UNC SCHOOL OF GOVERNMENT

2025 Felony Defender Training

February 5-7, 2025 / Chapel Hill, NC

Co-sponsored by the UNC-Chapel Hill School of Government & Office of Indigent Defense Services

Wednesday, February 5

9:00-9:15 am	Welcome and Introductory Remarks
9:15-10:15 am	**Felony Case Preparation – What's Different in Superior Court** (60 min.) Danny Spiegel, Assistant Professor of Criminal Law, Procedure, and Evidence UNC School of Government, Chapel Hill, NC
10:15-10:30 am	*Break*
10:30-11:45 am	**Discovery and Investigation in Felony Cases** (75 min.) Keith Williams, Attorney Law Offices of Keith Williams, Greenville, NC
11:45-12:45 pm	*Lunch*
12:45-2:00 pm	**WORKSHOP: Developing an Investigative and Discovery Strategy** (75 min.)
2:00-2:15 pm	*Break*
2:15-3:45 pm	**Sentencing in Superior Court** (90 min.) Jamie Markham, Associate Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:45-4:00 pm	*Break*
4:00-5:00 pm	**Confidential Informants and Defense Investigation: A Case Study** (60 min.) Jackie Willingham, Attorney Willingham Law, Raleigh, NC
5:00 pm	*Adjourn*

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Thursday, February 6

9:00-10:00 am	**Ethics for Felony Defenders** (60 min.) ETHICS Kelley DeAngelus, Deputy Counsel Cameron Lee, Deputy Counsel North Carolina State Bar, Raleigh, NC
10:00-10:15 am	*Break*
10:15-11:30 am	**Motions to Suppress: Statements, Property, and Identification** (75 min.) Phil Dixon, Teaching Associate Professor UNC School of Government, Chapel Hill, NC
11:30-12:30 pm	*Lunch*
12:30-1:45 pm	**WORKSHOP: Motions to Suppress and Evidence Blocking** (75 min.)
1:45-2:00 pm	*Break*
2:00-3:00 pm	**Lab Reports and Legal Issues** (60 min.) Sarah R. Olson, Forensic Resource Counsel Office of Indigent Defense Services, Durham, NC
3:00-3:15 pm	*Break*
3:15-4:30 pm	**Voir Dire and Demonstration** (75 min.) Michael Kabakoff, Assistant Public Defender Mecklenburg County Public Defender's Office, Charlotte, NC
4:30 pm	*Adjourn*
5:30 pm	*Optional Social Gathering – Location TBD*

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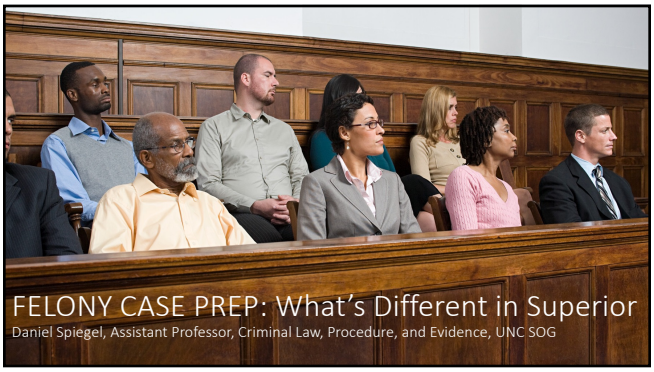
Friday, February 7

9:00-10:00 am	**Pretrial Release Advocacy in Superior Court** (60 min.) Idrissa Smith, Assistant Public Defender Durham County Office of the Public Defender, Durham, NC
10:00-10:15 am	*Break*
10:15-11:15 am	**Preservation Essentials** (60 min.) Amanda Zimmer, Assistant Appellate Defender Director of Training, Outreach, and Special Litigation Office of the Appellate Defender, Durham, NC
11:15-11:30 am	*Break*
11:30-12:30 pm	**Pleading Guilty in Superior Court** (60 min.) Ray Griffis, Attorney Doby & Griffis, Attorneys at Law, Graham, NC
12:30-1:30 pm	*Lunch*
1:30-2:45 pm	**Motion Practice to Advance Your Theory of the Case** (75 min.) Jonathan Broun, Senior Staff Attorney NC Prisoner Legal Services, Raleigh, NC
2:45-3:00 pm	*Break*
3:00-4:00 pm	**A View from the Bench** (60 min.) Hon. Bryan Collins, Resident Superior Court Judge Judicial District 10, Wake County, NC
4:00 pm	*Final Wrap-Up and Adjourn*

