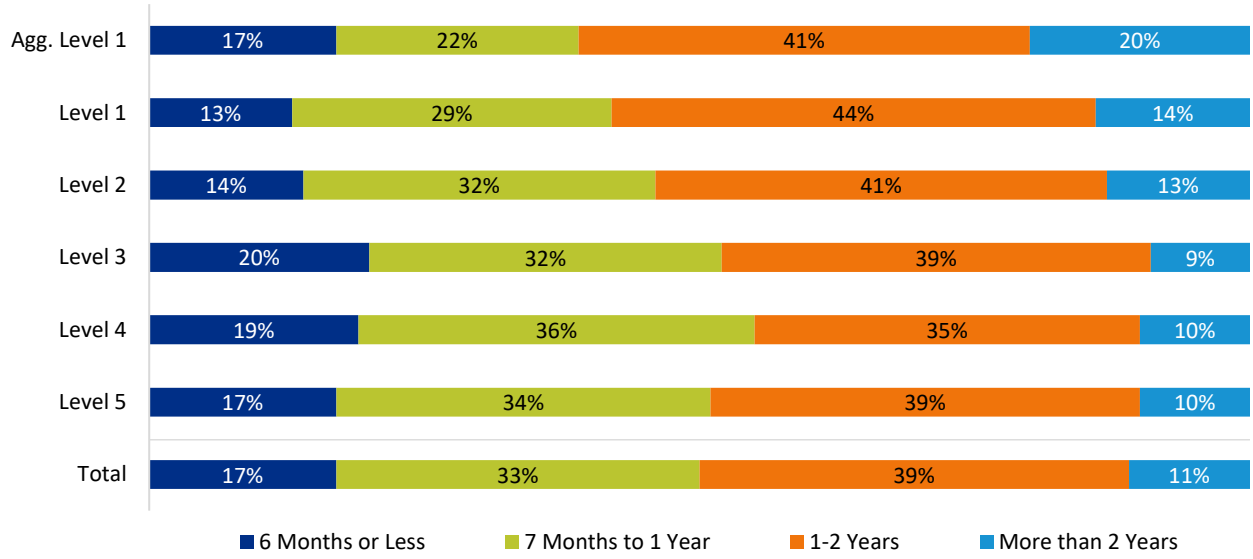
Figure Q: Median Time to Sentencing by Punishment Level and Method of Disposition for District Court and Superior Court (Months)



Note: Of the 21,240 DWI convictions in FY 2021, 6 Superior Court bench trials were excluded from this figure, as well as 16 convictions with discrepant date values. The median time to sentencing for Superior Court jury trials in Aggravated Level 1 through Level 5 were each based on fewer than 50 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Figure R illustrates the distribution of time to sentencing for convictions by punishment level. Overall, 17% of convictions occurred in 6 months or less, 33% occurred within 7 months to 1 year, 39% occurred within 1 to 2 years, and 11% occurred in more than 2 years. Overall, half of convictions were disposed within a year or less (50%). Fewer Aggravated Level 1 through Level 2 convictions were disposed within one year compared to Level 3 through Level 5 convictions.

Figure R: Distribution of Time to Sentencing by Punishment Level



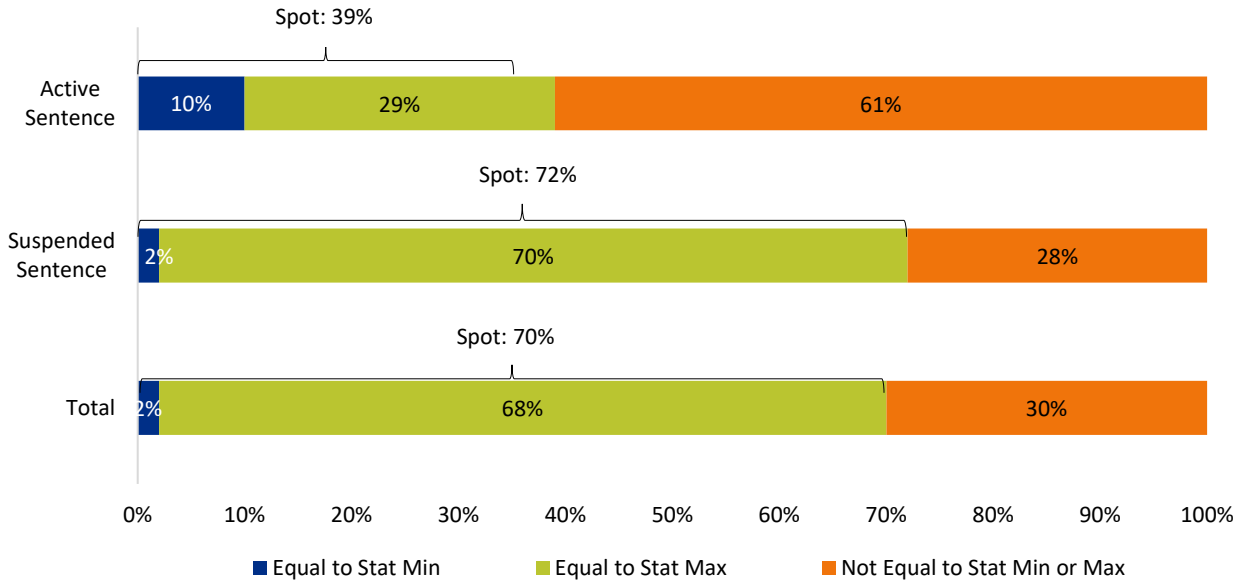
Note: Of the 21,240 DWI convictions in FY 2021, 16 convictions with discrepant date values were excluded.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

B. Sentence Length Relative to the Statutory Minimum and Maximum Sentences

Figure S examines how often the minimum sentence imposed is equal to the statutory minimum or statutory maximum sentence length. Overall, the majority of minimum sentences imposed were equal to the statutory maximum (68%) and only 2% were equal to the statutory minimum – for a total of 70% on one of these two "spots." However, active sentences were only imposed on a spot 39% of the time compared to 72% of suspended sentences. The statutory minimum sentence was imposed very infrequently regardless of whether the sentence was active or suspended (with the exception of Aggravated Level 1 convictions).[15]

[15] Overall, 23% of Aggravated Level 1 offenders were sentenced to the statutory minimum (12 months), 48% were sentenced to the statutory maximum (36 months), and 30% were sentenced to a different amount of time, for a total of 71% sentenced on either the statutory minimum or statutory maximum.

Figure S: Sentence Length Relative to the Statutory Minimum and Maximum Sentences



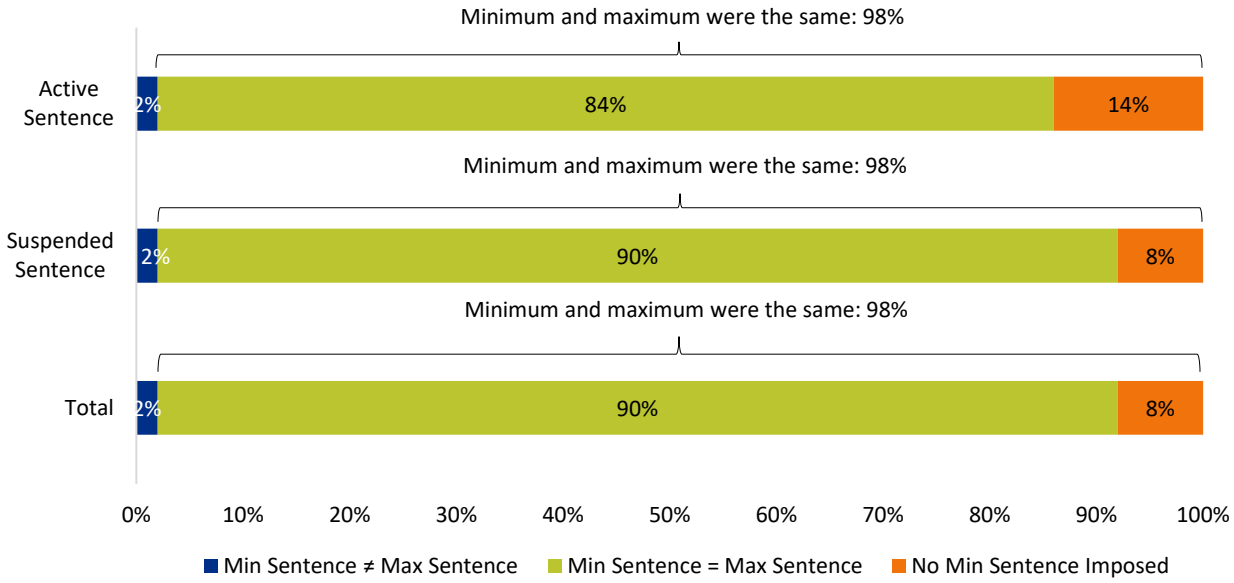
Note: Of the 21,240 DWI convictions in FY 2021, 16 convictions with missing values for type of sentence imposed were excluded from this figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

C. Use of Minimum and Maximum Sentences

Judges must impose a maximum term of imprisonment and may impose a minimum term.[16] Figure T examines whether a minimum term was imposed and whether the minimum term equaled the maximum term. Overall, 90% of sentences imposed included a minimum term that was equal to the maximum term (e.g., 12 months minimum and 12 months maximum). In an additional 8% of the sentences, no minimum term was indicated and only a maximum term was imposed. In the remaining 2% of sentences imposed, the minimum and maximum terms differed, indicating a range of months (e.g., 12 months minimum and 36 months maximum). The use of a sentencing range occurred infrequently regardless of whether an active or a suspended sentence was imposed.

[16] G.S. 15A-1351(b)

Figure T: Use of Minimum and Maximum Sentences



Note: Of the 21,240 DWI convictions in FY 2021, 16 convictions with missing values for type of sentence imposed were excluded from this figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

D. Credit for Time Served

Credit for time served refers to the amount of time an offender has spent committed to or confined in a State or local correctional, mental, or other institution prior to sentencing. Seventeen percent (17%) of all DWI offenders received credit for time served (*see* Table 7). Fifty-eight percent (58%) of offenders who received active sentences also received credit for time served compared to only 15% of those who received suspended sentences. Offenders who received an active sentence averaged a greater amount of credit for time served than those who received a suspended sentence (67 and 15 days respectively).

Table 7: Convictions with Credit for Time Served (Days) by Punishment Level

Punishment Level	Sentence Type	#	Convictions with Credit for Time Served		
			%	Average	Median
Agg. Level 1	Active	164	57	85	44
	Suspended	359	42	61	27
	Subtotal	**523**	**47**	**71**	**30**
Level 1	Active	221	44	86	54
	Suspended	1,758	30	26	14
	Subtotal	**1,979**	**32**	**35**	**20**
Level 2	Active	190	56	89	49
	Suspended	2,664	28	14	7
	Subtotal	**2,854**	**30**	**23**	**7**
Level 3	Active	124	49	95	51
	Suspended	1,035	18	19	4
	Subtotal	**1,159**	**22**	**38**	**8**
Level 4	Active	152	64	62	45
	Suspended	2,466	13	9	2
	Subtotal	**2,618**	**16**	**22**	**3**
Level 5	Active	376	67	38	30
	Suspended	11,715	8	5	1
	Subtotal	**12,091**	**10**	**12**	**1**
Subtotal	**Active**	**1,227**	**58**	**67**	**37**
	Suspended	**19,997**	**15**	**15**	**3**
	Total	**21,224**	**17**	**25**	**6**

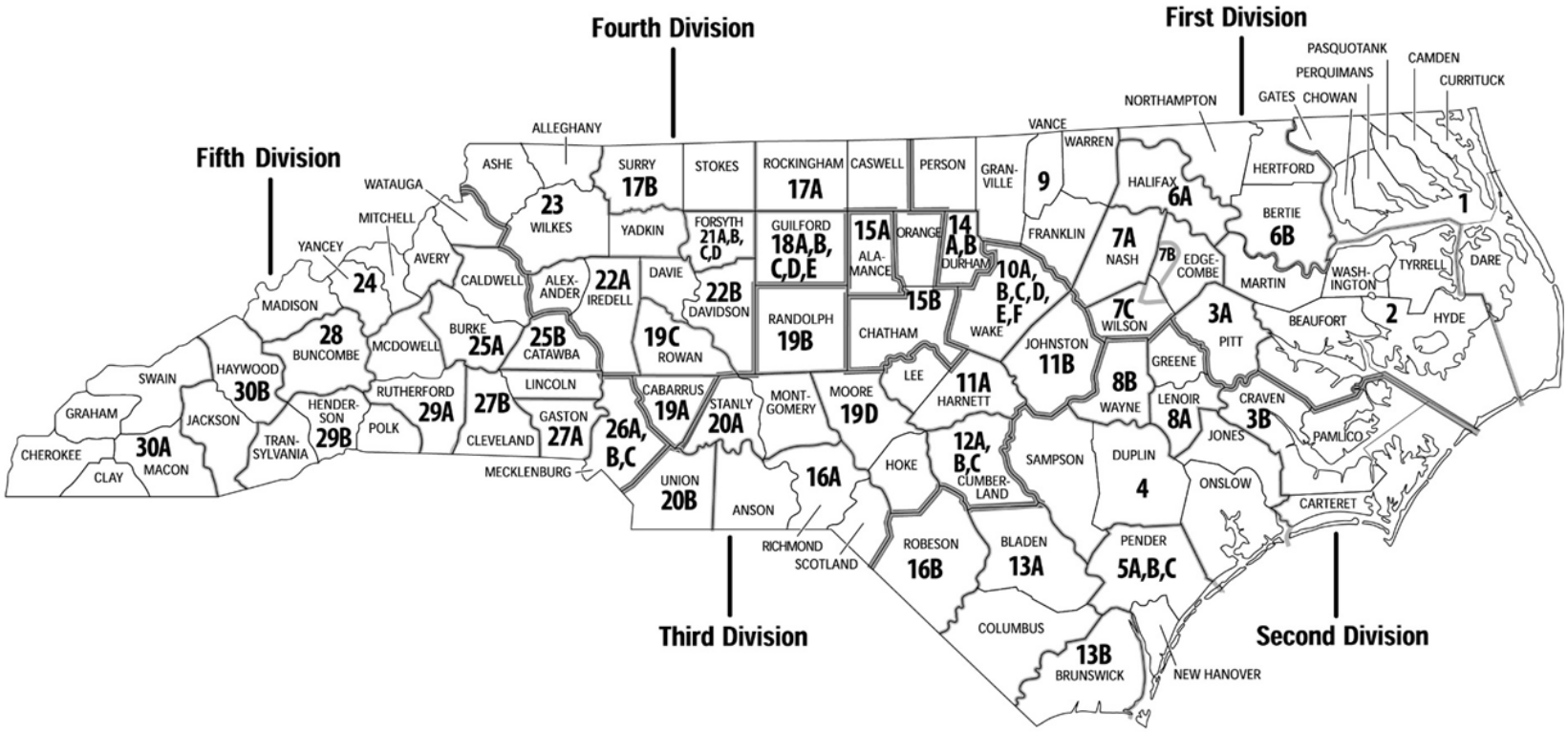
Note: Of the 21,240 DWI convictions in FY 2021, 16 convictions with missing values for type of sentence imposed were excluded from this table.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

APPENDIX A
MAPS OF JUDICIAL DIVISIONS AND DISTRICTS

North Carolina Superior Court Districts

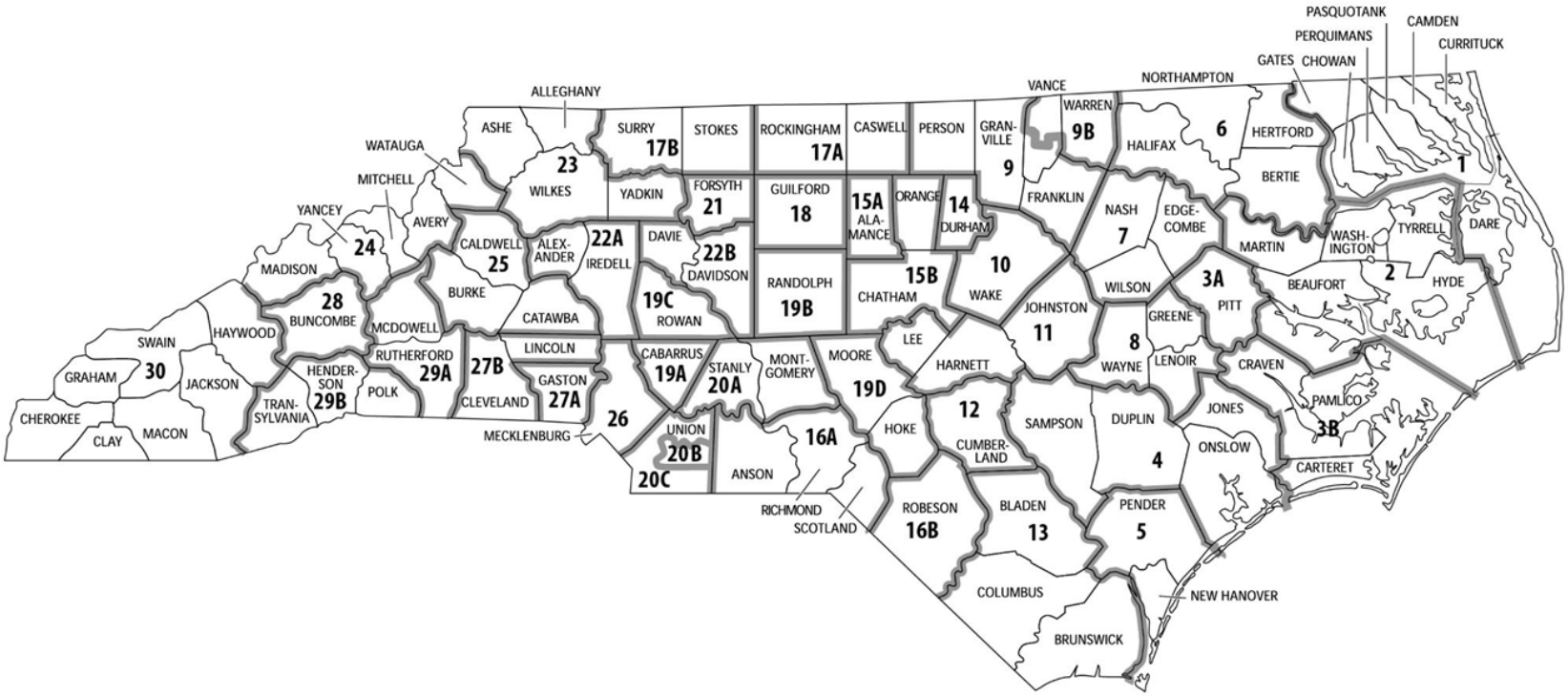
Effective January 1, 2019



Note: Districts that have more than one letter associated with the district number (i.e., 10A, B, C, D) are divided into separate districts for electoral purposes. For administrative purposes, they are combined into a single district.

North Carolina District Court Districts

Effective January 1, 2019



Note: Districts 9 and 9B, and districts 20B and 20C are districts for electoral purposes only. They are combined for administrative purposes.

APPENDIX B
DWI PUNISHMENT TABLE

SENTENCING FOR IMPAIRED DRIVING OFFENSES

PUNISHMENT LEVELS	FACTORS	PUNISHMENT	FINE
Aggravated Level 1 (20-179(f3))	3 grossly aggravating factors apply. (20-179(c))	**Active sentence range:** Min: 12 months Max: 36 months **Or split sentence:** at least 120 days	Maximum of $10,000
Level 1 (20-179(g))	Grossly aggravating factor #4 [a] or 2 other grossly aggravating factors apply.	**Active sentence range:** Min: 30 days Max: 24 months **Or split sentence:** at least 30 days [b]	Maximum of $4,000
Level 2 (20-179(h))	1 grossly aggravating factor (other than #4[a]) applies.	**Active sentence range:** Min: 7 days Max: 12 months **Or split sentence:** at least 7 days [c]	Maximum of $2,000
Level 3 (20-179(i))	Aggravating factors substantially outweigh mitigating factors. (20-179(d) and (e))	**Active sentence range:** Min: 72 hours Max: 6 months **Or split sentence:** at least 72 hours **Or community service:** 72 hours	Maximum of $1,000
Level 4 (20-179(j))	No aggravating or mitigating factors or factors substantially counterbalance each other.	**Active sentence range:** Min: 48 hours Max: 120 days **Or split sentence:** 48 hours **Or community service:** 48 hours	Maximum of $500
Level 5 (20-179(k))	Mitigating factors substantially outweigh aggravating factors.	**Active sentence range:** Min: 24 hours Max: 60 days **Or split sentence:** 24 hours **Or community service:** 24 hours	Maximum of $200

[a] Child under 18 or person with mental or physical disability in the vehicle at the time of the offense.

[b] Not less than 10 days if a condition of special probation is imposed to require that a defendant abstain from alcohol consumption and be monitored by a continuous alcohol monitoring system, of a type approved by the Division of Adult Correction of the Department of Public Safety, for a period of not less than 120 days.

[c] Abstain from consuming alcohol for at least 90 consecutive days, as verified by a continuous alcohol monitoring system.

Offenses

- Impaired driving. (G.S. 20-138.1)
- Impaired driving in a commercial vehicle. (G.S. 20-138.2)
- Operating a commercial vehicle after consuming alcohol. (Second or subsequent) (G.S. 20-138.2A)
- Operating a school bus, school activity bus, child care vehicle, ambulance, other EMS vehicle, firefighting vehicle, or law enforcement vehicle after consuming alcohol. (Second or subsequent) (G.S. 20-138.2B)

Sentence

A sentence to imprisonment must impose a maximum term and may impose a minimum term. The impaired driving judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. (G.S. 15A-1351(b))

Place of confinement for active sentences

For convictions on or after January 1, 2015:

- DWI defendants must be sentenced to the Statewide Misdemeanant Confinement Program. (G.S. 15A-1352(f))

APPENDIX C
ADDITIONAL CONVICTION DATA BY JUDICIAL DISTRICT AND COUNTY

Appendix C, Table 1: Convictions by Judicial District and County

Judicial District and County		DWI Convictions	Convictions per 1,000 Adults (16+)
District 1	Camden	37	4
	Chowan	18	2
	Currituck	166	7
	Dare	314	10
	Gates	11	1
	Pasquotank	54	2
	Perquimans	40	4
	Total	**640**	**5**
District 2	Beaufort	152	4
	Hyde	13	3
	Martin	65	4
	Tyrrell	28	11
	Washington	22	3
	Total	**280**	**4**
District 3A	Pitt	347	3
	Total	**347**	**3**
District 3B	Carteret	166	3
	Craven	124	2
	Pamlico	13	1
	Total	**303**	**2**
District 4	Duplin	174	4
	Jones	40	5
	Onslow	330	2
	Sampson	196	4
	Total	**740**	**3**
District 5	New Hanover	872	5
	Pender	261	5
	Total	**1,133**	**5**
District 6	Bertie	34	2
	Halifax	124	3
	Hertford	31	2
	Northampton	27	3
	Total	**216**	**3**
District 7	Edgecombe	163	4
	Nash	261	3
	Wilson	179	3
	Total	**603**	**3**
District 8	Greene	67	4
	Lenoir	157	4
	Wayne	699	8
	Total	**923**	**6**
District 9,9B	Franklin	317	6
	Granville	259	5
	Person	197	6
	Vance	298	9
	Warren	72	5
	Total	**1,143**	**6**
District 10	Wake	1,415	2
	Total	**1,415**	**2**
District 11	Harnett	105	1
	Johnston	436	2
	Lee	83	2
	Total	**624**	**2**
District 12	Cumberland	343	1
	Total	**343**	**1**
District 13	Bladen	109	**5**
	Brunswick	458	4
	Columbus	146	**4**
	Total	**713**	**4**
District 14	Durham	433	2
	Total	**433**	**2**
District 15A	Alamance	488	3
	Total	**488**	**3**
District 15B	Chatham	172	3
	Orange	455	4
	Total	**627**	**3**
District 16A	Anson	72	4
	Richmond	70	2
	Scotland	57	**2**
	Total	**199**	**3**
District 16B	Robeson	175	2
	Total	**175**	**2**
District 17A	Caswell	75	4
	Rockingham	364	5
	Total	**439**	**5**
District 17B	Stokes	155	4
	Surry	226	4
	Total	**381**	**4**
District 18	Guilford	806	2
	Total	**806**	**2**
District 19A	Cabarrus	383	2
	Total	**383**	**2**

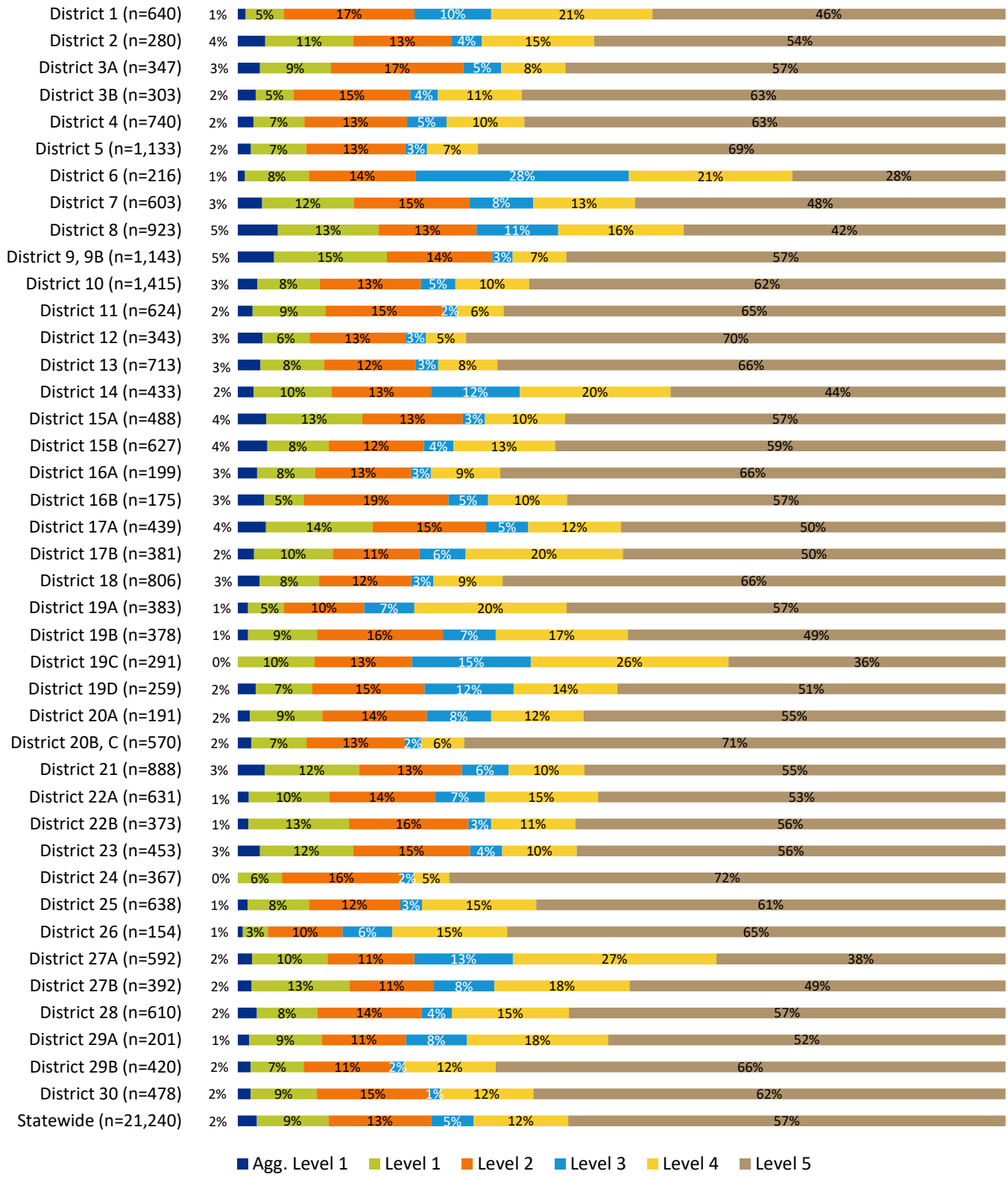
continued

Appendix C, Table 1: Convictions by Judicial District and County

Judicial District and County		DWI Convictions	Convictions per 1,000 Adults (16+)
District 19B	Randolph	378	3
	Total	**378**	**3**
District 19C	Rowan	291	2
	Total	**291**	**2**
District 19D	Hoke	82	2
	Moore	177	2
	Total	**259**	**2**
District 20A	Montgomery	55	3
	Stanly	136	3
	Total	**191**	**3**
District 20B,C	Union	570	3
	Total	**570**	**3**
District 21	Forsyth	888	3
	Total	**888**	**3**
District 22A	Alexander	98	3
	Iredell	533	3
	Total	**631**	**3**
District 22B	Davidson	285	2
	Davie	88	3
	Total	**373**	**2**
District 23	Alleghany	26	3
	Ashe	104	5
	Wilkes	192	4
	Yadkin	131	4
	Total	**453**	**4**
District 24	Avery	52	3
	Madison	48	3
	Mitchell	44	4
	Watauga	182	4
	Yancey	41	3
	Total	**367**	**3**
District 25	Burke	204	3
	Caldwell	127	2
	Catawba	307	2
	Total	**638**	**2**
District 26	Mecklenburg	154	<1
	Total	**154**	**<1**
District 27A	Gaston	592	3
	Total	**592**	**3**
District 27B	Cleveland	207	3
	Lincoln	185	3
	Total	**392**	**3**
District 28	Buncombe	610	3
	Total	**610**	**3**
District 29A	McDowell	111	3
	Rutherford	90	2
	Total	**201**	**2**
District 29B	Henderson	267	3
	Polk	60	4
	Transylvania	93	3
	Total	**420**	**3**
District 30	Cherokee	45	2
	Clay	27	3
	Graham	16	2
	Haywood	124	2
	Jackson	98	3
	Macon	110	3
	Swain	58	5
	Total	**478**	**3**
	State Total	***21,240***	***2***

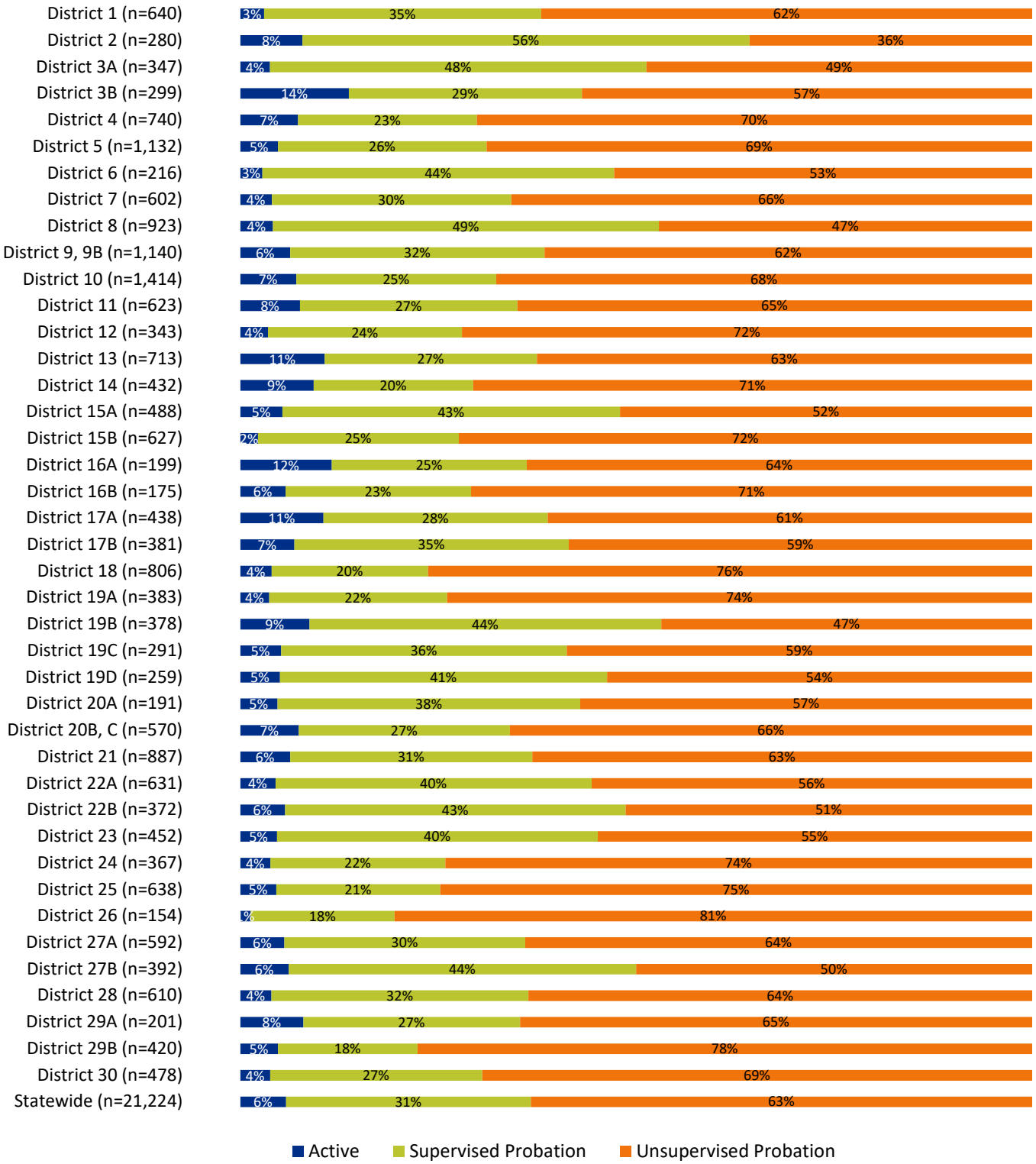
SOURCES: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data and NC Office of State Management and Budget, 2021 Population Projections from https://demography.osbm.nc.gov/explore/.

Appendix C, Figure 1: Convictions by Judicial District and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Appendix C, Figure 2: Convictions by Judicial District and Type of Punishment



Note: Of the 21,240 DWI convictions in FY 2021, 16 convictions with missing values for type of sentence imposed were excluded from this figure.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

APPENDIX D
ADDITIONAL CONVICTION DATA BY PUNISHMENT LEVEL

Appendix D, Table 1: Offender Characteristics and Punishment Imposed by Punishment Level
N=21,240

	Agg. Level 1 n=524	Level 1 n=1,979	Level 2 n=2,855	Level 3 n=1,161	Level 4 n=2,619	Level 5 n=12,102
Offender Characteristics						
Gender						
Male	83%	72%	79%	83%	78%	72%
Female	17%	28%	21%	17%	22%	28%
Race						
White	42%	49%	58%	50%	54%	59%
Black	47%	37%	31%	38%	30%	24%
Hispanic	8%	10%	8%	10%	12%	12%
Other	3%	%	3%	2%	4%	5%
Age at Offense						
Less than 21 Years	1%	3%	2%	3%	5%	6%
21-30 Years	30%	32%	29%	24%	29%	38%
31-40 Years	33%	32%	29%	28%	27%	24%
41-50 Years	18%	18%	20%	23%	19%	16%
Over 50 Years	18%	15%	20%	22%	20%	16%
Average Age	38	37	39	40	38	36
Median Age	35	35	37	39	36	32
Blood Alcohol Concentration						
Less than .08	2%	2%	2%	3%	2%	2%
.08 to .14	45%	48%	44%	23%	25%	60%
.15 or More	53%	50%	54%	74%	73%	38%
Punishment Imposed						
Method of Disposition						
Guilty Plea	93%	92%	89%	91%	91%	88%
Bench Trial	7%	8%	11%	8%	9%	12%
Jury Trial	0%	<1%	<1%	<1%	<1%	<1%
Sentence Type						
Active Sentence	31%	11%	7%	11%	6%	3%
Supervised Probation	68%	85%	85%	50%	25%	7%
Unsupervised Probation	1%	4%	8%	39%	69%	90%
Sentence Length/Location						
Active						
Average Length (Months)	20	11	6	4	2	1
Sentenced at Stat. Minimum	38%	8%	6%	5%	5%	3%
Sentenced at Stat. Maximum	16%	17%	37%	44%	28%	33%
Sentence Other than Stat. Min/Max	46%	75%	57%	51%	67%	64%
Suspended						
Average Length (Months)	29	20	11	5	3	2
Sentenced at Stat. Minimum	15%	2%	1%	1%	1%	1%
Sentenced at Stat. Maximum	62%	67%	81%	68%	60%	71%
Sentence Other than Stat. Min/Max	22%	31%	18%	31%	39%	28%

Note: Convictions with missing data were excluded.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Appendix D, Table 2: Conditions of Probation for Probation Sentences by Punishment Level
N=19,997

	Agg. Level 1 n=359	Level 1 n=1,758	Level 2 n=2,664	Level 3 n=1,035	Level 4 n=2,466	Level 5 n=11,715
Supervised Probation	99%	96%	91%	56%	26%	7%
Length						
1 Year or Less	6%	21%	37%	36%	66%	75%
13-18 Months	12%	25%	41%	45%	23%	16%
19-24 Months	38%	46%	19%	17%	10%	8%
More than 2 Years	44%	8%	3%	2%	1%	1%
Average Length (Months)	28	21	17	17	15	14
Unsupervised Probation	1%	4%	9%	44%	74%	93%
Length						
1 Year or Less	0%	44%	57%	48%	76%	89%
13-18 Months	67%	30%	33%	36%	15%	7%
19-24 Months	33%	22%	9%	11%	8%	3%
More than 2 Years	0%	4%	1%	5%	1%	1%
Average Length (Months)	20	18	15	18	14	13
Mandatory Conditions						
Special Probation	97%	95%	88%	20%	10%	6%
Community Service	6%	8%	9%	58%	66%	65%
Both	6%	7%	7%	1%	1%	<1%
Fines						
Convictions with Fine Imposed	67%	79%	85%	85%	88%	85%
Fine Amount						
Less than $100	2%	3%	3%	3%	5%	9%
$100 to $199	11%	14%	18%	22%	52%	82%
$200 to $299	10%	16%	21%	33%	32%	8%
$300 to $499	16%	26%	32%	25%	9%	1%
$500 or More	61%	41%	26%	17%	2%	<1%
Average Fine Imposed	$739	$486	$360	$282	$175	$110
Median Fine Imposed	$500	$400	$300	$200	$150	$100

Note: Convictions with missing data were excluded. The average length of probation for unsupervised probation in Aggravated Level 1 was based on fewer than 10 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2021 DWI Statistical Report Data

Disclaimer for AOC Data

These data are from the Administrative Office of the Courts' (AOC) Automated Criminal Infraction System (ACIS). These data are a snapshot in time and are subject to change from such factors as the sealing or expungement of records, corrections made to data entry, motions, appeals, or other legal actions that may change the nature, status or outcome of a case, and other factors. Data maintained in ACIS are intended for management of caseloads, basic record-keeping, and general statistics. These data reveal nothing about evidence presented or its weight or credibility, the reasons or validity of factual or legal arguments or conclusions presented or made, or any other of the myriad circumstances relevant to the results of any particular case. Therefore, the data should not be used or represented to reflect on the merits of the facts or the outcomes of cases. For that and many analytic purposes, it would be inappropriate and misleading to use these data as a substitute for a review of actual case files and/or transcripts. No analysis of or conclusions drawn from these data may be attributed to the AOC. Neither the analysis nor any conclusions in this report are accepted as accurate or endorsed by the AOC.

PLEADINGS IN DISTRICT COURT

Jim Grant
Office of the Appellate Defender

1

What are they?

- In District Court, the initial process functions as the State's pleading:
  - Arrest Warrant
  - Criminal Summons
  - Magistrate's Order
  - Citation
- Or the ADA can supersede with a "Statement of Charges":
  - Must be signed by the ADA who files it. N.C.G.S. 15A-922(a)
  - Entitles Defense to 3 days notice (or in practice longer)

2

General Requirements

- Can be found at N.C.G.S. 15A-924
  - Defendant's Name
  - Separate Count for Each Offense
  - County
  - Date/Time of Offense
  - Citation to Underlying Statute/Ordinance
  - **A Plain and Concise Factual Statement for Each Element**

3

N.C.G.S. 15A-924(a)(5)

- "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 and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation."
- What does that mean? The State must, at minimum, allege ALL of the elements of the offense.

4

Roadmap

- Pleading Issues
  - Facial Defects
  - Variances
- Practice Points
  - Motions
  - Amendments
  - Appeals to Superior Court
  - Trouble on the Horizon?
- Questions

5

Facial Defects

- The pleading fails *on its face*
  - Pleading must charge offense properly to give the Court jurisdiction
- Two sets of requirements
  - Statute: N.C.G.S. 15- 924(a)
  - Offense Specific: Caselaw (see SOG Bulletin)
- Examples of common defects…

6

Real Case

Client is charged with "disorderly conduct" under N.C.G.S. § 14-288.4(a)(2), which requires the State to prove beyond a reasonable doubt that the defendant:

(1) intentionally;

(2) caused a public disturbance;

(3) by making or using any utterance, gesture, display, *or* abusive language

(4) That was intended to, and plainly likely to, provoke violent retaliation and cause a breach of the peace.

7

Real Case

The warrant alleged that client "unlawfully and willfully":

"DID CAUSE DISRUPTION IN NATIONWIDE BUILDING AND PROBATION OFFICE, BY CAUSING A DISTURBANCE THAT WAS DISRUPTING CLIENTS AND MANAGEMENT IN THE INSURANCE BUILDING."

8

Result?

Conviction vacated, no jurisdiction:

"Regarding the trial court's jurisdiction, defendant first contends the trial court lacked jurisdiction because the warrant for his arrest failed to sufficiently charge him with misdemeanor disorderly conduct in a public building. We agree."

State v. Combs, 2018 N.C. App. LEXIS 975 (unpublished).

9

Caselaw Requirements

Missing statutory elements are not the only ways the allegations can be facially defective.

Examples….

10

Defect in RDO Pleading

- Citation for RDO reads, "To wit did resist and delay officer W. E. Preast a state patrolman performing the duties of his office by striking said officer with his hands and fist.
- Seems ok?

(a) If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge an official duty, the person is guilty of a Class 2 misdemeanor.

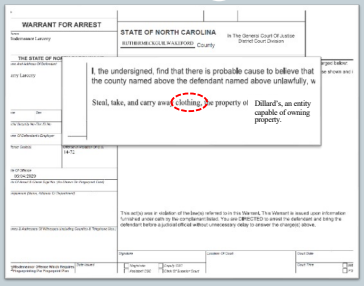
11

Defect in RDO Pleading

"To charge a violation of G.S. 14-223, the warrant or bill must indicate the specific official duty the officer was discharging or attempting to discharge."
State v. Wells, 59 N.C. App. 682 (1982) (citing *State v. Smith*, 262 N.C. 472 (1964)).

12

Find the Defect


WARRANT FOR ARREST

STATE OF NORTH CAROLINA

I, the undersigned, find that there is probable cause to believe that the county named above the defendant named above unlawfully, w

Steal, take, and carry away clothing, the property of Dillard's, an entity capable of owning property.

13

A Note on Juvenile Cases

Same rules?

...pretty much, for now.

14

Examples of Defects in Juvenile Petitions

Petition filed alleging that the juvenile was delinquent in that he "did unlawfully, willfully, and feloniously possess with intent to deliver 1 pill of [sic] 1 orange pill believed/told to be an Adderall, which is included in Schedule II of the North Carolina Controlled Substances Act, in violation of G.S. 90-95(a)(1)." *In re J.S.G.*, 2021-NCCOA-40.

15

Exception: Citations

- Requirement of alleging every element relaxed for citations
  - Needs only allege "the crime charged." *State v. Jones*, 371 N.C. 548, 819 S.E.2d 340 (2018)
  - "Fill In the Blank" Rule?
- Objection
  - May object to trial by citation pursuant to N.C.G.S. 15A-922(c)
  - Doing this requires the State to file a Statement of Charges, which entitles you to at least that 3-day continuance if you need or want it.

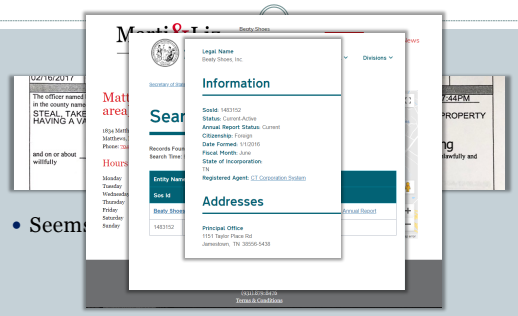
16

Variance

- Variance occurs when the evidence introduced during trial is different than the allegation in the pleading.
- Non-Jurisdictional – must be preserved
- Does not bar further prosecution….for a different offense.

17

Defect….or variance?



- Seems

18

In Practice

- How and when to attack the pleadings
- What if the ADA catches the problem?