CLE HOURS: 17.00

Includes 1 hour of ethics/professional responsibility



FELONY CASE PREP: What's Different in Superior

Daniel Spiegel, Assistant Professor, Criminal Law, Procedure, and Evidence, UNC SOG

1

Big Picture Differences from District Court

- Discovery- Open File
- Motions- in writing, more formal
- Organization / Complexity
- Jury Trial Skills
- Preservation – Court of Record

2

Read the Statutes (OK, not all of them)

- G.S. 15A-601 through 606 –First Appearance for Felonies / Demand or Waiver of Probable Cause Hearing
- 15A-611 through 614 – Probable Cause Hearing Procedure
- 15A-641 through 646 – Indictments
- **15A-901 through 910 – Discovery in Superior Court
- 15A-971 through 980 – Motions to Suppress
- 15A-1021 through 1027 – Guilty Plea Procedure

3

Open File Discovery

- G.S. 15A-903. Disclosure of evidence by the State - Information subject to disclosure.

(a) Upon motion of the defendant, the court must order:

(1) The State to make available to the defendant the **complete files** of all **law enforcement agencies**, **investigatory agencies**, and **prosecutors' offices** involved in the investigation of the crimes committed or the prosecution of the defendant.

a. The term **"file" includes** the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, **or any other matter or evidence obtained during the investigation of the offenses** alleged to have been committed by the defendant.

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Open File Discovery- Exceptions

- G.S. 15A-904. Disclosure by the State - Certain information not subject to disclosure.
  - Work product/Legal Research/Correspondence/Memos
  - Confidential Informant ID…. Unless…. (see 7 blogs I wrote on this)
  - Identifying info of witnesses beyond basics (enough to identify and locate)
  - Victim Impact Statements…. Unless??

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Motions to Suppress

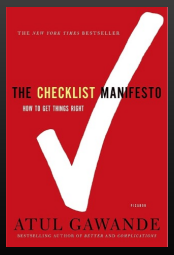
- G.S. 15A-977. Motion to suppress evidence in superior court; procedure.

(a) A motion to suppress evidence in superior court made before trial **must be in writing** and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The **motion must be accompanied by an affidavit** containing facts supporting the motion.

6

Discovery- Use Checklists

- Open file discovery in Superior Court since 2004
- You get basically… everything!
- Brainstorm all the items that are part of the investigative file and ask for them



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Checklists – Different for Different Case Types

- Develop your own, refine them
- Think about what you commonly get and don't get in discovery
- Iterate and compare with colleagues
- Not too simple, not too complex

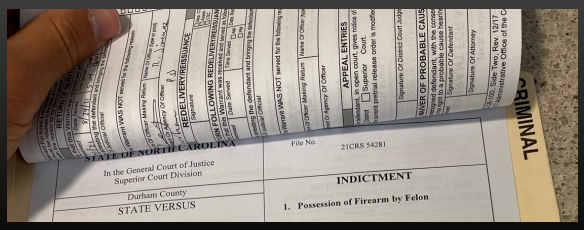
8

Go Look at the Evidence- Right to Inspection!

- You have a right to inspect any physical evidence under G.S. 15A-903(a)(1)(d)
- Go look at the drugs, at the purse, at the backpack, at the gun, at the ….
- This will help you understand weaknesses in State's case and refine your defense theory

9

Go look at the Court File! (or the e-file)



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Develop Good Habits . . .

- Regular system for organizing file
- Regular system for tracking deadlines
  - Spreadsheet, Filing system, Habits, Administrative Procedures
  - Ask experienced attorneys in your office how they manage their caseload

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Motions

- IDS Motions Bank:
  - https://www.ncids.org/get-help/motions-bank/
- In Superior Court, generally will be in writing
- Defendermanuals.sog.unc.edu
- Signed, served, filed, affidavits where necessary, cert. of service
- Cite authority, specific grounds for relief, what relief you want.

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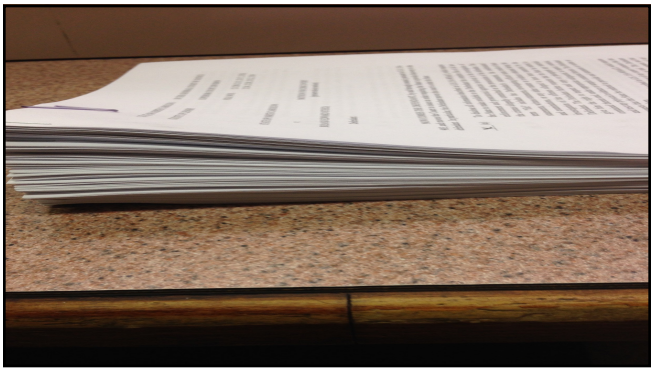

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Motions Deadlines

- Pre-Arraignment Motions:

File Request for Arraignment? → Motions Due At Arraignment

No Request for Arraignment? → Motions Due within 21 days of Indictment

- Change venue, improper venue, special venire, joinder of offenses, bill of particulars. *See* G.S. 15A-952

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Motions Deadlines

Suppression Motions:

- Generally pre-trial. G.S. 15A-975
- With certain evidence, within 10 business days of receipt of State's notice of intent to use. *See* G.S. 15A-976

Notice of Defenses: 20 days after case set for trial G.S. 15A-905(c)(1)

Notice of Expert Testimony: Reasonable time before trial.

Notice of Appeal: 14 days; 30 days for civil cases like SBM and must be written. N.C. R. App. P. 4(a)

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Trial Motions

- Recordation G.S. 15A-1241 – if request made for complete recordation, it must be granted
- Sequestration
- Jury instruction requests
- Motions in limine ("on the threshold" or "at the start" – generally motion before trial, or during trial outside of presence of jury, to exclude or include certain evidence)
  - See Jonathan and Phil's presentations this week
- Good to have checklist! Can use prior cases as template.

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ORGANIZATION- Trial

- Lots more to worry about and to organize
- Find a system that works– Tabs, Folders, Subfolders, Stickies/Flags, etc.
- Be able to find what you need in trial, and keep track of what's happening at trial

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ORGANIZATION = Trial Notebook

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Sample Trial Notebook – File Folders in Redwell

- Can be organized alphabetically, chronologically, or in trial order
- Allows for easy retrieval and return to file
- Can pull multiple pieces together at the same time, e.g. indictment and case law
- Lets you focus on one area and easily add/subtract
- More suited to improvisational style compared to trial binder

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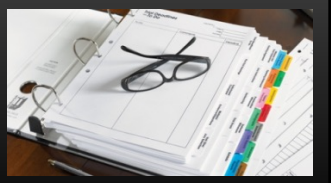
Sample Trial Notebooks – Trial Binder

- Can be organized alphabetically, chronologically, or in trial order
- Holds together- harder to lose documents
- Can use tabs and flags for organization
- More suited for case with less improvisation, anticipated course



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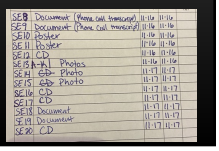
What you'll need . . .

- Indictments
- Witness statements, report
- Your motions, their motions, and the caselaw
- Direct and Cross Examinations, with any supporting evidence
- Exhibits also –keep track of what's in and not-
  - Can use AOC form or not
- Jury Instructions



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YOU NOW MUST WORRY ABOUT . . .

- Selecting a Jury
- Opening Statements
- Motion to Dismiss at Close of State's Evidence
- Charge Conference and Jury Instructions
- Preservation- Court of Record
- Notice of Appeal if you lose

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Preservation

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24

DON’T WORRY . . .

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HOW DO YOU GET BETTER AT JURY TRIALS??

27

BY TRYING CASES!!!

- They know who tries cases, and how well you try them.
- You cannot learn jury selection or trial procedure without trying cases.