19

Motion to Dismiss

- Fatal Variance
  - By nature of the motion, must occur after the State rests
  - If not made, waived
  - Must renew if you put on evidence
  - Although the law is getting better….say "variance"
- Fatal Defect
  - Jurisdictional – may be made at any time (unless citation – object to trial on citation).
  - Arraignment? After verdict?

20

Amendments and MSOCs

- Am
  - N "when the
    an nse
    ch
  - El
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- Mis -922(d)
  - Pr ent.
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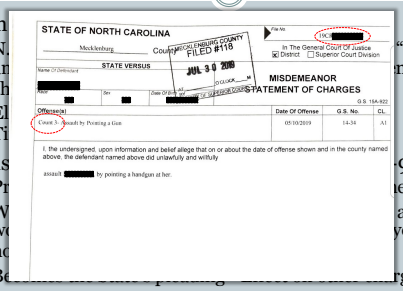
STATE OF NORTH CAROLINA

Mecklenburg County

FILED #116

JUL 3 0 2019

STATE VERSUS

MISDEMEANOR STATEMENT OF CHARGES

G.S. 15A-922

Offense(s)	Date Of Offense	G.S. No.	Cl.
Count 1: Assault by Pointing a Gun	05/10/2019	14-34	A1

I, the undersigned, upon information and belief allege that on or about the date of offense shown and in the county named above, the defendant named above did unlawfully and wilfully

assault [redacted] by pointing a handgun at her.

21

Appeals for Trial *De Novo*

- Can the State fix a pleading after you appeal it to Superior Court?
  - No. Superior Court jurisdiction is "derivative of" the charge that is pled and convicted in District Court. N.C.G.S. 7A-271(b)
  - Response – Motion to Dismiss in Superior Court for lack of jurisdiction.
  - One other Superior Court wrinkle – *State v. Armstrong*, 248 N.C. App. 265 (2016)

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Trouble on the Horizon?

Members of our Supreme Court have signaled in dissents that NC should do away with pleading defects as jurisdictional problems....

Two merits cases pending where Court granted PDR and State has advanced that argument:

- *State v. Stewart,* No. 23PA22
- *In re J.U.*, No. 263PA21

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Useful Materials

- "The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment" Administration of Justice Bulletin, Prof. Jessica Smith (2008) (http://sogpubs.unc.edu/electronicversions/pdfs/aojb0803.pdf)
- Quick Reference Checklist (AAD Emily Davis and APD Belal Elrahal)
- CRIMES
- An OAD Consult! – 919.354.7210

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Questions?

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OAD OFFICE OF THE APPELLATE DEFENDER

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CRIMINAL PLEADINGS IN DISTRICT COURT

WHAT IS IT: The "charging instrument" or document the State uses to charge D with a crime.

EXAMPLES:

- **Citation**-Issued by officer who must have probable cause that D committed a misdemeanor or infraction. 15A-302(b). D can object to being tried on a citation, 15A-922(c), but State can then file statement of charges. If magistrate signs, it becomes a magistrate's order.
- **Magistrate's Order**-Issued by magistrate when a person has been arrested without a warrant and magistrate finds probable cause. 15A-511(c).
- **Criminal Summons**-Issued by a judicial official on finding of probable cause. Directs D to appear in court; D is not taken into custody. 15A-301(b).
- **Arrest Warrant**-Issued by judicial official on finding of probable cause. Directs officers to arrest D. 15A-304(b).
- **Statement of Charges**-Prepared by prosecutor to charge a misdemeanor. Supersedes all previous pleadings. 15A-922(a).
    - Before arraignment, prosecutor may file to amend charge or add new charges. 15A-922(d). D entitled to continuance unless no material change. 15A-922(b)(2).
    - After arraignment, prosecutor may file only if does not change nature of offense.15A-922(e). D entitled to continuance unless no material change. 15A-922(b)(2).

BASIC REQUIREMENTS FOR CONTENTS: 15A-924(a).

- Name or other identification of D;
- Separate count for each offense charged;
    - Move to require State to elect where there is duplicity. 15A-924(b).
- County where offense took place;
- Date or time period when offense took place.
    - Grounds to dismiss where time is of the essence, ie, D has alibi. 307 NC 645.
- Plain and concise factual statement supporting *every* element of offense charged;
- Reference to the statute or ordinance that D allegedly violated.
    - Error or omission is not grounds for dismissal. 15A-924(a)(6).
    - *But see* "Specific Offenses" below regarding ordinance violations.

  [Note: 15A-924(a)(7) applies to felonies only. State does not have to allege in pleading the aggravating factors it intends to use in DWI sentencing.]

*Court MUST dismiss for failure to meet requirements, unless amendment allowed. 15A-924(e).

PROBLEMS WITH PLEADING:

- **Facially Defective**-Fails to charge offense properly.
    - Fair Notice-Vague language violates due process right to be informed of accusation D must defend against.
    - Jurisdiction-Certain defects deprive court of jurisdiction to hear matter.
        - Failure to include element. 291 NC 586
        - Failure to name victim. 338 NC 315.
    - Jeopardy Protections-Would not enable D to raise double jeopardy bar to subsequent prosecution for same offense. 312 NC 432.
- **Fatal Variance**-State's proof at trial is different from what is alleged in pleading. 297 NC 100.
- *Remedy is dismissal. 15A-952.

WHEN TO MOVE TO DISMISS:

- For facial defect: typically, pre-trial. 15A-952(a).
    - Wait until arraignment. Then, State can NOT correct by filing a statement of charges where it would change the nature of the offense. 15A-922(e).
    - Motion concerning jurisdiction or failure of pleading to charge offense can be made at any time. 15A-952(d). But best practice is to make motion right after arraignment.
- For fatal variance: at close of State's evidence and at close of all evidence.

SPECIFIC OFFENSES:

- **Larceny**
    - Pleading must correctly name owner of stolen property. 289 NC 578; 671 SE 2d 357.
    - Fatal variance if person named in pleading is not owner. 282 NC 249.
        - But sufficient if person named was in lawful possession. 35 NCA 64; 673 SE 2d 718.
    - Grounds for dismissal if pleading fails to identify legal entity capable of owning property. 162 NCA 350 (pleading fatally defective where it named "Faith Temple Church of God" instead of "Faith Temple Church-High Point, Inc.")
- **Break and Enter**-Must identify building with reasonable particularity. 267 NC 755.
- **Possess Drug Paraphernalia**-Must describe item alleged to be paraphernalia. 162 NCA 268 (error to allow amendment from "can" to "brown paper container").
- **Resist, Delay, Obstruct**-Must identify officer by name, indicate duty being discharged and how D resisted/delayed/obstructed. 262 NC 472.
- **Assaults**-Must identify victim correctly; error to allow amendment to change.
    - Fatal variance where pleading alleged victim was "Gabriel Henandez Gervacio" and evidence revealed name was "Gabriel Gonzalez." 349 NC 382.
- **Shoplifting/Possess Marijuana/Worthless Check**-Pleading must allege facts showing the offense is a subsequent crime in order to subject the accused to the higher penalty. 237 NC 427; 21 NCA 70.
- **Ordinance Violations**-Per 15A-924(a)(6), failure to cite ordinance is not grounds for dismissal. But see 160A-79 (requirements for pleading city ordinance); 153A-50 (same for county ordinances); 283 NC 705 (dismissal where State failed to plead and prove ordinance where no section number or caption); 33 NCA 195 (dismissal where State failed to allege caption or contents).

AMENDMENT:

- State can NOT amend if it changes the nature of the offense. 15A-922(f).
    - But State can prepare statement of charges prior to arraignment. 15A-922(d).
    - State can NOT amend to convict of a greater offense than the one originally charged or to add aggravating factors. 154 NCA 332.
- State must amend in writing. 10 NCA 443.

PRACTICE TIPS:

- √ Examine pleadings closely for defects on face such as missing elements, failure to identify D or victim, or vague language that D can not defend against.
- √ Compare allegations in pleading to State's proof at trial to make sure they match up.
- √ If the State tries to amend, object (after arraignment) where the nature of the offense would be changed.

UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NUMBER 2008/03 | JULY 08

The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment

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Contents

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I. Introduction

To pass constitutional muster, an indictment "must allege lucidly and accurately all the essential elements of the [crime] . . . charged."[1] This requirement ensures that the indictment will (1) identify the offense charged; (2) protect the accused from being twice put in jeopardy for the same offense; (3) enable the accused to prepare for trial; and (4) enable the court, on conviction or plea of *nolo contendere* or guilty, to pronounce sentence according to the rights of the case.[2] If the indictment satisfies this requirement, it will not be quashed for "informality or refinement."[3] However, if it fails to meet this requirement, it suffers from a fatal defect and cannot support a conviction.

As a general rule, an indictment for a statutory offense is sufficient if it charges the offense in the words of the statute.[4] However, an indictment charging a statutory offense need not exactly track the statutory language, provided that it alleges the essential elements of the crime charged.[5] If the words of the statute do not unambiguously set out all of the elements of the offense, the indictment must supplement the statutory language.[6] Statutory short form indictments, such as for murder, rape, and sex offense, are excepted from the general rule that an indictment must state each element of the offense charged.[7]

Although G.S. 15A-923(e) states that a bill of indictment may not be amended, the term "amendment" has been construed to mean any change in the indictment that "substantially alter[s] the charge set forth in the indictment."[8] Thus, amendments that do not substantially alter the charge are permissible.

Even an indictment that is sufficient on its face may be challenged. Specifically, an indictment may fail when there is a fatal variance between its allegation and the evidence introduced at trial. In order for a variance to be fatal, it must pertain to an essential element of the crime charged.[9] If the variance pertains to an allegation that is merely surplusage, it is not fatal.[10]

Fatal defects in indictments are jurisdictional, and may be raised at any time.[11] However, a dismissal based on a fatal variance between the indictment and the proof at trial or based on a fatal defect does not create a double jeopardy bar to a subsequent prosecution.[12]

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1. State v. Hunt, 357 N.C. 257, 267 (2003) (quotation omitted). *See generally* G.S. 15A-924 (contents of pleadings).

2. *See Hunt*, 357 N.C. at 267; State v. Hines, 166 N.C. App. 202, 206-07 (2004).

3. G.S. 15-153.

4. *See, e.g.,* State v. Wade, 161 N.C. App. 686, 692 (2003).

5. *See, e.g.,* State v. Hunter, 299 N.C. 29, 40-42 (1980) (although kidnapping indictment did not track the language of the statute completely, it did charge every necessary element).

6. *See* State v. Greer, 238 N.C. 325, 328-31 (1953); State v. Partlow, 272 N.C. 60, 65-66 (1967).

7. *See Hunt*, 357 N.C. at 272-73; *see also infra* pp. 16-17 (discussing short form for murder in more detail) and pp. 29-32 (discussing short forms for rape and sex offense in more detail).

Also, G.S. 20-138.1(c) allows a short form pleading for impaired driving. G.S. 20-138.2(c) does the same for impaired driving in a commercial vehicle.

8. *See* State v. Price, 310 N.C. 596, 598 (1984) (quotation omitted).

9. *See, e.g.,* State v. Langley, 173 N.C. App. 194, 197 (2005).

10. *See infra* pp. 4-53 (citing many cases distinguishing between fatal and non-fatal defects).

11. *See, e.g.,* State v. Snyder, 343 N.C. 61, 65 (1996); State v. Sturdivant, 304 N.C. 293, 308 (1981).

12. *See* State v. Stinson, 263 N.C. 283, 286-92 (1965) (prior indictment suffered from fatal variance); State v. Whitley, 264 N.C. 742, 745 (1965) (prior indictment was fatally defective); *see also* State v. Abraham, 338 N.C. 315, 339-41 (1994) (noting that proper procedure when faced with a fatal variance is to dismiss the

The sections below explore these rules. For a discussion of the use of the conjunctive term "and" and the disjunctive term "or" in criminal pleadings, see Robert Farb, The "Or" Issue in Criminal Pleadings, Jury Instructions, and Verdicts; Unanimity of Jury Verdict (Faculty Paper, July 1, 2008) (available on-line at www.iogcriminal.unc.edu/verdict.pdf).

II. General Matters

A. Date or Time of Offense

G.S. 15A-924(a)(4) provides that a criminal pleading must contain "[a] statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." Also, G.S. 15-144 (essentials of bill for homicide), G.S. 15-144.1 (essentials of bill for rape), and G.S. 15-144.2 (essentials of bill for sex offense) require that the date of the offense be alleged.[13] However, a judgment will not be reversed when the indictment fails to allege or incorrectly alleges a date or time, if time is not of the essence of the offense and the error or omission did not mislead the defendant.[14] Likewise, when time is not of the essence of the offense charged, an amendment as to date does not substantially alter the charge. Time becomes of the essence when an omission or error regarding the date deprives a defendant of an opportunity to adequately present his or her defense,[15] such as when the defendant relies on an alibi defense[16] or when a statute of limitations is involved.[17] The cases summarized below apply these rules.

1. Homicide

State v. Price, 310 N.C. 596, 598-600 (1984) (no error to allow the State to amend date of murder from February 5, 1983—the date the victim died—to December 17, 1982—the date the victim was shot).

State v. Wissink, 172 N.C. App. 829, 835-36 (2005) (trial court did not err by allowing the State to amend a murder indictment on the morning of trial; the original indictment alleged that the murder occurred on or about June 26, 2000, and the evidence showed that the murder actually occurred on June 27, 2000), *rev'd in part on other grounds,* 361 N.C. 418 (2007).

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charge and grant the State leave to secure a proper bill of indictment); State v. Blakney, 156 N.C. App. 671 (2003) (noting that although the indictment was fatally defective, the State could re-indict).

13. The short forms for impaired driving also require an allegation regarding the time of the offense. *See* G.S. 20-138.1(c) (impaired driving); G.S. 20-138.2(c) (impaired driving in a commercial vehicle).

14. *See* G.S. 15-155; G.S. 15A-924(a)(4); *Price,* 310 N.C. at 599.

15. *Price*, 310 N.C. at 599.

16. *See* State v. Stewart, 353 N.C. 516, 518 (2001). *But see* State v. Custis, 162 N.C. App. 715 (2004) (explaining that time variances do not always prejudice a defendant, even when an alibi is involved; such is the case when the allegations and proof substantially correspond, the alibi evidence does not relate to either the date charged or that shown by the evidence, or when the defendant presents an alibi defense for both dates).

17. *See* State v. Davis, 282 N.C. 107, 114 (1972) (variance of one day "is not material where no statute of limitations is involved").

2. Burglary

State v. Davis, 282 N.C. 107, 114 (1972) (no fatal variance when indictment alleged that offense occurred on November 13 but evidence showed it took place on November 14 of the same year; "variance between allegation and proof as to time is not material where no statute of limitations is involved") (quotation omitted).

State v. Mandina, 91 N.C. App. 686, 690 (1988) ("[a]lthough nighttime is clearly 'of the essence' of the crime of burglary, an indictment for burglary is sufficient if it avers that the crime was committed in the nighttime"; failure to allege the hour the crime was committed or the specific year does not render the indictment defective).

State v. Campbell, 133 N.C. App. 531, 535-36 (1999) (no error to allow the State to amend burglary indictment to change date of offense from June 2, 1997 to May 27, 1997; time is not an essential element of the crime; defendant was neither misled nor surprised by the change—in fact, defendant was aware that the date on the indictment was incorrect).

3. Sexual Assault

In a sexual assault case involving a child, leniency is allowed regarding the child's memory of specific dates of the offense.[18] The rule of leniency is not limited to very young children, and has been applied to older children as well.[19] Unless the defendant demonstrates that he or she was deprived of his or her defense because of the lack of specificity, this policy of leniency governs.[20] The following cases illustrate these rules.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Stewart, 353 N.C. 516, 517-19 (2001) (indictment alleged that statutory sex offense occurred between July 1, 1991 and July 31, 1991; the State's evidence encompassed a 2 1/2 year period but did not include an act within the time period alleged in the indictment; defendant relied on the dates in the indictment to prepare an alibi defense and presented evidence of his whereabouts for each of those days; noting that a rule of leniency generally applies in child sexual abuse cases but holding that the "dramatic variance" between the dates resulted in a fatal variance).

State v. Whittemore, 255 N.C. 583, 592 (1961) (time was of the essence in statutory rape case in which indictment alleged that offenses occurred on a specific date and in its case in chief, the State's witnesses confirmed that date; after defendant presented an alibi defense, the State offered rebuttal evidence showing that the crime occurred on a different date; the rule that time is generally not an essential ingredient of the crime charged cannot be used to "ensnare" a defendant).

State v. Custis, 162 N.C. App 715 (2004) (fatal variance existed between dates alleged in sex offense and indecent liberties indictment and evidence introduced at trial; the indictment alleged that the defendant committed the offenses on or about June 15, 2001; at trial there was no evidence of sexual acts or indecent liberties occurring on or about that date; evidence at trial suggested sexual encounters over a period of years

18. *See, e.g.,* State v. Stewart, 353 N.C. 516, 518 (2001).

19. *See, e.g.,* State v. Ware, __ N.C. App. __, 656 S.E.2d 662 (2008) (applying the rule to a case involving a 15-year-old victim).

20. *See Stewart,* 353 N.C. at 518.

some time prior to the date listed in the indictment; defendant relied on the date alleged in the indictment to build an alibi defense for the weekend of June 15).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Sills, 311 N.C. 370, 375-77 (1984) (variance between actual date of rape, March 14, 1983, and the date alleged in the indictment as "on or about March 15, 1983" was not fatal; defendant was not deprived of his ability to present his alibi defense; defendant had notice that the offense date could not be pinpointed due to the victim's youth).

State v. Baxley, 223 N.C. 210, 211-12 (1943) (although indictment charged that offense was committed in April, 1942, victim testified at trial that the acts took place about September, 1942, in December, 1941, and in April, 1942; time is not of the essence of the offense of rape of a female under the age of sixteen).

State v. Ware, __ N.C. App. __, 656 S.E.2d 662 (2008) (in a case involving statutory rape and incest, the court applied the rule of leniency with respect to a 15-year-old victim; the court noted that on all of the dates alleged, the victim would have been 15 years old).

State v. Wallace, 179 N.C. App. 710, 716-18 (2006) (trial judge did not err by allowing a mid-trial amendment of an indictment alleging sex offenses against a victim who was 13, 14, or 15 years old; original dates alleged were June through August 2000, June through August 2002, and November 2001; amendment, which replaced the date of November 2001 with June through August 2001, did not substantially alter the charges against defendant when all of the alleged acts occurred while the victim was under the age of fifteen; although the defendant presented evidence that the victim was in another state during November 2001, no other alibi or reverse alibi evidence was presented).

State v. Whitman, 179 N.C. App. 657, 665 (2006) (trial court did not err by allowing, on the first day of trial, the State to amend the dates specified in the indictment for statutory rape and statutory sexual offense of a 13, 14, or 15-year-old from "January 1998 through June 1998" to "July 1998 through December 1998"; because the victim would have been fifteen under the original dates and under the amended dates, time was not of the essence to the State's case; the amendment did not impair the defendant's ability to present an alibi defense because the incest indictment, which was not amended, alleged dates from "January 1998 through June 1999," a time span including the entire 1998 calendar year, and thus the defendant was on notice that if he wished to present an alibi defense, he was going to have to address all of 1998).

State v. Locklear, 172 N.C. App. 249, 255 (2005) (no fatal variance in incest case when the defendant did not assert a defense of alibi).

State v. Poston, 162 N.C. App. 642 (2004) (no fatal variance between first-degree sexual offense indictment alleging that acts took place between June 1, 1994, and July 31, 1994 and evidence at trial suggesting that the incident occurred when the victim "was seven" or "[a]round seven" and that victim's seventh birthday was on October 8, 1994; no fatal variance between first-degree sexual offense indictment alleging that acts took place between October 8, 1997 and October 16, 1997, and evidence at trial suggesting that it occurred when victim was "[a]round 10" and maybe age eleven, while she was living at a specified location and that victim turned ten on October 8, 1997 and lived at the location from 1997 until August 1999).

State v. McGriff, 151 N.C. App. 631, 634-38 (2002) (no error to allow amendment of the dates of offense in statutory rape and indecent liberties indictment; indictment alleged that the offenses occurred on or between January 1, 1999 though January 27, 1999; when the evidence introduced at trial showed that at least one of the offenses occurred between December 1, 1998 and December 25, 1998, the trial court allowed the State to amend the indictment to conform to the evidence; rejecting the defendant's argument that the change in dates prejudiced his ability to present an alibi defense).

State v. Crockett, 138 N.C. App. 109, 112-13 (2000) (indictments charging statutory rape during the period from November 22, 1995 to February 19, 1996, were not impermissibly vague; evidence showed that the act occurred in January 1996 when the victim was fourteen years old; "the exact date that defendant had sex with [the victim] is immaterial").

State v. Campbell, 133 N.C. App. 531, 535-36 (1999) (no error to allow the State to amend a statutory rape indictment to change date of offense from June 2, 1997 to May 27, 1997; time is not an essential element of the crime; the defendant was neither misled nor surprised by the change).

State v. Hatfield, 128 N.C. App. 294, 299 (1998) (first degree sexual offense and indecent liberties indictments were not impermissibly vague, although they alleged that the acts occurred "on or about dates in August 1992" and required defendant to explain where he was during the entire summer in order to present an alibi defense).

State v. McKinney, 110 N.C. App. 365, 370-71 (1993) (first-degree rape indictments alleging the date of the offenses against child victims as "July, 1985 thru July, 1987" were not fatally defective; time is not an element of the crime and is not of the essence of the crime).

State v. Norris, 101 N.C. App. 144, 150-51 (1990) (no fatal variance between indictment alleging that rape of child occurred in "June 1986 or July 1986" and child's testimony that rape occurred in 1984 or 1985; child's mother fixed the date as June or July, 1986, and the date is not an essential element of the crime).

State v. Cameron, 83 N.C. App. 69, 71-74 (1986) (no error in allowing the State to amend date of offense in an incest indictment involving a child victim from "on or about 25 May 1985," to "on or about or between May 18th, 1985, through May 26th, 1985"; change did not substantially alter the charge; no unfair surprise because defendant knew that the conduct at issue allegedly occurred during a weekend when an identified family friend was visiting).

4. Failure to Register as a Sex Offender

State v. Harrison, 165 N.C. App. 332 (2004) (an indictment charging failure to register as a sex offender is not defective for failing to allege the specific dates that the defendant changed residences).

5. Larceny

State v. Osborne, 149 N.C. App. 235, 245-46 (no fatal variance between the date of the offense alleged in the larceny indictment and the evidence offered at trial; indictment alleged date of offense as "on or about May 3, 1999," the date the item was found in the defendant's possession; defendant argued that the evidence did not establish that the

item was stolen on this date; variance did not deprive the defendant of an opportunity to present a defense when defendant did not rely on an alibi), *aff'd* 356 N.C. 424 (2002).

6. False Pretenses

State v. May, 159 N.C. App. 159, 163 (2003) (no error by permitting amendment of the date in a false pretenses indictment to accurately reflect the date of the offense rather than the date of arrest; time is not an essential element of the crime).

State v. Simpson, 159 N.C. App. 435, 438 (2003) (trial court did not err in granting the State's motion to amend the false pretenses indictment to change the date of the offense), *aff'd,* 357 N.C. 652 (2003).

State v. Tesenair, 35 N.C. App. 531, 533-34 (1978) (no error in granting the State's motion to amend date of offense in a false pretenses indictment from November 18, 1977, a date subsequent to the trial, to November 18, 1976; time was not of the essence of the offense charged and defendant was "completely aware" of the nature of the charge and the dates on which the transactions giving rise to the charge occurred).

7. Possession of a Firearm by a Felon

State v. Coltrane, __ N.C. App. __, 656 S.E.2d 322 (2008) (trial court did not err in allowing the State to amend an indictment that alleged the offense date as "on or about the 9th day of December, 2004" and change it to April 25, 2005; the date of the offense is not an essential element of this crime).

8. Impaired Driving

For cases pertaining to date issues with respect to prior offenses alleged for habitual impaired driving, see *infra* p. 50.

State v. Watson, 122 N.C. App. 596, 602 (1996) (no fatal variance caused by Trooper's mistaken statement at trial that events occurred on June 25 when they actually occurred on June 5; defendant himself testified that the events occurred on June 5; "this mistake on the part of the officer was just that and not a fatal variance").

9. Conspiracy

State v. Christopher, 307 N.C. 645, 648-50 (1983) (fatal variance existed and resulted in "trial by ambush"; conspiring to commit larceny indictment alleged that the offense occurred "on or about" December 12, 1980; defendant prepared an alibi defense; the State's trial evidence indicated the crime might have occurred over a three month period from October, 1980 to January, 1981).

State v. Kamtsiklis, 94 N.C. App. 250, 254-55 (1989) (no error in allowing amendment of conspiracy indictments to change dates of offense from "on or about May 6, 1987 through May 12, 1987" to "April 19, 1987 until May 12, 1987"; "[o]rdinarily, the precise dates of a conspiracy are not essential to the indictment because the crime is complete upon the meeting of the minds of the confederates").

10. Habitual and Violent Habitual Felon

In habitual felon and violent habitual felon cases, date issues arise with respect to the felony supporting the habitual felon indictment ("substantive felony") as well as the prior convictions. The court of appeals has allowed the State to amend allegations pertaining to the date of the substantive

felony, reasoning that the essential issue is whether the substantive felony was committed, not its specific date.[21]

G.S. 14-7.3 provides, in part, that an indictment charging habitual felon must, as to the prior felonies, set forth the date that the prior felonies were committed and the dates that pleas of guilty were entered or convictions returned. Similarly, G.S. 14-7.9 provides, in part, that an indictment charging violent habitual felon must set forth that prior violent felonies were committed and the conviction dates for those priors. Notwithstanding these provisions, the court of appeals has allowed amendment of indictment allegations as to the prior conviction dates and has held that errors with regard to the alleged dates of the prior felonies do not create a fatal defect or fatal variance.[22]

11. Sexual Exploitation of a Minor

In *State v. Riffe*,[23] indictments charging the defendant with third-degree sexual exploitation of a minor in violation of G.S. 14-190.17A alleged the date of the offense as August 30, 2004. At trial, the defense established that on that date, the computer in question was in the possession of law enforcement, and not the defendant. Nevertheless, the trial court allowed a mid-trial amendment to the allegation regarding the offense date. On appeal, the court held that this was not error, noting that no alibi defense had been presented and thus that time was not of the essence.

B. Victim's Name

Several general rules can be stated regarding errors in indictments with respect to the victim's name: (1) a charging document must name the victim;[24] (2) a fatal variance results when an

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21. State v. May, 159 N.C. App. 159, 163 (2003) (no error in allowing amendment of the date of the felony offense accompanying the habitual felon indictment; the date of that offense is not an essential element of establishing habitual felon status); State v. Locklear, 117 N.C. App. 255, 260 (1994) (no error by allowing the State to amend a habitual felon indictment to change the date of the commission of the felony supporting the habitual felon indictment from December 19, 1992 to December 2, 1992; the fact that another felony was committed, not its specific date, was the essential question).

22. State v. Lewis, 162 N.C. App. 277 (2004) (no error in allowing the State to amend habitual felon indictment which mistakenly noted the date and county of defendant's probation revocation instead of the date and county of defendant's conviction for the prior felony; because the indictment correctly stated the type of offense and the date of its commission, it sufficiently notified defendant of the particular prior being alleged; also, defendant stipulated to the conviction); State v. Gant, 153 N.C. App. 136, 142 (2002) (error in indictment that listed prior conviction date as April 16, 2000 instead of April 16, 1990 was "technical in nature"); State v. Hargett, 148 N.C. App. 688, 693 (2002) (trial court did not err in allowing the State to amend conviction dates); State v. Smith, 112 N.C. App. 512, 516 (1993) (habitual felon indictment that failed to allege the date of defendant's guilty plea to a prior conviction was not fatally defective; indictment alleged that defendant pled guilty to the offense in 1981 and was sentenced on December 7, 1981); State v. Spruill, 89 N.C. App. 580, 582 (1988) (no fatal variance when indictment alleged that one of the three prior felonies occurred on October 28, 1977, and defendant stipulated prior to trial that it actually occurred on October 7, 1977; time was not of the essence and the stipulation established that defendant was not surprised by the variance).

23. ___ N.C. App. ___, ___ S.E.2d ___ (June 17, 2008).

24. State v. Powell, 10 N.C. App. 443, 448 (1971) (in order to charge an assault, there must be a victim named; by failing to name the person assaulted, the defendant would not be protected from subsequent prosecution); *see also* State v. Scott, 237 N.C. 432, 434 (1953) (indictment that named the assault victim in one place as George Rogers and in another as George Sanders was void on its face).

indictment incorrectly states the name of the victim;[25] and (3) it is error to allow the State to amend an indictment to change the name of the victim.[26]

The appellate courts find no fatal defect or variance or bar to amendment when a name error falls within the doctrine of *idem sonans.* Under this doctrine, a variance in a name is not material if the names sound the same.[27] Other cases hold that the error in name is immaterial if it can be characterized as a typographical error or if it did not mislead the defendant. The cases summarized below illustrate these exceptions to the general rules stated above. Note that when these cases are compared to those cited in support of the general rules, some inconsistency appears.

State v. Williams, 269 N.C. 376, 384 (1967) (indictment alleged victim's first name as "Mateleane"; evidence at trial indicated it was "Madeleine"; there was no uncertainty as to victim's identity, the variance came within the rule of *idem sonans*, and was not material).

State v. Gibson, 221 N.C. 252, 254 (1942) (variance between victim's name as alleged in indictment—"Robinson"—and victim's real name—"Rolison"—came within the rule of *idem sonans*).

State v. Hewson, 182 N.C. App. 196, 211 (2007) (no error in allowing the State to amend first-degree murder and shooting into an occupied dwelling indictment to change victim's name from "Gail Hewson Tice" to "Gail Tice Hewson").

State v. Holliman, 155 N.C. App. 120, 125-27 (2002) (no error to allow the State to change name of murder victim from "Tamika" to "Tanika").

State v. McNair, 146 N.C. App. 674, 677-78 (2001) (no error by allowing the State to amend two of seven indictments to correct typographical error and change victim's name from Donald Dale Cook to Ronald Dale Cook; victim's correct name appeared twice in one of the two challenged indictments and the defendant could not have been misled or surprised as to the nature of the charges).

State v. Wilson, 135 N.C. App. 504, 508 (1999) (no fatal variance between indictment that alleged assault victim's name as "Peter M. Thompson" and the evidence at trial indicating that the victim's name was "Peter Thomas"; arrest warrant correctly named victim, defendant's testimony revealed that he was aware that he was charged with assaulting Peter Thomas, and the names are sufficiently similar to fall within the doctrine of *idem sonans*).

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25. State v. Call, 349 N.C. 382, 424 (1998) (fatal variance between indictment charging defendant with assault with a deadly weapon with intent to kill inflicting serious injury upon Gabriel Hernandez Gervacio and evidence at trial revealing that the victim's correct name was Gabriel Gonzalez); State v. Bell, 270 N.C. 25, 29 (1967) (fatal variance existed between the robbery indictment and the evidence at trial; indictment alleged that the name of the robbery victim was Jean Rogers but the evidence showed that the victim was Susan Rogers); State v. Overman, 257 N.C. 464, 468 (1962) (fatal variance between the hit-and-run indictment and the proof; indictment alleged that Frank E. Nutley was the victim but the evidence showed the victim was Frank E. Hatley).

26. State v. Abraham, 338 N.C. 315, 339-41 (1994) (error to allow the State to amend an assault with a deadly weapon with intent to kill indictment to change name of victim from Carlose Antoine Lattter to Joice Hardin; "[w]here an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal"; court notes that proper procedure is to dismiss the charge and grant the state leave to secure a proper bill of indictment).

27. *See* Black's Law Dictionary p. 670 (5th ed. 1979).

State v. Bailey, 97 N.C. App 472, 475-76 (1990) (no error in allowing the State to amend the victim's name in three indictments from "Pettress Cebron" to "Cebron Pettress"; the errors in the indictments were inadvertent and defendant could not have been misled or surprised as to the nature of the charges against him").

State v. Marshall, 92 N.C. App. 398, 401-02 (1988) (no error to allow amendment of rape indictment to change victim's name from Regina Lapish to Regina Lapish Foster; defendant was indicted for four criminal violations, three indictments correctly alleged the victim's name, and only one "inadvertently" omitted her last name).

State v. Isom, 65 N.C. App. 223, 226 (1983) (no fatal variance between indictments naming the victim as Eldred Allison and proof at trial; although victim testified at trial that his name was "Elton Allison," his wallet identification indicated his name was Eldred and the defendant referred to the victim as Elred Allison; the names Eldred, Elred, and Elton are sufficiently similar to fall within the doctrine of *indem sonans* and the variance is immaterial).

The courts have recognized other exceptions to the general rules that an indictment must correctly allege the victim's name and that an amendment as to the victim's name substantially alters the charge. For example, *State v. Sisk*,[28] held that the State properly could amend an indictment charging uttering a forged instrument, changing the name of the party defrauded or intended to be defrauded from First Union National Bank to Wachovia Bank. *Sisk* reasoned that the bank's name did not speak to the essential elements of the offense charged and that the defendant did not rely on the identity of the bank in framing her defense. Also, *State v. Bowen*[29] held that the trial court did not err in allowing the state to change the victim's last name in a sex crimes indictment to properly reflect a name change that occurred because of an adoption subsequent to when the indictment was issued. And finally, *State v. Ingram*[30] held that it was not error to allow the State to amend a robbery indictment by deleting the name of one of two victims alleged.

For a discussion of defects regarding the victim's name for larceny, embezzlement, and other offenses that interfere with property rights, see *infra* pp. 32–36.

C. Defendant's Name

G.S. 15A-924(a)(1) provides that a criminal pleading must contain a name or other identification of the defendant. Consistent with this provision, *State v. Simpson*[31] held that an indictment that fails to name or otherwise identify the defendant, if his or her name is unknown, is fatally defective. Distinguishing *Simpson,* the court of appeals has found no error when the defendant's name is omitted from the body of the indictment but is included in a caption that is referenced in the body of the indictment.[32] Similarly, that court has found no error when the defendant's name is misstated in one part of the indictment but correctly stated in another part. In *State v. Sisk*,[33] for example, the court of appeals held that it was not error to allow the State to amend the defendant's name, as stated in the body of an uttering a forged instrument indictment. In *Sisk*, the

28. 123 N.C. App. 361, 366 (1996), *aff'd in part,* 345 N.C. 749 (1997).
29. 139 N.C. App. 18, 27 (2000).
30. 160 N.C. App. 224, 226 (2003), *aff'd,* 358 N.C. 147 (2004).
31. 302 N.C. 613, 616-17 (1981).
32. *See* State v. Johnson, 77 N.C. App. 583, 584-85 (1985).
33. 123 N.C. App. 361, 365-66 (1996), *aff'd in part*, 345 N.C. 749 (1997).

indictment's caption correctly stated the defendant's name as the person charged, the indictment incorporated that identification by reference in the body of the indictment, and the body of the indictment specifically identified defendant as the named payee of the forged document before mistakenly referring to her as Janette Marsh Cook instead of Amy Jane Sisk. The *Sisk* court also noted that the defendant was not prejudiced by the error.

As with errors in the victim's name, the courts have applied the doctrine of *idem sonans* to errors in the defendant's name, when the two names sound the same.[34] The court of appeals has allowed amendment of the defendant's name when the error was clerical.[35]

D. Address or County

G.S. 15A-924(a)(3) provides that a pleading must contain a statement that the offense was committed in a designated county. This allegation establishes venue. In *State v. Spencer*,[36] the court of appeals held that the fact that the indictment alleged that the crime occurred in Cleveland County but the evidence showed it occurred in Gaston County was not a fatal defect, because the variance was not material. When the issue arose in another case, the court looked to the whole body of the indictment to hold that the county of offense was adequately charged.[37]

A related issue was presented in *State v. James*,[38] where the defendant argued that a murder indictment was fatally defective because it omitted the defendant's county of residence. G.S. 15-144 sets out the essentials for a bill of homicide and provides that the indictment should state, among other things, the name of the person accused and his or her county of residence. That provision also states, however, that in these indictments, it is not necessary to allege matter not required to be proved at trial. Relying on this language, *James* held that "[s]ince the county of . . . residence need not be proved, the omission of this fact does not make the indictment fatally defective."

The following cases deal with other issues pertaining to incorrect county names or addresses or omission of one of those facts.[39]

> *State v. Harrison*, 165 N.C. App. 332 (2004) (indictment charging failure to register as a sex offender was not defective by failing to identify defendant's new address).

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34. *See supra* pp. 10–11 (discussing *idem sonans*); State v. Vincent, 222 N.C. 543, 544 (1943) (Vincent and Vinson); *see also* State v. Higgs, 270 N.C. 111, 113 (1967) (Burford Murril Higgs and Beauford Merrill Higgs).

35. *See* State v. Grigsby, 134 N.C. App. 315, 317 (1999) (trial court did not err in allowing the State to amend the indictment to correct the spelling of defendant's last name by one letter; "[a] change in the spelling of defendant's last name is a mere clerical correction of the truest kind"), *reversed on other grounds*, 351 N.C. 454 (2000).

36. __ N.C. App. __, 654 S.E.2d 69 (2007).

37. *See* State v. Almond, 112 N.C. App. 137, 147-48 (1993) (false pretenses indictments not fatally defective for failing to allege the county in which the offense occurred; indictments were captioned as from Wilkes County and all but one contained the incorporating phrase "in the county named above"; although the name of the county was not in the body of the indictment, the indictment contained sufficient information to inform defendant of the charges; as to the one indictment that did not include incorporating language, it is undisputed that the named victim was located in Wilkes County and thus defendant had full knowledge of the charges against him; finally, when all of the indictments are taken together, there is no question that the activities for which defendant was charged took place within Wilkes County).

38. 321 N.C. 676, 680 (1988).

39. *See also infra* pp. 21–23 (discussing burglary and related crimes).

State v. Hyder, 100 N.C. App. 270, 273-74 (1990) (trial court did not err by allowing the State to amend a delivery of a controlled substance indictment; top left corner of indictment listed Watauga as the county from which the indictment was issued; amendment replaced "Watauga County" with "Mitchell County"; error was typographical and in no way misled the defendant as to the nature of the charges).

State v. Lewis, 162 N.C. App. 277 (2004) (State was properly allowed to amend a habitual felon indictment, which mistakenly noted the date and county of defendant's probation revocation instead of the date and county of defendant's previous conviction; there also was an error as to the county seat).

State v. Grady, 136 N.C. App. 394, 396 (2000) (trial court did not err in allowing amendment of address of dwelling in maintaining dwelling for use of controlled substance indictment).

E. Use of the Word "Feloniously"

The use of the word "feloniously" in charging a misdemeanor will be treated as harmless surplusage.[40] However, felony indictments that do not contain the word "feloniously" are fatally defective, "unless the Legislature otherwise expressly provides."[41] *State v. Blakney*[42] explored the meaning of the phrase "unless the Legislature otherwise expressly provides." In that case, the defendant was charged with possession of more than one and one-half ounces of marijuana, among other charges. Although the possession charge did not contain the word "feloniously," the defendant pleaded guilty to felony possession of marijuana. The defendant then appealed, challenging the sufficiency of the possession charge, arguing that because it did not contain the word "feloniously," it was invalid. Reviewing the case law, the court of appeals indicated that the rule regarding inclusion of the word feloniously in felony indictments developed when a felony was defined as an offense punishable by either death or imprisonment. This definition made felonies difficult to distinguish from misdemeanors, unless denominated as such in the indictment. In 1969, however, G.S. 14-1 was amended to define a felony as a crime that: (1) was a felony at common law; (2) is or may be punishable by death; (3) is or may be punishable by imprisonment in the state's prison; or (4) is denominated as a felony by statute. The court noted that "[w]hile the felony-misdemeanor ambiguity that prompted the [older] holdings . . . remains in effect today with respect to subsections (1) through (3), subsection (4) now expressly provides for statutory identification of felonies." Thus, it concluded, subsection (4) affords a defendant notice of being charged with a felony, even without the use of the word "feloniously," provided the indictment gives notice of the statute denominating the alleged crime as a felony. The court added, however, it is still better practice to include the word "feloniously" in a felony indictment.

Turning to the case before it, the court noted that the indictment charging the defendant with possession referred only to G.S. 90-95(a)(3), making it "unlawful for any person . . . [t]o possess a controlled substance," but not stating whether the crime is a felony or a misdemeanor. Because the indictment stated that defendant possessed "more than one and one-half ounces of marijuana[,] a controlled substance which is included in Schedule VI of the North Carolina Controlled Substances

40. *See* State v. Higgins, 266 N.C. 589, 593 (1966); State v. Wesson, 16 N.C. App. 683, 686-87 (1972).

41. State v. Whaley, 262 N.C. 536, 537 (1964) (per curiam); *see also* State v. Fowler, 266 N.C. 528, 530-31 (1966) (noting that the State may proceed on a sufficient bill of indictment).

42. 156 N.C. App. 671 (2003).

Act," it contained a reference to G.S. 90-95(d)(4). That provision states that if the quantity of the marijuana possessed exceeds one and one-half ounces, the offense is a Class I felony. The court concluded, however, that although the indictment's language would lead a defendant to G.S. 90-95(d)(4), it failed to include express reference to the relevant statutory provision on punishment and therefore did not provide defendant with specific notice that he was being charged with a felony. Because the indictment failed to either use the word "feloniously" or to state the statutory section indicating the felonious nature of the charge, the court held that the indictment was invalid. Finally, the court noted that the State could re-indict defendant, in accordance with its opinion.

F. Statutory Citation

G.S. 15A-924(a)(6) provides that each count of a criminal pleading must contain "a citation of any applicable statute, rule, regulation, ordinance, or other provision of law" alleged to have been violated. That subsection also provides, however, that an error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.[43] The case law is in accord with the statute and holds (1) that there is no fatal defect when the body of the indictment properly alleges the crime but there is an error in the statutory citation;[44] and (2) that a statutory citation may be amended when the body of the indictment puts the defendant on notice of the crime charged.[45]

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43. For pleading city ordinances, see G.S. 160A-79 (codified ordinances must be pleaded by both section number and caption; non-codified ordinances must be pleaded by caption). *See also* State v. Pallet, 283 N.C. 705, 712 (1973) (ordinance must be pleaded according to G.S. 106A-79).

44. State v. Lockhart, 181 N.C. App. 316 (2007) (an indictment that tracked the statutory language of G.S. 148-45(g) properly charged the defendant with a work-release escape even though it contained an erroneous citation to G.S. 148-45(b)); State v. Mueller, __ N.C. App. __, 647 S.E.2d 440 (2007) (indictments cited G.S. 14-27.7A (statutory rape of a 13, 14, or 15 year old) as the statute allegedly violated but the body of the instrument revealed that the intended statute was G.S. 14-27.4 (first-degree statutory rape of a child under 13); citing *Jones* and *Reavis* (discussed below), the court noted that "although an indictment may cite to the wrong statute, when the body of the indictment is sufficient to properly charge defendant with an offense, the indictment remains valid and the incorrect statutory reference does not constitute a fatal defect" and held that the indictments were valid and properly put the defendant on notice that he was being charged under G.S. 14-27.4); State v. Jones, 110 N.C. App. 289, 291 (1993) (indictment sufficiently charged arson; "Even though the statutory reference was incorrect, the body of the indictment was sufficient to properly charge a violation. The mere fact that the wrong statutory reference was used does not constitute a fatal defect as to the validity of the indictment."). *Cf.* State v. Reavis, 19 N.C. App. 497, 498 (1973) ("[E]ven, assuming *arguendo*, that reference to the wrong statute is made in the bill of indictment . . . , this is not a fatal flaw in the sufficiency of the bill of indictment."); *see also* State v. Anderson, 259 N.C. 499, 501 (1963) ("Reference to a specific statute upon which the charge in a warrant is laid is not necessary to its validity. Likewise, where a warrant charges a criminal offense but refers to a statute that is not pertinent, such reference does not in validate the warrant."); State v. Smith, 240 N.C. 99, 100-01 (1954) (warrant erroneously cited G.S. 20-138 when it should have cited G.S. 20-139; "reference . . . to the statute is not necessary to the validity of the warrant") (citing G.S. 15-153); In Re Stoner, 236 N.C. 611, 612 (1952) (warrant erroneously cited G.S. 130-255.1 when correct provisions was G.S. 130-225.2; "reference . . . to a statute not immediately pertinent would be regarded as surplusage").

45. State v. Hill, 362 N.C. 169 (2008) (trial court did not err by allowing the State to amend indictments to correct a statutory citation; the indictments incorrectly cited a violation of G.S. 14-27.7A (sexual offense against a 13, 14, or 15 year old), but the body of the indictment correctly charged the defendant with a violation of G.S. 14-27.4 (sexual offense with a victim under 13)).

G. Case Number

The court of appeals has held that the State may amend the case numbers included in the indictment.[46]

H. Completion By Grand Jury Foreperson

G.S. 15A-623(c) requires the grand jury foreperson to indicate on the indictment the witness or witnesses sworn and examined before the grand jury. It also provides, however, that failure to comply with this requirement does not invalidate a bill of indictment. The cases are in accord with this statutory provision.[47]

G.S. 15A-644(a) requires that the indictment contain the signature of the foreperson or acting foreperson attesting to the concurrence of twelve or more grand jurors in the finding of a true bill. However, failure to check the appropriate box on the indictment for "True Bill" or "Not a True Bill" is not a fatal defect, when there is either evidence that a true bill was presented or no evidence indicating that it was not a true bill, in which case a presumption of validity has been applied.[48]

I. Prior Convictions

G.S. 15A-928(a) provides that when a prior conviction increases the punishment for an offense and thereby becomes an element of it, the indictment or information may not allege the previous conviction. If a reference to a prior conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information; rather an improvised name or title must be used which labels and distinguishes the crime without reference to the prior conviction.[49] G.S. 15A-928(b) provides that the indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated into the principal indictment as a separate count.[50] Similar rules apply regarding the requirement of a separate pleading for misdemeanors tried *de novo* in superior court when the fact of the prior conviction is an element of the offense.[51]

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46. *See* State v. Rotenberry, 54 N.C. App. 504, 510 (1981) (no error to allow the State to amend the case number listed in the indictment).

47. *See* State v. Wilson, 158 N.C. App. 235, 238 (2003) (indictment for common law robbery was not fatally defective even though grand jury foreperson failed to indicate that the witnesses identified on the face of the indictment appeared before the grand jury and gave testimony; failure to comply with G.S. 15A-623(c) does not vitiate a bill of indictment or presentment) (citing State v. Mitchell, 260 N.C. 235 (1963) (indictment is not fatally defective when the names of the witnesses to the grand jury are not marked)); State v. Allen, 164 N.C. App. 665 (2004) (citing *Mitchell*).

48. *See* State v. Midyette, 45 N.C. App. 87, 89 (1980) ("an indictment is not invalid merely because there is no specific expression in the indictment that it is a "true bill"; record revealed that indictments were returned as true bills); State v. Hall, 131 N.C. App. 427 (1998) (because the parties provided no evidence of the presentation of the bill of indictment to the trial court, the court relied on the presumption of validity of the trial court's decision to go forward with the case; defendant provided no evidence that the trial court was unjustified in assuming jurisdiction), *aff'd*, 350 N.C. 303 (1999).

49. G.S. 15A-928(a).

50. G.S. 15A-928(b).

51. G.S. 15A-928(d).

In one case, the court of appeals held that the trial court did not err by allowing the State to amend a felony stalking indictment that had alleged the prior conviction that elevated the offense to a felony in the same count as the substantive felony.[52] The trial court had allowed the State to amend the indictment to separate the allegation regarding the prior conviction into a different count, thus bringing the indictment into compliance with G.S. 15A-928.[53] Other cases dealing with charging of a previous conviction are discussed in the offense specific sections below under section III.

J. "Sentencing Factors"

In *Blakely v. Washington*[54] the United States Supreme Court held that any factor, other than a prior conviction, that increases a sentence above the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The case had significant implications on North Carolina's sentencing procedure. For a full discussion of the impact of *Blakely* on North Carolina's sentencing schemes, see Jessica Smith, North Carolina Sentencing after *Blakely v. Washington* and the *Blakely* Bill (September 2005) (available on-line at http://www.iogcriminal.unc.edu/Blakely%20Update.pdf). Post-*Blakely*, the new statutory rules for felony sentencing under Structured Sentencing provide that neither the statutory aggravating factors in G.S. 15A-1340.16(d)(1) through (19) nor the prior record point in G.S. 15A-1340.14(b)(7) need to be included in an indictment or other charging instrument.[55] However, the "catch-all" aggravating factor under G.S. 15A-1340.16(d)(20) must be charged.[56] Additionally, other notice requirements apply.[57] For the pleading and notice requirements for aggravating factors that apply in sentencing of impaired driving offenses, see G.S. 20-179.

III. Offense Specific Issues

A. Homicide[58]

G.S. 15-144 prescribes a short-form indictment for murder and manslaughter. It provides:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming

52. *See generally* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime pp. 136-37 (6th ed. 2007) (describing stalking crimes).

53. State v. Stephens, __ N.C. App. __, 655 S.E.2d 435 (2008).

54. 542 U.S. 296 (2004).

55. G.S. 15A-1340.16(a4) through (a5).The statute sets out other prior record points, *see* G.S. 15A-1340.14(b), but only this one must be pleaded.

56. G.S. 15A-1340.16(a4).

57. G.S. 15A-1340.16(a6).

58. For case law pertaining to the date of offense in homicide indictments, see *supra* p. 4.

> the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter as the case may be.

A murder indictment that complies with the requirements of G.S. 15-144 will support a conviction for first- or second-degree murder.[59] A first-degree murder indictment that conforms to G.S. 15-144 need not allege the theory of the offense, such as premeditation and deliberation,[60] or aiding and abetting.[61] It also will support a conviction for attempted first-degree murder,[62] even if the short-form has been modified with the addition of the words "attempt to."[63] If the indictment otherwise conforms with G.S. 15-144 but alleges a theory, the State will not be limited to that theory at trial.[64] A short-form murder indictment will not support a conviction for simple assault, assault inflicting serious injury, assault with intent to kill, or assault with a deadly weapon.[65]

The North Carolina appellate courts repeatedly have upheld the short form murder indictment as constitutionally valid.[66] That does not mean, however, that short-form murder indictments are completely insulated from challenge. In *State v. Bullock*,[67] for example, the court held that although the short form murder indictment is authorized by G.S. 15-144, the indictment for attempted first-degree murder was invalid because of the omission of words "with malice aforethought."[68]

The following cases deal with other types of challenges to homicide pleadings.

> *State v. Hall,* 173 N.C. App. 735, 737-38 (2005) (magistrate's order properly charged the defendant with misdemeanor death by vehicle; the order clearly provided that the charge was based on the defendant's failure to secure the trailer to his vehicle with safety chains or cables as required by G.S. 20-123(b)).
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> *State v. Dudley*, 151 N.C. App. 711, 716 (2002) (in a felony murder case, the State is not required to secure a separate indictment for the underlying felony) (citing State v. Carey, 288 N.C. 254, 274 (1975), *vacated in part by,* 428 U.S. 904 (1976)).

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59. *See, e.g.,* State v. King, 311 N.C. 603, 608 (1984).

60. *See, e.g.,* State v. Braxton, 352 N.C. 158, 174-75 (2000); *see generally* G.S. 14-17 (proscribing first-degree murder).

61. State v. Glynn, 178 N.C. App. 689, 694-95 (2006).

62. State v. Jones, 359 N.C. 832, 835-38 (2005); State v. Watkins, 181 N.C. App. 502, 506 (2007); State v. Reid, 175 N.C. App. 613, 617-18 (2006); State v. McVay, 174 N.C. App. 335, 337-38 (2005).

63. *Jones*, 359 N.C. at 838.

64. *See, e.g.,* State v. Moore, 284 N.C. 485, 495-96 (1974).

65. State v. Parker, __ N.C. App. __, 653 S.E.2d 6 (2007) (assault); State v. Whiteside, 325 N.C. 389, 402-04 (1989) (assault, assault inflicting serious injury, and assault with intent to kill).

66. *See, e.g.,* State v. Hunt, 357 N.C. 257 (2003); State v. Squires, 357 N.C. 529, 537 (2003); State v. Wissink, 172 N.C. App. 829, 834-35 (2005), *rev'd in part on other grounds,* 361 N.C. 418 2007); State v. Hasty, 181 N.C. App. 144, 146 (2007).

67. 154 N.C. App. 234, 243-45 (2002).

68. Note the contrast between this case and *State v. McGee*, 47 N.C. App. 280, 283 (1980), which dealt with a charge of second-degree murder. *Id.* In *McGee*, the court rejected the defendant's argument that a bill for second-degree murder should be quashed because it did not contain the word "aforethought" modifying malice. *Id*. (while second-degree murder requires malice as an element, it does not require malice aforethought; "aforethought" means "with premeditation and deliberation" as required in murder in the first-degree; aforethought is not an element of second-degree murder) (citing State v. Duboise, 279 N.C. 73 (1971)).

State v. Sawyer, 11 N.C. App. 81, 84 (1971) (indictment charging that defendant "did, unlawfully, willfully and feloniously kill and slay one Terry Allen Bryan" sufficiently charged involuntary manslaughter).

B. Arson

Consistent with the requirement that the indictment must allege all essential elements of the offense, *State v. Scott*[69] held that a first-degree arson indictment was invalid because it failed to allege that the building was occupied. Also consistent with that requirement is *State v. Jones*,[70] holding that an indictment alleging that the defendant maliciously burned a mobile home that was the dwelling house of a named individual was sufficient to charge second-degree arson.

An indictment charging a defendant with arson is sufficient to support a conviction for burning a building within the curtilage of the house; the specific outbuilding need not be specified in the indictment.[71]

C. Kidnapping and Related Offenses

In order to properly indict a defendant for first-degree kidnapping, the State must allege the essential elements of kidnapping in G.S. 14-39(a),[72] and at least one of the elements of first-degree kidnapping in G.S. 14-39(b).[73] An indictment that fails to allege one of the elements of first-degree kidnapping in G.S. 14-39(b) will, however, support a conviction of second-degree kidnapping.[74]

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69. 150 N.C. App. 442, 451-53 (2002).
70. 110 N.C. App. 289 (1993).
71. State v. Teeter, 165 N.C. App. 680, 683 (2004).
72. G.S. 14-39(a) provides:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.
> (5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.
> (6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

73. *See* State v. Bell, 311 N.C. 131, 137 (1984). G.S. 14-39(b) provides:

> There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

74. *See Bell,* 311 N.C. at 137.

The victim's age is not an essential element of kidnapping.[75] Therefore, if an indictment alleges that the victim has attained the age of sixteen but the evidence at trial reveals that the victim was not yet sixteen, there is no fatal variance.[76]

Kidnapping requires, in part, that the defendant confine, restrain, or remove the victim. A number of cases hold that the trial judge only may instruct the jury on theories of kidnapping alleged in the indictment.[77] Although contrary case law exists,[78] it has been called in question.[79] If the indictment alleges confinement, restraint, *and* removal (in the conjunctive), no reversible error occurs if the trial court instructs the jury on confinement, restraint, *or* removal (the disjunctive).[80]

In addition to the element described above, kidnapping requires that the confinement, restraint, or removal be done for one of the following purposes: holding the victim as a hostage or for ransom, using the victim as a shield, facilitating the commission of a felony or flight following commission of a felony, doing serious bodily harm to or terrorizing the victim or any other person, holding the victim in involuntary servitude, trafficking a person with the intent that the person be held in involuntary or sexual servitude, or subjecting or maintaining the person for sexual servitude.[81] If the evidence at trial regarding the purpose of the kidnapping does not conform to the indictment, there is a fatal variance.[82] Thus, for example, a fatal variance occurs if the indictment

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75. State v. Tollison, __ N.C. App. __, 660 S.E.2d 647 (2008).

76. *Id.* The court viewed the victim's age as a factor that relates to the State's proof regarding consent; if the victim is under sixteen years old, the State must prove that the unlawful confinement, restraint, or removal occurred without the consent of a parent or guardian.

77. State v. Tucker, 317 N.C. 532, 536-40 (1986) (plain error to instruct on restraint when indictment alleged only removal); State v. Bell, 166 N.C. App. 261, 263-65 (2004) (trial court erred in instructing on restraint or removal when indictment alleged confinement and restraint but not removal); State v. Smith, 162 N.C. App. 46 (2004) (trial court erred in instructing the jury that it could find the defendant guilty of kidnapping if he unlawfully confined, restrained, or removed the victim when the indictment only alleged unlawful removal); State v. Dominie, 134 N.C. App. 445, 447 (1999) (when indictment alleged only removal, trial judge improperly instructed that the jury could convict if defendant confined, restrained, or removed the victim).

78. *See* State v. Raynor, 128 N.C. App. 244, 247-49 (1998) (although indictment alleged restraint, there was no plain error in the instructions that allowed conviction on either restraint or removal).

79. The later case of *State v. Dominie*, 134 N.C. App. 445, 449 (1999), recognized that *Raynor* is inconsistent with *Tucker,* discussed above.

80. State v. Anderson, 181 N.C. App. 655, 664-65 (2007); State v. Quinn, 166 N.C. App. 733, 738 (2004).

81. *See* G.S. 14-39.

82. State v. Tirado, 358 N.C. 551, 574-75 (2004) (the trial court erred when it charged the jury that it could find the defendants guilty if they removed two named victims for the purpose of facilitating the commission of robbery or doing serious bodily injury when the indictment alleged only the purpose of facilitating the commission of a felony; the trial court also erred when it instructed the jury that it could find the defendant guilty of kidnapping a third victim if they removed the victim for the purpose of facilitating armed robbery or doing serious bodily injury but the indictment alleged only the purpose of doing serious bodily injury; errors however did not rise to the level of plain error); State v. Morris, __ N.C. App. __, 648 S.E.2d 909 (2007) (the trial court erred when it allowed the State to amend an indictment changing the purpose from facilitating a felony to facilitating inflicting serious injury; rejecting the State's argument that the additional language in the indictment stating that the victim was seriously injured charged the amended purpose and concluding that such language was intended merely to elevate the charge to first-degree kidnapping); State v. Faircloth, 297 N.C. 100, 108 (1979) (fatal variance between indictment alleging purpose of facilitating flight and evidence that showed kidnapping for the purpose of facilitating rape); State v. Morris, 147 N.C. App. 247, 250-53 (2001) (fatal variance between indictment alleging purpose of

alleges a purpose of facilitating flight from a felony but the evidence at trial shows a purpose of facilitating a felony.[83]

When the indictment alleges that the purpose was to facilitate a felony, the indictment need not specify the crime that the defendant intended to commit.[84] The fact that the jury does not convict the defendant of the crime alleged to have been facilitated does not create a fatal variance.[85]

Regarding the related offense of felonious restraint, *State v. Wilson*[86] held that transportation by motor vehicle or other conveyance is an essential element that must be alleged in an indictment in order to properly charge that crime, even if the indictment properly charged kidnapping.[87]

D. Burglary, Breaking or Entering, and Related Crimes

1. Burglary and Breaking or Entering

Both burglary and felonious breaking or entering require that the defendant's acts be committed with an intent to commit a felony or larceny in the dwelling or building. Indictments for these offenses need not allege the specific felony or larceny intended to be committed therein.[88] However, if the indictment alleges a specific felony, that allegation may not be amended and a variance between the charge and the proof at trial will be fatal. For example, in *State v. Silas,*[89] the indictment alleged that the defendant broke and entered with the intent to commit the felony of murder. At the charge conference, the trial judge allowed the State to amend the indictment to allege an intent to commit assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury. On appeal, the court held that because the State indicted the defendant for felonious breaking or entering based upon a theory of

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facilitating the commission of a felony and evidence that showed purpose was facilitating defendant's flight after commission of a felony), *aff'd* 355 N.C. 488 (2002).

83. *Faircloth,* 297 N.C. 100.

84. State v. Freeman, 314 N.C. 432, 434-37 (1985) (rejecting defendant's argument that first-degree kidnapping indictment was defective because it failed to specify the felony that defendant intended to commit at the time of the kidnapping); State v. Escoto, 162 N.C. App. 419 (2004) (burglary and kidnapping indictments need not allege the specific felony a defendant intended to commit at the time of the criminal act; *Apprendi* does not require a different result). As discussed in the section that follows, the appellate division has held, in a breaking or entering case, that if an intended felony that need not be alleged is in fact alleged, that allegation may not be amended.

85. State v. Quinn, 166 N.C. App. 733 (2004) (the indictment alleged that the defendant's actions were taken to facilitate commission of statutory rape; the court rejected the defendant's argument that because the jury could not reach a verdict on the statutory rape charge, there was a fatal variance; the court explained that the statute is concerned with the defendant's intent and that there was ample evidence in the record to support the jury's verdict).

86. 128 N.C. App. 688, 694 (1998).

87. The court rejected the State's argument that its holding circumvented the provision in G.S. 14-43.3 that felonious restraint is a lesser included offense of kidnapping.

88. State v. Parker, 350 N.C. 411, 424-25 (1999) (indictment alleging that defendant broke and entered an apartment "with the intent to commit a felony therein" was not defective; a burglary indictment need not specify the felony that defendant intended to commit); State v. Worsley, 336 N.C. 268, 279-81 (1994) (rejecting defendant's argument that the indictment charging him with first-degree burglary was defective because it failed to specify the felony he intended to commit when he broke into the apartment); *Escoto*, 162 N.C. App. 419 (2004) (burglary and kidnapping indictments need not allege the specific felony a defendant intended to commit at the time of the criminal act; *Apprendi* does not require a different result).

89. 360 N.C. 377 (2006).

intended murder, it was required to prove defendant intended to commit murder upon breaking or entering the apartment and that, therefore, the amendment to the original indictment was a substantial alteration.[90]

If the indictment alleges a specific intended felony and the trial judge instructs the jury on an intended felony that is a greater offense (meaning that the intended felony that was charged in the indictment is a lesser-included offense of the intended felony included in the jury instructions), the variance does not create prejudicial error.[91]

When the intended felony is a larceny, the indictment need not describe the property that the defendant intended to steal,[92] or allege its owner.[93]

At least one case has held that indictments for these offenses will not be considered defective for failure to properly allege ownership of the building.[94] However, the indictment must identify the building "with reasonable particularity so as to enable the defendant to prepare [a] defense and plead his [or her] conviction or acquittal as a bar to further prosecution for the same offense."[95] Ideally, indictments for these offenses would allege the premise's address.[96] Examples of cases on point are summarized below.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Miller, 271 N.C. 646, 653-54 (1967) (fatal variance between indictment charging felony breaking and entering a building "occupied by one Friedman's Jewelry, a corporation" and evidence that building was occupied by "Friedman's Lakewood, Incorporated"; evidence showed that there were three Friedman's stores in the area and that each was a separate corporation).

State v. Smith, 267 N.C. 755, 756 (1966) (indictment charging defendant with breaking and entering "a certain building occupied by one Chatham County Board of Education" was defective; although "it appears . . . that he actually entered the Henry Siler School in Siler City but under the general description of ownership in the bill, it could as well been any other school building or other property owned by the Chatham County Board of Education").

State v. Benton, 10 N.C. App. 280, 281 (1970) (fatal variance between indictment charging defendant with breaking and entering "the building located 2024 Wrightsville Ave., Wilmington, N.C., known as the Eakins Grocery Store, William Eakins, owner/

90. *See also* State v. Goldsmith, __ N.C. App. __, 652 S.E.2d 336 (2007) (because the State indicted the defendant for first-degree burglary based upon the felony of armed robbery, it was required to prove defendant intended to commit armed robbery upon breaking and entering into the residence).

91. State v. Farrar, 361 N.C. 675 (2007) (no prejudicial error when the indictment alleged that the intended felony was larceny and the judge instructed the jury that the intended felony was armed robbery).

92. *See* State v. Coffey, 289 N.C. 431, 437 (1976).

93. *See* State v. Norman, 149 N.C. App. 588, 592-93 (2002).

94. *See Norman,* 149 N.C. App. at 591-92 (felonious breaking or entering indictment need not allege ownership of the building; it need only identify the building with reasonable particularity; indictment alleging that defendant broke and entered a building occupied by Quail Run Homes located at 4207 North Patterson Avenue in Winston-Salem, North Carolina was sufficient). *But see* State v. Brown, 263 N.C. 786 (1965) (fatal variance between the felony breaking or entering indictment and the proof at trial; indictment identified property as a building occupied by "Stroup Sheet Metal Works, H.B. Stroup, Jr., owner" and evidence at trial revealed that the occupant and owner was a corporation).

95. *See Norman*, 149 N.C. App. at 592 (quotation omitted).

96. *See id.*

possessor" and evidence which related to a store located at 2040 Wrightsville Avenue in the City of Wilmington, owned and operated by William Adkins).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Coffey, 289 N.C. 431, 438 (1976) (upholding a burglary indictment that charged that the defendant committed burglary "in the county aforesaid [Rutherford], the dwelling house of one Doris Matheny there situate, and then and there actually occupied by one Doris Matheny"; distinguishing *State v. Smith,* 267 N.C. 755 (1966), discussed above, on grounds that there was no evidence that Doris Matheny owned and occupied more than one dwelling house in Rutherford County).

State v. Davis, 282 N.C. 107, 113-14 (1972) (no fatal variance between indictment alleging breaking and entering of a "the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina" and evidence that Baker lived at 830 Washington Drive; an indictment stating simply "dwelling house of Nina Ruth Baker in Fayetteville, North Carolina" would have been sufficient).

State v. Sellers, 273 N.C. 641, 650 (1968) (upholding breaking and entering indictment that identified the building as "occupied by one Leesona Corporation, a corporation").

State v. Ly,__ N.C. App. __, 658 S.E.2d 300 (2008) (breaking or entering indictment sufficiently alleged the location and identity of the building entered; indictment alleged that the defendants broke and entered "a building *occupied* by [the victim] used as a dwelling house located at Albermarle, North Carolina"; although the victim owned several buildings, including six rental houses, the evidence showed there was only one building where the victim actually lived).

State v. Vawter, 33 N.C. App. 131, 134-36 (1977) (no fatal variance between breaking and entering indictment that identified the premises as "a building occupied by E.L. Kiser (sic) and Company, Inc., a corporation d/b/a Shop Rite Food Store used as retail grocery located at Old U.S. Highway #52, Rural Hall, North Carolina" and evidence that showed that the Kiser family owned and operated the Shop Rite Food Store located on Old U.S. 52 at Rural Hall; no evidence was presented regarding the corporate ownership or occupancy of the store).

State v. Shanklin, 16 N.C. App. 712, 714-15 (1972) (felonious breaking or entering indictment that identified the county in which the building was located and the business in the building was not defective; court noted that "better practice" would be to identify the premises by street address, highway address, rural road address, or some clear description or designation).

State v. Paschall, 14 N.C. App. 591, 592 (1972) (indictment charging breaking and entering a building occupied by one Dairy Bar, Inc, Croasdaile Shopping Center in the County of Durham was not fatally defective).

State v. Carroll, 10 N.C. App. 143, 144-45 (1970) (no fatal defect in felonious breaking or entering indictment that specified a "building occupied by one Duke Power Company, Inc"; although the indictment must identify the building with reasonable particularity, "[i]t would be contrary to reason to suggest that the defendant could have . . . thought that the building . . . was one other than the building occupied by Duke Power Company in which he was arrested"; noting that "[i]n light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting

officers of this State would be well advised to identify the subject premises by street address, highway address, rural road address, or some clear description and designation to set the subject premises apart").

State v. Cleary, 9 N.C. App. 189, 191 (1970) ("building occupied by one Clarence Hutchens in Wilkes County" was sufficient description).

State v. Melton, 7 N.C. App. 721, 724 (1970) (approving of an indictment that failed to identify the premises by street address, highway address, or other clear designation; noting that a "practically identical" indictment was approved in *Sellers,* 273 N.C. 641, discussed above).

State v. Roper, 3 N.C. App. 94, 95-96 (1968) (felonious breaking or entering indictment that identified building as "in the county aforesaid, a certain dwelling house and building occupied by one Henry Lane" was sufficient).

One case held that there was no fatal variance when a felony breaking or entering indictment alleged that the defendant broke and entered a building occupied by "Lindsay Hardison, used as a residence" but the facts showed that the defendant broke and entered a building within the curtilage of Hardison's residence.[97] The court reasoned that the term residence includes buildings within the curtilage of the dwelling house, the indictment enabled the defendant to prepare for trial, and the occupancy of a building was not an element of the offense charged. Thus, it concluded that the word "residence" in the indictment was surplusage and the variance was not material.

2. Breaking into Coin- or Currency-Operated Machine

An indictment alleging breaking into a coin- or currency-operated machine in violation of G.S. 14-56.1 need not identify the owner of the property, as that is not an element of the crime charged.[98]

E. Robbery

A robbery indictment need not allege lack of consent by the victim, that the defendant knew he or she was not entitled to the property, or that the defendant intended to permanently deprive the victim of the property.[99] Additionally, because the gist of the offense of robbery is not the taking of personal property, but a taking by force or putting in fear,[100] the actual legal owner of the property is not an essential element of the crime. As the following cases illustrate, the indictment need only negate the idea that the defendant was taking his or her own property.

State v. Thompson, 359 N.C. 77, 108 (2004) (rejecting the defendant's argument that the trial court erred in failing to dismiss the robbery indictment because it failed to allege that the victim, Domino's Pizza, was a legal entity capable of owning property; an indictment for armed robbery is not fatally defective simply because it does not correctly identify the owner of the property taken; additionally the description of the

97. State v. Jones, __ N.C. App. __, 655 S.E.2d 915 (2008).
98. State v. Price, 170 N.C. App. 672, 674-75 (2005).
99. State v. Patterson, 182 N.C. App. 102 (2007).
100. *See* State v. Jackson, 306 N.C. 642, 654 (1982).

property in the indictment was sufficient to demonstrate that the property did not belong to the defendant).

State v. Pratt, 306 N.C. 673, 681 (1982) ("As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery.").

State v. Jackson, 306 N.C. 642, 653-54 (1982) (variance between indictment charging that defendant took property belonging to the Furniture Buyers Center and evidence that the property belonged to Albert Rice could not be fatal because "[a]n indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property") (quotation omitted).

State v. Spillars, 280 N.C. 341, 345 (1972) (same).

State v. Rogers, 273 N.C. 208, 212-13 (1968) (variance between indictment and evidence as to ownership of property was not fatal; "it is not necessary that ownership of the property be laid in any particular person in order to allege and prove . . . armed robbery"), *overruled on other grounds by*, State v. Hurst, 320 N.C. 589 (1987).

State v. Burroughs, 147 N.C. App. 693, 695-96 (2001) (robbery indictment was not fatally defective; indictment properly specified the name of the person from whose presence the property was attempted to be taken, whose life was endangered, and the place that the offense occurred).

State v. Bartley, 156 N.C. App. 490, 500 (2003) (robbery indictment not defective for failure to sufficiently identify the owner of the property allegedly stolen, "the key inquiry is whether the indictment … is sufficient to negate the idea that the defendant was taking his own property").

Relying on the gist of the offense—a taking by force or putting in fear—the courts have been lenient with regard to variances between the personal property alleged in the indictment and the personal property identified by the evidence at trial, and amendments to the charging language describing the personal property are allowed.[101]

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101. State v. McCallum, __ N.C. App. __, 653 S.E.2d 915 (2007) (the trial court did not err by permitting the State to amend the indictments to remove allegations concerning the amount of money taken during the robberies; the amendments left the indictments alleging that defendant took an unspecified amount of "U.S. Currency"; the allegations as to the value of the property were mere surplusage); State v. McCree, 160 N.C. App. 19, 30-31 (2003) (no fatal variance in armed robbery indictment alleging that defendant took a wallet and its contents, a television, and a VCR; the gist of the offense is not the taking of personal property, but rather a taking or attempted taking by force or putting in fear of the victim by the use of a dangerous weapon; evidence showed that defendant took $50.00 in cash from the victim upstairs and his accomplice took the television and VCR from downstairs; indictment properly alleged a taking by force or putting in fear); State v. Poole, 154 N.C. App. 419, 422-23 (2002) (no fatal variance when robbery indictment alleged that defendant attempted to steal "United States currency" from a named victim; at trial, the State presented no evidence identifying what type of property the defendant sought to obtain; the gravamen of the offense charged is the taking by force or putting in fear, while the specific owner or the exact property taken or attempted to be taken is mere surplusage).

A robbery indictment must name a person who was in charge of or in the presence of the property at the time of the robbery.[102] When a store is robbed, this person is typically the store clerk, not the owner.[103]

Finally, no error occurs when a trial court allows an indictment for attempted armed robbery to be amended to charge the completed offense of armed robbery; the elements of the offenses are the same and G.S. 14-87 punishes the attempt the same as the completed offense.[104]

An indictment for robbery with a dangerous weapon must name the weapon and allege either that the weapon was a dangerous one or facts that demonstrate its dangerous nature.[105]

F. Assaults

1. Generally

Although it is better practice to include allegations describing the assault,[106] a pleading sufficiently charges assault by invoking that term in the charging language.[107] If the indictment adds detail regarding the means of the assault (e.g., by shooting) and that detail is not proved at trial, the language will be viewed as surplusage and not a fatal variance.[108] A simple allegation of "assault" is insufficient when the charge rests on a particular theory of assault, such as assault by show of violence or assault by criminal negligence.[109]

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102. State v. Burroughs, 147 N.C. App. 693, 696 (2001) ("While an indictment for robbery … need not allege actual legal ownership of property, the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery….") (citations omitted); State v. Moore, 65 N.C. App. 56, 61, 62 (1983) (robbery indictment was fatally defective; "indictment must at least name a person who was in charge or in the presence of the property").

103. State v. Matthews, 162 N.C. App. 339 (2004) (indictment was not defective by identifying the target of the robbery as the store employee and not the owner of the store); State v. Setzer, 61 N.C. App. 500, 502-03 (1983) (indictment alleging that by use of a pistol whereby the life of Sheila Chapman was endangered and threatened, the defendant took personal property from The Pantry, Inc., sufficiently alleges the property was taken from Sheila Chapman; it is clear from this allegation that Sheila Chapman was the person in control of the corporation's property and from whose possession the property was taken).

104. State v. Trusell, 170 N.C. App. 33, 36-38 (2005).

105. State v. Marshall, __ N.C. App. __, 656 S.E.2d 709 (2008) (armed robbery indictment was defective; indictment alleged that the defendant committed the crime "by means of an assault consisting of having in possession and threatening the use of an implement, to wit, keeping his hand in his coat demanding money").

106. *See* Farb, Arrest Warrant & Indictment Forms (UNC School of Government 2005) at G.S. 14-33(a) (simple assault).

107. State v. Thorne, 238 N.C. 392, 395 (1953) (warrant charging that the defendant "unlawfully, willfully violated the laws of North Carolina . . . by . . . assault on . . . one Harvey Thomas" was sufficient to charge a simple assault).

108. State v. Pelham, 164 N.C. App. 70 (2004) (indictment alleging that defendant assaulted the victim "by shooting at him" was not fatally defective even though there was no evidence of a shooting; the phrase was surplusage and should be disregarded); State v. Muskelly, 6 N.C. App. 174, 176-77 (1969) (indictment charging "assault" with a deadly weapon was sufficient; words "by shooting him" were surplusage).

109. State v. Hines, 166 N.C. App. 202, 206-08 (2004) (the trial court erred by instructing the jury that it could convict on a theory of criminal negligence when the indictment for aggravated assault on a handicapped person alleged that the defendant "did . . . assault and strike" the victim causing trauma to her head); State v. Garcia, 146 N.C. App. 745, 746-47 (2001) (warrant insufficiently alleged assault by show of violence; warrant alleged an assault and listed facts supporting the elements of a show of violence and a

2. Injury Assaults

When the assault involves serious injury, the injury need not be specifically described.[110] It is, however, better practice to describe the injury.[111]

3. Deadly Weapon Assaults

A number of assault offenses involve deadly weapons. Much of the litigation regarding the sufficiency of assault indictments pertains to the charging language regarding deadly weapons. As the cases annotated below reveal, an indictment must name the weapon and either state that it was a "deadly weapon" or include facts demonstrating its deadly character. The leading case on point is *State v. Palmer,*[112] in which the court upheld an indictment charging that the defendant committed an assault with "a stick, a deadly weapon." The indictment did not contain any description of the size, weight, or other properties of the stick that would reveal its deadly character. Reviewing prior case law, the court held:

> it is sufficient for indictments … seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon.

The cases applying this rule are summarized below.

> ***Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment***
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> *State v. Moses*, 154 N.C. App. 332, 334-37 (2002) (count of indictment charging assault with deadly weapon was invalid because it did not identify the deadly weapon; charge was not saved by allegation of the specific deadly weapon in a separate count in the indictment).

> ***Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment***
>
> *State v. Brinson*, 337 N.C. 764, 766-69 (1994) (original assault with deadly weapon indictment stated that defendant assaulted the victim with his fists, a deadly weapon, by hitting the victim over the body with his fists and slamming his head against the cell bars and floor; was not error for the trial court to allow the State to amend the indictment on the day of trial to charge that defendant assaulted the victim with his fists by hitting the victim over the body with his fists and slamming his head against the cell bars, a deadly weapon, and floor; original indictment satisfied the *Palmer* test: it specifically referred to the cell bars and floor and recited facts that demonstrated their deadly character; identifying fists as deadly weapons did not preclude the state from identifying at trial other deadly weapons when the indictment both describes those weapons and demonstrates their deadly character).

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deviation from normal activities by the victim but failed to allege facts supporting the element of "reasonable apprehension of immediate bodily harm or injury on the part of the person assailed").

110. *See* State v. Gregory, 223 N.C. 415, 420 (1943) (indictment charging that defendant assaulted the victim and inflicted "serious injuries" is sufficient).

111. *See* Farb, Arrest Warrant & Indictment Forms (UNC School of Government 2005) at G.S. 14-33(c)(1) (assault inflicting serious injury).

112. 293 N.C. 633, 634-44 (1977)

State v. Grumbles, 104 N.C. App. 766, 769-70 (1991) (indictment "more than adequately" charged assault with a deadly weapon; indictment named defendant's hands as the deadly weapon and expressly stated defendant's hands were used as "deadly weapons").

State v. Everhardt, 96 N.C. App. 1, 10-11 (1989) (indictment sufficiently alleged the deadliness of "drink bottles" by stating that defendant assaulted the victim by inserting them into her vagina), *aff'd on other grounds*, 326 N.C. 777 (1990).

State v. Hinson, 85 N.C. App. 558, 564 (1987) ("Each of the indictments … names the two and one-half ton truck as the weapon used by defendant in committing the assault and expressly alleges that it was a 'deadly weapon.' The indictments were, therefore, sufficient to support the verdicts of guilty of felonious assault with a deadly weapon and the judgments based thereon.").

State v. Jacobs, 61 N.C. App. 610, 611 (1983) (since defendant's fists could have been a deadly weapon in the circumstances of this assault, the indictment was sufficient; the indictment specifically stated that defendant used his fists as a deadly weapon and gave facts demonstrating their deadly character).

Even when the indictment is valid on its face, challenges are sometimes made regarding a fatal variance between the deadly weapon charged in the indictment and the proof at trial. The cases summarized below are illustrative.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Skinner, 162 N.C. App. 434 (2004) (fatal variance existed between the indictment and the evidence at trial; indictment alleged that defendant assaulted the victim with his hands, a deadly weapon; evidence at trial indicated that the deadly weapon used was a hammer or some sort of iron pipe; although indictment was sufficient on its face, variance was fatal).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Shubert, 102 N.C. App. 419, 428 (1991) (no fatal variance; rejecting defendant's argument that while the indictment charged that defendant "unlawfully, willfully, and feloniously did assault Lizzie Price with his feet, a deadly weapon, with the intent to kill and inflicting serious injury," the evidence proved only the use of defendant's fists; the evidence that the victim was hit with something harder than a fist and that human blood was found on defendant's shoes is sufficient to justify an inference that the assault was in part committed with defendant's feet).

State v. Everhardt, 96 N.C. App. 1, 10-11 (1989) (no fatal variance between indictment alleging that defendant assaulted the victim with a "table leg, a deadly weapon" and the evidence, showing that the deadly weapon was the leg of a footstool; "This is more a difference in semantics than in substance. The defendant had fair warning that the State sought to prosecute him for assaulting his wife with the leg of a piece of furniture, and the State explicitly called it a deadly weapon . . . ."), *aff'd on other grounds*, 326 N.C. 777 (1990).

State v. Jones, 23 N.C. App. 686, 687-88 (1974) (no fatal variance in indictment charging assault with a firearm on a law enforcement officer; indictment charged that defendant used a 16 gauge automatic rifle and evidence showed that defendant fired a 16 gauge

automatic shotgun; "the indictment[] charged assault with a firearm and clearly an automatic shotgun comes within that classification").

State v. Muskelly, 6 N.C. App. 174, 176-77 (1969) (no fatal variance between indictment alleging that defendant assaulted the victim "with a certain deadly weapon, to wit: a pistol . . . by shooting him with said pistol" and proof which showed that although shots were fired by the defendants, the victim was not struck by a bullet but was in fact beaten about the head with a pistol; the words "by shooting him with said pistol" were superfluous and should be disregarded).

4. Assault on a Government Official

Unlike indictments alleging resisting, delaying, and obstructing an officer, indictments alleging assault on a law enforcement officer need not allege the specific duty that the officer was performing at the time of the assault.[113] Nor are they required to allege that the defendant knew the victim was a law enforcement officer, provided they allege the act was done willfully, a term that implies that knowledge.[114]

5. Habitual Misdemeanor Assault

An indictment for habitual misdemeanor assault must conform to G.S. 15A-928. For additional detail, see Robert Farb, *Habitual Offender Laws* at p. 13 (Faculty Paper, July 1, 2008) (available online at www.sog.unc.edu/programs/crimlaw/habitual.pdf).

6. Malicious Conduct by Prisoner

In *State v. Artis,*[115] the court of appeals held than an indictment charging malicious conduct by a prisoner under G.S. 14-258.4 was not defective even though it failed to allege that the defendant was in custody when the conduct occurred. The court held that the defendant had adequate notice of the charges because he was an inmate in the county detention center, was incarcerated when he received notice of the charges, and raised no objection that he was unaware of the facts giving rise to the charges.

G. Stalking

State v. Stephens, __ N.C. App. __, 655 S.E.2d 435 (2008) (the trial court did not err by allowing amendment of a stalking indictment; the amendment did not change the language of the indictment, but rather separated out the allegation regarding the prior conviction that elevated punishment to a felony, as required by G.S. 15A-928).

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113. *See* State v. Bethea, 71 N.C. App. 125, 128-29 (1984) (indictment charging that defendant assaulted a law enforcement officer who "was performing a duty of his office" was sufficiently specific to permit entry of judgment for felony assault with a firearm on a law enforcement officer; the indictment need not specify the particular duty the officer was performing; indictment only needs to allege that the law enforcement officer was performing a duty of his office at the time the assault occurred).

114. *See* State v. Thomas, 153 N.C. App. 326, 335-336 (2002) (indictment charging assault with deadly weapon on law enforcement officer did not need to allege that the defendant knew or had reasonable grounds to believe that the victim was a law enforcement officer; indictment alleged that defendant "willfully" committed an assault on a law enforcement officer, a term that indicates defendant knew that the victim was a law enforcement officer).

115. 174 N.C. App. 668, 671-73 (2005).

H. Resist, Delay, and Obstruct Officer

Indictments charging resisting, delaying, and obstructing an officer must identify the officer by name, indicate the duty being discharged (e.g., "searching the premises"), and indicate generally how the defendant resisted the officer (e.g., "using his body to block the officer's entry into the premises").[116]

I. Disorderly Conduct

In State v. Smith,[117] the court held that an indictment under G.S. 14-197 charging that the defendant "appeared in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" was fatally defective. The indictment failed to allege that (1) the defendant used indecent or profane language on a public road or highway and (2) such language was made in a loud and boisterous manner.

J. Child Abuse

In *State v. Qualls,*[118] the court held that there was no fatal variance when an indictment alleged that the defendant inflicted a subdural hematoma and the evidence showed that the injury was an epidural hematoma. The court explained that to indict a defendant for felonious child abuse all that is required is an allegation that the defendant was the parent or guardian of the victim, a child under the age of sixteen, and that the defendant intentionally inflicted any serious injury upon the child. The court regarded the indictment's reference to the victim suffering a subdural hematoma as surplusage.

K. Sexual Assault

G.S. 15-144.1 prescribes a short form indictment for rape and G.S. 15-144.2 prescribes a short form indictment for sexual offense. The statutes provide that the short form indictments may

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116. *See* State v. Smith, 262 N.C. 472, 474 (1964) (pleading alleging that the defendant "did obstruct, and delay a police officer in the performance of his duties by resisting arrest" by striking, hitting and scratching him was fatally defective; a warrant or indictment charging a violation of G.S. 14-223 must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should note the manner in which defendant resisted, delayed or obstructed); In Re J.F.M., 168 N.C. App. 144 (2005) (juvenile petition properly alleged resist, delay and obstruct by charging that "[T]he juvenile did unlawfully and willfully resist, delay and obstruct (name officer) S.L. Barr, by holding the office of (name office) Deputy (describe conduct) delay and obstructing a public [officer] in attempting to discharge a duty of his office. At the time, the officer was discharging and attempting to discharge a duty of his/her (name duty) investigate and detain [TB] whom was involved in an affray[.] This offense is in violation of G.S. 14-233."); State v. Swift, 105 N.C. App. 550, 552-54 (1992) (indictment charging resisting an officer was not fatally defective; such an indictment must identify the officer by name, indicate the official duty being discharged and indicate generally how defendant resisted the officer); *see also* State v. White, 266 N.C. 361 (1966) (resisting warrant charging that defendant "did unlawfully and willfully resist, delay and obstruct a public officer, to wit: Reece Coble, a Policeman for the Town of Pittsboro, while he, the said Reece Coble, was attempting to discharge and discharging a duty of his office, to wit: by striking the said Reece Coble with his fist" was insufficient) (citing *Smith*, 262 N.C. 472, discussed above).

117. 262 N.C. 472, 473-74 (1964).

118. 130 N.C. App. 1, 6-8 (1998), *aff'd*, 350 N.C. 56 (1999).

be used for a number of listed offenses.[119] For example, G.S. 15-144.1(a) provides the short form for forcible rape and states that any indictment "containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female." However, when a rape indictment specifically alleges all of the elements of first-degree rape under G.S. 14-27.2 and does not contain the specific allegations or averments of G.S. 15-144.1, the court may instruct the jury only on that offense and any lesser included offenses.[120]

The appellate courts repeatedly have upheld both the rape and sexual offense short form indictments.[121] This does not mean, however, that all indictments conforming to the statutory short form language are insulated from attack. In *State v. Miller*,[122] for example, the court of appeals found the statutory sex offense indictments invalid. In that case, although the indictments charged first-degree statutory sex offense in the language of G.S. 15-144.2(b), they also cited G.S. 14-27.7A (statutory rape or sexual offense of a person who is 13, 14, or 15 years old) instead of G.S. 14-27.4 (first-degree sexual offense). Moreover, the indictments included other allegations that pertained to G.S. 14-27.7A. Based on the "very narrow circumstances presented by [the] case," the court held that the short form authorized by G.S. 15-144.2 was not sufficient to cure the fatal defects.[123]

The effect of the short form is that although the State must prove each and every element of these offenses at trial, every element need not be alleged in a short form indictment.[124] A defendant may, of course, request a bill of particulars to obtain additional information about the charges.[125] The trial court's decision to grant or deny that request is reviewed for abuse of discretion.[126] An indictment that conforms to the statutory short form need not allege:

- That the victim was a female;[127]
- The defendant's age;[128]

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119. See *also* State v. Daniels, 164 N.C. App. 558 (2004) (holding that the short form in G.S. 15-144.2(a) may be used to charge statutory sex offense against a person who is 13, 14, or 15 years old).

120. *See* State v. Hedgepeth, 165 N.C. App. 321 (2004) (reasoning that the short form was not used and that assault on a female is not a lesser included offense of rape).

121. *See, e.g.,* State v. Wallace, 351 N.C. 481, 503-08 (2000) (upholding short form indictments for first-degree murder, rape, and sexual offense in the face of an argument that *Jones v. United States*, 526 U.S. 227 (1999), required a finding that they were unconstitutional); State v. Effer, 309 N.C. 742, 745-47 (1983) (short form for sexual offense); State v. Lowe, 295 N.C. 596, 599-604 (1978) (short form for rape is constitutional).

122. 159 N.C. App. 608 (2003), *aff'd,* 358 N.C. 133 (2004).

123. *See id*. at 614; *see supra* p. 14 & nn. 44-45 (discussing other sexual assault cases involving amendments to the statutory citation).

124. G.S. 15-144.1 ("In indictments for rape, it is not necessary to allege every matter required to be proved on the trial . . . ."); G.S. 15-144.2 (same for sexual offenses); *Lowe*, 295 N.C. at 600.

125. *See* State v. Randolph, 312 N.C. 198, 210 (1984).

126. *See id.*

127. *See* State v. Bell, 311 N.C. 131, 137-38 (1984) (indictments for attempted rape were sufficient even though they did not allege that the victims were females).