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Final Thoughts

- Think creatively and exhaustively about discovery requests. You are entitled to everything.
- Cultivate good organization of your files and trial notebooks.
- Cultivate a motions practice and think about motions in the case and when they must be filed.
- Watch jury trials, and take cases to trial.

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QUESTIONS?

- Danny Spiegel
- 919-966-4377
- spiegel@sog.unc.edu

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Probable-Cause Hearing Scheduling

- G.S. 15A-606. Demand or waiver of probable-cause hearing.

(a) If a defendant is charged with a criminal offense within the original jurisdiction of the superior court, the **judge must schedule a probable-cause hearing**….

(d) If the defendant does not waive a probable-cause hearing, the district court judge must schedule a hearing **not later than 15 working days following the initial appearance** before the district court judge….

(f) Upon a **showing of good cause**, a scheduled probable-cause hearing may be continued by the district court upon **timely motion** of the defendant or the State. **Except for extraordinary cause**, a motion is **not timely unless made at least 48 hours prior** to the time set for the probable-cause hearing.

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Probable-Cause Hearing Procedure

- G.S. 15A-611. Probable-cause hearing procedure.

…(b) The State must by **nonhearsay evidence**, **or by evidence that satisfies an exception to the hearsay rule**, **show that there is probable cause** to believe that the offense charged has been committed

(Some exceptions for ownership of property, lack of consent, scientific tests, etc)

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Developing an Investigative and Discovery Strategy

Keith Williams
Greenville, North Carolina
252-931-9362 keith@williamslawonline.com

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Credits

- 2016 Power Point from Glenn Gerding
- 2017 Power Point from Vince Rabil
- Ch. 4 of Vol. 1 of Defender Manual
- Phil Dixon, Jr., School of Government Faculty Member

2

Three Points

1. What They Give You
2. What You Give Them
3. What You Get on Your Own

3

1. What They Give You

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1. What They Give You

- Constitutional (due process)
  - Exculpatory Material
    - *Brady v Maryland*, 373 US 83 (1963)
    - Information relevant to guilt or punishment that is favorable to the defendant

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1. What They Give You

  - Impeachment Material
    - *Giglio v United States*, 405 US 150 (1972)
  - Prosecutor has the duty to find any exculpatory or impeachment material known to law enforcement
    - *Kyles v. Whitley*, 514 US 419 (1995)

6

1. What They Give You

- Old Rule
  - Prosecutor decides what is exculpatory or impeaching and gives it to you
  - Or if s/he wanted to, they could give you open file discovery

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1. What They Give You

- New Rule: mandatory open file discovery
  - Fox should not guard henhouse
  - They give you everything they have, per 15A-903
  - More than just exculpatory or impeaching; everything

8

1. What They Give You

- Procedure
  - File Request for Discovery 15A-902
    - Generally within 10 working days after being notified of the indictment

9

1. What They Give You

- After 7 days, make motion for discovery 15A-902
  - If State has not provided it
  - And even if State has provided it
    - "This motion is made for the record, to assert fully the Defendant's rights to discovery"

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1. What They Give You

- After you get the discovery
  - Read it and make note of anything mentioned but not provided
  - Example: "Officer A took pictures of the scene" – but no pictures provided
  - Example: "Officer B sent items to the State Crime Lab for analysis" – but no lab report provided

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1. What They Give You

- Then file a motion for additional discovery
  - Citing Brady, Giglio, and the open file discovery statutes
  - Ask the court to order production of the missing items
  - Most prosecutors will work with you

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1. What They Give You

- If the State is playing games, file a motion for sanctions (sample attached; first attachment)
  - 15A-910: asking for a continuance, a mistrial, a dismissal, or "other appropriate orders"
  - Cross the offending officer with the issue at trial

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1. What They Give You

- In a drug case in which the State used a confidential informant (CI), include in your motion a request for the CI file
  - most agencies maintain files on their CI's, showing the CI's history with the agents, payments made to the CI, and other information concerning the CI

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1. What They Give You

- Especially if the agency is certified by CALEA (the Commission on Accreditation for Law Enforcement Agencies)
- Argue as part of open file discovery because "the complete files of all law enforcement agencies . . . involved in the investigation of the crimes committed or the prosecution of the defendant." 15A-903(a1)

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1. What They Give You

- From Greenville Police Department Manual:
  - directs that GPD maintain a file on all informants that includes a record of payments made to the informant and a copy of the informant's criminal record.