128. *See Lowe,* 295 N.C. at 600 (short form for rape "clearly authorizes an indictment … which omits [the] averment[] … [regarding] the defendant's age"); State v. Wiggins, 161 N.C. App. 583 (2003) (defendant's age not an essential element in statutory rape case); State v. Hunter, 299 N.C. 29, 37-38 (1980) (same). Note that under prior law both first-degree statutory and first-degree forcible rape required that the defendant be more than 16 years of age. *See* G.S. 14-21(1) (repealed). Under current law, although first-degree statutory

- The aggravating factor or factors that elevate a second-degree forcible offense to a first-degree forcible offense;[129] or
- The specific sex act alleged to have occurred.[130]

The statutes require that short form indictments for both forcible rape and forcible sexual offense include an averment that the assault occurred "with force and arms."[131] However, failure to include that averment is not a fatal defect.[132] The short forms for both forcible rape and forcible sexual offense also require an allegation that the offense occurred "by force and against her will."[133] However, in *State v. Haywood*,[134] the court of appeals concluded that the trial court did not err by allowing the State to amend a first-degree sex offense indictment by adding the words "by force." The court reasoned that because the indictment already included the terms "feloniously" and "against the victim's will," the charge was not substantially altered by the addition of the term "by force."

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rape requires that the defendant be at least 12 years old, first-degree forcible rape no longer has an element pertaining to the defendant's age. *See* G.S. 14-27.2.

129. *See* State v. Roberts, 310 N.C. 428, 432-34 (1984) (rejecting defendant's argument that a short form rape indictment was insufficient to charge first-degree rape because it did not allege that "defendant displayed a dangerous weapon or that he caused serious injury or that he was aided and abetted by another, essential elements of first degree rape"); *Lowe*, 295 N.C. at 600 (indictment is valid even if it does not indicate whether offense was perpetrated by means of a deadly weapon or by inflicting serious bodily injury).

130. *See* State v. Kennedy, 320 N.C. 20, 23-25 (1987) (indictments charging that defendant engaged in a sex offense with the victim without specifying the specific sexual act were valid); State v. Edwards, 305 N.C. 378, 380 (1982) (sexual offense indictment drafted pursuant to G.S. 15-144.2(b) need not specify the sexual act committed); State v. Burgess, 181 N.C. App. 27 (2007) (same); State v. Mueller, __ N.C. App. __, 647 S.E.2d 440 (2007) (indictments charging sexual crimes were sufficient even though they did not contain allegations regarding which specific sexual act was committed); State v. Youngs, 141 N.C. App. 220, 229-31 (2000) (no defect in indictments charging indecent liberties with a minor and statutory sex offense; an indictment charging statutory sex offense need not contain a specific allegation regarding which sexual act was committed; an indictment charging indecent liberties need not indicate exactly which of defendant's acts constitute the indecent liberty).

Although the State is not required to allege a specific sex act in the indictment, if it does so, it may be bound by that allegation, at least with respect to prosecutions under G.S. 14-27.7. *See* State v. Loudner, 77 N.C. App. 453, 453-54 (1985) (indictment pursuant to G.S. 14-27.7 (intercourse and sexual offenses with certain victims) charged that defendant engaged "in a sexual act, to wit: performing oral sex" and the evidence showed only that defendant engaged in digital penetration of the victim; "While the State was not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations…") (citation omitted); State v. Bruce, 90 N.C. App. 547, 549-50 (1988) (fatal variance in indictment pursuant to G.S. 14-27.7 indicating that charge was based on defendant's having engaged in vaginal intercourse with the victim and evidence at trial that showed attempted rape, attempted anal intercourse and fellatio but not vaginal intercourse).

131. G.S. 15-144.1(a); G.S. 15-144.2(a).

132. *See* G.S. 15-155 (indictment not defective for omission of the words "with force and arms"); State v. Cheek, 307 N.C. 552, 555 (1983); State v. Corbett, 307 N.C. 169, 173-75 (1982).

133. *See* G.S. 15-144.1(a); G.S. 15-144.2(a).

134. 144 N.C. App. 223, 228 (2001).

For first-degree statutory rape and first-degree statutory sex offense, the short forms state that it is sufficient to allege the victim as "a child under 13."[135] Although that allegation need not follow the statute verbatim,[136] it must clearly allege that the victim is under the age of thirteen.[137]

For cases dealing with challenges to sexual assault indictments regarding the date of the offense, see *supra* pp. 5–7.

L. Indecent Liberties

An indictment charging taking indecent liberties with a child under G.S. 14-202.1 need not specify the act that constituted the indecent liberty.[138]

M. Larceny, Embezzlement, and Related Crimes Interfering with Property Rights

Larceny and embezzlement indictments must allege a person or entity that has a property interest in the property stolen. That property interest may be ownership, or it may be some special property interest such as that of a bailee or custodian.[139] Although the name of a person or entity with a property interest must be alleged in the indictment, the exact nature of the property interest, e.g., owner or bailee, need not be alleged.[140] G.S. 15-148 sets out the rule for alleging joint ownership of property. It provides that when the property belongs to or is in the possession of more than one person, "it is sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others as the case may be."

As the cases summarized below illustrate,[141] failure to allege the name of one with a property interest in the item will render the indictment defective. Similarly, a variance between the person or entity alleged to hold a property interest and the evidence at trial is often fatal. And finally, amendments as to this allegation generally are not permitted.

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135. G.S. 15-144.1(b); G.S. 15-144.2(b).

136. *See* State v. Ollis, 318 N.C. 370, 374 (1986) (allegation that the victim is "a female child eight (8) years old" sufficiently alleges that she is "a child under 12" and satisfies the requirement of G.S. 15-144.1(b) as it existed at the time; the additional allegation that the child was "thus of the age of under thirteen (13) years" is surplusage [Note: at the time of the alleged offense in this case, first-degree statutory rape applied to victims under the age of 12; the statute now applies to victims under the age of 13]).

137. *See id.*; State v. Howard, 317 N.C. 140, 140-41 (1986) (defendant was tried and convicted under G.S. 14-27.2 of rape of a "child under the age of 13 years" upon a bill of indictment which alleged that the offense occurred when the old version of G.S. 14-27.2, applying to victims under the age of 12, was in effect; although valid for offenses occurring after amendment of the statute, the indictment did not allege a criminal offense for a rape allegedly occurring before the amendment); State v. Trent, 320 N.C. 610, 612 (1987) (same).

138. *See* State v. Youngs, 141 N.C. App. 220, 229-31 (2000) (citing State v Blackmon, 130 N.C. App. 692, 699 (1998), and State v. Singleton, 85 N.C. App. 123, 126 (1987)).

139. *See, e.g.*, State v. Greene, 289 N.C. 578, 584 (1976).

140. *See Greene*, 289 N.C. at 586-86 (no fatal variance between indictment alleging that Welborn and Greene had a property interest in the stolen property and evidence showing that Greene was the owner and Welborn merely a bailee).

141. Many cases on point exist. The cases annotated here are meant to be illustrative.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Downing, 313 N.C. 164, 166-68 (1985) (fatal variance between felony larceny indictment alleging that items were the personal property of a mother who owned the building and evidence showing that items were owned by the daughter's business, which was located in the building).

State v. Eppley, 282 N.C. 249, 259-60 (1972) (fatal variance between larceny indictment alleging that property belonged to James Ernest Carriker and evidence showing that although the property was taken from Carriker's home, it was owned by his father).

State v. Cathey, 162 N.C. App. 350 (2004) (error to allow amendment regarding owner of property).

State v. Craycraft, 152 N.C. App. 211, 213-14 (2002) (fatal variance between felony larceny indictment alleging that stolen property belonged to one Montague and evidence showing that items belonged to defendant's father; Montague, the landlord, did not have a special possessory interest in the items, although he was maintaining them for his former tenant).

State v. Salters, 137 N.C. App. 553, 555-57 (2000) (fatal variance between felony larceny indictment charging defendant with stealing property owned by Frances Justice and evidence showing that the property belonged to Kedrick (Justice's eight-year old grandson); noting that had Justice been acting *in loco parentis*, "there would be no doubt" that Justice would have been in lawful possession or had a special custodial interest in the item).

State v. Johnson, 77 N.C. App. 583, 585 (1985) (indictment charging defendant with breaking or entering a building occupied by Watauga Opportunities, Inc. and stealing certain articles of personal property was fatally defective because it was silent as to ownership, possession, or right to possess the stolen property; fatal variance existed between second indictment charging defendant with breaking or entering a building occupied by St. Elizabeth Catholic Church and stealing two letter openers, the personal property of St. Elizabeth Catholic Church, and evidence that did not show that the church either owned or had any special property interest in the letter openers but rather established that the articles belonged to Father Connolly).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Green, 305 N.C. 463, 474 (1982) (no fatal variance between larceny indictment alleging that the stolen item was "the personal property of Robert Allen in the custody and possession of Margaret Osborne" and the evidence; rejecting defendant's argument that the evidence conclusively showed that Terry Allen was the owner and concluding that even if there was no evidence that Robert Allen owned the item, there would be no fatal variance because the evidence showed it was in Osborn's possession; the allegation of ownership in the indictment therefore was mere surplusage).

State v. Liddell, 39 N.C. App. 373, 374-75 (1979) (no fatal variance between indictments charging defendant with stealing "the property of Lees-McRae College under the custody of Steve Cummings" and evidence showing that property belonged to Mackey Vending Company and ARA Food Services; Lees-McRae College was in lawful possession of the items as well as having custody of them as a bailee).

When a variance between the indictment's allegation regarding the owner or individual or entity with a possessory interest and the evidence can be characterized as minor or as falling within the rule of *idem sonans*,[142] it has been overlooked.[143]

Larceny and embezzlement indictments must allege ownership of the property in a natural person or a legal entity capable of owning property. When the property owner is a business, the words "corporation," "incorporated," "limited," and "company," as well as abbreviations for those terms such as "Inc." and "Ltd." sufficiently designate an entity capable of owning property.[144] The following cases illustrate this rule.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Thornton, 251 N.C. 658, 660-62 (1960) (embezzlement indictment charging embezzlement from "The Chuck Wagon" was defective because it contained no allegation that the victim was a legal entity capable of owning property; although the victim's name was given, there was no allegation that it was a corporation and the name itself did not indicate that it was such an entity).

State v. Brown, __ N.C. App. __, 646 S.E.2d 590 (2007) (larceny indictment stating that stolen items were the personal property of "Smoker Friendly Store, Dunn, North Carolina" was defective because it did not state that the store was a legal entity capable of owning property; rejecting the State's argument that when count one and two were read together the indictment alleged a legal entity capable of owning property; although count two referenced a corporation as the owner, that language was not incorporated into count one and each count of an indictment must be complete in itself).

State v. Price, 170 N.C. App. 672, 673 (2005) (indictment for larceny was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that this entity was a legal entity capable of owning property).

State v. Phillips, 162 N.C. App. 719 (2004) (larceny indictments were fatally defective because they failed to give sufficient indication of the legal ownership of the stolen items; indictment alleged that items were the personal property of "Parker's Marine"; Parker's Marine was not an individual and the indictment failed to allege that it was a legal entity capable of ownership; defective count cannot be read together with

142. *See supra* pp. 10–11.

143. State v. Weaver, 123 N.C. App. 276, 291 (1996) (no fatal variance between attempted larceny indictment alleging that the stolen items were "the personal property of Finch-Wood Chevrolet-Geo Inc." and evidence; evidence showed that Finch-Wood Chevrolet had custody and control of the car but did not show that entity was incorporated or that it also was known as Finch-Wood Chevrolet-Geo); State v. Cameron, 73 N.C. App 89, 92 (1985) (no fatal variance between indictment alleging that stolen items belonged to "Mrs. Narest Phillips" and evidence showing that the owner was "Mrs. Ernest Phillips"; names are sufficiently similar to fall within the doctrine of idem sonans, and the variance was immaterial); State v. McCall, 12 N.C. App. 85, 87-88 (1971) (no fatal variance between indictment and proof; indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc."); *see also* State v. Smith, 43 N.C. App. 376, 378 (1979) (no fatal variance between warrant charging defendant with stealing the property of "K-Mart Stores, Inc., Lenoir, N.C." and testimony at trial that the name of the store was "K-Mart, Inc.," "K-Mart Corporation," or "K-Mart Corporation").

144. State v. Cave, 174 N.C. App. 580, 583 (2005).

non-defective count when defective count does not incorporate by reference required language).

State v. Norman, 149 N.C. App. 588, 593 (2002) (felony larceny indictment alleging that defendant took the property of "Quail Run Homes Ross Dotson, Agent" was fatally defective because it lacked any indication of the legal ownership status of the victim (such as identifying the victim as a natural person or a corporation); "Any crime that occurs when a defendant offends the ownership rights of another, such as conversion, larceny, or embezzlement, requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property.")

State v. Linney, 138 N.C. App. 169, 172-73 (2000) (fatal variance existed in embezzlement indictment alleging that rental proceeds belonged to an estate when in fact they belonged to the decedent's son; also, an estate is not a legal entity capable of holding property).

State v. Woody, 132 N.C. App. 788, 790 (1999) (indictment for conversion by bailee alleging that the converted property belonged to "P&R unlimited" was defective because it lacked any indication of the legal ownership status of the victim; while the abbreviation "ltd" or the word "limited" is a proper corporate identifier, "unlimited" is not).

State v. Hughes, 118 N.C. App. 573, 575-76 (1995) (embezzlement indictments alleged that gasoline belonged to "Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation"; evidence showed that gasoline was actually owned by Petroleum World, Incorporated, a corporation; trial judge improperly allowed the State to amend the indictments to delete the words Mike Frost, President; because an indictment for embezzlement must allege ownership of the property in a person, corporation or other legal entity able to own property, the amendment was a substantial alteration).

State v. Strange, 58 N.C. App. 756, 757-58 (1982) (arresting judgment *ex mero moto* where the defendant was charged and found guilty of the larceny of a barbeque cooker "the personal property of Granville County Law Enforcement Association" because indictment failed to charge the defendant with the larceny of the cooker from a legal entity capable of owning property).

State v. Perkins, 57 N.C. App. 516, 518 (1982) (larceny indictment was defective because it failed to allege that "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was a corporation or other legal entity capable of owning property and name did not indicate that it was a corporation or natural person).

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Cave, 174 N.C. App. 580, 582 (2005) (larceny indictment was not defective; the indictment named the owner as "N.C. FYE, Inc."; the indictment was sufficient because the abbreviation "Inc." imports the entity's ability to own property).

State v. Day, 45 N.C. App. 316, 317-18 (1980) (no fatal variance between the indictment alleging that items were the property of "J. Riggings, Inc., a corporation" and evidence; witnesses testified that items were owned by "J. Riggings, a man's retailing establishment," "J. Riggins Store," and "J. Riggings" but no one testified that J. Riggings was a corporation).

One case that appears to be an exception to the general rule that the owner must be identified as one capable of legal ownership is *State v. Wooten*.[145] That case upheld a shoplifting indictment that named the victim simply as "Kings Dept. Store." Noting that indictments for larceny and embezzlement must allege ownership in either a natural person or legal entity capable of owning property, the *Wooten* court distinguished shoplifting because it only can be committed against a store. At least one case has declined to extend *Wooten* beyond the shoplifting context.[146]

A larceny indictment must describe the property taken. The cases annotated below explore the level of detail required in the description. When the larceny is of any money, United States treasury note, or bank note, G.S. 15-149 provides that it is sufficient to describe the item "simply as money, without specifying any particular coin [or note]." G.S. 15-150 provides a similar rule for embezzlement of money.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Ingram, 271 N.C. 538, 541-44 (1967) (larceny indictment that described stolen property as "merchandise, chattels, money, valuable securities and other personal property" was insufficient).

State v. Nugent, 243 N.C. 100, 102-03 (1955) ("meat" was an insufficient description in larceny and receiving indictment of the goods stolen).

State v. Simmons, 57 N.C. App. 548, 551-52 (1982) (fatal variance between larceny indictment and the proof at trial as to what item or items were taken; property was alleged as "eight (8) Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., a corporation"; however, the property seized was a 21 cubic foot freezer, serial number "W210TSSC-030-138").

Cases Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Hartley, 39 N.C. App. 70, 71-72 (1978) (larceny indictments alleging property taken as "a quantity of used automobile tires, the personal property of Jerry Phillips and Tom Phillips, and d/b/a the Avery County Recapping Service, Newland, N.C." was sufficient; indictments named property (tires), described them as to type (automobile), condition (used), ownership, and location).

State v. Monk, 36 N.C. App. 337, 340-41 (1978) (indictment alleging "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was sufficient).

State v. Boomer, 33 N.C. App. 324, 330 (1977) ("When describing an animal, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. The general term 'hogs' in the indictment sufficiently describes the animals taken so as to identify them with reasonable certainty.") (citation omitted).

State v. Coleman, 24 N.C. App. 530, 532 (1975) (no fatal variance between indictment describing property as "a 1970 Plymouth" with a specific serial number, owned by

145. 18 N.C. App. 652 (1973).

146. *See* State v. Woody, 132 N.C. App. 788, 791 (1999).

George Edison Biggs and evidence which showed a taking of a 1970 Plymouth owned by George Edison Biggs but was silent as to the serial number).

State v. Foster, 10 N.C. App. 141, 142-43 (1970) (larceny indictment alleging "automobile parts of the value of $300.00 . . . of one Furches Motor Company" was sufficient).

State v. Mobley, 9 N.C. App. 717, 718 (1970) (indictment alleging "an undetermined amount of beer, food and money of the value of $25.00 . . . of the said Evening Star Grill" was sufficient).

State v. Chandler[147] held that when the charge is attempted larceny, it is not necessary to specify the particular goods and chattels the defendant intended to steal. The court reasoned that the offense of attempted larceny is complete "when there is a general intent to steal and an act in furtherance thereof." Thus, it concluded, an allegation as to the specific articles intended to be taken is not essential to the crime.[148]

A larceny indictment need not describe the manner of the taking, even if the larceny was by trick.[149] Nor is it necessary for a larceny indictment to expressly allege that the defendant intended to convert the property to his or her own use, that the taking was without consent, or that the defendant had an intent to permanently deprive the owner of the property of its use.[150]

In order to properly charge felony larceny, the indictment must specifically allege one of the factors that elevate a misdemeanor larceny to a felony.[151] Thus, if the factor elevating the offense to a felony is that the value of the items taken exceeds $1,000, this fact must be alleged in the indictment. However, a variance as to this figure will not be fatal, provided that the evidence establishes that the value of the items is $1,000 or more.[152] An indictment alleging that the larceny was committed "pursuant to a violation of G.S. 14-51" is sufficient to charge felony larceny committed pursuant to a burglary.[153] Also, a defendant properly may be convicted of felony larceny pursuant

147. 342 N.C. 742, 753 (1996).

148. *See id.*

149. *See* State v. Barbour, 153 N.C. App. 500, 503 (2002) ("It is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words 'by trick' need not be found in an indictment charging larceny."); State v. Harris, 35 N.C. App. 401, 402 (1978).

150. *See* State v. Osborne, 149 N.C. App. 235, 244-45 (indictment properly charged larceny even though it did not allege that item was taken without consent or that defendant intended to permanently deprive the owner; charge that defendant "unlawfully, willfully and feloniously did "[s]teal, take, and carry away" was sufficient), *aff'd*, 356 N.C. 424 (2002); State v. Miller, 42 N.C. App. 342, 346 (1979) (rejecting defendant's argument that the indictment was fatally defective because it failed to state a felonious intent to appropriate the goods taken to the defendant's own use; allegation that defendant "unlawfully and willfully did feloniously steal, take, and carry away" the item was sufficient); *see also* State v. Wesson, 16 N.C. App. 683, 685-88 (1972) (warrant's use of the term "steal" in charging larceny sufficiently charged the required felonious intent).

151. *See* G.S. 14-72 (delineating elements that support a felony charge); State v. Wilson, 315 N.C. 157, 164-65 (1985) (agreeing with defendant's contention that the indictment failed to allege felonious larceny because it did not specifically state that the larceny was pursuant to or incidental to a breaking or entering and the amount of money alleged to have been stolen was below the statutory amount necessary to constitute a felony).

152. *See* State v. McCall, 12 N.C. App. 85, 88 (1971) (indictment alleged larceny of $1948 and evidence showed larceny of $1748).

153. *See* State v. Mandina, 91 N.C. App. 686, 690-91 (1988).

to a breaking and entering when the indictment charged felony larceny pursuant to a burglary,[154] because breaking or entering is a lesser included offense of burglary.[155]

N. Receiving or Possession of Stolen Property

Unlike larceny, indictments charging receiving or possession of stolen property need not allege ownership of the property.[156] The explanation for this distinction is that the name of the person from whom the goods were stolen is not an essential element of these offenses.[157]

O. Injury to Personal Property

An indictment for injury to personal property must allege the owner or person in lawful possession of the injured property.[158] If the entity named in the indictment is not a natural person, the indictment must allege that the victim was a legal entity capable of owning property.[159] These rules follow those for larceny, discussed above.[160]

P. False Pretenses and Forgery

1. False Pretenses

One issue in false pretenses cases is how the false representation element should be alleged in the indictment. In *State v. Perkins*,[161] the court of appeals held that an allegation that the defendant used a credit and check card issued in the name of another person, wrongfully obtained and without authorization, sufficiently apprised the defendant that she was accused of falsely representing herself as an authorized user of the cards.[162] In *State v. Parker*,[163] the court of appeals upheld the

154. *See* State v. McCoy, 79 N.C. App. 273, 277 (1986); State v. Eldgridge, 83 N.C. App. 312, 316 (1986).

155. *See McCoy*, 79 N.C. App. at 277.

156. *See* State v. Jones, 151 N.C. App. 317, 327 (2002) (variance between ownership of property alleged in indictment and evidence of ownership introduced at trial is not fatal to charge of felonious possession of stolen goods); State v. Medlin, 86 N.C. App. 114, 123-24 (1987) ("In cases of receiving stolen goods, it has never been necessary to allege the names of persons from whom the goods were stolen, nor has a variance between an allegation of ownership in the receiving indictment and proof of ownership been held to be fatal. We now hold that the name of the person from whom the goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictments' allegations of ownership of property and the proof of ownership fatal.") (citations omitted).

157. *See Jones*, 151 N.C. App at 327.

158. *See* State v. Price, 170 N.C. App. 672, 673-74 (2005).

159. *See id.* at 674 (indictment for injury to personal property was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that it was a legal entity capable of owning property).

160. *See supra* pp. 34–36.

161. 181 N.C. App. 209, 215 (2007).

162. *Id.* (the indictment alleged that the defendant "unlawfully, willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, attempted to obtain BEER AND CIGARETTES from FOOD LION by means of a false pretense which was calculated to deceive. The false pretense consisted of the following: THIS PROPERTY WAS OBTAINED BY MEANS OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM").

163. 146 N.C. App. 715 (2001).

trial court's decision to allow the State to amend a false pretenses indictment by changing the items that the defendant represented as his own from "two (2) cameras and photography equipment" to a "Magnavox VCR."[164] The court held that the amendment was not a substantial alteration because the description of the item or items that the defendant falsely represented as his own was irrelevant to proving the essential elements of the crime charged. Those essential elements were simply that the defendant falsely represented a subsisting fact, which was calculated and intended to deceive, which did in fact deceive, and by which defendant obtained something of value from another.

In false pretenses cases, the thing obtained must be described with reasonable certainty.[165] This standard was satisfied in *State v. Walston*,[166] where the court held that there was no fatal variance between a false pretenses indictment alleging that the defendant obtained $10,000 in U.S. currency and the evidence that showed that the defendant deposited a $10,000 check into a bank account. The court reasoned that "whether defendant received $10,000.00 in cash or deposited $10,000.00 in a bank account, he obtained something of monetary value which is the crux of the offense."[167] Although early cases indicate that a false pretenses indictment should describe money obtained by giving the amount in dollars and cents,[168] more modern cases have been flexible on this rule. Thus, an indictment alleging that the defendant falsely represented to a store clerk that he had purchased a watch band in order to obtain "United States currency" was held to be sufficient, even though a dollar amount was not stated.[169] The court distinguished the earlier cases noting that in the case before it, the indictment alleged the item – the watch band – which the defendant used to obtain the money.[170]

G.S. 15-151 provides that in any case in which an intent to defraud is required for forgery or any other offense, it is sufficient to allege an intent to defraud, without naming the person or entity intended to be defrauded. That provision states that at trial, it is sufficient and not a variance if there is an intent to defraud a government, corporate body, public officer in his or her official capacity, or any particular person. Without citing this provision, at least one case has held that a false pretenses indictment need not specify the alleged victim.[171]

2. Identity Theft

Identity theft[172] is a relatively new crime and few cases have dealt with indictment issues regarding this offense. One case that has is *State v. Dammons,*[173] in which the indictment alleged that the defendant had fraudulently represented himself as William Artis Smith "for the purpose of making financial or credit transactions and for the purpose of avoiding legal consequences in the name of Michael Anthony Dammons." The State's evidence at trial indicated that the defendant assumed Smith's identity without consent in order to avoid legal consequences in the form of

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164. *See id*. at 719.

165. *See* State v. Walston, 140 N.C. App. 327, 334 (2000) (quotation omitted).

166. 140 N.C. App. 327 (2000).

167. *Id.* at 334-36

168. *See* State v. Smith, 219 N.C. 400, 401 (1941); State v. Reese, 83 N.C. 638 (1880).

169. State v. Ledwell, 171 N.C. App. 314, 317-18 (2005).

170. *See id.* at 318.

171. State v. McBride, __ N.C. App. __, 653 S.E.2d 218 (2007) (the court concluded that the statute proscribing the offense, G.S. 14-100, does not require that the State prove an intent to defraud any particular person).

172. G.S. 14-113.20.

173. 159 N.C. App. 284 (2003).

felony charges. The appellate court rejected the defendant's argument of fatal variance, concluding that the charging language about the financial transaction was unnecessary and was properly regarded as surplusage.[174]

3. Forgery

In North Carolina, there are common law and statutory offenses for forgery.[175] For offenses charged under G.S. 14-119 (forgery of notes, checks, and other securities; counterfeiting instruments), the indictment need not state the manner in which the instrument was forged.[176]

Q. Perjury and Related Offenses

G.S. 15-145 provides the form for a bill of perjury. G.S. 15-146 does the same for a bill of subornation of perjury. G.S. 14-217(b) specifies the contents of an indictment for bribery of officials.

R. Habitual and Violent Habitual Felon

In North Carolina, being a habitual felon or a violent habitual felon is not a crime but a status, the attaining of which subjects a defendant thereafter convicted of a crime to an increased punishment.[177] The status itself, standing alone, will not support a criminal conviction.[178] Put another way, an indictment for habitual or violent habitual felon must be "attached" to an indictment charging a substantive offense.[179] Focusing on the distinction between a status and a crime, the

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174. *Id.* at 293.

175. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime pp. 334-39 (6th ed. 2007).

176. State v. King, 178 N.C. App. 122 (2006) (indictment alleged that "on or about the 19th day of March, 2004, in Wayne County Louretha Mae King unlawfully, willfully, feloniously and with the intent to injure and defraud, did forge, falsely make, and counterfeit a Wachovia withdrawal form, which was apparently capable of effecting a fraud, and which is as appears on the copy attached hereto as Exhibit "A" and which is hereby incorporated by reference in this indictment as if the same were fully set forth"; rejecting the defendant's argument that the indictment was defective because it failed to allege how the defendant committed the forgery; concluding that the indictment clearly set forth all of the elements of the offense and that furthermore a copy of the withdrawal slip was attached to the indictment as an exhibit showing the date and time of day, amount of money withdrawn, account number, and particular bank branch from which the funds were withdrawn).

177. *See, e.g.,* State v. Allen, 292 N.C. 431, 433-35 (1977) ("Properly construed the [habitual felon] act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon.").

178. *See, e.g., id.* at 435.

179. *Compare id.* at 436 (holding that habitual felon indictment was invalid because there was no pending felony prosecution to which the habitual felon proceeding could attach) *and* State v. Davis, 123 N.C. App. 240, 243-44 (1996) (trial court erred by sentencing defendant as an habitual felon after arresting judgment in all the underlying felonies for which defendant was convicted) *with* State v. Oakes, 113 N.C. App. 332, 339 (1994) (until judgment was entered upon defendant's conviction of the substantive felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could

North Carolina Court of Appeals has stated that because being a habitual felon is not a substantive offense, the requirement in G.S. 15A-924(a)(5) that each element of the crime be pleaded does not apply.[180] It went on to indicate that as a status, "the only pleading requirement is that defendant be given notice that he is being prosecuted for some substantive felony as a recidivist."[181]

The relevant statutes provide that the indictment charging habitual felon or violent habitual felon status shall be separate from the indictment charging the substantive felony.[182] Although it has not ruled on the issue, in *State v. Patton*, the North Carolina Supreme Court has indicated that this language requires separate indictments.[183] In *State v. Young*,[184] the North Carolina Court of Appeals upheld an indictment that charged the underlying felony and habitual felon in separate counts of the same indictment. *Young* held that G.S. 14-7.3 does not require that a habitual felon indictment be contained in a separate bill of indictment; rather it held that the statute requires merely that the indictment charging habitual felon status "be distinct, or set apart, from the charge of the underlying felony." However, *Young* was decided before *Patton* and it is not clear that its rationale survives that later case.

The indictment for the substantive felony need not charge or refer to the habitual felon status.[185] Nor must the habitual felon indictment allege the substantive felony.[186] If the substantive felony is alleged in the habitual felon indictment and an error is made with regard to that allegation, the allegation will be treated as surplusage and ignored.[187] Finally a separate habitual felon indictment is not required for each substantive felony indictment.[188]

A number of issues have arisen regarding the timing of habitual and violent habitual felon indictments. The basic rule is that an indictment for habitual felon or violent habitual felon must be obtained before the defendant enters a plea at trial to the substantive offense.[189] The reason for this rule is "so that defendant has notice that he [or she] will be charged as a recidivist before pleading to the substantive felony, thereby eliminating the possibility that he [or she] will enter a

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attach) *and* State v. Mewborn, 131 N.C. App. 495, 501 (1998) (after the original violent habitual felon indictment was quashed, prayer for judgment continued was entered on the substantive felony, a new indictment was issued, and defendant stood trial under that indictment as a violent habitual felon; because defendant had not yet been sentenced for the substantive felony and because the original indictment placed him on notice that he was being tried as a violent habitual felon, the subsequent indictment attached to the ongoing felony proceeding and defendant was properly tried as a violent habitual felon).

180. *See* State v. Roberts, 135 N.C. App. 690, 698 (1999).

181. *Id.* at 698 (quotation omitted and emphasis deleted).

182. *See* G.S. 14-7.3 (habitual felon); 14-7.9 (violent habitual felon).

183. *See* State v. Patton, 342 N.C. 633, 635 (1996); State v. Allen, 292 N.C. 431, 433 (1977).

184. 120 N.C. App. 456, 459-61 (1995).

185. *See* State v. Todd, 313 N.C. 110, 120 (1985); State v. Peoples, 167 N.C. App. 63, 71 (2004); State v. Mason, 126 N.C. App. 318, 322 (1997); State v. Hodge, 112 N.C. App, 462, 466-67 (1993); State v. Sanders, 95 N.C. App. 494, 504 (1989); State v. Keyes, 56 N.C. App. 75, 78 (1982).

186. *See* State v. Cheek, 339 N.C. 725, 727 (1995); State v. Smith, 160 N.C. App. 107, 124 (2003); State v. Bowens, 140 N.C. App. 217, 224 (2000); State v. Roberts, 135 N.C. App. 690, 698 (1999); *Mason,* 126 N.C. App. at 322.

187. *See, e.g., Bowens*, 140 N.C. App. at 224-25.

188. *See* State v. Patton, 342 N.C. 633, 635 (1996) (rejecting the notion that a one-to-one correspondence was required); State v. Taylor, 156 N.C. App. 172, 174 (2003).

189. *See* State v. Allen, 292 N.C. 431, 436 (1977); State v. Little, 126 N.C. App. 262, 269 (1997).

The court of appeals has rejected the argument that the "cut off" is when a defendant enters a plea at an arraignment. State v. Cogdell, 165 N.C. App. 368 (2004). The court concluded that "the critical event . . . is the plea entered before the actual trial." Id. at 373.

guilty plea without a full understanding of the possible consequences of conviction."[190] A habitual or violent habitual indictment may be obtained before an indictment on the substantive charge is obtained, provided there is compliance with the statutes' notice and procedural requirements.[191] Once a guilty plea has been adjudicated on a habitual felon indictment or information, that particular pleading has been "used up" and cannot support sentencing the defendant as a habitual felon on another felony; this rule applies even if the sentencing on the original pleading has been continued.[192]

The most common challenges to habitual felon and violent habitual felon indictments are to the prior felonies alleged. G.S. 14-7.3 (charge of habitual felon), provides that indictments "must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." G.S. 14-7.9 (charge of violent habitual felon) contains similar although not identical language. The prior convictions are treated as elements; thus, it is error to allow the State to amend an indictment to replace an alleged prior conviction.[193] Similarly, an indictment will be deemed defective if one of the alleged priors is a misdemeanor, not a felony, even if defense counsel stipulates that the prior convictions were felonies.[194] By contrast, the courts are lenient with regard to the statutory requirement that the indictment identify the state or other sovereign against whom the prior felonies were committed.[195]

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190. State v. Oakes, 113 N.C. App. 332, 338 (1994). The court of appeals has deviated from the basic timing rule in two cases. However, in both cases, (1) the habitual felon indictment was obtained before the defendant entered a plea at trial and was later replaced with either a new or superseding indictment; thus there was some notice as to the charge; and (2) both cases described the defects in the initial indictment as "technical"; thus, both probably could have been corrected by amendment. *See Oakes,* 113 N.C. App. 332; *Mewborn*, 131 N.C. App. 495.

191. *See* State v. Blakney, 156 N.C. App. 671, 675 (2003); *see also* State v. Murray, 154 N.C. App. 631, 638 (2002).

192. State v. Bradley, 175 N.C. App. 234 (2005) (when the defendant pleaded guilty to two crimes and having attained habitual felon status as to each but sentencing was continued, the original habitual felon informations could not be used to support habitual felon sentencing for a subsequent felony charge).

193. *State v. Little*, 126 N.C. App. 262, 269-70 (1997) (the State should not have been allowed to obtain a superseding indictment which changed one of the three felony convictions listed as priors; the court concluded that a change in the prior convictions was substantive and altered an allegation pertaining to an element of the offense).

194. State v. Moncree, __ N.C. App. __, 655 S.E.2d 464 (2008) (habitual felon indictment was defective where one of the prior crimes was classified as a misdemeanor in the state where it was committed; defense counsel's stipulations that all of the priors were felonies did not foreclose relief on appeal).

195. State v. Montford, 137 N.C. App. 495, 500-01 (2000) (trial court did not err in allowing the State to amend the habitual felon indictment; original indictment listed three previous felonies, but did not state that they had been committed against the State of North Carolina, instead listing that they had occurred in Carteret County; State amended the indictment by inserting "in North Carolina" after each listed felony; "we need not even address the amendment issue, as we conclude that the original indictment itself was not flawed"; although the statute requires the indictment to allege the name of the state or sovereign, we have not required rigid adherence to this rule; "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed"; the original indictment sufficiently indicated the state against whom the prior felonies were committed because "State of North Carolina" explicitly appears at the top of the indictment, followed by "Carteret County," thus, Carteret County is clearly linked with the state name); State v. Mason, 126 N.C. App. 318, 323 (1997) (indictment stated the prior assault with a deadly weapon inflicting serious injury occurred in "Wake County, North Carolina" and

Cases dealing with date issues regarding prior convictions in these indictments are summarized above, see *supra* pp. 8–9. The summaries below explore other challenges that have been asserted against the prior felony allegations in habitual felon and violent habitual felon indictments.

> *State v. McIlwaine,* 169 N.C. App. 397, 399-499 (2005) (habitual felon indictment alleged that the defendant had been previously convicted of three felonies, including "the felony of possession with intent to manufacture, sell or deliver [S]chedule I controlled substance, in violation of N.C.G.S. 90-95"; the indictment was sufficient to charge habitual felon even though it did not allege the specific name of the controlled substance).
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> *State v. Briggs*, 137 N.C. App. 125, 130-31 (2000) (habitual felon indictment listing conviction for "felony of breaking and entering buildings in violation of N.C.G.S. 14-54" and containing the date the felony was committed, the court in which defendant was convicted, the number assigned to the case, and the date of conviction was sufficient).
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> *State v. Hicks*, 125 N.C. App. 158, 160 (1997) (no error by allowing State to amend habitual felon indictment; original indictment alleged that all of the previous felony convictions were committed after the defendant reached the age of eighteen; the State amended to allege that all but one of the previous felony convictions were committed after the defendant reached the age of eighteen; the three underlying felonies remained the same).

S. Drug Offenses

1. Sale or Delivery

Indictments charging sale or delivery of a controlled substance in violation of G.S. 90-95(a)(1) must allege a controlled substance that is included in the schedules of controlled substances.[196] Such indictments also must allege the name of the person to whom the sale or delivery was made, when that person's name is known, or allege that the person's name was unknown.[197] One exception

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that judgment was entered in Wake County Superior Court and listed voluntary manslaughter as occurring in "Wake County" and that judgment was entered in Wake County Superior Court, but did not list a state; indictment was sufficient "because the description of the assault conviction indicates Wake County is within North Carolina, and the indictment states both judgments were entered in Wake County Superior Court, we believe this, along with the dates of the offenses and convictions, is sufficient to give defendant the required notice"); State v. Young, 120 N.C. App. 456, 462 (1995) (rejecting defendant's argument that habitual felon indictment inadequately alleged the name of the state or other sovereign against whom the prior felonies were committed); State v. Hodge, 112 N.C. App. 462, 467 (1993) (upholding indictment that alleged that the felony of common law robbery was committed in "Wake County, North Carolina," and that the other priors were committed in "Wake County," descriptions which were in the same sentence; the use of "Wake County" to describe the sovereignty against which the felonies were committed was clearly a reference to Wake County, North Carolina); State v. Williams, 99 N.C. App. 333, 334-35 (1990) (habitual felon indictment setting forth each of the prior felonies of which defendant was charged and convicted as being in violation of an enumerated "North Carolina General Statutes" contained a sufficient statement of the state or sovereign against whom the felonies were committed).

196. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 785-86 (2006); *see infra* pp. 47-48 (discussing allegations regarding drug name).

197. *See* State v. Bennett, 280 N.C. 167, 168-69 (1971) (an indictment for sale of a controlled substance must state the name of the person to whom the sale was made or that his or her name was unknown) (decided under prior law); State v. Calvino, 179 N.C. App. 219, 221-222 (2006) (the indictment alleged that defendant sold cocaine to "a confidential source of information" and it was undisputed that the State knew the name

to this rule has been recognized by the court of appeals in cases involving middlemen. *State v. Cotton*[198] is illustrative. In *Cotton,* the sale and delivery indictment charged that the defendant sold the controlled substance to Todd, an undercover officer. The evidence at trial showed a direct sale to Morrow, who was acting as a middleman for Todd. Defendant unsuccessfully moved to dismiss on grounds of fatal variance. The court of appeals noted that the State could overcome the motion by producing substantial evidence that the defendant knew the cocaine was being sold to a third party, and that the third party was named in the indictment. Turning to the facts before it, the court noted that the evidence showed that Todd accompanied Morrow to the defendant's house and was allowed to stay in the house while Morrow and defendant had a discussion. Todd was brought upstairs with them and waited in the bedroom when they went into the bathroom. Morrow then came out and told Todd to give him the money because the defendant was paranoid, went back into the bathroom, and came out with the cocaine. The court concluded that there was substantial evidence that the defendant knew that Morrow was acting as a middleman, and that the cocaine was actually being sold to Todd, the person named in the indictment, and thus that there was no fatal variance.[199] When there is insufficient evidence showing that the defendant knew that the intermediary was buying or taking delivery for the purchaser named in the indictment, a fatal variance results.[200]

If the charge is conspiracy to sell or deliver, the person with whom the defendant conspired to sell and deliver need not be named.[201]

2. Possession and Possession With Intent to Manufacture, Sell or Deliver

An indictment for possession of a controlled substance must identify the controlled substance allegedly possessed.[202] However, time and place are not essential elements of the offense of

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of the individual to whom defendant allegedly sold the cocaine in question; the indictment was fatally defective); State v. Smith, 155 N.C. App. 500, 512-13 (2002) (fatal variance in indictment alleging that defendant sold marijuana to Berger; facts were that Berger and Chadwell went to defendant's bar to purchase marijuana; Berger waited in the car while Chadwell went into the building and purchased marijuana on their behalf; there was no substantial evidence that defendant knew he was selling marijuana to Berger); State v. Wall, 96 N.C. App. 45, 49-50 (1989); (fatal variance between indictment charging sale and delivery of cocaine to McPhatter, an undercover officer, and evidence showing that McPhatter gave Riley money to purchase cocaine, which she did; there was no substantial evidence that defendant knew Riley was acting on McPhatter's behalf); State v. Pulliman, 78 N.C. App. 129, 131-33 (1985) (no fatal variance between indictment charging sale and delivery to Walker, an undercover officer, and evidence; evidence showed that although the sale was made to Cobb, defendant knew Cobb was buying the drugs for Walker); State v. Sealey, 41 N.C. App. 175, 176 (1979) (fatal variance between indictment charging defendant with selling dilaudid to Mills and evidence showing that defendant made the sale to Atkins); State v. Ingram, 20 N.C. App. 464, 465-66 (1974) (fatal variance between indictment charging that defendant sold to Gooche and evidence showing that the purchaser was Hairston); State v. Martindate, 15 N.C. App. 216, 217-18 (1972) (indictment that did not name the person to whom a sale was allegedly made and did not allege that the purchaser's name was unknown was fatally defective); State v. Long, 14 N.C. App. 508, 510 (1972) (same).

198. 102 N.C. App. 93 (1991).

199. *See also Pulliman*, 78 N.C. App. at 131-33.

200. *See Wall,* 96 N.C. App. at 49-50; *Smith,* 155 N.C. App. at 512-13.

201. *See, e.g.,* State v. Lorenzo, 147 N.C. App. 728, 734-35 (2001) (indictment charging conspiracy to traffic in marijuana by delivery was not defective for failing to name the person to whom defendant allegedly conspired to sell or deliver the marijuana).

202. *See* State v. Ledwell, 171 N.C. App. 328, 331 (2005).

unlawful possession.[203] Indictments charging possession with intent to sell or deliver need not allege the person to whom the defendant intended to distribute the controlled substance.[204]

For case law pertaining to drug quantity, see *infra* pp. 46–47. For case law pertaining to the name of the controlled substance, see *infra* pp. 47–48.

3. Trafficking

An indictment charging conspiracy to traffic in controlled substances by sale or delivery is sufficient even if it does not identify the person with whom the defendant conspired to sell or deliver the controlled substance.[205]

For case law pertaining to drug quantity in trafficking cases, see *infra* pp. 46–47.

4. Maintaining a Dwelling

The specific address of the dwelling need not be alleged in an indictment charging the defendant with maintaining a dwelling.[206]

5. Drug Paraphernalia

In *State v. Moore*,[207] an indictment charging possession of drug paraphernalia alleged that the defendant possessed "drug paraphernalia, to wit: a can designed as a smoking device." However, none of the evidence at trial related to a can; rather, it described crack cocaine in a folded brown paper bag with a rubber band around it. After denying the defendant's motion to dismiss, the trial court granted the State's motion to amend the indictment striking "a can designed as a smoking device" and replacing it with "drug paraphernalia, to wit: a brown paper container." The court of appeals held that because this change constituted a substantial alteration of the indictment, it was impermissible and the motion to dismiss should have been granted. It reasoned: "As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, 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." Without citing *Moore,* a later case held that no plain error occurred when the indictment charged the defendant with possessing "drug paraphernalia, SCALES FOR PACKAGING A CONTROLLED SUBSTANCE," but the trial court instructed the jury that it could find the defendant guilty if it concluded that he knowingly possessed drug paraphernalia, without mentioning scales or packaging.[208]

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203. *See Bennett*, 280 N.C. at 169.

204. *See* State v. Campbell, 18 N.C. App. 586, 589 (1973) (decided under prior law).

205. *See Lorenzo*, 147 N.C. App. at 734.

206. *See* State v. Grady, 136 N.C. App. 394, 396-98 (2000) (no error in allowing amendment of dwelling's address in indictment for maintaining dwelling for use of controlled substance; address changed from "919 Dollard Town Road" to "929 Dollard Town Road"; because the specific designation of the dwelling's address need not be alleged in an indictment for this offense, the amendment did not "substantially alter the charge set forth in the indictment"; also, defendant could not have been misled or surprised because another count in the same indictment contained the correct address).

207. 162 N.C. App. 268 (2004).

208. State v. Shearin, 170 N.C. App. 222, 232-33 (2005).

6. Obtaining Controlled Substance by Fraud or Forgery

Cases involving challenges to indictments charging obtaining a controlled substance by forgery are annotated below.

State v. Brady, 147 N.C. App. 755, 758 (2001) (no error in allowing amendment to change the controlled substance named from "Xanax" to "Percocet" in an indictment for obtaining a controlled substance by forgery; the name of the controlled substance is not necessary in an indictment charging this offense).

State v. Baynard, 79 N.C. App. 559, 561-62 (1986) (indictments charging crime of obtaining controlled substance by fraud and forgery under G.S. 90-108(a)(10) were adequate to support conviction, even though they did not specifically state that defendant presented forged prescriptions knowing they were forged; indictments alleged that the offense was done "intentionally" and contained the words "misrepresentation, fraud, deception and subterfuge," all of which implied specific intent to misrepresent).

State v. Fleming, 52 N.C. App. 563, 565-66 (1981) (indictment properly charged offense under G.S. 90-108(a)(10); the illegal means employed was alleged with sufficient particularity).

State v. Booze, 29 N.C. App. 397, 398-400 (1976) (indictment alleging the time and place and the persons from whom defendant attempted to acquire the controlled substance, identifying the controlled substance, and stating the illegal means with particularity, "by using a forged prescription and presenting it to" the named pharmacists, was sufficient; "it was not necessary to make further factual allegations as to the nature of the forged prescriptions or to incorporate the forged prescriptions in the bills").

7. Amount of Controlled Substance

When the amount of the controlled substance is an essential element of the offense, it must be properly alleged in the indictment. Amount is an essential element with felonious possession

of marijuana,[209] felonious possession of hashish,[210] and trafficking in controlled substances.[211] Quantity is not an element of an offense under 90-95(a)(1).[212]

8. Drug Name

When the identity of the controlled substance is an element of the offense,[213] the indictment must allege a substance that is included in the schedules of controlled substances.[214] Thus, when an indictment alleged that the defendant possessed "Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I," and no such controlled substance by that name is listed in Schedule I, the indictment was defective.[215] Similarly, an indictment that identified the controlled substance allegedly possessed, sold, and delivered as "methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act" was defective because although 3, 4-Methylenedioxymethamphetamine was listed in

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209. *See* State v. Partridge, 157 N.C. App. 568, 570-71 (2003) (indictment charging felonious possession of marijuana was defective because it did not state drug quantity; the weight of the marijuana is an essential element of this offense); State v. Perry, 84 N.C. App. 309, 311 (1987) (the elements of felony possession were set out with sufficient clarity in indictment that specifically mentioned drug quantity).

210. *See* State v. Peoples, 65 N.C. App. 168, 168 (1983) (indictment that failed to allege the amount of hashish possessed could not support a felony conviction).

211. *See* State v. Outlaw, 159 N.C. App. 423 (trafficking indictment that failed to allege weight of cocaine was invalid) (citing State v. Epps, 95 N.C. App. 173 (1989)); State v. Trejo, 163 N.C. App. 512 (2004) (rejecting defendant's argument that the indictments charging him with trafficking in marijuana by possession and trafficking in marijuana by transportation were fatally defective because each failed to correctly specify the quantity of marijuana necessary for conviction; indictment charging trafficking in marijuana by possession alleged that defendant "possess[ed] 10 pounds or more but less than 50 pounds" of marijuana; the indictment charging defendant with trafficking in marijuana by transportation alleged that defendant "transport[ed] 10 pounds or more but less than 50 pounds" of marijuana; indictments, although overbroad, did allege the required amount of marijuana; fact that challenged indictments were drafted to include the possibility that defendant possessed and transported exactly ten pounds of marijuana (which does not constitute trafficking in marijuana) does not invalidate the indictments); *Epps*, 95 N.C. App. at 175-76 (quashing conspiracy to traffic in cocaine indictment for failure to refer to amount of cocaine); State v. Keyes, 87 N.C. App. 349, 358-59 (1987) (although statute makes it a trafficking felony to possess "four grams or more, but less than 14 grams" of heroin, the indictment charged possession of "more than four but less than fourteen grams of heroin"; distinguishing *Goforth*, discussed below, and holding that variance was not fatal; the indictment excludes from criminal prosecution the possession of exactly four grams, whereas the statute includes the possession of exactly four grams; the indictment, while limiting the scope of defendant's liability, is clearly within the confines of the statute); State v. Goforth, 65 N.C. App. 302, 305 (1983) (applying prior law that criminalized trafficking in marijuana at weights of in excess of 50 pounds and holding that indictment charging conspiracy to traffic "in at least 50 pounds" of marijuana was defective). *But see Epps*, 95 N.C. App. at 176-77 (affirming trafficking by sale conviction even though relevant count in indictment did not allege a drug quantity; defendant was charged in a two-count indictment, count one charged trafficking by possession of a specified amount of cocaine and count two charged trafficking by sale but did not state an amount; the two counts, when read together, informed defendant that he was being charged with trafficking by sale).

212. *See* State v. Hyatt, 98 N.C. App. 214, 216 (1990) ("while the quantity of drugs seized is evidence of the intent to sell, 'it is not an element of the offense'"); *Peoples*, 65 N.C. App. at 169 (same).

213. *See, e.g., supra* pp. 43, 44.

214. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 784-85 (2006); State v. Ledwell, 171 N.C. App. 328 (2005).

215. *Ledwell*, 171 N.C. App. at 331-33.

Schedule I, methylenedioxymethamphetamine was not.[216] Notwithstanding this, cases have held that controlled substance indictments will not be found defective for minor errors in identifying the relevant controlled substance, such as "cocoa" instead of cocaine,[217] cocaine instead of a mixture containing cocaine,[218] and the use of a trade name instead of a chemical name.[219]

T. Weapons Offenses and Firearm Enhancement

Several cases addressing indictment issues with regard to weapons offenses and the firearm enhancement in G.S. 15A-1340.16A are annotated below.

1. Shooting into Occupied Property

State v. Pickens, 346 N.C. 628, 645-46 (1997) (no fatal variance between indictment alleging that defendant fired into an occupied dwelling with a shotgun and evidence establishing that the shot came from a handgun; the essential element of the offense is "to discharge ... [a] firearm"; indictment alleging that defendant discharged "a shotgun, a firearm" alleged that element and the averment to the shotgun was not necessary, making it mere surplusage in the indictment).

State v. Cockerham, 155 N.C. App. 729, 735-36 (2003) (indictment charging shooting into occupied property was not defective for failing to allege that defendant fired into a "building, structure or enclosure"; indictment alleged defendant shot into an "apartment" and as such was sufficient; an indictment which avers facts constituting every element of the offense need not be couched in the language of the statute).

State v. Bland, 34 N.C. App. 384, 385 (1977) (no fatal variance between indictment alleging that defendant shot into an occupied building and evidence showing that he shot into an occupied trailer; indictment specifically noted that the occupied building was located at 5313 Park Avenue, the address of the trailer).

State v. Walker, 34 N.C. App. 271, 272-74 (1977) (indictment not defective for failing to allege that the defendant knew or should have known that the trailer was occupied by one or more persons).

2. Possession of Firearm by Felon

G.S. 14-415.1 makes it a crime for a felon to possess a firearm or weapon of mass destruction. G.S. 14-415.1(c) provides that an indictment charging a defendant with this crime "shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section." It further provides that the indictment

> must set forth the date that the prior offense was committed, the type of offense and the penalty therefore, and the date that the defendant was convicted or plead guilty to such

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216. *Ahmadi-Turshizi*, 175 N.C. App. at 785-86.

217. *See* State v. Thrift, 78 N.C. App. 199, 201-02 (1985).

218. State v. Tyndall, 55 N.C. App. 57, 61-62 (1981) (although the indictment alleged that defendant sold cocaine rather than a mixture containing cocaine, this was not a fatal variance).

219. State v. Newton, 21 N.C. App. 384, 385-86 (1974) (no fatal variance between indictment charging that defendant possessed Desoxyn and evidence that showed defendant possessed methamphetamine; Desoxyn is a trade name for methamphetamine hydrochloride).

offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

The court of appeals has held that the statutory requirement that the indictment state the conviction date for the prior offense is directory and not mandatory.[220] Thus, it concluded that failure to allege the date of the prior conviction did not render an indictment defective.[221] Also, *State v. Boston,*[222] rejected a defendant's claim that an indictment for this offense was fatally defective because it failed to state the statutory penalty for the prior felony conviction. The court held that "the provision . . . that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right," that the defendant was apprised of the relevant conduct, and "[t]o hold otherwise would permit form to prevail over substance." Other relevant cases are summarized below.

Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment

State v. Langley, 173 N.C. App. 194, 196-99 (2005) (in conviction under a prior version of G.S. 14-415.1, the court held that there was a fatal variance where the indictment charged that the defendant was in possession of a handgun and the State's evidence at trial tended to show that defendant possessed a firearm with barrel length less than 18 inches and overall length less than 26 inches, a sawed-off shotgun).[223]

Finding No Fatal Defect or Variance/No Error With Respect to an Amendment

State v. Coltrane, __ N.C. App. __, 656 S.E.2d 322 (2008) (the trial court did not err by allowing the State to amend the allegation that the defendant's underlying felony conviction occurred in Montgomery County Superior Court to state that it occurred in Guilford County Superior Court; the indictment correctly identified all of the other allegations required by G.S. 14-415.1(c).

State v. Bishop, 119 N.C. App. 695, 698-99 (1995) (indictment was not invalid for failing to allege (1) that possession of the firearm was away from defendant's home or business; (2) that defendant's prior Florida felony was "substantially similar" to a particular North Carolina crime; and (3) to which North Carolina statute the Florida conviction was similar; omission of the situs of the offense was not an error because situs is an exception to the offense, not an essential element; omission of a statement that the Florida felony was "substantially similar" to a particular North Carolina crime was not an error because the indictment gave sufficient notice of the offense charged; the indictment clearly described the felony committed in Florida, satisfying the requirements of G.S. 14-415.1(b)(3) and properly charging defendant with possession of firearms by a felon).

State v. Riggs, 79 N.C. App. 398, 402 (1986) (indictment charging that defendant possessed "a Charter Arms .38 caliber pistol, which is a handgun" was not invalid for failing to allege the length of the pistol).

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220. State v. Inman, 174 N.C. App. 567 (2005).

221. *Id.* at 571.

222. 165 N.C. App. 214 (2004).

223. At the time, the prior version of the statute made it a crime for a felon to possess "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass destruction as defined by G.S. 14-288.8(c)." G.S. 14-415.1(a) (2003).

3. Possession of Weapon of Mass Destruction

State v. Blackwell, 163 N.C. App. 12 (2004) (no fatal variance between indictment charging possession of weapon of mass destruction that alleged possession of "a Stevens 12 gauge single-shot shotgun" and evidence at trial that shotgun was manufactured by Jay Stevens Arms; even if there was no evidence that the shotgun was a "Stevens" shotgun, there would be no fatal variance because "any person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim).

4. Firearm Enhancement

G.S. 15A-1340.16A provides for an enhanced sentence if the defendant is convicted of a felony falling within one of the specified classes and the defendant used, displayed, or threatened to use or display a firearm during commission of the felony. The statute provides that an indictment is sufficient if it alleges that "the defendant committed the felony by using, displaying, or threatening the use or display of a firearm and the defendant actually possessed the firearm about the defendant's person."[224]

U. Motor Vehicle Offenses

1. Impaired Driving

G.S. 20-138.1(c) and 20-138.2(c) allow short-form pleadings for impaired driving and impaired driving in a commercial vehicle respectively. For a discussion of the implications of *Blakely v. Washington,*[225] on these offenses, see *supra* p. 16. A case dealing with an allegation regarding the location of an impaired driving offense is summarized below.

State v. Snyder, 343 N.C. 61, 65-68 (1996) (indictment alleged that offense occurred on a street or highway; trial judge properly permitted the State to amend the indictment to read "on a highway or public vehicular area"; although the *situs* of the impaired driving offense is an essential element, the indictment simply needs to contain an allegation of *a situs* covered by the statute and no greater specificity is required; change in this case merely a refinement in the description of the type of *situs* on which the defendant was driving rather than a change in an essential element of the offense).

2. Habitual Impaired Driving

Under the current version of the habitual impaired driving statute,[226] this offense is committed when a person drives while impaired and has three or more convictions involving impaired driving within the last ten years. Under an earlier version of the statute, the "look-back period" for prior convictions was only seven years. At least one case has held, in connection with a prosecution under the prior version of the statute, that it was error to allow the State to amend a habitual impaired driving indictment to correct the date of a prior conviction and thereby bring it within the seven-year look-back period.[227] Indictments charging habitual impaired driving must conform to G.S. 15A-928. Cases on point are summarized below.

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224. G.S. 15A-1340.16A(d).
225. 542 U.S. 296 (2004).
226. G.S. 20-138.5.
227. State v. Winslow, 360 N.C. 161 (2005).

State v. Mark, 154 N.C. App. 341, 344-45 (2002) (rejecting defendant's argument that indictment violated G.S. 15A-928 because count three was entitled "Habitual Impaired Driving"), *aff'd,* 357 N.C. 242 (2003).

State v. Lobohe, 143 N.C. App. 555, 557-59 (2001) (indictment which alleged in one count the elements of impaired driving and in a second count the previous convictions elevating the offense to habitual impaired driving properly alleged habitual impaired driving) (citing G.S. 15A-928(b)).

State v. Baldwin, 117 N.C. App. 713, 715-16 (1995) (indictment alleged the essential elements of habitual impaired driving; contrary to defendant's claim, it alleged that defendant had been previously convicted of three impaired driving offenses).

3. Speeding to Elude Arrest

G.S. 20-141.5 makes it a misdemeanor to operate a motor vehicle while fleeing or attempted to elude a law enforcement officer who is in lawful performance of his or her duties. The crime is elevated to a felony if two or more specified aggravating factors are present, or if the violation is the proximate cause of death.

An indictment for this crime need not allege the lawful duties the officer was performing.[228] When the charge is felony speeding to elude arrest based on the presence of aggravating factors, the indictment is sufficient if it charges those aggravating factors by tracking the statutory language.[229] Thus, when the aggravating factor is "reckless driving proscribed by G.S. 20-140,"[230] the indictment need not allege all of the elements of reckless driving.[231] However, when the aggravating factor felony version of this offense is charged, the aggravating factors are essential elements of the crime and it is error to allow the State to amend the indictment to add an aggravating factor.[232]

4. Driving While License Revoked

In *State v. Scott,*[233] the court rejected the defendant's argument that an indictment for driving while license revoked was defective because it failed to list the element of notice of suspension. Acknowledging that proof of actual or constructive notice is required for a conviction, the court held that "it is not necessary to charge on knowledge of revocation when unchallenged evidence shows that the State has complied with the provisions for giving notice of revocation.[234]

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228. State v. Teel, 180 N.C. App. 446, 448-49 (2006).

229. State v. Stokes, 174 N.C. App. 447, 451-52 (2005) (indictment properly charged this crime when it alleged that the defendant unlawfully, willfully and feloniously did operate a motor vehicle on a highway, Interstate 40, while attempting to elude a law enforcement officer, T.D. Dell of the Greensboro Police Department, in the lawful performance of the officer's duties, stopping the defendant's vehicle for various motor vehicle offenses, and that at the time of the violation: (1) the defendant was speeding in excess of 15 miles per hour over the legal speed limit; (2) the defendant was driving recklessly in violation of G.S. 20-140; and (3) there was gross impairment of the defendant's faculties while driving due to consumption of an impairing substance); *see also* State v. Scott, 167 N.C. App. 783, 787-88 (2005) (indictment charging driving while license revoked as an aggravating factor without spelling out all elements of that offense was not defective).

230. G.S. 20-141.5(b)(3).

231. *Stokes,* 174 N.C. App. at 451-52.

232. State v. Moses, 154 N.C. App. 332, 337-38 (2002) (error to allow the State to amend misdemeanor speeding to allude arrest indictment by adding an aggravating factor that would make the offense a felony).

233. 167 N.C. App. 783 (2005).

234. *Id.* at 787.

V. General Crimes

1. Attempt

An indictment charging a completed offense is sufficient to support a conviction for an attempt to commit the offense.[235] This is true even though the completed crime and the attempt are not in the same statute.[236] G.S. 15-144, the statute authorizing use of short-form indictment for homicide, authorizes the use of the short-form indictment to charge attempted first-degree murder.[237]

2. Solicitation

In solicitation indictments, "it is not necessary to allege with technical precision the nature of the solicitation."[238]

3. Conspiracy

For the law regarding conspiracy to sell or deliver controlled substances indictments, see *supra* p. 44. For cases pertaining to allegations regarding the date of a conspiracy offense, see *supra* p. 8.

Conspiracy indictments "need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime."[239] Thus, the court of appeals has upheld a conspiracy indictment that alleged an agreement between two or more persons to do an unlawful act and contained allegations regarding their purpose, in that case to "feloniously forge, falsely make and counterfeit a check."[240] The court rejected the defendant's argument that the indictment should have been quashed for failure to specifically allege the forgery of an identified instrument.[241]

4. Accessory After the Fact to Felony

Accessory after the fact to a felony is not a lesser included offense of the principal felony.[242] This suggests that an indictment charging only the principal felony will be insufficient to convict for accessory after the fact.[243]

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235. *See* G.S. 15-170; State v. Gray, 58 N.C. App. 102, 106 (1982); State v. Slade, 81 N.C. App. 303, 306 (1986)

236. *See Slade*, 81 N.C. App. at 306 (1987) (discussing State v. Arnold, 285 N.C. 751, 755 (1974), and describing it as a case in which the defendant was indicted for the common law felony of arson but was convicted of the statutory felony of arson).

237. State v. Jones, 359 N.C. 832, 834-38 (2005) (noting that it is sufficient for the State to insert the words "attempt to" into the short form language); State v. Reid, 175 N.C. App. 613, 617-18 (2006) (following *Jones*).

238. State v. Furr, 292 N.C. 711, 722 (1977) (holding "indictment alleging defendant solicited another to murder is sufficient to take the case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object").

239. State v. Nicholson, 78 N.C. App. 398, 401 (1985) (rejecting defendant's argument that conspiracy to commit forgery indictment was fatally defective because it "failed to allege specifically the forgery of an identified instrument").

240. *Id.*

241. *See id.*

242. *See* State v. Jones, 254 N.C. 450, 452 (1961).

243. *Compare infra* n. 246 & accompanying text (discussing accessory before the fact). For a case allowing amendment of an accessory after the fact indictment, see *State v. Carrington*, 35 N.C. App. 53, 56-58 (1978) (indictments charged defendant with being an accessory after the fact to Arthur Parrish and an

W. Participants in Crime

An indictment charging a substantive offense need not allege the theory of acting in concert,[244] aiding or abetting,[245] or accessory before the fact.[246] Thus, the short-form murder indictment is sufficient to convict under a theory of aiding and abetting.[247] Because allegations regarding these theories are treated as "irrelevant and surplusage,"[248] the fact that an indictment alleges one such theory does not preclude the trial judge from instructing the jury that it may convict on another such theory not alleged,[249] or as a principal.[250]

unknown black male in the murder and armed robbery of a named victim; trial court did not err by allowing amendment of the indictments to remove mention of Parrish, who had earlier been acquitted).

244. *See* State v. Westbrook, 345 N.C. 43, 57-58 (1996).

245. *See* State v. Ainsworth, 109 N.C. App. 136, 143 (1993) (rejecting defendant's argument that first degree rape indictment was insufficient because it failed to charge her explicitly with aiding and abetting); State v. Ferree, 54 N.C. App. 183, 184 (1981) ("[A] person who aids or abets another in the commission of armed robbery is guilty … and it is not necessary that the indictment charge the defendant with aiding and abetting."); State v. Lancaster, 37 N.C. App. 528, 532-33 (1978).

246. *See* G.S. 14-5.2 ("All distinctions between accessories before the fact and principals … are abolished."); *Westbrook*, 345 N.C. at 58 (1996) (indictment charging murder need not allege accessory before the fact); State v. Gallagher, 313 N.C. 132, 141 (1985) (indictment charging the principal felony will support trial and conviction as an accessory before the fact).

247. State v. Glynn, 178 N.C. App. 689, 694-95 (2006).

248. State v. Estes, __ N.C. App. __, 651 S.E.2d 598 (2007).

249. *Estes*, __ N.C. App. __, 651 S.E.2d 598 (trial judge could charge the jury on the theory of aiding and abetting even though indictment charged acting in concert).

250. State v. Fuller, 179 N.C. App. 61, 66-67 (2006) (where superseding indictment charged the defendant only with aiding and abetting indecent liberties, the trial judge did not err in charging the jury that it could convict if the defendant was an aider or abettor or a principal).

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Client Interviewing, Building Trust & What to Do When It Falls Apart

D. Tucker Charns
Chief Regional Defender
Office of Indigent Defense Services

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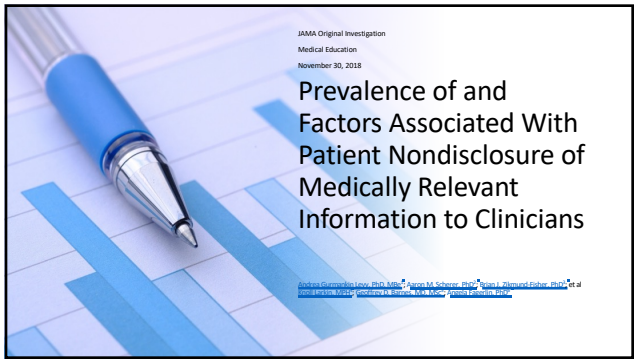
JAMA Original Investigation
Medical Education
November 30, 2018
Prevalence of and Factors Associated With Patient Nondisclosure of Medically Relevant Information to Clinicians

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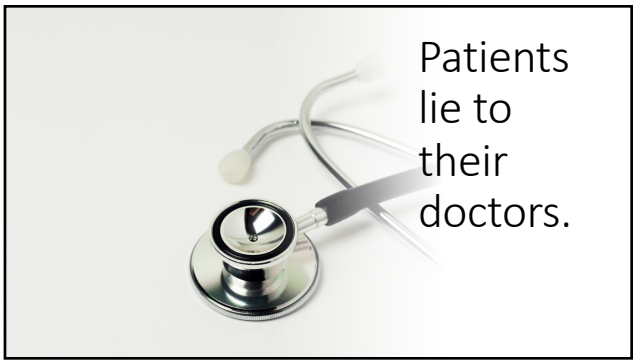

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81% of patients said they had lied to their doctors about exercise, diet, medication and stress reduction.

50% reported they did not speak up about not understanding the doctor.

8

9

Fear of shame.
Fear of judgment.

10

Why do clients lie to lawyers?

11

Fear of shame.
Fear of judgment.

12

Fear we are not on their side.

13

Fear we won't work hard for them if they tell us everything.

14

15

Trust

16

Our own experiences.

17

The experiences of our clients.

18

Trust

19

Ethics Based Client Centered Advocacy

Recognizing that an attorney is ethically bound to use any and all legal means necessary to get the best possible outcome for the fully informed client.

20

Thoroughness and preparation.

Communication.

Loyalty to the client.

Advocate for client's interest.

21

N.C. State Bar:

22

Rule 1.1 Competence

. . . Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

23

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

24

Rule 1.4 Communication

Consult/explain:

- Informed consent
- Case status
- Requests for information
- Attorney limitations
- What the client needs to make an informed decision about their choices

25

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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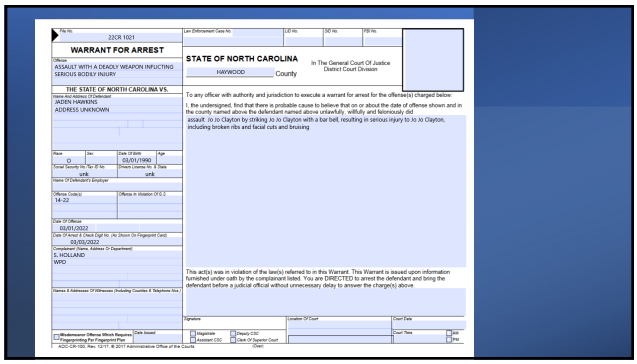
We know that!

27



File No. 22CR 1021

WARRANT FOR ARREST

Offense: ASSAULT WITH A DEADLY WEAPON INFLICTING SERIOUS BODILY INJURY

THE STATE OF NORTH CAROLINA VS.

Name And Address Of Defendant: JADEN HAWKINS, ADDRESS UNKNOWN

Race: O | Sex: | Date Of Birth: 03/01/1990 | Age:

Social Security No. Or I.D. No.: unk | Drivers License No. & State: unk

Name Of Defendant's Employer:

Offense Code(s): 14-22 | Offense In Violation Of G.S.:

Date Of Offense: 03/01/2022

Date Of Arrest & Arrest Cpd No. (As Shown On Fingerprint Card): 03/02/2022

Complainant (Name, Address Or Department): S. HOLLAND, WPD

Names & Addresses Of Witnesses (Including Counties & Telephone Nos.):

Law Enforcement Case No. | LEA No. | SID No. | FBI No.

STATE OF NORTH CAROLINA

HAYWOOD County

In The General Court Of Justice, District Court Division

To any officer with authority and jurisdiction to execute a warrant for arrest for the offense(s) charged below:

I, the undersigned, find that there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault Xx Xx Clayton by striking Xx Xx Clayton with a bar bell, resulting in serious injury to Xx Xx Clayton, including broken ribs and facial cuts and bruising

This act(s) was in violation of the law(s) referred to in this Warrant. This Warrant is issued upon information furnished under oath by the complainant listed. You are DIRECTED to arrest the defendant and bring the defendant before a judicial official without unnecessary delay to answer the charge(s) above.

Signature | Location Of Court | Court Date | Court Time: AM / PM

Misdemeanor Offense Which Requires Fingerprinting Per Fingerprint Plan | Date Issued

Magistrate / Assistant CSC | Deputy CSC / Clerk Of Superior Court (Over)

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When we think we know the story, we don't hear the story.

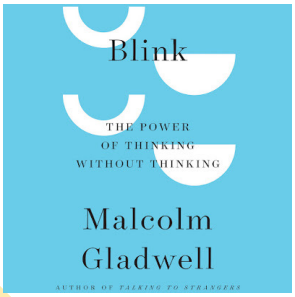
30

Trust

31

Prepare for the meeting.

32



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"(First) judgments are, first of all, enormously quick: they rely on the thinnest slices of experience…they are also unconscious."

34

Prepare for the meeting.

35

What our client has seen.

36

What our client has lost.

37

Trust.

38

Check the warrant for conflicts.

Check the warrant for defects.

39

Know the elements and defenses to the charges.

40

Know the next court date.

41

Meet the client as soon as possible after the event.

42

Communication.

43

In the interview, the attorney talks first.

44

Confidentiality.

45

Explain the elements.
Explain the defenses.
Explain the process and what happens next.

46

What they should expect.

47

What they should really expect.

48

?

If you ask questions about the event, be mindful of how you ask the questions.

49

Words are our tools.

50

Instead of:

"Where did they find the drugs?"

51

Try:

"Where will the officer say she found the drugs?"

52

Instead of:

"What did you tell the police?"

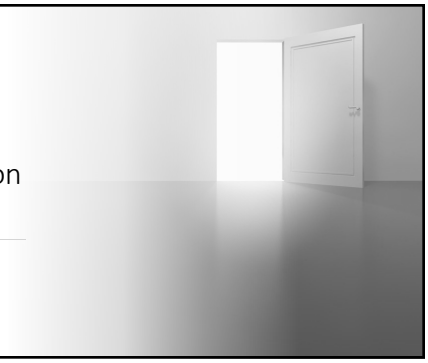
53

Try:

"What will they say you said?"

54

Keep the communication door open.



55

Instead of:

"So, you admit that…."

56

Try:

"Let's talk about…."

57

Instead of:

"Your record will kill you."

58

Try:

"Let's think about what the jury/judge would think about a that…"

59

Keep the communication glass full.

60

61

Loyalty to the client

62

63

64

In court.....

65

NO CLIENT

66

67

I do not have any information that I am able to provide.

68

69

70

Advocate for the Client's Interest

71

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a **lawyer shall abide by a client's decisions concerning the objectives of representation and,** as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

72

(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

73

Conflict about the case.

74

What do you do with a client who won't do what is best?

75

The fully informed client's expressed outcome controls.

76

Plea or trial.

77

Bond hearing.

78

Trial strategy.

79

"[W]hen counsel and a fully informed criminal defendant reach an absolute impasse as to such tactical decisions, the client's wishes must control...in accord with the principal-agent nature of the attorney-client relationship."

State v. Ali
329 N.C. 394 (1991)

80

81

"I told my lawyer, 'man, you work for me.
Object. Object.
This ain't right.'"

82

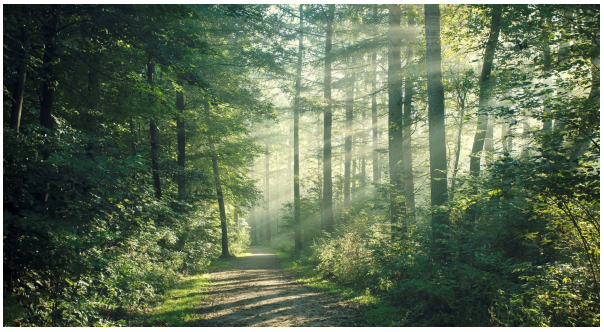
83

Batson v. Kentucky, 476 U.S. 79 (1985)

84

Simeon v. Hardin,
339 N.C. 358 (1994)

85



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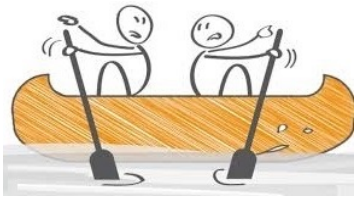


That moment.

87

You work for the State.
You are not fighting for me.
Others get better pleas.
You are selling me out to the DA.

88

Oh, fuck.

89

90

You need to get from
“Oh, fuck”
to
“OK”.

91

Recognize the “oh, fuck”.

92

93

Don’t get hijacked.

94

Get to okay.

95

At okay, turn to the client.

96

Recognize that the client's rational brain has been hijacked by the reptile brain.

97

98

Don't make it worse.

99

Don’t interrupt.
Don’t correct.
Don’t argue.

100

101

Anything else you want to tell me?

102

103

Anything else you want to tell me?

104

Respond, don't react.

105

Your goal right now is not to solve the problem/s in the rant but to stop talking AT each other.

106

Getting some yes answers.

107

I bet you think no one understands how trapped you feel right now.

108

I guess you think I'm against you sometimes because when you say A, I say Z.

109

You've been thinking on this for a while, yes?

110

111

Three steps to re-building trust.

112

1. Start with with seeing the client's perspective.

113

Every living thing wants to be seen.

114

115

Seeing someone means understanding their perspective.

116

You have to ask.

117

Guess the emotion.
Cite the facts for that.
Ask the question.

118

Wow. You seem very cross. What happened between now and the last time we talked?

119

You seem to be saying that you are worried I am out to get you. What makes you say that?

120

You are saying that I'm making you take a plea. We have talked about that being your call. What else is going on here?

121

2. Seeing the client's view of the facts the case.

122

What are you seeing that I am not seeting?

123

How hard do you really believe that?

124

How would a jury handle that?

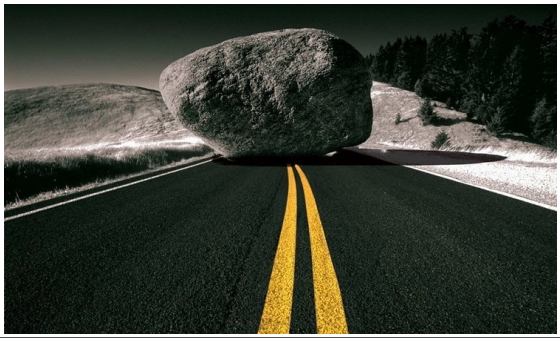
125

3. Seeing the client's view of the law of the case.

126

127

128



129

You work for the State.

130

Other plea offers.

131

Family.

132

What CCA is not.

133

What CCA requires.

134

The heart of a warrior.

135

"We are all broken by something. We have all hurt someone and have been hurt. We all share the condition of brokenness even if our brokenness is not equivalent."

- Bryan Stevenson

136

137

Tucker Charns
tucker.charns@nccourts.org
919-475-5957

138

Introducing Evidence:

Get it In and Keep it Out

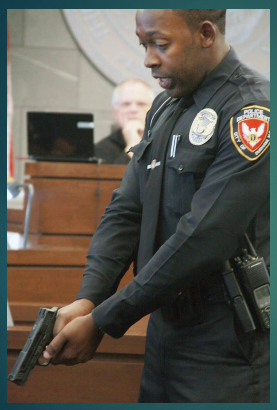
JOHN DONOVAN
MAGISTRATE

1

Categories of Evidence

- **Demonstrative Evidence**
  - Evidence that shows what something looks like (a neighborhood) or how something was done (an assault, a sobriety test). This can also include an attorney or witness demo.
- **Documentary Evidence**
  - Paper documents, Phone records, Medical Records, Employment records.
- **Physical Evidence**
  - Physical objects of evidentiary value.

2



Demonstrations: Safety First!

3

A Demonstration is Not an Experiment

- North Carolina recognizes a distinction between demonstrations and experiments. An experiment is a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried. A demonstration, on the other hand, is an illustration or explanation, as of a theory or product, by exemplification or practical application.
- Evidence pertaining to an experiment is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence. In contrast, a demonstration does not require substantially similar circumstances.
  State v. Witherspoon, 199 N.C. App. 141, 141, 681 S.E.2d 348, 348 (2009)

4

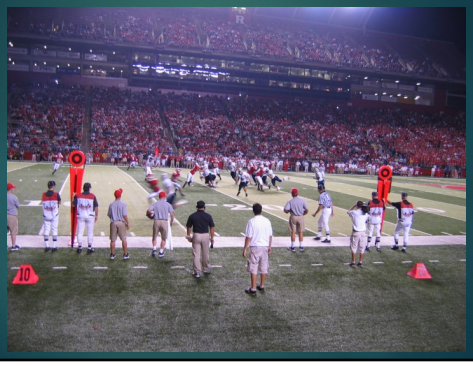
Laying the Foundation

For physical or documentary evidence, proponent must establish:

- **1) Identity** - Can the witness identify it? (Rule 901)
  - Requirement of an "original" or acceptable "duplicate," (Rules 1001-1003)
- **2) Authentication** – Is the item what you say it is (Rule 901) or is item self-authenticating (Rule 902)?
- **3) Relevance** - Does it make a consequential fact more or less probable? (Rules 401, 402, 403)
- **4) Chain of Custody** – Has it changed or been altered since it was collected? (Custody requirements may be relaxed with some documentary evidence, e.g. medical records).

5

Relevance: Does it Move the Ball?



6

Identification and Authentication

- Often used interchangeably in Rule 901
- Identification – How can the witness identify it?
  - Markings on object, individual characteristics of the item, serial number
  - Witness is record custodian, or created the item herself
- Authentication – How does the evidence "connect to the relevant facts of the case"?
  - Linked to a relevant person, place, time, event?
  - Authentication is a "special aspect of relevancy"
    - G.S. 8C-901, Official Commentary

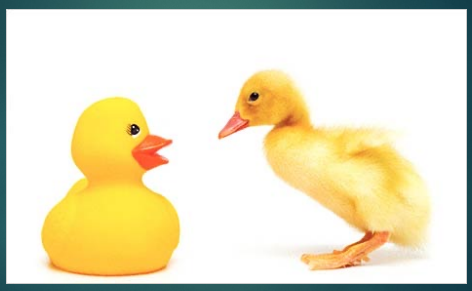
7

RULE 901 – Requirement of Authentication or Identification

- Must present "evidence sufficient to support a [rational] finding that the matter in question is what its proponent claims."
  - Intentionally broad language – threshold standard
  - Rule 901 details many different ways to authenticate
  - Even if 'authenticated' and admitted, the jury need not believe the authenticating witness' testimony, or even believe that the admitted evidence is actually what it the witness says it is. Fact finder does not have to rely on evidence just because the judge admitted it.
    - *State v. DeJesus*, 265 N.C. App. 279 (2019)

8

Just because it's admissible doesn't mean it's persuasive.



9

The Fact Finder Decides

- Doubts about authentication generally go to the weight, not the admissibility, of the evidence.
  - Jeffrey Welty, *Digital Evidence*, UNC SOG, p. 157

10

Rule 901(b)(1), Testimony of Witness with Knowledge & Chain of Custody

- 901(b)(1) - "Testimony that a matter is what it is claimed to be"- a witness with first-hand knowledge can establish the foundation through testimony.
- First-hand knowledge means detailed sensory perceptions.
- "Show, don't tell" during direct examination
  - Present the sights, sounds, smells, feelings the witness experienced
  - Don't jump to conclusions – lay the groundwork that leads to the conclusion.

11

First-Hand Knowledge

- Incriminating text messages found on defendant's phone
- Text messages admissible where a witness testified that she was the person who composed and sent the text messages to the defendant.
- No requirement to present technical evidence about how telecommunications companies transmit text messages.
  - *State v. Gray*, 234 N.C. App. 197, 758 S.E.2d 699 (2014)

12

Custody authentication

- A series of witnesses who can account for the whereabouts and condition of an object from the time it is found in connection with the relevant facts of the case until the moment it is offered into evidence.

13

They Crushed My Crack!

- "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility."

  State v. Dawkins, 269 N.C. App. 45, 48, 837 S.E.2d 138, 141 (2019)

14

Beware of documentary evidence containing hearsay!

- If the DA attempts to introduce documentary evidence that does not fall under a hearsay exception, OBJECT on hearsay and 14th Amendment Due Process grounds, as well as 6th Amendment Confrontation Clause grounds if appropriate.
- (If you are proffering the evidence, perhaps you are actually "refreshing recollection" of the witness and stopping short of moving to introduce the item.)
- What is the item being offered for? Impeachment purposes? Illustrative purposes? Substantive purposes?
- Hearsay is not permitted if an item is being offered for substantive purposes without a hearsay exception.

15

Types of Evidence to Introduce

- Phone records (often in the phone itself), Text messages, Social Media posts
- Business records - Rule 803(6) hearsay exception - including Medical records.
- Photographs
- Video
- Voice recordings
- Diagrams

16

Go for it! You are among friends.

17

Business Records How To

- 1) Mark documents for identification
- 2) Show documents to opposing counsel
- 3) Approach witness
- 4) Show documents to witness
- 5) Ask witness to identify the documents
- 6) Ask how the records are made, i.e. in the ordinary course of business by someone with a business duty to record such info
- 7) Storage of the documents, where the documents are retrieved from
- 8) Whether it is a regular part of business to keep and maintain this type of record
- 9) Whether documents of this type would be kept under the witness's custody or control – any changes since the records were made?
- 10) Move for admission of the documents

18

The Pause That Refreshes

19

Present Recollection Refreshed

- If the State's hearsay objection is sustained, ask the witness if reviewing the records would refresh his present recollection of the times and dates of the calls in question (Rule of Evidence 612).
- But remember the witness can't directly read from the records and they can't be introduced into evidence over a sustained hearsay objection.
- However, the witness is allowed to refer to the document as an aid to memory
- State is entitled to see the document
- Can't be a "mere recitation of the refreshing memorandum".
  - *State v. Harrison*, 218 N.C. App. 546 (Feb. 7, 2012); *State v. Jones*, 280 N.C. App. 241, 2021-NCCOA-592 (Nov. 2, 2021)

20

Computerized Business Records

- If records are computer-generated, the custodian-witness must have personal knowledge of how the computers gather and store information about the business activity so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.
  - *State v. Springer*, 283 N.C. 627, 636 (1973).

21

Jury or Judge Still Get to Decide if the Records are Reliable

- Authentication only establishes that the evidence supports a rational finding that they are business records.
- The jury gets to decide if the records are actually accurate.
- And if the record-keeping process really produces reliable records.
- And if the specific foundation witness is credible.
  - *See State v. Crawley*, 217 N.C. App. 509 (Dec. 20, 2011).

22

The Special Case of Medical Records

- NC law provides a method for you to subpoena medical records and introduce them into evidence without in-person authentication.
- Pursuant to N.C.G.S. §§ 1A-1 Rule 45(c)(2) and 8-44.1, a medical records custodian need not appear in response to subpoena so long as the custodian delivers certified copies of the records requested to the judge's chambers.
- The records must be accompanied by a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business.
- Medical records can come in without further authentication if this procedure is followed.

23

Photographs

- Photographs are admissible under N.C.G.S. § 8-97 as either illustrative or substantive evidence.
- Under the NC Pattern Jury Instructions, the jury may consider a "substantive" photograph itself as "evidence of facts it illustrates or shows."
- An "illustrative" photograph may only be considered by the jury to the extent it "illustrates and explains" the testimony of a witness and not for any other purpose. The testimony is evidence, not the photograph.

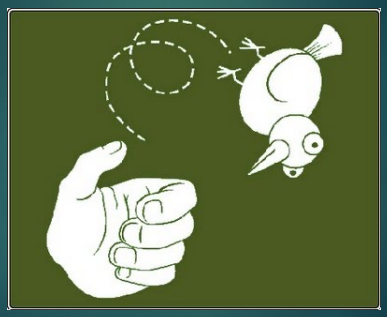
24

Photos: Illustrative

- Photos for illustrative purposes need not be authenticated in the same way as photos for substantive purposes
  - State v. Little, ___ N.C. App. ___, 799 S.E.2d 427 (Apr. 18, 2017)
- Photos staged to be used as visual aids can be used to illustrate a witness's testimony
  - State v. Moultry 246 N.C. App. 702 (Apr. 5, 2016)

25

Facebook photo: Illustrative



26

Facebook Photo: Illustrative

- State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (Jun. 20, 2017)
  - OK for trial court to allow introduction of a printed Facebook photo of defendant flipping the *digitus impudicus* where victim had showed same photo to investigator to identify perpetrator and accomplice
  - The investigator's testimony was the evidence, not the photo
  - Trial court gave limiting instruction to that effect, and photo was otherwise authenticated properly

27

Introducing Photo - Illustrative

1) Mark exhibit and show to opposing counsel
2) Approach witness and show exhibit
3) Ask whether the witness recognizes and is familiar with the image (person, place, object, etc.) portrayed in this photograph
4) How the witness recognizes what is shown in this photograph
5) Whether the photograph fairly and accurately represents the subject as the witness remembers it on the date in question
6) Would the photo assist you in illustrating your testimony?
7) Move for admission of the exhibit
8) Expect State's request for limiting instruction (illustrative purposes only)
9) Consider publishing photo to jury or placing on display screen during testimony

28

Photographs as Substantive Evidence

- To introduce a photograph as substantive evidence, you must lay a foundation showing that the photograph establishes a relevant fact and that the photograph has not changed or been altered since it was taken.
- To lay such a foundation you need the witness to confirm:
  - First-hand knowledge of when and how the photo was taken, developed or displayed
  - The photograph accurately depicts its subject as it appeared at a relevant time
  - No methods were used during photography, processing or display to distort how the subject looks
  - The photograph has not been altered or changed since it was taken or processed

29

Introducing Photo - Substantive

- Who took the picture?
- What kind of camera? Film? Digital?
- Does the picture accurately depict how the subject looked at the relevant time?
- How was the picture processed or stored?
- Any special methods used in processing or display to alter how the subject looks?
- Any alterations since the photo was first taken?

30

Voice Recording

- Authentication of recording upheld where:
  - (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number;
  - (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number;
  - (3) a witness familiar with the defendant's voice identified the defendant as the caller;
  - (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and
  - (5) the caller discussed circumstances similar to those involved with the defendant's arrest.
    - *State v. Mobley,* 206 N.C. App. 285 (Aug. 3, 2010).

31

Video Authentication

- Authentication upheld where:
  - Witness established that the recording process was reliable by testifying:
    - He was familiar with how video surveillance system worked, equipment was "industry standard," "in working order" on [the date in question], and the videos produced by the surveillance system contain safeguards to prevent tampering.
    - Witness established that the video introduced at trial was the same video produced by the recording process, and was the same video that he saw on the digital video recorder display.
    - Because Defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody.
      - *State v. Snead,* 368 N.C. 811 (April 15, 2016)

32

Don't allow a mere foundation witness to tell the fact finder what they are seeing!

- Don't blithely allow the witness to narrate the video.
- Unless the video is being used to illustrate what the witness saw with his own eyes, he doesn't get to tell the jury or judge what they are seeing.
- If the video "fairly and accurately depicts" what the witness actually saw, it can be introduced for illustrative purposes and the witness can narrate the video to illustrate her testimony.
  - *State v. Fleming,* ___ N.C. App. ___, 786 S.E.2d 760 (June 7, 2016).