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1. What They Give You

- provides that "[a]ll meetings with informants in which information is obtained or investigative progress is made shall be documented and included in the investigation file related to the case."
- has a section headed "Guidelines for Paying Informants." It directs the officer to meet with a supervisor "to determine [the] value" of information provided by an informant. It requires that payments to informants "be documented on Report of Special Expenditures."

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2. What You Give Them

18

2. What You Give Them

- Constitutional
  - No because State has no constitutional rights
- Statutory
  - Yes per statute, 15A-905
  - State's Motion for Reciprocal Discovery

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2. What You Give Them

- Within 20 working days after final administrative setting ("within 20 working days after the date the case is set for trial" 15A-905(c)(1))
  - Notice of Defenses: if you are going to rely on alibi, duress, entrapment, insanity, mental

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2. What You Give Them

infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication

- If alibi, State can ask for disclosure of alibi witnesses no later than 2 weeks before trial

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2. What You Give Them

- More detailed notice required for duress, entrapment, insanity, automatism, or involuntary intoxication: "specific information as to the nature and extent of the defense"
- OK to give the notice and later change your mind; giving the notice is "inadmissible against the defendant." 15A-905(c)(1)

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2. What You Give Them

- Around two to three weeks before trial ("reasonable time prior to trial") 15A-905(c)
  - Any exhibits or other materials you plan to admit
  - Results of any examinations or tests you plan to admit
  - Expert witness reports and curricula vitae for experts you will call

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2. What You Give Them

- Caveats
  - Only what you plan to admit
  - Not your whole file
    - No reciprocal open file discovery

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2. What You Give Them

- At beginning of jury selection
  - Your witness list per 15A-905(c)(3)
  - "a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial"

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2. What You Give Them

- If you play games with them: they can move for sanctions
- 15A-910

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3. What You Get on Your Own

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3. What You Get on Your Own

- Anybody can pick up a rock
- It takes imagination, effort, and discipline to dig and find the gemstones hidden underground
  - That's where the good stuff is

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3. What You Get on Your Own

- Imagination
  - Think beyond what is there
  - To what *could* be there
  - And how you can make it be there

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3. What You Get on Your Own

- Sometimes your investigation changes everything
- Sometimes you win because you did more investigation than the State

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3. What You Get on Your Own

- Imagination at work
  - My Cousin Vinny
    - https://www.youtube.com/watch?v=_T24lHnB7N8

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3. What You Get on Your Own

- Sky is the limit. Ceiling is the roof.
- Spend your time on what is needed for the theory of your case
  - Example: bank robbery; your client is alleged to be driver of the getaway car

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3. What You Get on Your Own

- If your theory is mistaken identity, spend your time getting evidence of his whereabouts on the offense date
- But if your theory is that he acted under duress b/c threatened by codefendant, spend your time going into codefendant's background

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3. What You Get on Your Own

- Some common examples
  - Social media
  - Video and audio recordings
  - Medical records and other material from third parties

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3. What You Get on Your Own

- Social media
  - Facebook, twitter, instagram, VSCO, Venmo
  - Get it if public
  - But do not "friend" them to get it

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3. What You Get on Your Own

- Video and Audio Recordings
  - Dashcam from the patrol car
  - Bodycam from the officer

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What You Get on Your Own

- Surveillance cameras
  - City-owned
  - Private businesses
- 911 Call Recordings

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3. What You Get on Your Own

- Recordings from private business or individual (surveillance cameras)
  - Work on these right away
  - Many are gone within 2-4 weeks
  - Go out to the scene and look for cameras

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3. What You Get on Your Own

- Issue subpoenas
  - if you are not sure who owns the business, check the records in Register of Deeds, Tax Office, or Secretary of State
  - Direct production of the recording in court on the court date

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3. What You Get on Your Own

- Or better: direct production to your office prior to the court date so you can get it ASAP
  - Permitted by 2008 Formal Ethics Opinion 4

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3. What You Get on Your Own

- Recordings from law enforcement (dash cams, body cams, etc.)
  - Cannot use subpoena
  - Must file a petition under NCGS § 132-1.4A(e1)
  - File in civil Superior Court (no filing fee)

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3. What You Get on Your Own

- Not as bad as it sounds; really just a subpoena using a different form
  - AOC-CV-270
  - Sample attached (second attachment)
- File it with Notice of Hearing
  - Set on next available civil Superior Court term

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3. What You Get on Your Own

- Mail to the Chief of Police (or Sheriff)
- As a courtesy, copy to the city attorney or county attorney who will handle it for them
- Generally, they give you the recording with little trouble; and often without the need to appear in civil court

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3. What You Get on Your Own

- Medical records and other records held by third parties (doctors, counselors, schools, etc.)
  - Example: mental health treatment records concerning the prosecuting witness
  - Sometimes called "third party discovery" or "Ritchie records"

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3. What You Get on Your Own

- *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987): criminal defendant entitled to receive portions of state social service agency files that contain material information
- You file the motion requesting the records
  - Sample attached (third attachment)

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3. What You Get on Your Own

- You send a subpoena to the third party that holds the records
  - Directing production under seal to the court (the Clerk's Office)
  - Note: these records are generally privileged, so do not direct production to your office; you need a court order to set aside the privilege

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3. What You Get on Your Own

- On court date, ask for a motions hearing
  - Ask the judge to order the records be given to you outright
  - If not, then ask for the judge to review *in camera* and give to you after reviewing; or to seal for appellate review if withheld

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3. What You Get on Your Own

- If you are not sure where the prosecuting witness received treatment, then just file the motion without the subpoena
  - Stating what you know about the prosecuting witness potentially having treatment records out there
  - At least asking for the prosecutor to provide any such records in their possession (putting it on the record)

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Conclusion

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Introduction to

Felony Sentencing

Jamie Markham

UNC School of Government

February 2025

UNC SCHOOL OF GOVERNMENT

www.sog.unc.edu

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	**PRESUMPTIVE**
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (252)	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
	51–64	**59–73**	**67–84**	**78–97**	**89–111**	**103–128**	
	ASR 38–51	ASR 44–59	ASR 51–67	58–78	67–89	77–103	
E Max. 88 (136)	I/A	I/A	A	A	A	A	
	25–31	29–36	33–41	38–48	44–55	50–63	
	20–25	**23–29**	**26–33**	**30–38**	**35–44**	**40–50**	
	ASR 15–20	ASR 17–23	ASR 20–26	ASR 23–30	26–35	30–40	
F Max. 59	I/A	I/A	I/A	A	A	A	
	16–20	19–23	21–27	25–31	28–36	33–41	
	13–16	**15–19**	**17–21**	**20–25**	**23–28**	**26–33**	
	ASR 10–13	ASR 11–15	ASR 13–17	ASR 15–20	ASR 17–23	20–26	
G Max. 47	I/A	I/A	I/A	I/A	A	A	
	13–16	14–18	17–21	19–24	22–27	25–31	
	10–13	**12–14**	**13–17**	**15–19**	**17–22**	**20–25**	
	ASR 8–10	ASR 9–12	ASR 10–13	ASR 11–15	ASR 13–17	ASR 15–20	
H Max. 39	C/I/A	I/A	I/A	I/A	I/A	A	
	6–8	8–10	10–12	11–14	15–19	20–25	
	5–6	**6–8**	**8–10**	**9–11**	**12–15**	**16–20**	
	ASR 4–5	ASR 4–6	ASR 6–8	ASR 7–9	ASR 9–12	ASR 12–16	
I Max. 24	C	C/I	I	I/A	I/A	I/A	
	6–8	6–8	6–8	8–10	9–11	10–12	
	4–6	**4–6**	**5–6**	**6–8**	**7–9**	**8–10**	
	3–4	3–4	4–5	4–6	5–7	6–8	

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period

The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision

Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines

Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Types of Sentences

- Prison (“Active”)
- Probation (“Intermediate” or “Community”)
- Split sentence (“Special Probation”)
- Sex Offenders
- Multiple convictions
- Fines and Restitution