33

"Functioning Properly" Testimony

- If the witness can only testify that the video equipment was "functioning properly" at the time the video was made, she lacks first-hand knowledge and should not be allowed to narrate or explain the video, since it is the video that is evidence, not her testimony.
  - *State v. Snead*, 368 N.C. 811 (April 15, 2016)
- If the witness is not an expert and does not have first-hand knowledge of the events shown, she is no better equipped than the jury or judge to decide what the video shows.
- State might try to qualify the witness as an expert to explain the video. Be ready to challenge under Rule 702.

34

Video Authentication Elements

- Video equipment functioning properly
  - Date and time stamps accurate
  - Other diagnostics show system working as intended
- System is monitored and maintained to prevent tampering and ensure functioning
- Video has not been edited or altered since the video custodian (store employee) first watched it
  - *See, e.g., State v. Ross*, ___ N.C. App. ___, 792 S.E.2d 155 (Oct. 4, 2016).

35

Cell phone video of surveillance video (Pt. 1)

- Officer took cell phone video of store surveillance video monitor.
- Officer testified the cell phone video accurately showed the contents of the video that he had seen at the store.
- The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he had observed on the day in question.

36

Cell phone video of surveillance video (Pt. 2): Need foundation.

- Need foundation testimony about the type of recording equipment used to make the original surveillance video, its condition on the day in question, and its general reliability.
- Must ask witness if the video accurately depicts events he observed personally.
- Without this, proponent lacks proper foundation for introduction of the video as either illustrative or substantive evidence.
  - *State v. Moore*, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017).

37

Diagrams

38

Diagrams

- A picture is worth a lot – especially if it illustrates your story of innocence.
- Can clarify and simplify complicated testimony
- Can help guide awkward or rambling witnesses
- Can serve as a symbol and reminder of your most important points

39

Diagrams - Illustrative

1) Mark exhibit and show exhibit to opposing counsel
2) Approach witness and show exhibit
3) Ask if witness is familiar with the area that this diagram depicts. If so, how?
4) Whether this diagram/map appears to be an accurate depiction of the area as the witness recalls it on the date in question
5) Is the diagram to scale?
6) Whether the diagram/map would help the witness describe the area included in the diagram or any events that occurred during the day in question
7) Move to admit the diagram into evidence for illustrative purposes

40

Internet Diagrams: Substantive

- If the diagram is created by a program such as Google Maps, consider asking the court to take judicial notice of the printout as substantive evidence.
- Potential substantive evidence includes layout of neighborhoods, distance between points, arrangement of highways, etc., under Rule of Evidence 201(b).
- Google Maps' diagrams have been recognized by federal appellate courts as a source containing information "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See *U.S. v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2d Cir. 2012); *Pahls v. Thomas*, 718 F.3d 1210 n.1 (10th Cir. 2012).

41

901(b)(4)– and After

- Allows low tech methods for authenticating high tech evidence
- Courts appear to be accepting "common sense" empirical ways to authenticate social media and electronic communications

42

Text Messages - Substantive

- Courts will usually require circumstantial evidence tending to show who sent a text message, above and beyond evidence of the number the text was sent from.
- Rule of Evidence 901(b)(4) allows for the use of "distinctive characteristics and the like" to identify or authenticate writings, including "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

43

Text Messages – circumstantial evidence

- Robbery case with multiple accomplices.
- A detective testified that he took pictures of text messages on the defendant's cell phone while searching the phone incident to arrest.
- The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them.
- Another accomplice, with whom the defendant was communicating in the text messages, also testified to the authenticity of the exhibit.
- Court rejected defendant's argument that authentication required testimony by phone company employees.
  - *State v. Gray*, 234 N.C. App. 197 (June 3, 2014).

44

Circumstantial Foundation for Text Messages:

- Defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called the police;
- Eyewitness provided a license plate number and a description of the car that matched the defendant's car, and testified that the driver appeared to be using a cell phone;
- Morning after the crime, the same car was found parked at the defendant's home with some of the stolen property in the trunk;
- Phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone;
- Text message itself referenced a stolen item;
- By analyzing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a route tracking the phone from the area of the defendant's home to the area of the victim's home and back.
  - *State v. Wilkerson*, 223 N.C. App. 195 (Oct. 16, 2012).

45

If you can avoid it, don't use the phone itself

- Consider printing out text messages
- Consider printing out pictures in color
- Consider burning a DVD of video evidence
  - You may want to hand up copies to the judge, and will also have to give copies to the State. Will also want a copy for the witness and for yourself.
  - Better to play a video on a laptop or overhead screen than to have all the parties crowded around a phone.
- In the chaotic reality of district court practice, this may not be possible.

46

Text Message - Example

1) Mark phone (showing text) – or printout of text - as exhibit
2) Show phone to opposing counsel
3) Approach witness and show phone with text
4) Whose phone is this
5) Is the witness familiar with the text – if so, how?
6) What number the text came from
7) Whether the defendant recognizes the number – if so, how?
8) What if any other communication to or from this number during the time in question
9) Later communication – by phone or in person – in response to or referring to this text
10) Other distinctive characteristics of the text message (use of nicknames, reference to prior texts whose origin in verified, reference to private details only the alleged sender would likely know, threats or promises in the text later carried out by alleged sender, later admission by alleged sender, etc.)
11) Who witness believes sent the text
12) Move to admit into evidence
13) Remember – just need enough evidence to allow a rational finding that the text message was sent by the person alleged

47

Not all dogs are this nice.

48

Social Media Screenshots: Foundation

- Pit bull kills man – voluntary manslaughter charge against owner
- State attempts to introduce MySpace screenshots
- Court finds screenshots properly authenticated where:
  - State presents evidence Defendant goes by "Flex", and page in question has name "Flexugod/7."
  - Page contained photos of the defendant and of the dog allegedly involved in the incident.
  - Link to a YouTube video depicting dog that killed victim.

49

Screenshots: Circumstantial Foundation

- Circumstantial evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage.
- Court noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant".
  - *State v. Ford*, ___ N.C. App. ___, 782 S.E.2d 98 (Feb. 16, 2016).

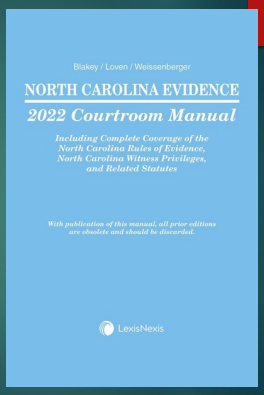
50

Facebook Screenshots

- The victim's testimony that she took the screenshots of her Facebook account was sufficient to authenticate the images as photographs.
- The victim's testimony of receiving letters from the defendant while he was in prison and distinctive phone calls from a blocked number after his release, together with evidence of the defendant's access to the daughter's Facebook account was sufficient to authenticate the comments as written statements potentially made by the defendant such that admission of the screenshots into evidence was proper.
  - *State v. Clemons*, 274 N.C. App. 401 (Dec. 1, 2020)

51

Use Often!



52

Contact Information:

- John.C.Donovan@nccourts.org
- (919) 636-8357

Thanks – please feel free to contact me with questions!

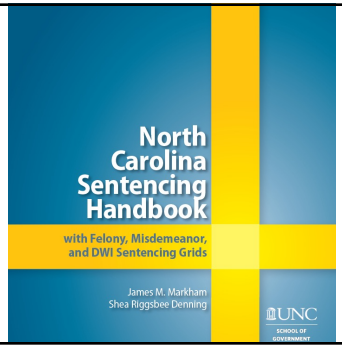
53

Introduction to Structured Sentencing

Jamie Markham
November 2022

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

1



2

Structured Sentencing

- Applies to most felonies and misdemeanors
- Excludes DWI
- Some crimes have special rules
  - –E.g., Shoplifting
  - –Page 60

3

Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days	C/I/A 1–150 days
1	C 1–45 days	C/I/A 1–45 days	C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days	C/I/A 1–60 days
		One to Three Prior Convictions	Four Prior Convictions	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days	C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

A—Active Punishment I—Intermediate Punishment C—Community Punishment

4

Basic Steps

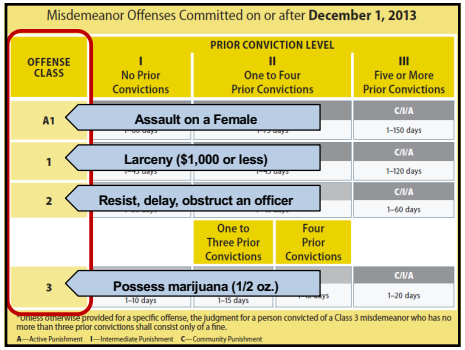
- **Step 1: Determine the Applicable Law**
- **Step 2: Determine the Offense Class**
- **Step 3: Determine the Prior Conviction Level**
- **Step 4: Select a Sentence of Imprisonment**
- **Step 5: Choose a Sentence Disposition**
- **Step 6: Review Additional Issues, as Appropriate**

5

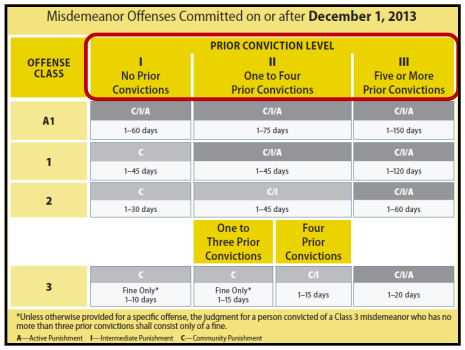
Sentence Types

- Jail
- Supervised probation
- Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

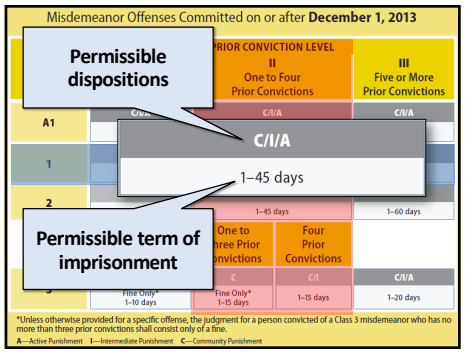
6


Misdemeanor Offenses Committed on or after December 1, 2013
OFFENSE CLASS
PRIOR CONVICTION LEVEL
I No Prior Convictions
II One to Four Prior Convictions
III Five or More Prior Convictions
A1
1
2
3
One to Three Prior Convictions
Four Prior Convictions
Assault on a Female
Larceny ($1,000 or less)
Resist, delay, obstruct an officer
Possess marijuana (1/2 oz.)
C/I/A
1–150 days
1–120 days
1–60 days
1–20 days
*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

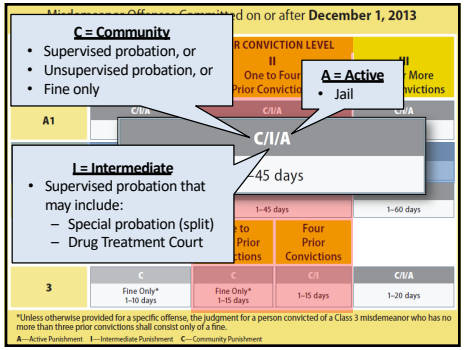
7


Misdemeanor Offenses Committed on or after December 1, 2013
OFFENSE CLASS
PRIOR CONVICTION LEVEL
I No Prior Convictions
II One to Four Prior Convictions
III Five or More Prior Convictions
A1
C/I/A
1–60 days
C/I/A
1–75 days
C/I/A
1–150 days
1
C
1–45 days
C/I/A
1–45 days
C/I/A
1–120 days
2
C
1–30 days
C/I
1–45 days
C/I/A
1–60 days
One to Three Prior Convictions
Four Prior Convictions
3
C
Fine Only*
1–10 days
C
Fine Only*
1–15 days
C/I
1–15 days
C/I/A
1–20 days
*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

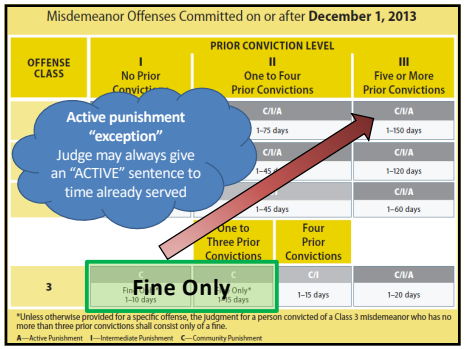
8


Misdemeanor Offenses Committed on or after December 1, 2013
Permissible dispositions
C/I/A
1–45 days
Permissible term of imprisonment
II One to Four Prior Convictions
III Five or More Prior Convictions
A1
1
2
1–45 days
1–60 days
Four Prior Convictions
C/I/A
1–20 days
*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

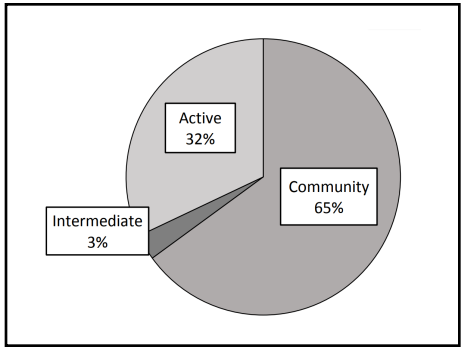
9


C = Community
• Supervised probation, or
• Unsupervised probation, or
• Fine only
A = Active
• Jail
I = Intermediate
• Supervised probation that may include:
– Special probation (split)
– Drug Treatment Court
C/I/A
1–45 days
1–60 days
Four Prior Convictions
C/I/A
Fine Only*
1–10 days
Fine Only*
1–15 days
C/I
1–15 days
1–20 days
*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

10


Misdemeanor Offenses Committed on or after December 1, 2013
OFFENSE CLASS
PRIOR CONVICTION LEVEL
I No Prior Convictions
II One to Four Prior Convictions
III Five or More Prior Convictions
Active punishment "exception"
Judge may always give an "ACTIVE" sentence to time already served
C/I/A
1–75 days
C/I/A
1–150 days
C/I/A
1–120 days
1–45 days
C/I/A
1–60 days
One to Three Prior Convictions
Four Prior Convictions
3
Fine Only
C/I
1–15 days
C/I/A
1–20 days
*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.
A—Active Punishment I—Intermediate Punishment C—Community Punishment

11


Active 32%
Community 65%
Intermediate 3%

12

Offense Class (p. 11)

- Appendix B

13

Appendix B: Offense Class Table for Misdemeanors

Class A1	
Assault by Pointing a Gun (G.S. 14-34)	
*Assault in Presence of Minor (G.S. 14-33(d))	
Assault Inflicting Serious Injury (G.S. 14-33(c)(1))	
Assault on Child under 12 Years of Age (G.S. 14-33(c)(3))	
Assault on Female (G.S. 14-33(c)(2))	
Assault on Government Officer or Employee (G.S. 14-33(c)(4))	
Assault on Handicapped Person (G.S. 14-32.1)	
Assault on School Employee or Volunteer (G.S. 14-33(c)(6))	
Assault with Deadly Weapon (G.S. 14-33(c)(1))	
Child Abuse (G.S. 14-318.2)	
First-Degree Trespass, Utility Premises or Agricultural Center (G.S. 14-159.12)	
Food Stamp Fraud, $100–$500 (G.S. 108A-53.1)	
Interfering with Emergency Communication (G.S. 14-286.2)	
Misdemeanor Death by Vehicle (G.S. 20-141.1)	Class 1 for offenses before 12/1/2009
Secretly Peeping, Second Offense or with Photo Device (G.S. 14-202)	
Sexual Battery (G.S. 14-27.33)	Was G.S. 14-27.5A for offenses before 12/1
*Stalking, First Offense (G.S. 14-277.3A)	
Violation of a Valid Protective Order (G.S. 50B-4.1(a))	
Class 1	
Aggressive Driving (G.S. 20-141.6)	
Breaking into Coin-Operated Machine, First Offense (G.S. 14-56.1)	
Breaking or Entering Buildings (G.S. 14-54(b))	
Communicating Threats (G.S. 14-277.1)	
Contributing to the Delinquency of a Juvenile (G.S. 14-316.1)	
Cruelty to Animals (G.S. 14-360)	
Cyber-Bullying, Defendant 18 or Older (G.S. 14-458.1)	
Disclosure of Private Images, Defendant under 18, First Offense (G.S. 14-190.5A)	

14

Offense Class (p. 11)

- Appendix B
- Attempt: One class lower
- Conspiracy: One class lower
- Solicitation: Always Class 3

15

Prior Conviction Level (p. 11-12)

- State's burden to prove
  - –Preponderance of the evidence
  - –Stipulation, court/DMV records, or any other reliable method
- Ethics: No intentional underreporting

16

Prior Conviction Level (p. 11-12)

- **Count**
  - Any prior conviction, felony or misdemeanor
  - Convictions from other jurisdictions
  - Old convictions
  - Traffic convictions
  - Prayer for judgment continued (PJC)
- **Do Not Count**
  - Infractions
  - Juvenile adjudications
  - Contempt
  - Probation revocations

- Count only one conviction from each session of district court and each week of superior court

17

Prior Conviction Level

No. Of Prior Convictions	Level
0	I
1 - 4	II
5+	III

PRIOR CONVICTION LEVEL ▶ [ ]

18

Prior Conviction Level

4

✓	12/23/1999	Felony larceny (Virginia)
✓	4/22/2006	PJC for disorderly conduct
✗	1/18/2007	Failure to stop at stop sign
✓	6/19/2008	2nd degree trespass
✓	9/12/2014	Intoxicated & disruptive
✗	9/12/2014	2nd degree trespass
✗	7/6/2018	Criminal contempt

19

Exercise 1

20

Exercise 1

- Communicating Threats
- Prior convictions: 5
- Jail credit: None

- What is the longest permissible Active sentence?

21

Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–120 days	
1	C 1–45 days		
2	C 1–30 days	1–45 days	1–60 days
		One to Three Prior Convictions / Four Prior Convictions	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days / C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

A—Active Punishment I—Intermediate Punishment C—Community Punishment

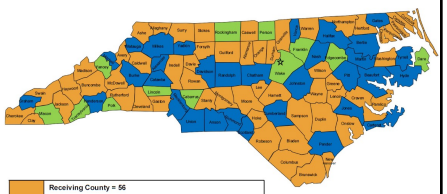
22

Active Sentences

- Defendant goes directly to jail
- Place of confinement
  - 90 days or less: Local jail
  - Over 90 days: Statewide Misdemeanant Confinement Program

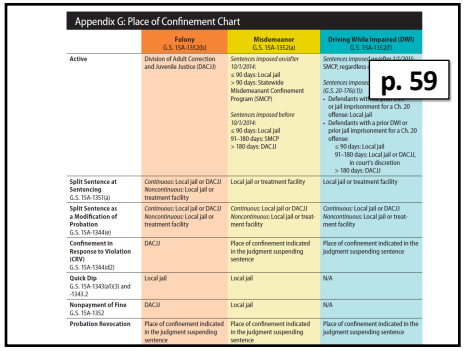
UNC

23



- $40 per day
- Out-of-Jail Medical Expenses

24

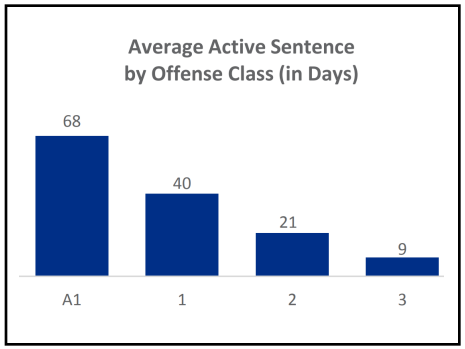


Appendix G: Place of Confinement Chart

	Felony G.S. 15A-1352(b)	Misdemeanor G.S. 15A-1352(a)	Driving While Impaired (DWI) G.S. 15A-1352(f)
Active	Division of Adult Correction and Juvenile Justice (DACJJ)	*Sentences imposed on/after 10/1/2014:* ≤ 90 days: Local jail > 90 days: Statewide Misdemeanant Confinement Program (SMCP) *Sentences imposed before 10/1/2014:* ≤ 90 days: Local jail 91–180 days: SMCP > 180 days: DACJJ	*Sentences imposed on/after 12/1/2015:* SMCP, regardless *Sentences imposed* (G.S. 20-176(c1)): • Defendants w or jail imprisonment for a Ch. 20 offense: Local jail • Defendants with a prior DWI or prior jail imprisonment for a Ch. 20 offense: ≤ 90 days: Local jail 91–180 days: Local jail or DACJJ, in court's discretion > 180 days: DACJJ
Split Sentence at Sentencing G.S. 15A-1351(a)	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	Local jail or treatment facility	Local jail or treatment facility
Split Sentence as a Modification of Probation G.S. 15A-1344(e)	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility	*Continuous:* Local jail or DACJJ *Noncontinuous:* Local jail or treatment facility
Confinement in Response to Violation (CRV) G.S. 15A-1344(d2)	DACJJ	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence
Quick Dip G.S. 15A-1343(a1)(3) and -1343.2	Local jail	Local jail	N/A
Nonpayment of Fine G.S. 15A-1352	DACJJ	Local jail	N/A
Probation Revocation	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence

p. 59

25



26

Credits

- Jail credit (p. 21)
  - **Concurrent sentences:** All get credit
  - **Consecutive sentences:** One gets credit
- Sentence reduction credit (p. 22)
  - **Earned time:** 4 days/month
  - **Good time (DWI):** Cuts time in half

27

Probationary Sentences

28

Probation (p. 26)

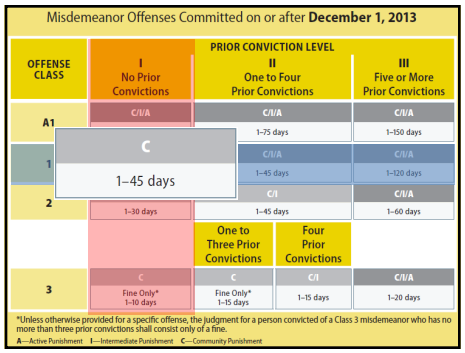
- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

29

Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

30



31

Probation (p. 26)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

32

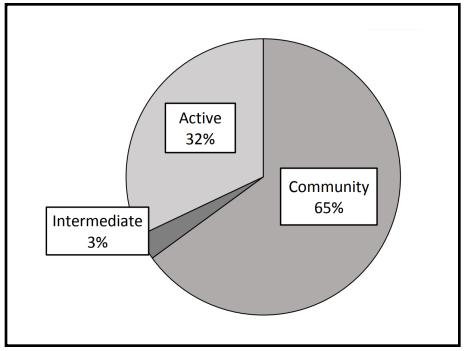
Community

- Supervised or unsupervised probation that MAY NOT include
  - Special probation
  - Drug treatment court

Intermediate

- Supervised probation that MAY include
  - Special probation
  - Drug treatment court

33

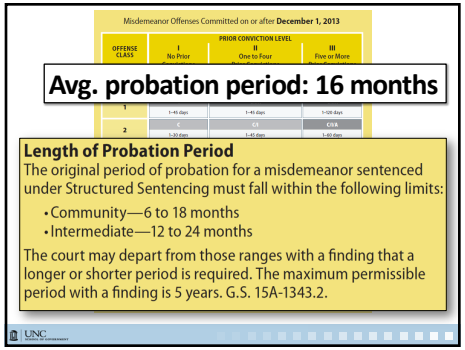


34

Probation (p. 28)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

35



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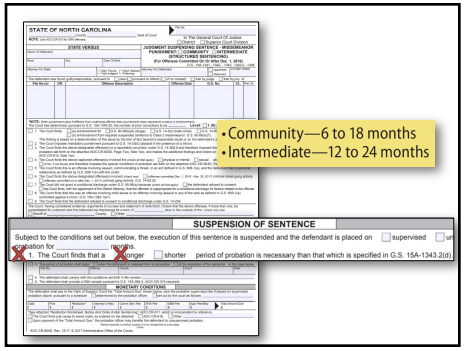


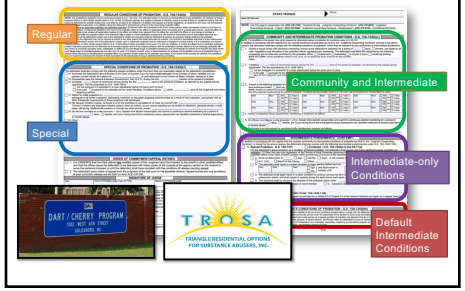
37

Probation (p. 28-32)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

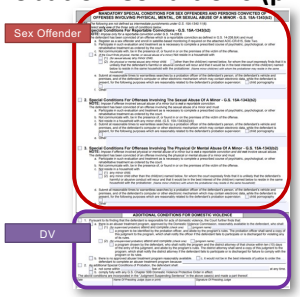
38

Probation Conditions (p. 28-32)



39

Probation Conditions (p. 28-32)



40

Probation (p. 32)

- Term of imprisonment
- Type of probation
- Period of probation
- Conditions of probation
- Delegated authority

41

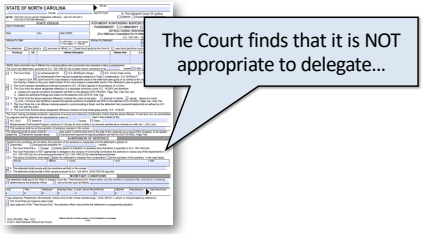
Delegated Authority

- Conditions a probation officer may impose without court action
  - Community service
  - Additional reporting
  - Substance abuse assessment/treatment
  - House arrest
  - Curfew with electronic monitoring
  - Educational/vocational programming
  - **2- or 3-day "quick dip" in the jail**

42

Delegated Authority

- Applies unless the court "un-delegates" it



43

Exercise 2

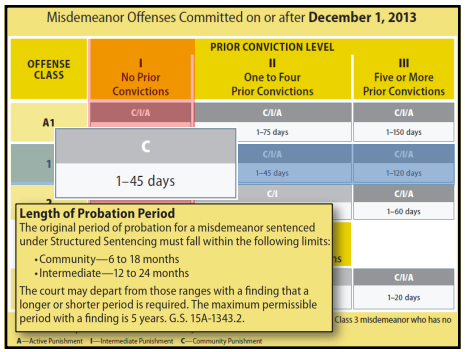
44

Exercise 2

- Misdemeanor larceny
- Prior convictions: 0
- Jail credit: None

Give a suspended sentence with the longest possible period of probation the court can order without a finding.

45



46

Special probation (split sentence)

- Intermediate punishment
- Jail confinement as a condition of probation
- Up to ¼ the maximum imposed sentence
- May be noncontinuous (e.g., weekends)
- Optional $40/day jail fee

47

Exercise 3

48

Exercise 3

- Assault on a Female
- Prior convictions: 4
- Jail credit: 3 days
- What is the longest permissible split sentence?

49

Misdemeanor Offenses Committed on or after **December 1, 2013**

OFFENSE CLASS	PRIOR CONVICTION LEVEL I No Prior Convictions	II One to Four Prior Convictions	III Five or More Prior Convictions
A1	C/I/A 1–60 days	C/I/A 1–75 days	C/I/A 1–150 days
1	C 1–45 days	C/I 1–45 days	C/I/A 1–120 days
2	C 1–30 days	C/I 1–45 days	C/I/A 1–60 days
		One to Three Prior Convictions	Four Prior Convictions	
3	C Fine Only* 1–10 days	C Fine Only* 1–15 days	C/I 1–15 days	C/I/A 1–20 days

*Unless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine.

A—Active Punishment I—Intermediate Punishment C—Community Punishment

50

Special probation (split sentence)

- Intermediate punishment
- Jail confinement as a condition of probation
- Up to ¼ the maximum imposed sentence
- May be noncontinuous (e.g., weekends)
- Optional $40/day jail fee
- *Judge's discretion whether to apply jail credit to the split sentence or to the suspended term*

51

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

52

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

⊘ Intermediate
⊘ Sex offenders

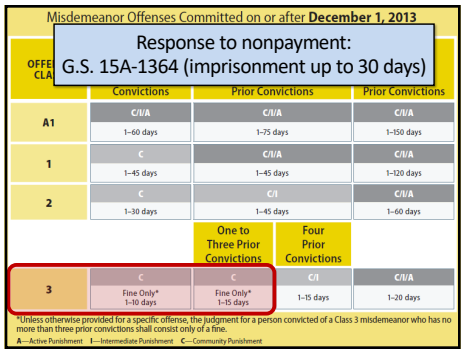
53

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- Fines and restitution
- Multiple convictions
- Diversions

- Class A1—Court discretion
- Class 1—Court discretion
- Class 2—$1,000
- Class 3—$200

54



55

Restitution (p. 19)

- Compensation to victim
  - **Limited to crimes of conviction (State v. Murphy)**
- Must have proof or stipulation
- Court must consider defendant's ability to pay

56

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fines and restitution
- Multiple convictions
- Diversions

57

Sentencing Multiple Convictions

- Page 20-21
  - –Consolidation
  - –Concurrent sentences
  - –Consecutive sentences
  - –Multiple probationary sentences

58

Limit on Consecutive Sentences

- The cumulative term of imprisonment may not exceed twice the maximum authorized sentence for the class and prior conviction level of the most serious offense
- If all convictions are for Class 3 misdemeanors, they may not run consecutively

59

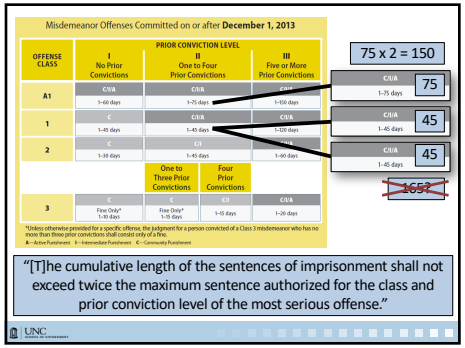
Exercise 4

60

Exercise 4

- Convictions
  - –Sexual battery (Class A1)
  - –Larceny (Class 1)
  - –Injury to personal property (Class 1)
- Prior Conviction Level II
- What is the longest permissible consecutive sentence?

61



62

Sex Offenders

- Reportable sex crimes (p. 19; p. 58)
  - –Sex offender registration (30 years or lifetime)
  - –Satellite-based monitoring (SBM)
  - –Additional probation conditions (p. 32)
  - –No unsupervised probation
  - –Optional: Permanent no-contact order

63

Sentence Types

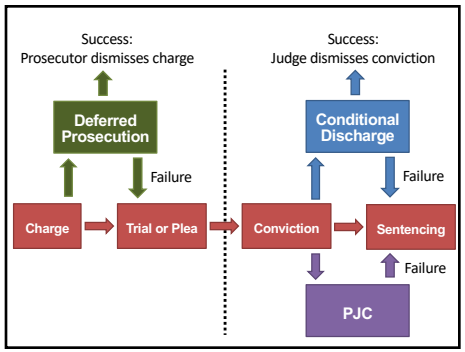
- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fine only
- ✓ Multiple convictions
- Diversions

64

Diversions (p. 23-24)

- Deferred prosecution
- Conditional discharge
- Prayer for Judgment Continued (PJC)

65



66

Deferred Prosecution

- Statutory deferred. G.S. 15A-1341(a1)
  - Misdemeanors, Class H/I felonies
  - No prior probation
  - 2-year probation maximum
  - Should not include acceptance of plea
- Informal deferred

67

Conditional Discharge

G.S. 90-96(a)	**Drug possession/paraphernalia**
G.S. 90-96(a1)	Drug possession/paraphernalia
G.S. 90-113.14	Toxic Vapor offenses
G.S. 15A-1341(a4)	**Any Class H/I felony or misdemeanor**
G.S. 15A-1341(a5)	Drug Treatment Court
G.S. 15A-1341(a3)	Prostitution
G.S. 14-50.29	Gang offender under 19 years old

68

PJC

- After adjudication of guilt, continuation without entry of judgment
- Permissible in any case, except:
  - DWI
  - Solicitation of prostitution
  - Speeding in excess of 25 mph over limit
  - Passing a stopped school bus
- May not include conditions beyond obeying the law and paying costs
- No subsequent authority to "dismiss"

69

Sentence Types

- ✓ Jail
- ✓ Supervised probation
- ✓ Special probation (probation with split)
- ✓ Unsupervised probation
- ✓ Fine only
- ✓ Multiple convictions
- ✓ Diversions

70

71

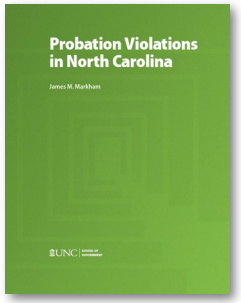
Probation Violations

Jamie Markham
UNC School of Government

November 2022

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

1



2

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

3

Violation Hearings

4

Initiating a Violation

- Probation Violation Report (DCC-10)
- Probationer is entitled to 24 hours notice of alleged violations
- All violations must be filed before case expires
- No special rules for "addendum" violations

5

Arrest and Bail (p. 6-7)

- Probationers can be arrested for a violation
- Generally entitled to bail
- Exceptions for "dangerous" probationers:
  - With felony charges pending, or
  - Ever convicted of a sex crime
- No statutory authorization for anticipatory bonds
  - "Arrest on first positive drug screen. $50,000 bond."
  - "Hold without bond"
  - Court of Appeals has "urged caution" against that practice. State v. Hilbert, 145 N.C. App. 440 (2001)

6

Preliminary Hearings

- Required under G.S. 15A-1345(c)
  - Within 7 working days of arrest
  - Felony preliminary hearings may be held in district court
  - Required only if probationer is detained
- If not held within 7 working days, probationer must be released pending final violation hearing

7

Final Violation Hearings

- Proper venue:
  - Where probation imposed
  - Where violation occurred
  - Where probationer resides
- Court may return the case to district of origin or residence

8

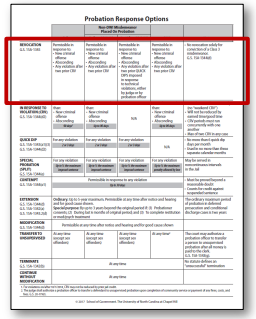
Final Violation Hearings

- Not a formal trial
- Probationer entitled to counsel
- Probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation
- Rules of evidence don't apply
  - Hearsay admissible
  - Exclusionary rule inapplicable
- Proof to judge's "reasonable satisfaction"

9

Response Options

10


Probation Response Options

11

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

12

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

13

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

14

4. Condition of Probation "Commit no criminal
offense in any jurisdiction" in that
THE DEFENDANT HAS THE FOLLOWING PENDING CHARGES:
ON 10/10/12 THE DEFENDANT WAS CHARGED WITH DWLR AND FICT/AL
TITLE/REG CARD/TAG IN 12CR 705617, EXPIRED/NO INSPECTION AN
OPERATE VEH NO INS IN 12CR 705618 AND DRIVE/ALLOW MV NO
REGISTRATION AND CANCL/REVOK/SUSP CERTIF/TAG IN 12CR 705619
AND ALL ABOVE CHARGES ARE IN SAMPSON COUNTY.
ON 10/17/12 THE DEFENDANT WAS CHARGED WITH SHOPLIFTING
CONCEALMENT GOODS IN 12CR 223602 IN WAKE COUNTY.
ON 11/16/12 THE DEFENDANT WAS CHARGED WITH DWLR IN
12CR 709464 IN HARNETT COUNTY.
ON 12/18/12 THE DEFENDANT WAS CHARGED WITH POSSESSION OF
FIREARM BY FELON IN 12CR 057780 AND POSSESS MARIJUANA UP TO

1/2 OZ IN 12CR 0577[illegible] IN JOHNSTON COUNTY.
IF THE DEFENDANT IS CONVICTED OF ANY OF THE CHARGES IT WILL
BE A VIOLATION OF HIS CURRENT PROBATION.

15

New criminal offense (p. 19)

- "Commit no criminal offense in any jurisdiction"
  - **Conviction** for new offense
  - **Independent findings** of criminal offense at probation violation hearing
- No revocation solely for Class 3 misdemeanor

16

Absconding (p. 21)

"Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation."

G.S. 15A-1343(b)(3a)

17

Absconding

- More than merely failing to report
- More than merely failing to remain within the jurisdiction
- Facts supporting absconding:
  - Long absence from residence
  - Repeated attempts by officer to contact
  - Probationer knows officer is looking for him or her and still doesn't respond

18

Revocation (p. 16)

Serious Violations
- New criminal offense
- Absconding

Eligible for revocation upon first violation

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

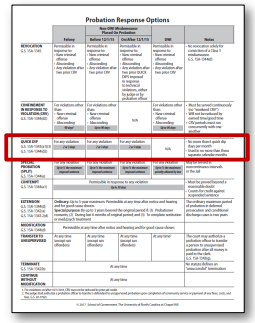
19

Revocation (p. 16)

Technical Violations
- Everything else

Three Strikes approach
Eligible for revocation after two prior . . .
Misd: Quick dips
Felony/DWI: CRV

20


Probation Response Options

21

Quick Dips

- 2-3 days of jail confinement
  - No more than 6 quick dips days per month
  - Used in no more than three separate calendar months of probation
  - Not permissible in DWI cases
- Quick Dips may be imposed by judge or by probation officer through "delegated authority"

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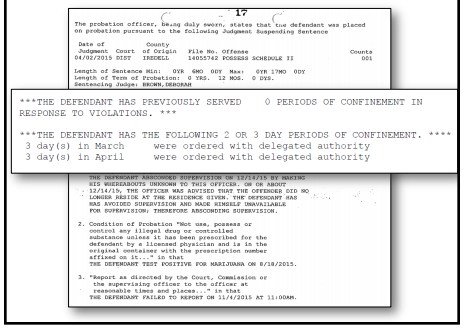


17

The probation officer, being duly sworn, states that the defendant was placed on probation pursuant to the following Judgment Suspending Sentence

Date of Judgment	Court	County of Origin	File No.	Offense	Counts
04/02/2015	DIST	IREDELL	14055742	POSSESS SCHEDULE II	001

Length of Sentence Min: 0YR 6MO 0DY Max: 0YR 17MO 0DY
Length of Term of Probation: 0 YRS. 12 MOS. 0 DYS.
Sentencing Judge: BROWN,DEBORAH

***THE DEFENDANT HAS PREVIOUSLY SERVED 0 PERIODS OF CONFINEMENT IN RESPONSE TO VIOLATIONS. ***

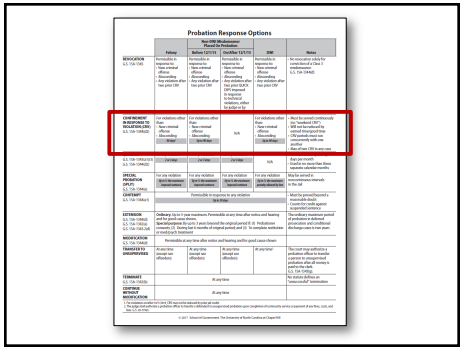
THE DEFENDANT HAS THE FOLLOWING 2 OR 3 DAY PERIODS OF CONFINEMENT. *
3 day(s) in March were ordered with delegated authority
3 day(s) in April were ordered with delegated authority

THE DEFENDANT ABSCONDED SUPERVISION ON 12/14/15 BY MAKING HIS WHEREABOUTS UNKNOWN TO THIS OFFICER. ON OR ABOUT 12/14/15, THE OFFICER WAS ADVISED THAT THE OFFENDER DID NO LONGER RESIDE AT THE RESIDENCE GIVEN. THE DEFENDANT HAS HAS AVOIDED SUPERVISION AND MADE HIMSELF INAVAILABLE FOR SUPERVISION; THEREFORE ABSCONDING SUPERVISION.

2. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it..." in that THE DEFENDANT TEST POSITIVE FOR MARIJUANA ON 8/18/2015.

3. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places..." in that THE DEFENDANT FAILED TO REPORT ON 11/4/2015 AT 11:00AM.

23



Probation Response Options

24

Confinement in Response to Violation (CRV) (p. 23)

- Permissible in response to violations other than "commit no criminal offense" and "absconding"
- Length:
  - Felony: 90 days
  - DWI: Up to 90 days

25

Summary of Revocation Eligibility

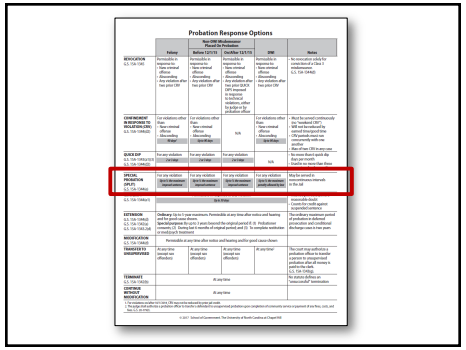
- For **new crimes** & **absconding**
  - Any probationer may be revoked upon first violation
- For **technical violations**, eligible for revocation after:
  - **Felony:** Two prior CRVs (90 days)
  - **DWI:** Two prior CRVs (up to 90 days)
  - **Misdemeanors**: Two prior Quick Dips (2-3 days, imposed by judge or probation officer)

26

Upon Revocation… (p. 18)

- The judge may reduce the sentence within the same range in the same grid cell
- Judge may allow consecutive suspended sentences to run concurrently

27



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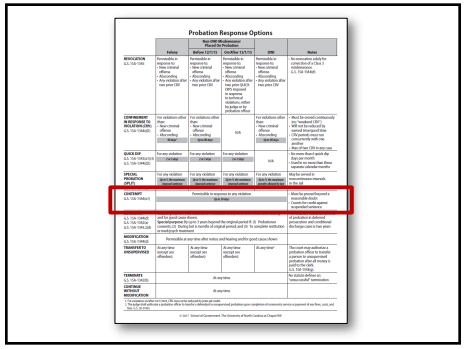
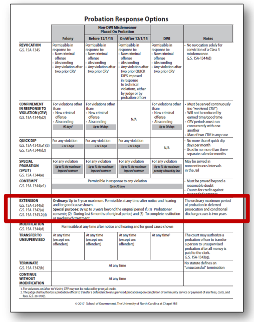


29

Contempt

- Up to 30 days in jail
- Chapter 5A procedures apply
  - Proper notice
  - Proof beyond a reasonable doubt
- Counts for credit against suspended sentence if defendant is later revoked

30


Probation Response Options

31

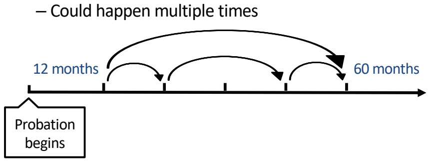
Extending Probation

- Two types: *ordinary* and *special purpose*

32

Ordinary Extensions

- At any time prior to expiration, for good cause shown, the court may extend probation to the 5-year maximum
  - No violation required
  - Could happen multiple times

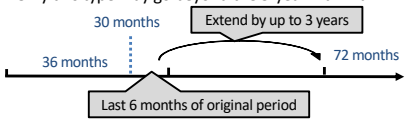


33

SCHOOL OF GOVERNMENT

Special Purpose Extensions

- Extension by up to 3 years beyond the ***original*** period if:
  - Probationer consents
  - During last 6 months of ***original*** period, *and*
  - Extension is for restitution or medical or psychiatric treatment
- Only this type may go beyond the 5-year maximum



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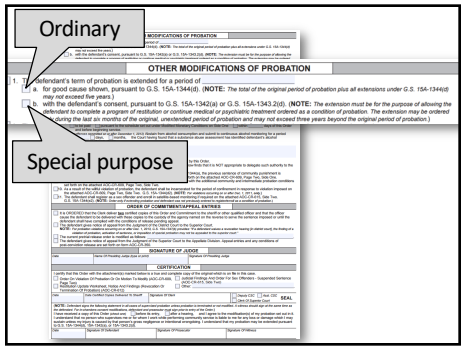

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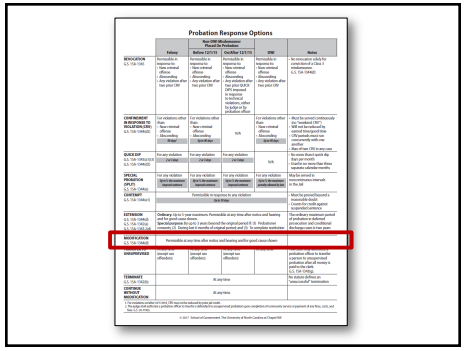
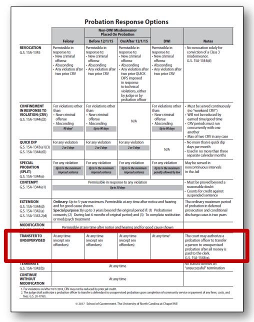


36

Modification

- Court may add/remove conditions at any time for good cause shown
  - No violation need have occurred
- After violation, the judge may add Intermediate conditions to a Community case

37

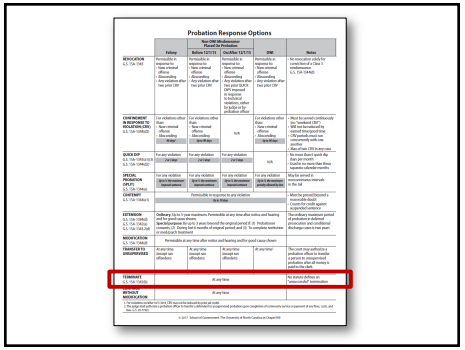

Probation Response Options

38

Transfer to Unsupervised

- Permissible at any time
- Judge may authorize probation officer to transfer a defendant to unsupervised probation once all money is paid

39



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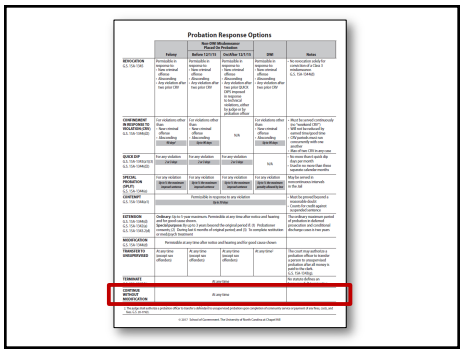
Termination

- Ends probation early
- Permissible at any time if warranted by the defendant's conduct and "the ends of justice"
- "Terminate unsuccessfully"

41



42

A defendant was placed on probation for Communicating Threats in 2019. He has a 60-day suspended sentence. The defendant admits to two violations (there are no prior violations):

- Failure to report to the probation officer
- Positive drug screen

Which responses are permissible?