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts
A Max. Death or Life w/o Parole	First-degree murder					
B1 Max. Life w/o Parole	A	A	A	A	A	A DISPOSITION
	Second-degree murder					
B2 Max. 484 (532)	A EM	A EM	A	A	A	A
	Second-degree murder					
C Max. 231 (279)	A EM	A EM	A	A	A	A
	Habitual felon					
D Max. 204 (252)	A EM	A EM	A	A	A	A
	Armed robbery					
E Max. 88 (736)	I/A	I/A	A	A	A	A
	AWDWISI					
F Max. 59	Indecent liberties with children					
	ASR 10–13	ASR 11–15	ASR 13–17	ASR 15–20	ASR 17–23	20–26
G Max. 47	Possession of firearm by felon					
	ASR 8–10	ASR 9–12	ASR 10–13	ASR 11–15	ASR 13–17	ASR 15–20
H Max. 39	Breaking or entering					
	ASR 4–5	ASR 4–6	ASR 6–8	ASR 7–9	ASR 9–12	ASR 12–16
I Max. 24	Meth Possession					
	3–4	3–4	4–5	4–6	5–7	6–8

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	
	PRIOR RECORD LEVEL						
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	DISPOSITION
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	PRESUMPTIVE
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (252)	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
	51–64	**59–73**	**67–84**	**78–97**	**89–111**	**103–128**	
	SR 38–51	ASR 44–59	ASR 51–67	58–78	67–89	77–103	
E Max. 88 (136)	I/A	I/A	A	A	A	A	
	25–31	29–36	33–41	38–48	44–55	50–63	
	20–25	**23–29**	**26–33**	**30–38**	**35–44**	**40–50**	
	SR 15–20	ASR 17–23	ASR 20–26	ASR 23–30	26–35	30–40	
F Max. 59	I/A	I/A	I/A	A	A	A	
	16–20	19–23	21–27	25–31	28–36	33–41	
	13–16	**15–19**	**17–21**	**20–25**	**23–28**	**26–33**	
	SR 10–13	ASR 11–15	ASR 13–17	ASR 15–20	ASR 17–23	20–26	
G Max. 47	I/A	I/A	I/A	I/A	A	A	
	13–16	14–18	17–21	19–24	22–27	25–31	
	10–13	**12–14**	**13–17**	**15–19**	**17–22**	**20–25**	
	SR 8–10	ASR 9–12	ASR 10–13	ASR 11–15	ASR 13–17	ASR 15–20	
H Max. 39	C/I/A	I/A	I/A	I/A	I/A	A	
	6–8	8–10	10–12	11–14	15–19	20–25	
	5–6	**6–8**	**8–10**	**9–11**	**12–15**	**16–20**	
	SR 4–5	ASR 4–6	ASR 6–8	ASR 7–9	ASR 9–12	ASR 12–16	
I Max. 24	C	C/I	I	I/A	I/A	I/A	
	6–8	6–8	6–8	8–10	9–11	10–12	
	4–6	**4–6**	**5–6**	**6–8**	**7–9**	**8–10**	
	3–4	3–4	4–5	4–6	5–7	6–8	

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period

The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision

Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines

Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole. Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	**PRESUMPTIVE**
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (252)	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
	51–64	**59–73**	**67–84**	**78–97**	**89–111**	**103–128**	
	EM 38–51	ASR 44–59	ASR 51–67	58–78	67–89	77–103	
E Max. 88 (136)	I/A	I/A	A	A	A	A	
	25–31	29–36	33–41	38–48	44–55	50–63	
	20–25	**23–29**	**26–33**	**30–38**	**35–44**	**40–50**	
					26–35	30–40	
					A	A	
					28–36	33–41	
					23–28	**26–33**	
					17–23	20–26	
					A	A	
					22–27	25–31	
					17–22	**20–25**	
					13–17	ASR 15–20	
					I/A	A	
					15–19	20–25	
					12–15	**16–20**	
					9–12	ASR 12–16	
					I/A	I/A	
					9–11	10–12	
					7–9	**8–10**	
					5–7	6–8	