- ❌Revocation?
- ❌CRV?
- ✔Quick dip?
- ✔Split?

43

A defendant was placed on probation for DWI in 2020. The officer alleges the following violation.

> Of the conditions of probation imposed in that judgment, the defendant has willfully violated:
> 1. Condition of Probation "Commit no criminal offense in any Jurisdiction" in that THE DEFENDANT HAS THE FOLLOWING PENDING CHARGES: ON 10/13/17 THE DEFENDANT WAS CHARGED WITH POSSESSION OF FIREARM BY FELON IN 17CRS705617 IN SAMPSON COUNTY. IF THE DEFENDANT IS CONVICTED OF THIS CHARGE IT WILL BE A VIOLATION OF HIS CURRENT PROBATION.

Which responses are permissible?

- ✔Revocation?
- ❌CRV?
- ❌Quick dip?
- ✔Split?

44

Appeals

- District court defendants have a statutory right to appeal **revocation** or imposition of a **split sentence** to superior court for de novo violation hearing
  - No appeal of CRV
  - No appeal of deferred prosecution revocation
- No de novo appeal to superior court if the defendant "waives" a revocation hearing

45

Appeals

- Class H and I felonies pled in district court
  - By default, violation hearing is in superior court
  - With consent, may be held in district court
  - Appeal is de novo to superior court

46

"Elect to Serve"

- No longer an option by statute (since 1997)

49

Jail Credit Upon Revocation

- Pre-trial
- Pre-hearing
- Prior splits
- DART Cherry / Black Mountain
- Contempt
- CRV
- Quick dips

50

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

51

Jurisdiction

- Was a violation report filed (and file stamped) before the probation period expired?
  - Watch for "addendum" violations

52

Jurisdiction

- Was the initial period of probation lawful to begin with?

53

Improper Probation Period

- Misdemeanor–Community 6-18 months
- Misdemeanor–Intermediate 12-24 months
- Felony–Community 12-30 months
- Felony–Intermediate 18-36 months


SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on ☐ supervised ☐ unsupervised probation for ____ months.

☐ 1. The Court finds that a ☒ longer ☐ shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).

54

Jurisdiction

- Has there ever been an unlawful extension of the defendant's probation?

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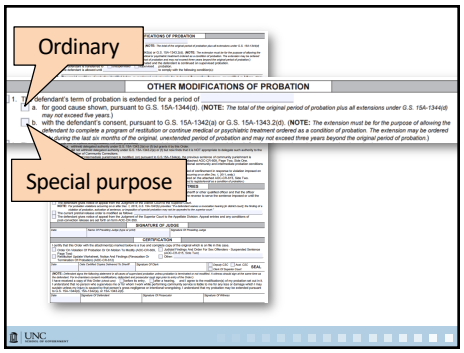

56

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

57

Jurisdiction

- The court may act…"[a]t any time prior to the expiration or termination of the probation period." G.S. 15A-1344(d).
- Court may also act after expiration if violation report filed (and file stamped) before probation ends. G.S. 15A-1344(f).

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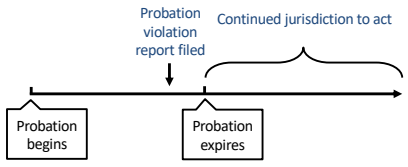

59

(f) Extension, Modification, or Revocation after Period of Probation. - The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

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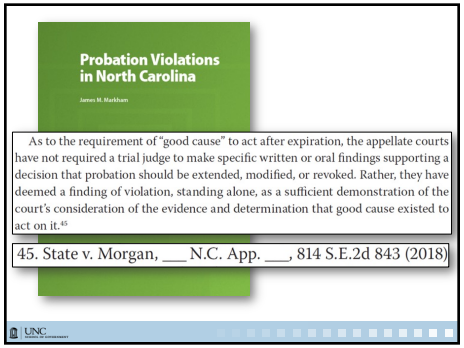


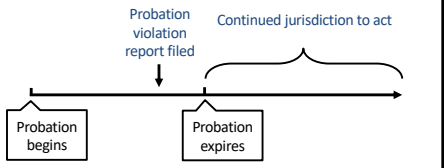
61

State v. Morgan (N.C., 2019)

- To preserve jurisdiction to act on a case after it has expired, the court must make a finding of **"good cause shown and stated"**

62

State v. Morgan



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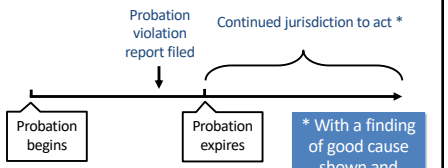
State v. Morgan



64

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

65

Willfulness

- "Good faith inability to pay"
- Be prepared to show defendant's living expenses, employment, etc.

66

General Framework

- Does the court have jurisdiction to act?
- Did the defendant violate a lawful condition?
- Was the violation willful?
- Was the violation revocation-eligible?
- Consider alternatives
- Mitigate

67

If revocation, mitigate

- Reduce sentence
- Run sentences concurrently
- Make sure all jail credit applied
- Relieve financial obligations

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Negotiating Effectively

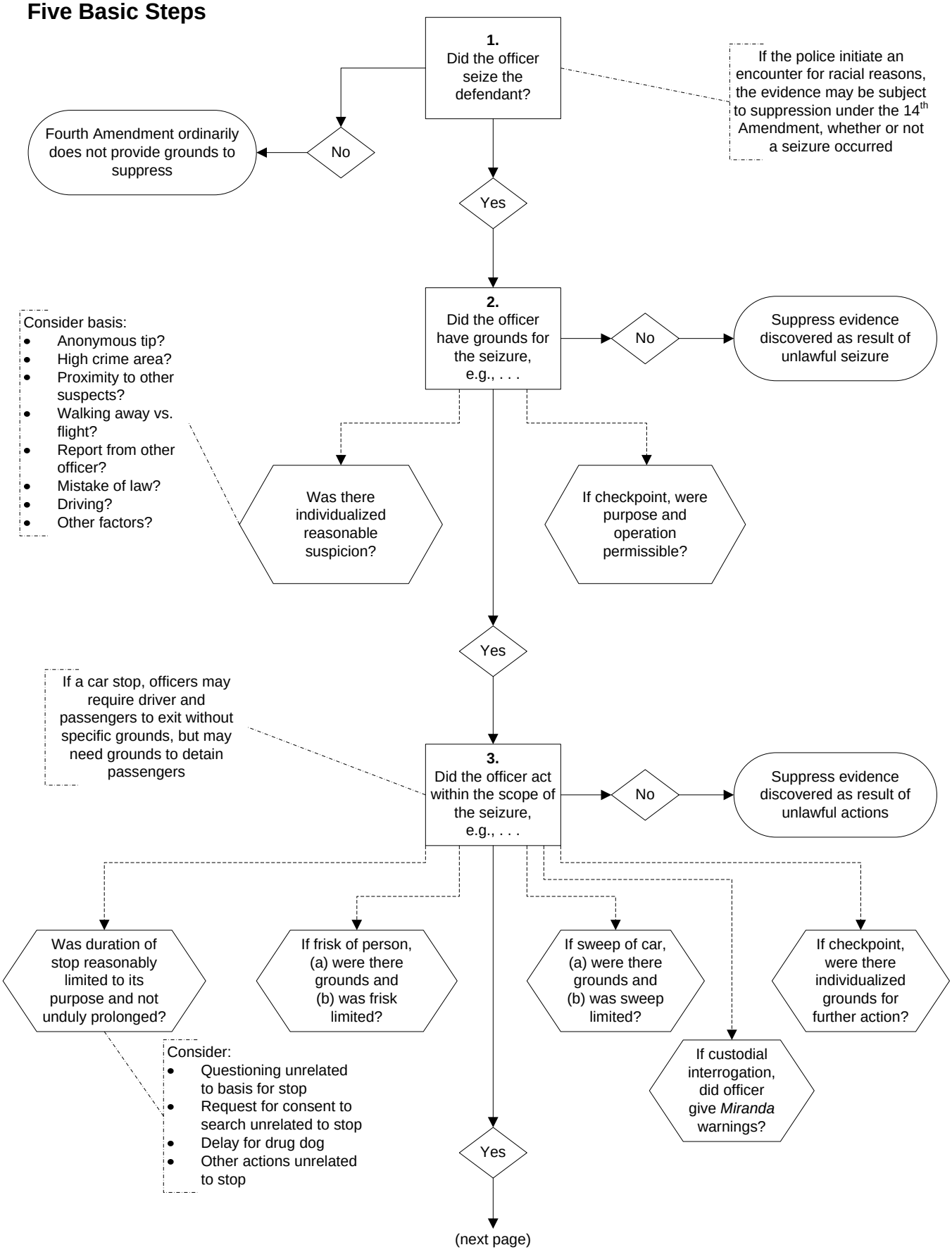
1. Why Negotiate
    a. Not ready for Trial – you or the State
    b. Client doesn't want a trial
    c. Facts are worse than the State knows
    d. Facts support other charges that weren't charged
        i. 2nd CCG
        ii. Habitual Larceny
    e. Judicial Efficiency
    f. It's in your Client's Best Interest - other cases unrelated resolved
2. Who is Standing Beside you? Oh yeah, it's not about you- it's about your Client
    a. What do they want?
    b. What is their exposure?
    c. What's in their best interest?
        i. Are they "Successful" Candidates for Probation?
            1. Smoke their weed
            2. Homeless
            3. Travel for Work – In State v Out of State
    d. Who are they time?
        i. Criminals
        ii. Criminals of need
        iii. Criminals for the fun of it
3. Who is Standing beside your Client?
    a. Family or Friends – listen, but don't listen
    b. You
        i. Are you prepared for trial?
        ii. Are you prepared for sentencing?
            1. Community Service
            2. LDP
            3. Documents for the Court
        iii. Are you known as...
            1. Lead 'em, to Plead 'em
            2. Locked and Loaded
            3. Cool Hand Luke

Time to Negotiate

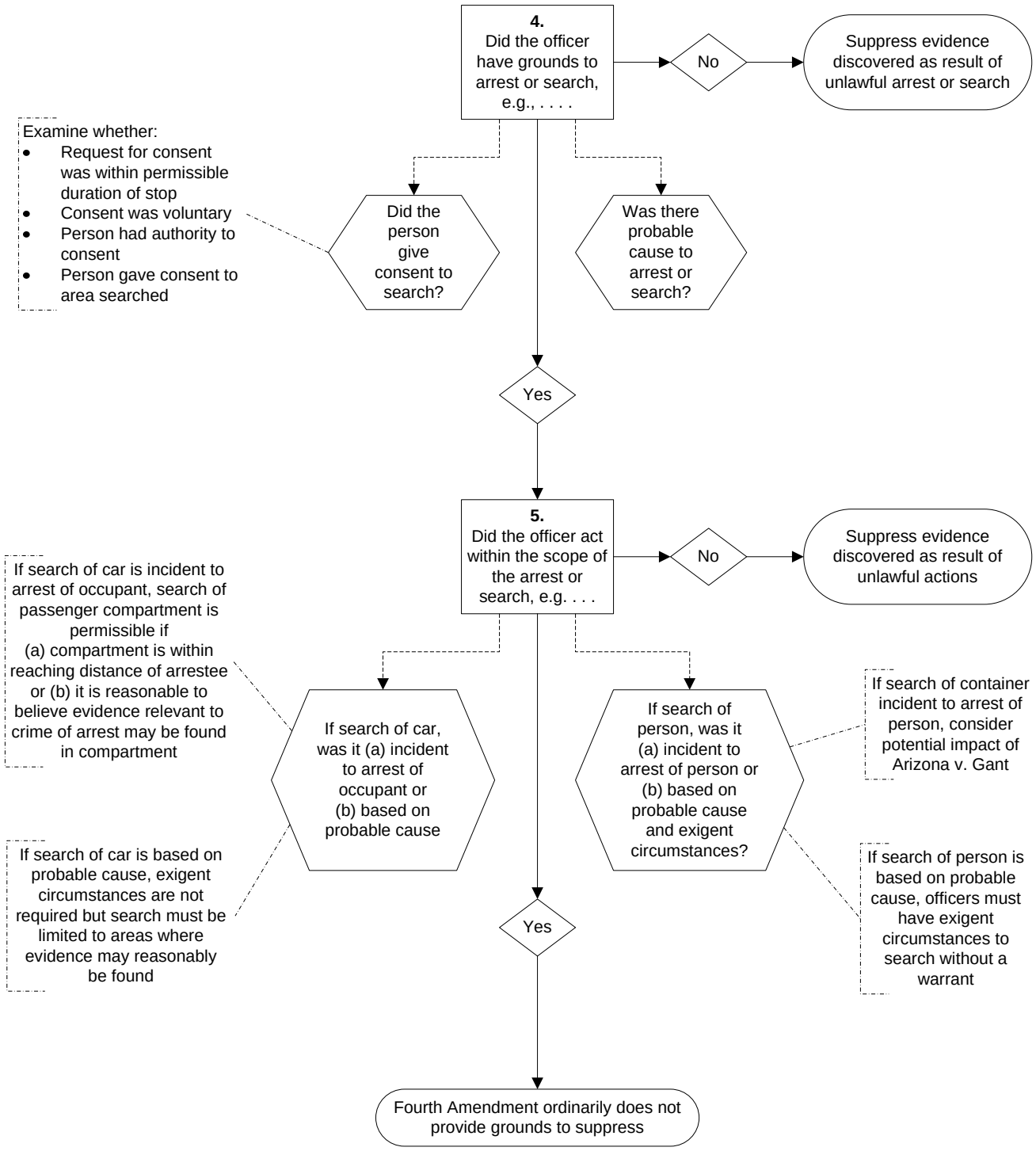
4. It's for Trial
    a. Walk in with Law Books tabbed and case law ready to share
        i. Remember, whether retained or appointed it's for trial
    b. What do you lose with a Trial
        i. DWIs mandatory Probation...
        ii. Can your client go to Jail?
    c. Remember if negotiations fall short, it's for Trial
5. Who is at the DA's Table
    a. Mrs. DA
        i. Persecutor v. Prosecutor
        ii. Doesn't live in the world your client lives in
    b. Mrs. DA want to be Judge
        i. They like to negotiate sentencing as well
    c. Mrs. "It's the Weekend Baby"
        i. They need a new pen, because its out of ink from signing dismissals
    d. Every ADA is different, you need to know how to
        i. Present your side
        ii. When to present your side
        iii. How hard to push
        iv. What are their "true" beliefs
            1. Do they like to try cases
            2. Do they believe in the charge
            3. Do they like the officer
6. What's the Policy of the District?
    a. Don't know ask a colleague, clerk, or a different DA
    b. Do they ADAs have discretion to vary
    c. Does your client qualify for something other than policy?
        i. 1st offender
        ii. Age
        iii. Maturity
        iv. Money talks...
        v. Letters of Support
        vi. Community Service done prior to Court
        vii. Snitches get stitches or end up in ditches
7. Charges
    a. What is the Law?
    b. Are there flaws in the Charging Document?
    c. Do you have valid issues in the case?

        i. Motion to Suppress
        ii. Necessary Witness that is unavailable
    d. Is there an alternative to the charge with a different punishment?
        i. Old DWI vs FTA on Implied Consent Charge
    e. Deferred Prosecution v Conditional Discharge v Informal Deferred
        i. Know the differences
8. Punishment
    a. Can you negotiate on sentencing with the DA
        i. Short active, time served, or Court Costs Only
        ii. PJC - Continue for Community service or classes
    b. Can you plead to something to "Tie" the Judge's hands
    c. Can you conference with the judge about a judgment
        i. Will the judge accept your plea even if you and the DA agree
9. Victims
    a. Who is the victim
        i. Mom, family member, neighbor, complete stranger
        ii. What do they want????
10. Back to Your Client
    a. Is what you worked out in their best interest?
    b. Will they take it?
    c. Are we going to plea or going to trial?

Appendix 15-1
Stops and Warrantless Searches: Five Basic Steps



Five Basic Steps (cont'd)



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Warrantless Stops and Searches:
Discussion Problems
September 2019

Did the officer seize the defendant?

1. Law-enforcement officers set up a driver's license checkpoint on a two lane city street (one lane in each direction). The officers were checking licenses at the checkpoint, but there is also evidence that the real purpose of the checkpoint was to look for drugs. One of the officers, Officer Jones, sees a car turn into a side street just before the checkpoint and begins following the car. The driver pulls into an apartment complex and parks. Jones pulls his car into the lot and approaches the defendant. Jones asks the defendant what he's doing, and the defendant replies in a slurred voice that he lives at the complex, which turns out to be true. Jones smells an overpowering odor of alcohol about the defendant and directs him to perform various field sobriety tests. The defendant does poorly, and Jones arrests him for driving while impaired. The defendant later blows a .26.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?
Did the officer have grounds for the seizure?

2. An unidentified person calls the police from his cell phone. He describes a car and its license plate and the general appearance of a man with long blond hair as the driver. He says that the car was weaving. The caller says he thinks the driver is drunk. Officer Connor receives a dispatch and pulls the car over. During the course of the stop, Connor discovers evidence that the driver is impaired and arrests him for impaired driving.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officers seize the defendant?
Did the officers have grounds for the stop?
Did the officers act within the scope of the seizure?

3. Drug officer Jones is driving an unmarked car in an area where drug activity is common. He sees an African American man, Harold Bryant, driving a fancy car slowly through the neighborhood and stops him for not wearing a seat belt. The officer asks Bryant whether he can search his car. The officer will swear that Bryant freely gave his consent. A search of the car uncovers marijuana, and the officer arrests Bryant for that offense.

What is your theory for suppressing the marijuana?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?
Did the officer have grounds for the seizure?
Did the officer act within the scope of the stop?
Did the officer have grounds to search?

4. Officer Smith clocks a car traveling 58 in a 45-mile per hour zone. Jones turns on his blue light, and the driver pulls over to the side of the road. The officer approaches the car, directs the driver and passengers to step out of the car, inspects the car for weapons, and pats each person down. While patting down the defendant, who was one of the passengers, Smith feels a small bottle in the defendant's right pants pocket and hears a rattling noise. Smith removes and opens the bottle and sees what he believes to be a few rocks of hashish. Laboratory analysis confirms that the substance was 1/10 of an ounce of hashish.

What is your theory for suppressing the hashish?

What evidence or lack of evidence would support your theory?

Traffic Stops

Jeff Welty

August 2015

INTRODUCTION

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.[1]

BEFORE THE STOP

"RUNNING TAGS"

Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. See, e.g., State v. Chambers, 203 N.C. App. 373 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); Jones v. Town of Woodworth, 132 So.3d 422 (La. Ct. App. 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); State v. Setinich, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); State v. Davis, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"), aff'd by an equally divided court, 295 P.3d 617 (2013); State v. Donis, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). Cf. New York v. Class, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). See also infra p. 8 (discussion under heading "Driver's Identity" and cases cited therein).

[1] The organization of this paper was inspired in part by Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843 (2004).

MAKING THE STOP

LEGAL STANDARD

"Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968). An officer may have reasonable suspicion of a traffic violation if a law is "genuinely ambiguous," and the officer reasonably interprets it to prohibit conduct that the officer has observed, even if the officer's interpretation of the law turns out to be mistaken.[2]

PRETEXTUAL STOPS

If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).[3] However, if an officer makes a pretextual traffic stop and then engages in investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer's subjective intentions regarding the purpose of the stop are immaterial, whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

WHEN REASONABLE SUSPICION MUST EXIST

[2] Heien v. North Carolina, __ U.S. __, ___, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring). In Heien, an officer stopped a motorist for having one burned-out brake light. The court of appeals ruled that the applicable statute required only one working brake light and that the stop was therefore unreasonable. The Supreme Court reviewed the case and ruled that the brake light statute was sufficiently difficult to parse that the officer's interpretation was reasonable even if mistaken, rendering the stop reasonable also. The majority opinion does not set forth a standard for when an officer's mistaken interpretation of law is reasonable, but Justice Kagan's concurrence argues that such an interpretation is reasonable only when the law itself is "genuinely ambiguous."

[3] Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer's incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (internal citations omitted)); State v. Osterhoudt, 222 N.C. App. 620 (2012) (an officer stopped the defendant based on the officer's mistaken belief that the defendant's driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant's driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant's driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a motorist to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the person's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. State v. Atwater, __ N.C. App. __, 723 S.E.2d 582 (2012) (unpublished) (adopting the foregoing analysis and concluding that "[r]egardless of whether [the officer] had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1313 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n.198 (5th ed. 2012) (collecting cases) (hereinafter, LaFave, Search and Seizure).

COMMON ISSUES

SPEEDING

Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed generally is also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer who had no special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, __ U.S. __, 133 S. Ct. 2851 (2013).

DRIVING SLOWLY

Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate

a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic . . . ."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA publication regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 m.p.h. on I-95 and weaved within his lane supported reasonable suspicion of DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, "his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer's] mind").

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) ("For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 207 N.C. App. 377 (2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding that "slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion," and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, 224 N.C. App. 514 (2012) (fact that vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. Brown, 207 N.C. App 377 (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 198 N.C. App. 703 (2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

WEAVING

G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

ACROSS LANES

Absent exceptional circumstances, weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, 222 N.C. App. 620 (2012) (where the "defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated" G.S. 20-146); State v. Hudson, 206 N.C. App. 482 (2010) (where the defendant "crossed the center line of I–95 and pulled back over the fog line twice," an officer was justified in stopping him for a violation of G.S. 20-146). See also State v. Kochuk, 366 N.C. 549 (2013) (per curiam) (adopting the analysis of the dissenting opinion in the court of appeals where it was explained that a driver "momentarily crossed the right dotted line once while in the middle lane" and "later drove on the fog line twice";

the opinion cites Hudson, supra, and appears to suggest that a stop was justified under G.S. 20-146; however, the opinion focuses primarily on the presence of reasonable suspicion of impaired driving as a basis for the stop); State v. Simmons, 205 N.C. App. 509 (2010) (without discussing G.S. 20-146, the court ruled that a stop was supported by reasonable suspicion of DWI where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"). But cf. State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that a stop was not supported by reasonable suspicion of DWI because it was based on only "one instance of weaving," even though "the right side of Defendant's tires crossed into the right-hand lane" during the weaving; the court did not address G.S. 20-146 as a possible basis for the stop).

Driving so that one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not weaving across lanes. Shea Denning, Keeping It Between the Lines, N.C. Crim. L. Blog (Mar. 11, 2015), http://nccriminallaw.sog.unc.edu/keeping-it-between-the-lines/ (discussing this point and citing State v. Peele, 196 N.C. App. 668 (2009), where the court ruled that there was no reasonable suspicion to stop a defendant whose tires touched the lane lines twice; although the court's discussion focuses on the presence or absence of reasonable suspicion of DWI and does not cite G.S. 20-146, the court does characterize the defendant's driving as weaving "within" a lane).

WITHIN A LANE

Weaving within a single lane does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that 'weaving plus' may do so. Fields has been applied in cases such as State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (2015) (mistakenly analyzing weaving across a lane line as if it were weaving within a lane, then finding reasonable suspicion of impaired driving based in part on the weaving and in part on the late hour and the proximity to bars); State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious, and that having "very bright" headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" driving while impaired, then saw the defendant "weave within his lane once").

- *Severe Weaving within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, 219 N.C. App. 385 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from

other drivers." The officer compared the defendant's vehicle to a "ball bouncing in a small room." The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving at 11:00 p.m. on a Friday night).

SITTING AT A STOPLIGHT

Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired.[4] An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

UNSAFE MOVEMENT/LACK OF TURN SIGNAL

Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle), and State v. Watkins, 220 N.C. App. 384 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the statute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle"), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

LATE HOUR, HIGH-CRIME AREA

The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a person is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the

[4] Under some circumstances, it might also constitute obstructing traffic in violation of G.S. 20-141(h).

incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

COMMUNITY CARETAKING

The court of appeals recognized the community caretaking doctrine as a basis for a vehicle stop in State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (2014). In Smathers, an officer stopped the defendant to make sure that she was OK after her car hit a large animal that ran in front of her. The court ruled that the stop was justified, finding an objectively reasonable basis for the caretaking stop that outweighed the intrusion of the stop on the driver's privacy. The court set out a flexible test for community caretaking, yet cautioned that the doctrine should be applied narrowly, so its precise scope remains uncertain.

TIPS

Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Whether the tipster is identified is a critical factor, so this paper treats anonymous tips separately from other tips.

ANONYMOUS TIPS

Historically, information from an anonymous tipster has been viewed as insufficient to support a stop, at least without unusual indicia of reliability, such as very detailed information or meaningful corroboration of the tip by the police. State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (a tip that the court treated as anonymous did not provide reasonable suspicion, in part because it "did not provide any way for [the investigating officer] to assess [the tipster's] credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions"); State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013) (taxi driver's anonymous call to 911, reporting that a specific red Ford Mustang, headed in a specific direction, was "driving erratically [and] running over traffic cones," was insufficient to support a stop of a red Mustang located less than two minutes later headed in the described direction; officers did not corroborate the bad driving and the tip had "limited but insufficient indicia of reliability"); State v. Johnson, 204 N.C. App. 259 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 196 N.C. App. 668 (2009) (an anonymous tip that the defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). This skepticism was rooted in part in Florida v. J.L., 529 U.S. 266 (2000), a non-traffic stop case in which the Court stated that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and so rarely provides reasonable suspicion. *Id.* (internal quotation marks and citation omitted.)

However, the Supreme Court recently decided Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (2014), ruling that a motorist's 911 call, reporting that a specific vehicle had just run the caller off the road, was an

anonymous tip that provided reasonable suspicion to stop the described vehicle 15 minutes later. The Court first ruled that the tip was reliable. It reasoned that the caller effectively claimed first-hand knowledge of the other vehicle's dangerous driving; that the call was "especially reliable" because it was contemporaneous with the dangerous driving; and that the call was made to 911, which "has some features [like recording and caller ID] that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Then the Court held that running another vehicle off the road "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues," and so provided reasonable suspicion of DWI. Because the Court found reasonable suspicion based on a garden-variety anonymous 911 call that the officers did little to corroborate, Navarette almost certainly changes the law in North Carolina regarding anonymous tips and reasonable suspicion.[5] However, it is unclear how far Navarette will extend. Will it apply when the tip is received through a means other than 911? When it concerns a completed traffic offense rather than an ongoing one like DWI? These issues will need to be decided in future cases.

OTHER TIPS

Where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, courts more readily conclude that the information provides reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").[6]

DRIVER'S IDENTITY

[5] North Carolina's appellate courts could adhere to the previous line of authority by ruling that the North Carolina Constitution provides greater protection than the Fourth Amendment, but that is unlikely given the courts' repeated statements that the state and federal constitutions provide coextensive protection from unreasonable searches and seizures. See, e.g., State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (2013) (stating that "this Court and the [state] Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights," and citing multiple cases holding that the two constitutions are coextensive in this regard), rev'd on other grounds, 367 N.C. 483 (2014).

[6] The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

"[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.[7]

INVESTIGATION DURING THE STOP

ORDERING OCCUPANTS OUT OF THE VEHICLE

In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4th ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, N.C. Crim. L. Blog (October 28, 2009), http://nccriminallaw.sog.unc.edu/traffic-stops-part-ii/.

FRISKING OCCUPANTS

A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). For example, a frisk was justified when a driver "had prior convictions for drug offenses, [an officer] observed [the driver's] nervous behavior inside his vehicle, and [the officer] saw him deliberately conceal his right hand and refuse to open it despite repeated requests." State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (2014). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

"CAR FRISKS"

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a traffic stop – because the vehicle in Long had already crashed when officers stopped to investigate – the two types

[7] In State v. Watkins, 220 N.C. App. 384 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

of stops are similar if not identical,[8] and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, 164 N.C. App. 130 (defendant suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently "close proximity to the interior of the vehicle" to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; "these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon"), with State v. Braxton, 90 N.C. App. 204 (1988) (it was "uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car" where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, 183 N.C. App. 1, the court held that an officer properly searched "a drawstring bag located underneath a piece of newspaper that fell to the ground" as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and "was at least large enough to contain methamphetamine and a 'smoking device," perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

LICENSE, WARRANT, AND RECORD CHECKS

Officers frequently check the validity of a driver's license, registration, and insurance during a traffic stop, and may also check for any outstanding arrest warrants against the driver. In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance" are routine and permissible parts of an ordinary traffic stop.

This statement is consistent with prior North Carolina case law allowing these checks, and the associated brief delays. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (finding "no . . . authority" for the

[8] Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest." (internal citations omitted)); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'" (citation omitted)).

defendant's claim that a document check exceeded the scope of a speeding stop, and noting that "officers routinely check relevant documentation while conducting traffic stops"); State v. Hernandez, 170 N.C. App. 299 (2005) (holding that "running checks on Defendant's license and registration" was "reasonably related to the stop based on the seat belt infraction"); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute "detention for the purpose of determining the validity of defendant's license was not unreasonable" when officer's computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10th Cir. 2009) ("It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." (citation omitted)); See generally Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) [hereinafter LaFave, "Routine"].

Checks that focus on a motorist's criminal history rather than his or her driving status and the existence of outstanding arrest warrants may be permissible also, though the issue is less clearly settled. The Rodriguez Court briefly suggested that criminal record checks may be permissible as an officer safety measure. 135 S. Ct. at 1616 (citing United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (en banc), for the proposition that running a motorist's criminal record is justified by officer safety). However, the Court did not address the issue in detail and at least one state court has since found one variety of record check to be improperly directed at detecting evidence of ordinary criminal wrongdoing. United States v. Evans, 786 F.3d 779 (9th Cir. 2015) (ruling that an officer improperly extended a traffic stop to conduct an "ex-felon registration check," a procedure that inquired into a subject's criminal history and determined whether he had registered his address with the sheriff as required for certain offenders in the state in which the stop took place).

QUESTIONS ABOUT UNRELATED MATTERS

The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007).

It should be emphasized that the questioning in Muehler did not extend the subject's detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

USE OF DRUG-SNIFFING DOGS

Having a dog sniff a car is not a search and requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. Whether a traffic stop may be prolonged for a dog sniff is discussed below.

ASKING FOR CONSENT TO SEARCH

Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, it does not implicate the Fourth Amendment unless it extends the duration of the stop. 4 LaFave, Search and Seizure § 9.3(e). See also United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (because "officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop," a request for consent to search that did not substantially prolong a traffic stop was permissible).

However, at least one North Carolina Court of Appeals case has stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.[9] But cf. State v. Jacobs, 162 N.C. App. 251 (2004) ("Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search [during an investigative stop]. No such showing is required.").

PROLONGING THE STOP TO INVESTIGATE UNRELATED MATTERS

In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog. The Court reasoned that a stop may not be extended beyond the time necessary to complete the "mission" of the stop, which is "to address the traffic violation that warranted the stop . . . and attend to related safety concerns." That is, "[a]uthority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Because a dog sniff is not a task "tied to the traffic infraction," but rather is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" any delay to enable a dog sniff violates the Fourth Amendment. The Court rejected the idea, widely endorsed by the lower courts,[10] that "de minimis" delays of just a few minutes did not rise to the level of Fourth Amendment concern. It therefore effectively overruled State v. Sellars, 222 N.C. App. 245 (2012) (delay of four minutes and thirty-seven seconds to allow a dog sniff to take place was de minimis and did not violate the Fourth

[9] This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

[10] See, e.g., United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014) (a seven- or eight-minute delay to deploy a drug-sniffing dog was "a de minimis intrusion" that did not implicate the Fourth Amendment), vacated, __ U.S. __, 135 S. Ct. 1609 (2015); United States v. Green, 740 F.3d 275 (4th Cir. 2014) (running a "criminal history check added just four minutes to the traffic stop" and "at most, amounted to a de minimis intrusion . . . [that] did not constitute a violation of [the defendant's] Fourth Amendment rights"); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) ("The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"); Turvin, 517 F.3d 1097 (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable, and collecting cases). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis).[11]

The reasoning of Rodriguez extends beyond dog sniffs. The case clearly implies that an officer may not extend a stop in order to ask questions unrelated to the purpose of the stop, such as questions about drug activity. Lower courts have uniformly understood that implication. See, e.g., United States v. Archuleta, __ F. App'x __, 2015 WL 4296639 (10th Cir. July 16, 2015) (unpublished) (citing Rodriguez while ruling that a bicycle stop was improperly prolonged "in order to ask a few additional questions" unrelated to the bicycle law violations that prompted the stop); Amanuel v. Soares, 2015 WL 3523173 (N.D. Cal. June 3, 2015) (unpublished) (extending a traffic stop by 10 minutes to discuss a passenger's criminal history, ask whether the passenger had been subpoenaed to an upcoming criminal trial, and caution the passenger against perjuring himself, would amount to an improper extension of the stop in violation of Rodriguez); United States v. Kendrick, 2015 WL 2356890 (W.D.N.Y. May 15, 2015) (unpublished) (agreeing that "absent a reasonable suspicion of criminal activity, extending the stop . . . in order to conduct further questioning of the driver and the occupants about matters unrelated to the purpose of the traffic stop would appear to violate the . . . rule announced in Rodriguez," though finding that reasonable suspicion was present in the case under consideration).[12]

Presumably, Rodriguez also makes it improper for an officer to extend a stop in order to seek consent to search. See United States v. Hight, __ F. Supp. 3d __, 2015 WL 4239003 (D. Colo. June 29, 2015) (an officer stopped a truck for a traffic violation, ran standard checks on the driver and spoke briefly with him, and decided that he wanted to ask for consent to search; the officer called for backup and spent at least nine minutes waiting for another officer and working on a consent form; when backup arrived, the officer terminated the stop, then asked for and obtained consent; the court ruled that the nine-minute extension of the stop was improper and that it required suppression even if consent to search was obtained voluntarily after the stop ended). Of course, as noted above, Parker, 183 N.C. App. 1, is also a relevant precedent in this area.

Officers may respond to Rodriguez by multitasking: deploying a drug dog while waiting for a response on a license check, or asking investigative questions of the driver while filling out a citation. Defendants may argue that such multitasking inherently slows an officer down. Whether that is so in a particular case is a factual question. At least in two early cases on point, courts seem to have accepted officers' multitasking. See, e.g., State v. Jackson, __ N.E.3d __, 2015 WL 3824080 (Ohio Ct. App. 2015) (a traffic stop conducted by one Trooper was not impermissibly extended when a different Trooper conducted a dog sniff while the first Trooper investigated the defendant's background and wrote a traffic citation); Lewis v. State, 773 S.E.2d 423 (Ga. Ct. App. 2015) (similar). It may be worth noting that both Jackson and Lewis involved multiple officers, with one handling the dog while the other addressed the traffic violation.

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[11] Even before Rodriguez, the North Carolina Court of Appeals had limited Brimmer and Sellars in State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (2014), where the court stated that it did "not believe that the de minimis analysis applied in Brimmer and Sellars should be extended to situations when, as here, a drug dog was not already on the scene."

[12] Even before Rodriguez, it was risky for an officer to measurably extend a stop to ask questions unrelated to the purpose of the stop in light of State v. Jackson, 199 N.C. App. 236 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions).

One question that arises from Rodriguez is what sorts of conversation relate to the traffic stop. May an officer engage in brief chit-chat with a motorist, or does such interaction constitute an extension of the stop? What about inquiring about a motorist's travel plans, or a passenger's, where such inquiries may bear on the likelihood of driver fatigue but also may be used to seek out inconsistencies that may be evidence of illicit activity? One early case of note is United States v. Iturbe-Gonzalez, __ F. Supp. 3d __, 2015 WL 1843046 (D. Mont. April 23, 2015), where the court indicated that an officer may make "traffic safety-related inquiries of a general nature [including about the driver's] travel plans and travel objectives," and said that "any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation, as opposed to human beings." Of course, even if Iturbe-Gonzalez is correct that a question or two about travel plans are sufficiently related to the purpose of a traffic stop, a court might take a different view of an officer's extended discussion of itineraries with multiple vehicle occupants.

TOTAL DURATION

There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4th ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) (thirteen minutes was "not unduly prolonged"), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __U.S. __, 135 S. Ct. 530 (2014); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minutes, though some portion of that time may have been after reasonable suspicion developed); United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes).

TERMINATION OF THE STOP

WHEN TERMINATION TAKES PLACE

As a general rule, "an initial traffic stop concludes . . . after an officer returns the detainee's driver's license and registration." Jackson, 199 N.C. App. 236; State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __ U.S. __, 135 S. Ct. 530 (2014). When an officer takes other documents from the driver, such as registration and insurance documents, these, too must be returned before the stop ends. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (even though an officer had returned a driver's license and issued a warning citation, "[t]he purpose of the stop was not completed until [the officer] finished a proper document check [of registration, insurance, and other documents the officer had taken] and returned the documents"). As the Fourth Circuit explains, when an officer returns a driver's documents, it "indicate[s] that all business with [the driver is] completed and that he [is] free to leave." United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996).

This rule is not absolute and specific circumstances may dictate a different result. The North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver's paperwork, in part because the officer "never told [the driver] he was free to leave." State v. Myles, 188 N.C. App. 42 (2008), aff'd per curiam, 362 N.C. 344 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

Some commentators have argued that many motorists will not feel free to depart until they are expressly permitted to do so. LaFave, "Routine" at 1899-1902. Certainly many officers mark the end of a stop by saying "you're free to go" or "you can be on your way" or something similar. Nonetheless, the United States Supreme Court has rejected the idea that drivers must expressly be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach).

EFFECT OF TERMINATION

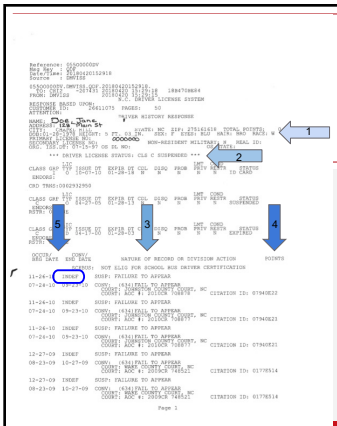
Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine" at 1898.

Driving Records & Getting Your Client Back On The Road

2022 MISDEMEANOR DEFENDER TRAINING
November 1-4, 2022
MIKE PADUCHOWSKI – PARTNER
MATTHEW CHARLES LAW

1

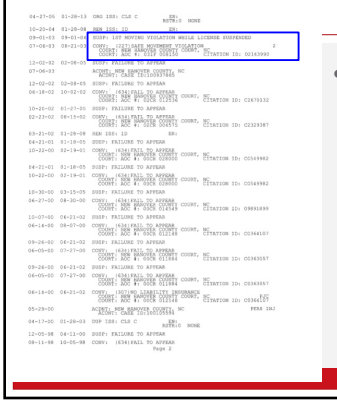
Driving Record



1. Personal Information Section
   a. Defendant's Name; Address; Date of Birth; License Number
2. Driver's License Status
   a. Active; Expired; Suspended; Inactive; Eligible for Reinstatement; Suspended –Pick up License
3. Nature of Record or Division Action
   a. Conviction, County in which case originated, and Original Case Number.
   b. Action DMV took as a result of the Conviction or Inaction of defendant.
4. Points/PJC
   a. Points assessed as a result of conviction or record of PJC
      Note: Zero points is blank
5. Important Dates
   a. Occurrence / Beginning
   b. Conviction / Ending

2

Driving Record



- 1st moving violation while suspended

3

How To Read a NC Driving Record

- Be familiar with abbreviations
  - PERM – Permanent Revocation
    - Permanent means forever? Yes, but that is where you come in
  - INDEF – Indefinite Revocation
    - Revoked until whenever the revocation is ended
      - Note: CJ Leads records do not say INDEF, just blank
  - PJC – Prayer for Judgment Continued
    - Shows when a PJC was used
  - ACDNT – Accident
    - If an accident was reported, then it is on the record. This does NOT mean the person was at fault, just that they were involved.
  - CLS – Class
    - Describes the class of license to let you know if a Commercial Drivers License (CDL) is in play (Class C is a typical non-CDL)

4

2 Types of Suspension

N.C. Gen. Stat. § 20-24.1 (Indefinite Suspension)

- Revocation (INDEF) for FTA or FTP/FTC
- Remains in effect until the FTA case is disposed or FTC case is paid

N.C. Gen. Stat. § 20-28 (a) and N.C. Gen. Stat. § 20-28.1 (Definite Suspension)

- Any moving violation conviction requires additional suspension of 1 year, 2 years or permanently if the moving violation was committed while in a state of suspension (20-28.1).
- Same with any conviction of DWLR-Impaired or DWLR-Non-Impaired with an offense date before 12/1/2015

5

Other Possible Causes of a Revocation

North Carolina General Statute § 20-16 provides, that the Division of Motor Vehicles has the authority to suspend the license of any driver, if a driver has:

- Accumulated twelve or more points within a three year period
- Been convicted of Driving While Impaired
- Been convicted of Speeding more than 80 MPH in a 70 MPH zone
- Been convicted of Speeding more than 75 MPH in a less than 70 MPH zone
- Been convicted in 12 months of Speeding 55 to 80 MPH and:
  - Speeding 55 to 80 MPH; or
  - Careless and Reckless Driving; or
  - Aggressive Driving;
- Committed Fraud involving a Driver's License or Learner's Permit
- Been Convicted of Illegally Transporting Alcohol
- Been Ordered Suspended as part of a Court Order

6

Moving vs. Non-Moving Violations

Moving Violations

- DWLR (Impaired)
- Speeding
- Stop Sign/Stoplight
- No Insurance
- Unsafe movement
- Reckless Driving (C&R)
- Move Over Law
- DWLR Non-Impaired**
- No Operator's License (NOL)**

**Offense Date Before 12-1-2015

- Driving While Impaired (DWI)
- Open Container
- Following Too Closely
- Left of Center
- Passing a Stopped School Bus
- Failure to Yield to Emergency Vehicle
- Illegal Passing
- Child Seat/Child Seatbelt (<16 years)

7

Moving vs. Non-moving

Non-moving Violations

- Improper Equipment
- Adult Seatbelt (age ≥ 16)
- Exp/Rev/Fict Registration
- Exp Inspection
- Fictitious Info to Officer
- Parking in a Handicapped Space

- Failure to Notify DMV of Address Change
- Window Tint
- All City Ordinance Violations
- DWLR (Non-Impaired)*
- No Operators License*

*Offense 12/1/15 or later

8

Alternatives to a Moving Violation Conviction

- Dismissal or Acquittal
- Reduce or Amend to Non-Moving Violation
- Prayer for Judgment Continued (PJC)

9

Dismissal/Acquittal

- Acquittal (i.e. a NG verdict) is usually an impractical route in these cases (exceptions apply)
- Outright dismissal of moving violations
  - Exception: Defendant agrees to plea to another moving violation, a non-moving violation, a criminal charge, etc. (Dismissal per plea)
  - Exception: Unsafe movement, Failure To Reduce Speed, etc. resulting from a vehicle collision – Defendant presents a letter from his insurance company
- BUT, a dismissal of CHARGED non-moving violation is quite common – FIX IT and show proof!
  - Expired Inspection, Registration
  - Improper Equipment, Window Tint

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Reduce or Amend to Non-moving Violation

- Speeding → Improper Equipment-Speedometer
  - Exception: IE is NOT available if speed > 25mph over
- Stoplight/Stop Sign → City Code Violation (or Improper Equipment-Brakes)
- DWLR/NOL → A non-moving violation for offense dates on/after Dec 1, 2015

11

Prayer for Judgment Continued (PJC)

- PJC is unique to North Carolina
- Guilty but not a "conviction" (court agrees to continue the judgment indefinitely)
- ***NOTE:*** only 2 PJCs per driver every 5 years for DMV purposes
- ***BUT*** only 1 PJC per *household/policy* every 3 years for insurance purposes
  - See N.C. Gen. Stat. § 58-36-75(f)

- DMV will not honor a PJC for the following:
  - DWI
  - Passing Stopped School Bus
  - Speed > 25mph over
  - Any offense committed while driving a commercial vehicle OR possessing a commercial drivers license

12

Extraordinary Relief

- (1) FTA Sent in Error
- (2) Nunc pro Tunc
- (3) Motion for Appropriate Relief (MAR)
- (4) Chapter 14 Criminal Charge of FTA

13

FTA Sent In Error

- Judge orders the clerk to transmit to the DMV that the clerk sent the FTA in error.
- If the FTA is removed (on the original charge), the moving violation no longer occurred while in a state of suspension. Cindy now can plead to the current moving violation. This effectively removes the FTA INDEF Suspension (and the FTA fee).
- Practical Tip: Prepare an order saying the FTA is "Stricken and Sent In Error by no fault of the clerk"

14

Nunc Pro Tunc (now for then)

- Rewrite history by changing the date a conviction, PJC or other action is entered. Has a retroactive legal effect. It is as though the action had occurred at an earlier date.
- Can use on an open or closed case. BUT, if want to Nunc Pro Tunc a date on a closed case, you need a way to open the closed case (see MAR…)
- VERY difficult to do in most counties

15

Motion for Appropriate Relief (MAR)

- N.C. Gen. Stat. § Section 15A-1415
- Allows an old case to be opened and change what happened in the past. Use when:
  - PJC was used improperly and need to get it back to use today
  - PJC was available and was not used OR is now available
  - Pled to speed when IE was an option
  - Change a Speeding plea to Exceeding a Safe Speed in a situation where there are two speeds greater than 55mph within a year

16

Chapter 14 Criminal Charge of FTA

- Ask ADA to amend the Chapter 20 traffic ticket (DWLR or moving violation) to the *criminal* charge of Failure to Appear (Chapter 14).
- Chapter 14 is not a traffic charge. If person pleads Guilty to a Chapter 14 charge of Failure to Appear, their DL will NOT be revoked because this is NOT a Chapter 20 moving violation.

17

Limited Driving Privilege

- N.C. Gen. Stat. § 20-20.1 Petition and Order (2 step process)
- COURT order allowing a person with a revoked license to drive on a limited basis. Prior to implementation of this statute, a DMV hearing was the only way to obtain a driving privilege.
- License is still revoked but Judge grants a limited driving privilege (work, school, household maintenance, religious worship)

18

Limited Driving Privilege (cont'd)

- Does not need a DMV hearing (issued by Judge).
- The person's license must be currently revoked under N.C. Gen. Stat. § G.S. 20-28.1 and this must be the ONLY revocation currently in effect.
- Can not be granted if person currently has any indefinite suspensions, has pending traffic charges or the suspension was a result of a DWI.

19

Limited Driving Privilege Cont'd

- Eligible to file petition in district court in the county of the person's residence:
  - 90 days after 1 year revocation period begins
  - 1 year after 2 year revocation period begins
  - 2 years after Permanent revocation period begins
- If Judge issues, clerk of court sends copy of the limited driving privilege to DMV.
- After one year of driving on a limited driving privilege for a Permanent Revocation, the license must be reinstated (but, for some reason, a hearing is still required)

20

Misdemeanor Reclassification

- DWLR – Impaired Revocation is still a Class 1 misdemeanor where counsel may be appointed
- DWLR – Non-Impaired Revocation is a Class 3 misdemeanor with a cost/fine disposition therefore eliminating the ability to apply for appointed counsel
  - Exception: Where a defendant has 4 or more previous convictions, a disposition other than a cost/fine is possible so the defendant may apply for court appointed counsel
  - Practical Tip: Courts will often appoint counsel on DWLR Non-Impaired if the defendant already has appointed counsel on other charges

21

NC Drivers License Restoration Act

What Does the NC DL Restoration Act do?

- The Act provides some weapons in the fight against the License Revocation Cycle
- The Act made great strides in ending additional license suspensions from "Driving While Poor"
- The Act has provided traction for programs in some counties to clean up old FTA'd cases

22

In a Nutshell…

- The Act makes DWLR (Non-Impaired) a NON-MOVING violation
  - This eliminates any suspensions for DWLR (as they currently stand…like moving violations while suspended)
  - Applies to anyone who is charged with DWLR on or after December 1, 2015
    - NOTE: "Charged" not "Convicted" – Changed in the Technical Corrections phase of the law
    - Practical Tip: DMV is not currently issuing suspensions for convictions after 12/1/2015 regardless of offense date

23

What Did This Do?

- You can now enter a plea to DWLR to (hopefully) get the accompanying moving violation (speeding, etc.) dismissed ➔ No Additional Suspension (Stops the DWLR Cycle)
- The Act was INTENDED TO encourage those with old charges to add them on to a docket and resolve them by plea. They can enter a plea of guilty to DWLR charges, pay off what they owe, and get a license back. Now it encourages new charges first.
- Get more licensed, insured drivers on the road (or reduce the amount of unlicensed/uninsured drivers)

24

Potential Pitfalls

- DMV may still view any pleas to non-moving violations as evidence of driving.
  - Even though a non-moving violation will not make a defendant ineligible for a hearing, it can be used against them as evidence of driving during the suspension (very common)
  - Practical Solution: Evidence of driving is irrelevant in consideration for the limited driving privilege, and after successfully having the privilege for 1 year, the license is reinstated (although a hearing is still required for a perm susp)

25

Potential Pitfalls

- The act encourages pleas that will result in a criminal record
  - DWLR (misdemeanor) will not suspend you further…Speeding 1mph over the limit (infraction) will suspend you for 1 year, 2 years, or permanently
  - There is a strong motivation to enter a plea of guilty to a misdemeanor (creating a criminal record if otherwise clean) instead of a traffic infraction to avoid a license suspension

26

NC DMV Hearings

- Most DMV hearings and interviews cannot be scheduled until a hearing fee has been paid
- DMV will let you pay for a hearing, schedule a hearing, and show up for a hearing…just to tell you that you are not eligible for a hearing
- Things that are perfectly fine for court and limited privilege purposes can be held against you in a DMV hearing and prevent license reinstatement

27

Filing Fees for DMV Hearings

DMV HEARING FEES	
Driver improvement clinic eligibility	$40
Commercial driver license disqualification	$200
Violation of Safety & Responsibility law	$200
Compliance with probation or restoration agreement	$220 (billed after hearing)
Pre-interview held before license restoration (situations involving alcohol-related convictions, suspensions or revocations)	$225
License restoration (DWI)	$425
License restoration (driving with revoked license)	$200
License restoration (moving violations while driving with revoked license)	$200
Refusal to submit to chemical analysis	$450
Alcohol concentration restriction violation	$450
Ignition interlock device restriction violation	$450 (billed after hearing)
License suspensions or revocations not otherwise listed to include those found in [redacted]	$100

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Affidavit of Indigence for DMV Hearings

- Available in English and Spanish online
- Income must be verified
  - Recent W-2 or 1099 tax docs
  - Tax Filings or Statement
  - Pay Stubs
  - Proof of government assistance

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Tips For License Restoration

- Always keep the DL in mind when resolving criminal cases. Even if unrelated, you can often help get a license back by getting charges dismissed with the same plea you were going to enter anyway. Always check CIPRS (NC Public Criminal & Infraction Records) before a plea!
- You can <u>never</u> have a license if you don't resolve the INDEF suspensions!
  - If indefinite suspensions exist you will be in a revoked status
  - If definite/permanent suspensions exist you have an end date

30

Tips for License Restoration

- Keep money in mind! Your client definitely will.
  - An FTA can cost $200 extra.
  - Just because you can get something dismissed doesn't always mean you should
  - Post-Act, you can save the $200 fee and avoid the additional suspension by entering a plea on the new DWLR charge (non-moving violation)
    - Remember: It is a criminal charge

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Tips for License Restoration

- Use and Build Your Network!
  - Call around and find out how a client can reset an old case in another county and if that is feasible to do without an attorney
  - Some counties will really try to help those who are trying to help themselves obtain a valid license
  - You will be surprised how many people will volunteer to help and can often just get an old case dismissed by showing what the client has done/paid so far

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Any Questions?

Feel free to contact me at any point in the future if I can help you out in any way.

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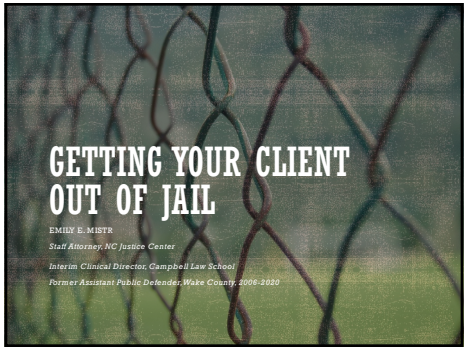

1

HOW DOES A PERSON END UP IN CUSTODY?

- Warrant v. Magistrate Order v. Criminal Summons v. Citation
- Initial appearance vs. first appearance
- First appearance – felony vs. misdemeanor

Types of pretrial release (NCGS 15A-534)
- Written promise to appear
- Unsecured bond
- Custody release, to a person agreeing to supervise him/her
- Secured bond
- House arrest with electronic monitoring

2

WHO IS ENTITLED TO PRETRIAL RELEASE?

- 15A-533(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with 15A-534.
- PLUS: additional considerations for certain types of crimes –
  - 15A-534.1: Crimes of domestic violence
  - 15A-534.2: Detention of impaired drivers
  - 15A-534.4: Sex offenses and crimes of violence against child victims
  - 15A-534(d1): Mandatory secured bond for FTA either double previous bond (secured or unsecured) or $1,000 if no prior bond required (secured or unsecured), unless bond preset when OFA issued
- First appearance vs. regular court date????

3

IMPORTANCE OF RELEASE

To your client and family

- Psychological
- Financial
- Assistance with defense
- Physical health

To the community

- Financial
- Long term harm

4

REQUIREMENT OF NON-MONETARY BOND

According to NCGS 15A-534(b), "The judicial official in granting pretrial release **must impose** condition (1) [written promise], (2) [unsecured bond], or (3) [custody release] . . . unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses."
(*emphasis added*)

5

Based on that, jails should mostly hold people charged with violent felonies, right?

WRONG.

6

GETTING YOUR CLIENT OUT OF JAIL

START LOCAL: Pursuant to NCGS 15A-535(a) the senior resident superior court judge in each jurisdiction must establish local policies, including bond guidelines.

NCGS 15A-534(c) lists factors the court is *supposed* to consider when determining pretrial release conditions.

- Details from officer – Specifics about charged conduct (use with caution)
- Details from client

Record	Family Situation
Work or school	Ties to community
Living situation	Character and mental condition
Financial situation	Probation (use with caution)

KNOW YOUR AUDIENCE – Know your judge and your ADA.

7

CHARGE SPECIFIC PRETRIAL REQUIREMENTS

- FAILURE TO APPEAR: 15A-534(d1). If client misses court and an Order for Arrest is issued, if no bond conditions are set at time of OFA issuance, judicial official MUST set a secured bond at a minimum of 2x most recent bond set for the case. If not bonded previously, MUST set at $1,000 minimum.
- NEW CHARGE WHILE ON PRETRIAL RELEASE FOR ANOTHER CHARGE: Client arrested for X and bonds out at $1,000 secured. While on PTR for that, client arrested for Y. Judicial official MAY set bond at 2x, but not required.
- DOMESTIC VIOLENCE: 15A-534.1 details additional requirements when the charges are based on acts of domestic violence.
  - 48 HOUR RULE (aka 48 HOUR HOLD)
- IMPAIRED DRIVERS: 15A-534.2 authorizes magistrate to temporarily hold defendant believed to be too drunk to safely release

8

OTHER CONSIDERATIONS

- Other pending cases (including other counties)
  - Jail credit issue if bond out on one
- Probation status
  - PV about to be filed?
- Immigration Detainers
- Child support charges
- DV civil issues
- Possible additional charges

9

DEALING WITH RISK FACTORS
(REALISTICALLY, YOU'LL HAVE TO)

- Prior record – explain, if needed/possible
- Failures to Appear
- If MH/SA issues, address treatment plan
- Supervision
  - Family
  - Pretrial Services
  - Probation
  - GPS/SCRAM

10

CRIME VICTIM'S RIGHTS ACT (MARSY'S LAW)

- In 2018, NC voters approved constitutional amendments related to victim's rights.
- In 2019 the CVRA was enacted to codify the enumerated rights.
- For misdemeanors, it applies to crimes against a person ONLY.

Defendant's Rights  Victim's Rights

WHO WINS?

11

PRETRIAL DETENTION REFORM

- Approximately 75% of the people in jails are being held PRETRIAL, and many are there because they can't afford their bail. Most of them are people of color.
- Voluntary Reform: JD 30B (Haywood, Jackson), JD 2 (Beaufort, Hyde, Martin, Tyrrell, and Washington), JD 21 (Forsyth County), JD (Orange County), JD 10 (Wake County)
- Forced reform: Groups file federal lawsuit challenging unjust cash bail system in Alamance County, NC.
- Model Bail Policy by Criminal Justice Innovation Lab: https://cjil.sog.unc.edu/areas-of-work/bail-reform-2-0/

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DISTRICT 30B – HAYWOOD AND JACKSON COUNTIES

- Adopted 5 reform measures:
  - Implement new decision-making framework to determine conditions of PTR
  - First appearances for all in-custody defendants
  - Provide for early involvement of counsel at pretrial proceedings
  - Promote increased use of summons in lieu of arrest in appropriate cases
  - Promote the increased use of citation in lieu of arrest in appropriate cases
- Results
  - Conditions of release
  - New criminal charges
  - First appearances – early involvement of counsel only in Haywood
  - Summons & Citations in lieu of arrest

13

DISTRICT 2 – TYRELL, HYDE, WASHINGTON, MARTIN, BEAUFORT

- Adopted 2 reform measures:
  - Implement a new structured decision-making tool to better inform judicial officials' pretrial decisions AND ENSURE COMPLIANCE WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS
  - New first appearance proceedings for in-custody misdemeanor defendants

DISTRICT 21 – FORSYTH COUNTY

- Adopted 2 reform measures:
  - Implement a new structured decision-making tool to better inform judicial officials' pretrial decisions, modeled on the tool adopted in 30B
  - Also adopted a new ability to pay procedure

14

DISTRICT 15B - ORANGE

- Adopted a new structured decision-making tool to guide magistrates' bail decisions
- Adopted a new decision-making process for responding to non-appearances in District Court

15

DISTRICT 10 – WAKE COUNTY

- Adopted 6 reform measures:
  - Implement a new "magistrate card" at initial appearances to standardize magistrate review of bail conditions consistent with the statutory framework of using least restrictive conditions that meet pretrial objectives and require a written finding when imposing a secured bond.
  - Implement a Public Safety Assessment (PSA) to provide empirically validated risk information to a judicial official during first appearance that can be considered in determining conditions of release.
  - Increase pretrial support services so that additional resources are provided to support an individual's success while on pretrial release.
  - Establish a pretrial jail status "real-time" dashboard to provide additional frequent review of jail population with daily dashboard updates.
  - Revise the Secured Bond Schedule in the 10th Judicial District to adjust the suggested secured bond amounts in certain offense classes in the context of the Committee's pretrial reform goals.
  - Provide for the Public Defender's Office to be present at first appearance hearings as resources permit so that defendants have greater access to legal counsel at the time conditions of pretrial release are considered.
- Results: TBD, meeting November 16

16

ALAMANCE COUNTY

- November 12, 2019 – class action lawsuit filed in federal court
  - 3 plaintiffs
  - Defendants – Senior Resident Sup Ct Judge, Chief District Ct Judge, 12 Magistrates and Sheriff
  - Alleges that county imposes money bonds on almost everyone arrested
- May 9, 2020 – parties filed a Consent Order of Preliminary Injunction
- July 1, 2020 – Defendants adopted certain policies and agreed to train local officials on new procedures

17

Crimmigration

2022 Misdemeanor Defender Training
UNC School of Government
November 3, 2022

1

What is the purpose of this presentation?

To help you develop a strategy to effectively advise all immigrant defendants of the immigration consequences for their criminal prosecution.

2

Padilla v. Kentucky, 559 U.S. 356 (2010)

- HELD: When immigration consequences are CLEAR, the criminal defense attorney has a DUTY to give correct advice regarding those consequences.
- Failure to do so is INEFFECTIVE ASSISTANCE OF COUNSEL to be analyzed under Strickland v. Washington, 466 U.S. 668 (1984).
- Silence is not an option.
- Wishy washy advice is not an option.

3

Lee v. United States, 137 S.Ct. 1958 (2017)

- Question for the court was essentially whether an immigrant can demonstrate prejudice under Strickland v. Washington analysis when the case against them is very strong. (Answer: YES)
- HELD: "but for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that 'almost' could make all the difference."

4

State v. Nkiam, 369 N.C. 61 (2016)

- NC first case applying Padilla
- HELD: when the consequence of deportation is clear, counsel is required by Padilla to give correct advice and not just advise defendant that his pending criminal charges may carry a risk of adverse immigration consequences
- *The judge cannot "cure" the failure to advise. The duty is that of defense counsel alone.*

5

State v. Marzouq, 836 S.E.2d 893 (2019)

- NC Case.
- Question: can a criminal defendant who was ineffectively advised by counsel demonstrate prejudice under Strickland v. Washington when they already had **criminal** grounds for removal at the time of entry of the plea in question?
- Answer: NO.

6

Our Process

- APD meets with client→ "Where were you born?"
- APD completely fills out Non-Citizen Defendant Worksheet (included in written materials)
- APD gives me the form
- I analyze (see next slide)
  - Including contacting immigration attorneys when needed
- I email APD w/ information and advice
  - APD accounts for my time in their client file
- I input data into database
- I keep form w/ advice email, notes, correspondence attached
- APD informs me when/how the case is resolved
- I update database and return the form to APD for closed file

7

My analysis, Part I

- What are the goals of the immigrant, based on his/her status?
- What position do I believe the immigrant to be in based on prior record? *(including prior convictions and dismissals)*
- What are the consequences of the current charges for the immigrant?
- What suggestions can I make regarding case outcome?
- What local agencies can I refer the immigrant to for referrals to immigration attorneys?

8

My analysis, Part II

- When I am looking at the charges pending against an immigrant, I need to know whether they carry any of the following potential **criminal grounds for removal or inadmissibility:**
  - Aggravated Felony
  - Crime of Moral Turpitude
  - Substance Abuse Grounds
  - Firearm/Destructive Device Grounds
  - DV Grounds
  - Stalking Grounds
  - Child Abuse/Neglect/Abandonment Grounds
  - Violation of a Protective Order Grounds
  - Prostitution
  - Human Trafficking
  - Money Laundering
  - Gambling

9

Resources I Use

- Immigration Consequences of a Criminal Conviction in North Carolina by Sejal Zota and John Rubin (2017) FREE on School of Government Website
- IDS Expert: www.ncids.org/immigration-consultations/
- Local friendly immigration attorneys

- Kurzban's Immigration Law Sourcebook by Ira J. Kurzban
- Immigration Consequences of Criminal Activity by Mary E. Kramer

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Online Resources

- NAPD: National Association of Public Defenders
  - My Gideon, archived in "Sentencing and Collateral Consequences" section
  - FREE "Padilla in Perspective" Webinars by Jessica Stern
- ILRC: Immigrant Legal Resource Center www.ilrc.org
- National Immigration Project of the National Lawyers Guild www.nipnlg.org
- Immigrant Defense Project www.immigrantdefenseproject.org

11

Lagemann, Barbara J.

From: Lagemann, Barbara J.
Sent: Tuesday, October 11, 2022 3:30 PM
To: Lagemann, Barbara J.
Subject: IMMIGRANT ADVICE MEMO

Hi ATTORNEY,

Thanks for the immigration referral. Please see my information and advice below.

If you have questions please let me know. Also, please let me know when/how the case is disposed so that I can update the database and return your form to you for your closed file.

Please account for 15 minutes in your file for my time.

1. Your client is removable simply for being in the US w/o permission. Any conviction hurts if/when s/he comes into contact with ICE.
    a. Your client's priorities will be: 1) to avoid inadmissibility; and 2) to avoid criminal grounds for removal (even though s/he is already removable)
2. Commonly used phrases/information:
    a. Admission: lawful entry into US after inspection and authorization by an immigration officer.
    b. Inadmissibility: cannot lawfully enter US and/or gain lawful status. I.E. an inadmissible LPR cannot (w/o relief) become a USC and will be turned away at the border if travels abroad and seeks to return to US.
    c. Aggravated Felony (AF) Consequences:
        i. Worst of the worst classification of criminal convictions for immigrants in removal proceedings
        ii. Will be removed
        iii. Will be barred from almost all forms of relief from removal
        iv. Permanently inadmissible and permanently barred from returning to US
        v. Held without bond during removal proceedings
        vi. Can face up to 20 years in prison for federal crime of illegal reentry.
    d. Crime of Moral Turpitude (CMT) Consequences:
        i. Deportable if convicted of one CMT committed w/in five years of lawful admission to US and punishable by at least one year active.
        ii. Deportable if convicted of two or more CMTs any time after lawful admission regardless of sentence.
        iii. Inadmissible if convicted of one CMT w/o relief.
3. **PRIOR RECORD**
    a. *While voluminous, there is nothing on there that carries criminal grounds for removal or inadmissibility.*
    b. *Just as a general note... if your client wants to avoid removal, in addition to the amazing work you're going to do...suggest that your client consult with an immigration attorney about how to gain lawful status (since he is married to a USC) if he has not already. It's not nearly as easy as it is rumored to be to get a green card, so maybe he already has tried or knows what he needs to do.*
4. **CURRENT CHARGES/CONSEQUENCES (AND POSSIBLE ALTERNATIVES)**
    a. *(m)Larceny:*
        i. *Not an AF*
        ii. *Is a CMT*
    b. *(m)RDO*
        i. *Not an AF*
        ii. *Is a CMT*
    c. *The PETTY OFFENSE EXCEPTION: can be used by an immigration court to waive the resulting inadmissibility when an immigrant is convicted of ONE CMT. Not two, ONE. It does not matter whether the two CMTs arise out of the same circumstances or whether they are consolidated for judgment.*
    d. *Because your client is not here legally, it is best for him to avoid supervised probation b/c DPS is required to cooperate with ICE if asked to do so.*
5. Defenses to Removal
    a. Undocumented Client
        i. Cancellation of Removal: barred by AF conviction

1. Must have lived in US 10 years prior to commission of offense (there is an exception for honorably discharged veterans)
2. Must establish that removal would result in extreme hardship to USC or LPR spouse, parent, or child

6. Common Outcomes
    a. Technical Definition of *conviction* for immigration purposes: a formal judgment of guilt by a court (OR if adjudication of guilt has been withheld) where
        i. Person found or pled guilty OR admitted sufficient facts to warrant finding of guilt
        ii. AND punishment, penalty, restraint on liberty imposed.
    b. Informal deferred/earned VD: not a conviction
    c. Conditional Discharge: IS A CONVICTION, regardless of whether the charges are later discharged as dismissed by the Court.
    d. Deferred Prosecution: sometimes safe, sometimes not
        i. District: not a conviction
        ii. Superior: not safe b/c of recordation and factual basis required
    e. PJC: not a conviction so long as the only condition in the record to have the PJC is the cost of court.
    f. Unsupervised Probation: safe outcome.
    g. Supervised Probation: try to avoid for immigrants without lawful status b/c DPS is required to cooperate with ICE if called upon to do so.
    h. Jail: Durham County Jail is safe under current Sheriff.
    i. DAC: Once an immigrant finishes his/her sentence in DAC if ICE wants him/her, s/he will be turned over to ICE.
7. The agencies listed below can assist your client with referrals to immigration attorneys.

El Centro Hispano	Durham	(919) 687-4635
D.E.A.R. Foundation	Raleigh	(919) 803-0559
NC Justice Center	Raleigh	(919) 856-2570

Non Citizen Defendant Worksheet

Client Name: _____

Attorney: _____ Next Court Date: _____

Immigration Status:

- ☐ LPR – Lawful Permanent Resident (greencard)
  - o Since: _____
  - o Renewal Date: _____
  - o **COPY CARD, please**
- ☐ Refugee or granted asylum status (circle one)
  - o Since: _____
- ☐ Undocumented (entered illegally)
  - o Since: _____
- ☐ Previously Deported
  - o By ICE or Saw Immigration Judge
- ☐ Other: _____

DOB: _____ Age today: _____

POB: _____

ICE Detainer: ☐ Yes ☐ No

Defendant is in Custody: ☐ Yes ☐ No

Family Ties

Spouse: ☐ USC ☐ LPR ☐ Undocumented
Partner: ☐ USC ☐ LPR ☐ Undocumented
Children: Number: _____ Ages: _____
USC: _____ LPR: _____ Undocumented: _____
Mother: ☐ USC ☐ LPR ☐ Undocumented
Father: ☐ USC ☐ LPR ☐ Undocumented
US Citizen Grandparents: ☐ Yes ☐ No

Client's Goals re: Immigration Consequences

- ☐ Avoid conviction that triggers deportation
- ☐ Preserve Eligibility to obtain future immigration benefits (e.g. LPR status or citizenship)
- ☐ Preserve ability to ask immigration judge to get/keep lawful status & stay in US
- ☐ DACA/DAPA (President Obama's Executive Orders for children/parents)
- ☐ Get out of jail ASAP
- ☐ Immigration consequences, including deportation, are not a priority

Complete Criminal History

(Include offense, file number for offense, date of conviction, and sentence [including suspended time], and arrests, deferred prosecutions, juvenile history, or other resolutions, **include dismissals**)

Current charge(s) (w/ statute #, if obscure):

_____

_____

File Number(s): _____

Related to DV? ☐ Yes ☐ No
Relationship to victim? V is D's: _____

Plea Offer(s):

_____

_____

Screener Use Only: Case Outcome:

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO: XXXXXXXXXx

STATE OF NORTH CAROLINA

v.

XXXXXXXXXXXXXXXXX

MOTION TO CONTINUE

This matter is before the Court on the Motion of Assistant Public Defender XXXXXXXXXXXXXXX to continue this case to the officer's next court date. In support of this motion, counsel argues:

1. This setting is the second time that this case appears on the Traffic Calendar with this attorney as counsel of record.

2. Defense counsel needs time to prepare adequate immigration information and advise client of the potential negative immigration consequences of this action against him.

3. Failure to advise a client on immigration consequences is a direct violation of Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

4. Failure to advise client on his immigration consequences is ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984).

5. This case is more difficult for defense counsel to prepare because all communication with the Defendant requires the services of a Spanish language interpreter.

_____

XXXXXXXXXXXXX, Assistant Public Defender
Counsel for the Defendant
Durham County Public Defender's Office
510 S. Dillard Street, Suite 4700
Durham, NC 27701

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion has been served in the following manner:

[X] By hand delivery to Durham County District Attorney's Office

Date: 09/12/2019

XXXXXXXXXXXXXXX
Assistant Public Defender
Attorney for Defendant

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO: XXXXXXXXXXXXX

STATE OF NORTH CAROLINA

ORDER

v.

XXXXXXXXXXXXXXXX

This motion, having come before the Court through counsel for the Defendant is hereby:

___ GRANTED: Next Court date will be: _____

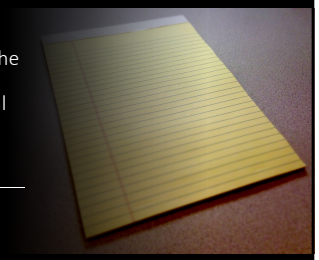
___ DENIED.

_____
The Honorable Judge XXXXXXXXX
District Court Judge

Date: XXXXXXXXXX

The Story of the Case: Factual and Emotional Case Themes

Tucker Charns
IDS Regional Defender

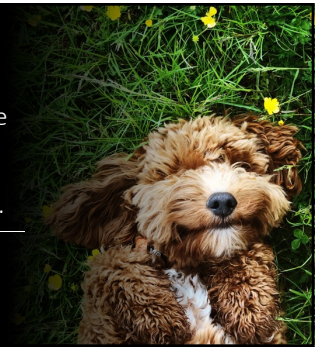


1

Start off with something "unlawyerly".

2

Think of the last time something moved you.



3

4

5

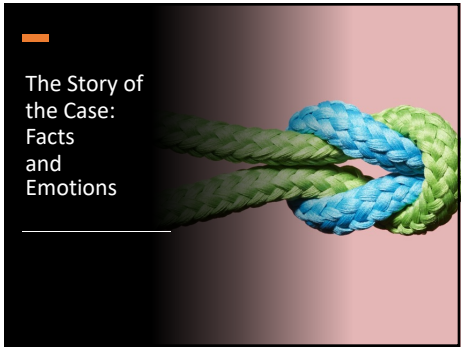
6

7

Take note about that feeling.

8

The Story of the Case: Facts and Emotions



9

It is one central story with a factual, emotional and legal reason why the right outcome for the judge is something good for your client.

10

Steps:

1. Know the facts of your case.
2. Know what your client wants.
3. Select the genre.
4. Tell the story with facts and emotions.

11

1. Know the facts of your case.

12

2. Know what your client wants.

13

3. Select the genre.

14

15

- **It never happened.**
- **It happened but I didn't do it.**
- **It happened, I did it but it was not a crime.**
- **It happened, I did it, it was a crime but not *this* crime.**

16

- **It happened, I did it, it was the charged crime, but I'm not responsible.**
- **It happened, I did it, it was a crime, I'm responsible, so what?**

17

Tips on Choices

- Gets harder as you go down the list
- Mistake over lies almost every time
- Less you have to take on, the better

18

1. It never happened.

19

1. It never happened:

didn’t violate DVPO

20

2. It happened but I didn't do it.

21

2. It happened but I didn't do it:

mistaken identification, alibi

22

3. It happened, I did it, but it was not a crime.

23

3. It happened, I did it, but it was not a crime:

self-defense, accident, not drunk,missing elements

24

4. It happened, I did it, it was a crime but not *this* crime.

25

4. It happened, I did it, it was a crime but not *this* crime:

-lesser included offenses or another crime

-careless & reckless, not drunk

26

5. It happened, I did it, it was the charged crime, but I'm not responsible.

27

5. It happened, I did it, it was the charged crime, but I'm not responsible:

insanity, voluntary intoxication, duress

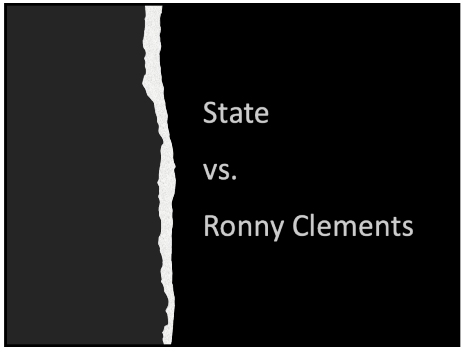
28

6. It happened, I did it, it was a crime, I'm responsible, so what?

29

The client's decision.

30



31

1. It just never happened.
2. It happened, I did it, but it was not a crime.
3. It happened but I didn't do it.
4. It happened, I did it, it was a crime but not *this* crime.
5. It happened, I did it, it was the charged crime, but I'm not responsible.
6. It happened, I did it, it was a crime, I'm responsible, so what?

32

We have the facts, the client's decision and the genre. Now for the emotional and factual case theme.

33

What is *not* an emotional and factual case theme:

34

Reasonable Doubt

35

Nothing factual or emotional.

36

There is a reasonable doubt that Ronny was in the store that day.

37

The only person who says Ronnie was there was the one whom the police already knew was there and the one who had everything to lose if he didn't make up a story.

38

Legalese won't help.

39

- Alibi
- Self-defense
- Voluntary intoxication
- Entrapment

40

There is no emotion behind these words.

41

There are no facts behind these words.

42

My client has an alibi. He wasn't there.

43

Or.

Ronny was home with his brother, watching a game and waiting for his mom to come home from work.

44

This is a case of duress. My client was forced to take the property.

45

Or.

Harland White has bullied Ronnie since 10th grade. He is even bigger and stronger than Ronnie now and would have hurt Ronnie- who had the impossible choice of taking a few beers or hoping he survived a beating.

46

Harland White is setting up my client. He hopes his testimony will get him a PJC in another case.

47

Or.

Ms. Tubbs is the only witness who has nothing to gain here. While Harland says he did nothing wrong, she knows he did when he forced this kid to take the beer. Harland wants a pass. She wants justice.

48

What *is* an emotional and factual case theme:

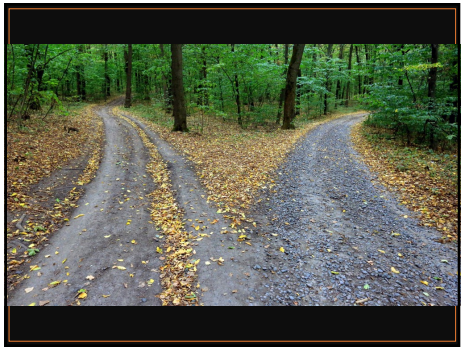
49

It is your client's story of innocence, of less blame or unfairness. It is what guides you through every part of the trial. It resolves problems and questions, and it does not hide them.

50

1. It is one central story.

51

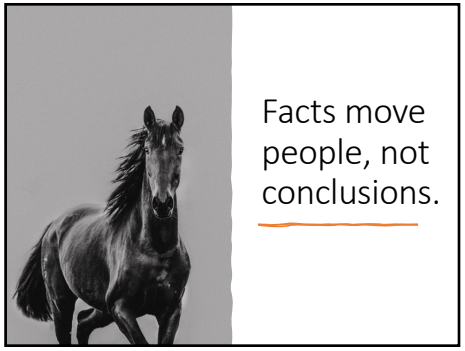


52

53

2. Factual, emotional and legal reasons why judge should do the right thing.

54



Facts move people, not conclusions.

55

3. Story of innocence, less blame or unfairness.

56

57

Think about the best storytellers.

- They get us right at the start.
- They know how they want you to feel.
- They know not to waste audience's time.

58

Think about the worst.

- Unfocused
- No set theme
- "And then she said..and then I told her…wait, but listen…."

59

Telling the Story

- Paint a picture
- Turn the chronology around: start from the end
- Quotes from the case

60

"Until the lion learns to write, the hunter will always be the hero. "

-African proverb

61

Writing the story.

It may help to start with a headline.

62

The Wrong Jacket Leads to the Wrong Arrest

63

It Is Not Against the Law to Drive Tired

64

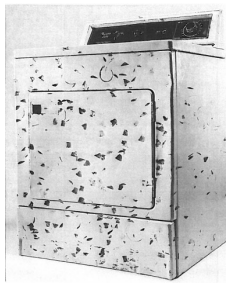
If the Glove Doesn't Fit, You Must Acquit

65

A Bully Never Changes.

66

Practice Make Perfect



67

4. It is what guides you through every part of the trial.

68

If your emotional and factual theory is that the event never happened, don't talk about self-defense.

69

An emotional and factual case theory gives you checklists.

70

OPENING CHECKLIST

- Story can be the basis for the opening
- If your story is about an accident, don't talk about mis-identification

71

CROSS EXAM CHECKLIST

- What points to make
- What points don't help
- What to leave alone

72

If your emotional and factual theory is mistaken identification, don't go after the witness's prior record.

73

DIRECT CHECKLIST

- What points to make
- What points don't advance the story

74

OTHER USES

Bond hearings

75

Example: Sean Wright is being held on a $2,000 bond for missing a court date on a misdemeanor larceny charge. He works at Wendy's.

76

A Wendy's Cook is Not A Danger to Our Community

77

A Wendy's cook is not a danger to our community. If Mr. Wright had $2,000, he would be firing up the grill for the lunch rush right now and not sitting on that bench.

78

If he had $2,000-, or 7.5-weeks worth of his take home pay, he would be wearing his Wendy's uniform and not that jumpsuit right now.

79

If he had $2,000, or 13% of his yearly salary, he would be paying taxes and not costing us taxes. A Wendy's cook is not a danger to our community.

80

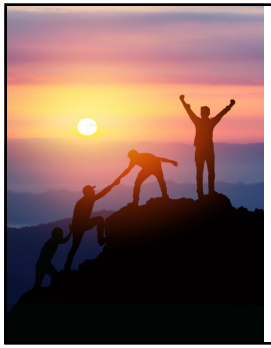
OTHER USES

- Plea negotiations
- You are always ready to argue your case
- It gives you swagger
- It makes you THAT lawyer

81

Magic?

82



. Work.

83

The End.

84

Wait. Remember those heroic slides?

85

86

87

88

Judges want to be heroes, too.

89

So do assistant district attorneys.

90

Make them.

91

92

CROSS EXAMINATION

2022 MISDEMEANOR DEFENDER

PHIL DIXON
DEFENDER EDUCATOR

1

WHY CROSS?

- To Advance your theory of the case
- To Discredit prosecution case
- To get Ammo for closing argument
- If cross isn't serving these purposes, you don't need to cross

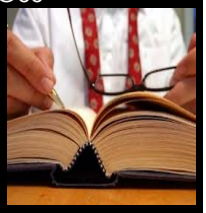
2

HOW TO GET READY FOR CROSS?

- Know your case
- Have a theory of innocence
- Think about the state's case
- Organize your trial file – especially impeachment material

3

HOW TO PREPARE A CROSS



- Write out questions or points to be made
- Organize points and questions by chapters
- Think about the order of your chapters

4

HOW TO CROSS

- Short, simple questions – One fact per question
- Have the witness confirm or deny your facts (no more or less)
- ONLY USE LEADING QUESTIONS

5

6

HOW TO CROSS

- Utilize all relevant facts (but only ask questions with a purpose)
- Start and End Strong – Primacy and Recency
- LISTEN – to the direct testimony, and to their answers on cross
- Use Transitions – "Now I'd like to talk to you about . . ."

7

HOW NOT TO CROSS

- Don't be unnecessarily combative or rude
- Don't argue with the witness (just impeach them)

8

HOW NOT TO CROSS

- Don't repeat the direct examination
- Don't ask the ultimate question (So, . . .)

9

HOW NOT TO CROSS

- Don't let the witness avoid the question
- Don't be a smartass (usually)
- Lose the lawyer/cop talk
- Don't cross just for the sake of asking questions

10

Never, never, never, on cross-examination ask a witness a question you don't already know the answer to.... Do it, and you'll often get an answer you I don't want, an answer that might wreck your case.

(Harper Lee)

izquotes.com

11

COMMON GROUNDS OF IMPEACHMENT

- Bias, Memory, Perception of Witness
- Prior Convictions
- Character for Truthfulness
- Contradictions, Inconsistencies, Failure to Investigate

12

OTHER CROSS TECHNIQUES

- Stretching
- Looping
- Use of Latent Facts
- Impeachment by Prior Statement

13

BASIC LAW OF CROSS

- Good Faith Requirement
- Rules of Evidence Apply (402, 403, 404, 608, 609, 611)
- No undue harassment, embarrassment

14

BASIC LAW OF CROSS

- Wide-Open Cross (but watch for opening doors . . .)
- Courts have wide discretion to limit for relevance, cumulative evidence, badgering, etc.
- 5th and 6th Amendments protect Defendant's right to present a defense, to a full and fair cross-examination, and to confront their accusers

15

FINAL THOUGHTS

- Don't take notes from the movies
- Do take notes from YouTube- Gerry Spence and Irving Younger
- Watch trials, study what works for people (and what doesn't)
- Develop your own style (within these rules)
- Prepare, prepare, prepare

16

17

QUESTIONS?

- PHIL DIXON
- DIXON@SOG.UNC.EDU

18

North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

Impeachment

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6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
iramick@worldnet.att.net

I. Some General Principles for Impeachment

A. Plan Your Impeachment

1. Make sure you have done a complete investigation and have obtained all discovery and Brady/Kyles materials before trial. Remember -- the U.S. Supreme Court has explicitly held that anything in the State's possession that can be used to impeach a State's witness must be disclosed under Brady. This applies even if the impeachment material does not in any way exculpate the defendant. As long as it can be used to impeach, contradict, or discredit a prosecution witness, it is Brady material.

2. Before the witness takes the stand, you should know what information you have about the witness's convictions, bad acts. and bad character that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

3. Before the witness takes the stand, you should know what information you have about the witness's biases and interests in the case that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

4. Although you cannot know in advance what the witness will say on direct, you must know in advance exactly what prior testimony and statements the witness has made. Make sure you are completely familiar with all of these prior statements, so if the witness testifies to something inconsistent, you are ready to impeach.

5. Be familiar with your theory of defense. That way you will know if you should be doing an impeachment. If the witness testifies to something inconsistent with a prior statement, only use the prior statement to impeach if the prior statement is more favorable to your theory of defense than the statement the witness just made on direct.

B. Never Ask an Impeaching Question That Calls For an Opinion or Explanation

C. Keep Your Questions Short and Simple

1. No multi-sentence questions.

2. No questions with a long preface or "wind up."

3. Use normal, clear language – no lawyer talk, no cop talk.

4. Don't be a wise ass. Let the impeachment material stand for itself.

E. The Ethics of Cross-Examination

1. You must have a good faith basis for every impeaching question you ask.
2. It is unethical to insert innuendo based on untrue facts.

3. It is unethical to ask accusatory questions for the purpose of embarrassing or rattling a witness if the answer to the question is irrelevant to the case at hand.

EX: The witness has a son who is in prison for child abuse. Unless this is somehow relevant to your case, it is improper to cross-examine the witness about this just for the purpose of embarrassing him or getting him to lose his temper on the stand.

F. Stop When You Are Done

1. Don't ask one too many questions.

2. If the witness refuses to answer the impeaching question, don't rush in with another question. Every moment of silence just emphasizes that the witness is stuck.

3. Resist the urge to ask the conclusory question after the witness has been impeached. Save the conclusions about the witness for your closing argument.

II. Impeachment With Prior Inconsistent Statements

A. Know the Witness's Prior Statements Inside Out Before You Reach Trial

B. Listen Carefully to the Witness's Answers on Direct. If you Don't Remember What He Said on Direct, You Won't Know If He Can Be Impeached

C. There is a formula for impeaching someone with a prior inconsistent statement. If you follow the simple formula in asking impeachment questions, you can't go wrong.

D. The Formula For Impeachment By Prior Inconsistent Statement

1. Get the witness to repeat the statement he just made at trial

2. Ask the witness if he made a prior statement (Don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute)

3. Mark the prior statement for identification (don't try to introduce it into evidence yet).

4. Confront the witness with the substance of the prior statement and ask the witness if he made that statement.

a. If the witness admits making the prior statement, stop there. You have established the inconsistency and are not allowed to actually introduce the prior statement in evidence – the inconsistency is already before the jury. [Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.]

b. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Then read it to the jury or have the witness read it aloud to the jury. [Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.]

5. *Do NOT give the witness a chance to explain the inconsistency.*

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. Q: Did you testify on direct examination that the light was red?
   A: Yes.

2. Q: Do you remember testifying at a preliminary hearing on March 15th of this year?
   A: Yes.

Defense counsel then marks the relevant lines of the preliminary hearing for identification.

3. Q: And at that preliminary hearing do you remember being asked the following question and giving the following answer? "Question: 'What color was the light?' Answer: 'Green'"
   A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency, and is Impeached

OR

A: No.

Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence Then Read Them to the Jury, or Have the Witness Read Them to the Jury

NOTE: Do not offer the entire transcript into evidence:

a. Everything except the inconsistent statement is both irrelevant and hearsay.
b. It probably contains a lot of other stuff that you don't want the jury seeing.

State v. Big Bad Wolf

1

Leading Questions

- Rule 611(c) "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony."

2

Hearsay

- Rule 801(c) " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."
- Rule 802: "Hearsay is not admissible except as provided by statute or these rules."

3

Lack of Personal Knowledge

- Rule 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

4

Speculation

- Rule 602 "Lack of Personal Knowledge"
- Rule 701: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, and (b) is helpful to a clear understanding of his testimony or determination of a fact in issue."

5

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

6

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

7

Right to confrontation

- Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."
- Crawford v. Washington, 541 U.S. 36 (2004)

8

Other crimes evidence

- Rule 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."
- Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

9

Privileges

- Husband-wife (communications) N.C Gen. Stat. 8-57
- Doctor-patient 8-53
- Clergyman-communicants 8-53.2
- Psychologist-patient 8-53.3
- Social worker privilege 8-53.7
- Optometrist-patient privilege 8-53.9
- Attorney client privilege

10

Polygraphs

- The results of polygraph examinations are strictly forbidden to be placed into evidence.

11

Rule 702

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

12

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

13

Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

14

Evidence of prior crimes for impeachment purposes subject to limitations

- Rule 609 "General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

15

Can't ask about bad, but not dishonest, misconduct

- Rule 608(b) "Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

16

Can't ask a witness about their religious beliefs

- Rule 610: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias."

17

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

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Third party guilt evidence

The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 351 S.E.2d. 277 (1987)

19

Out of court statements not hearsay if not being offered for truth of the matter asserted.

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Hearsay exception: statement against interest

- Rule 804(b) ( ) "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."

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