C/I/A

6–8

5–6

4–5

ASR

Extraordinary Mitigation (possible eligibility). *See page 10.*

Advanced Supervised Release (possible eligibility). *See page 10.*

defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

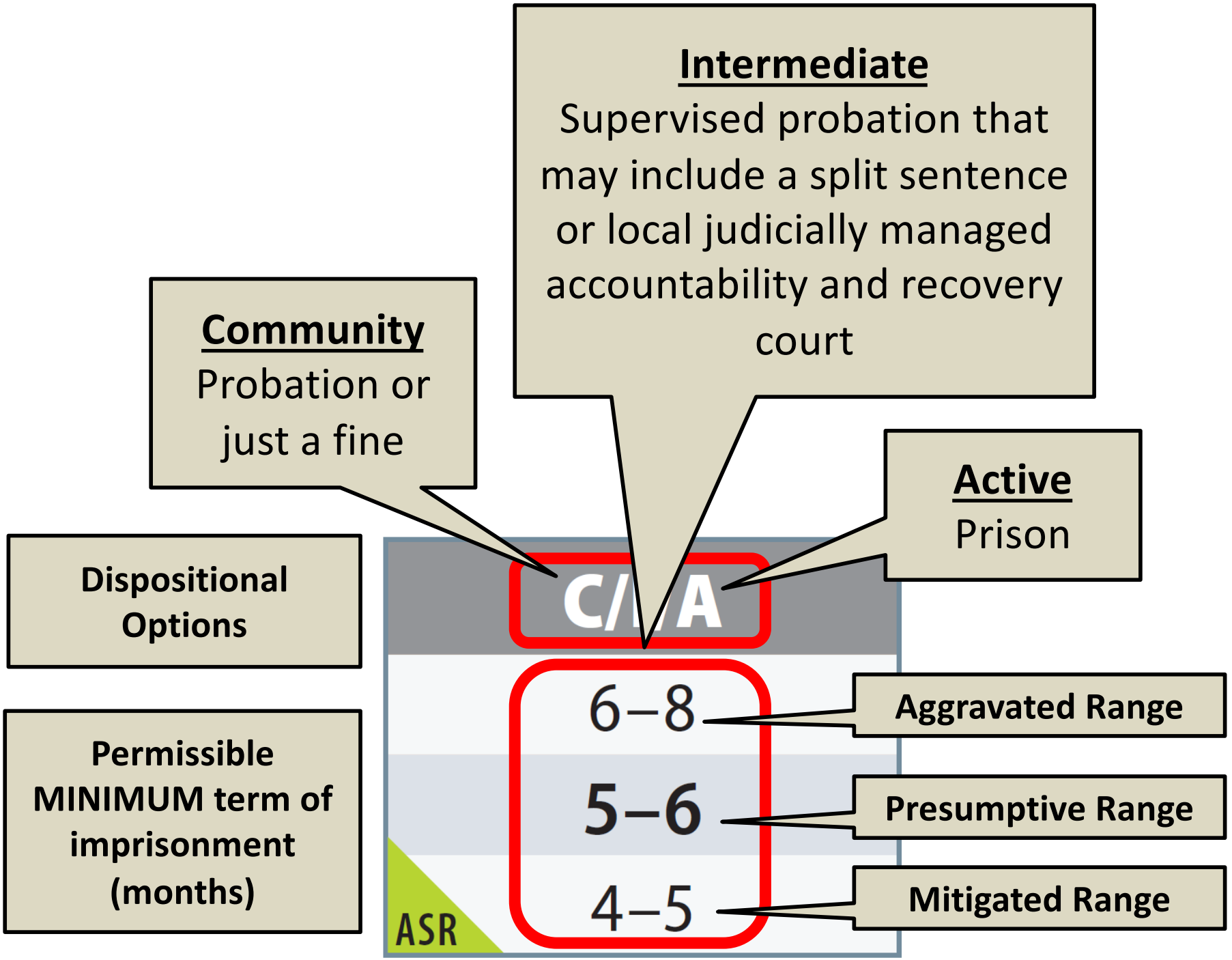
Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

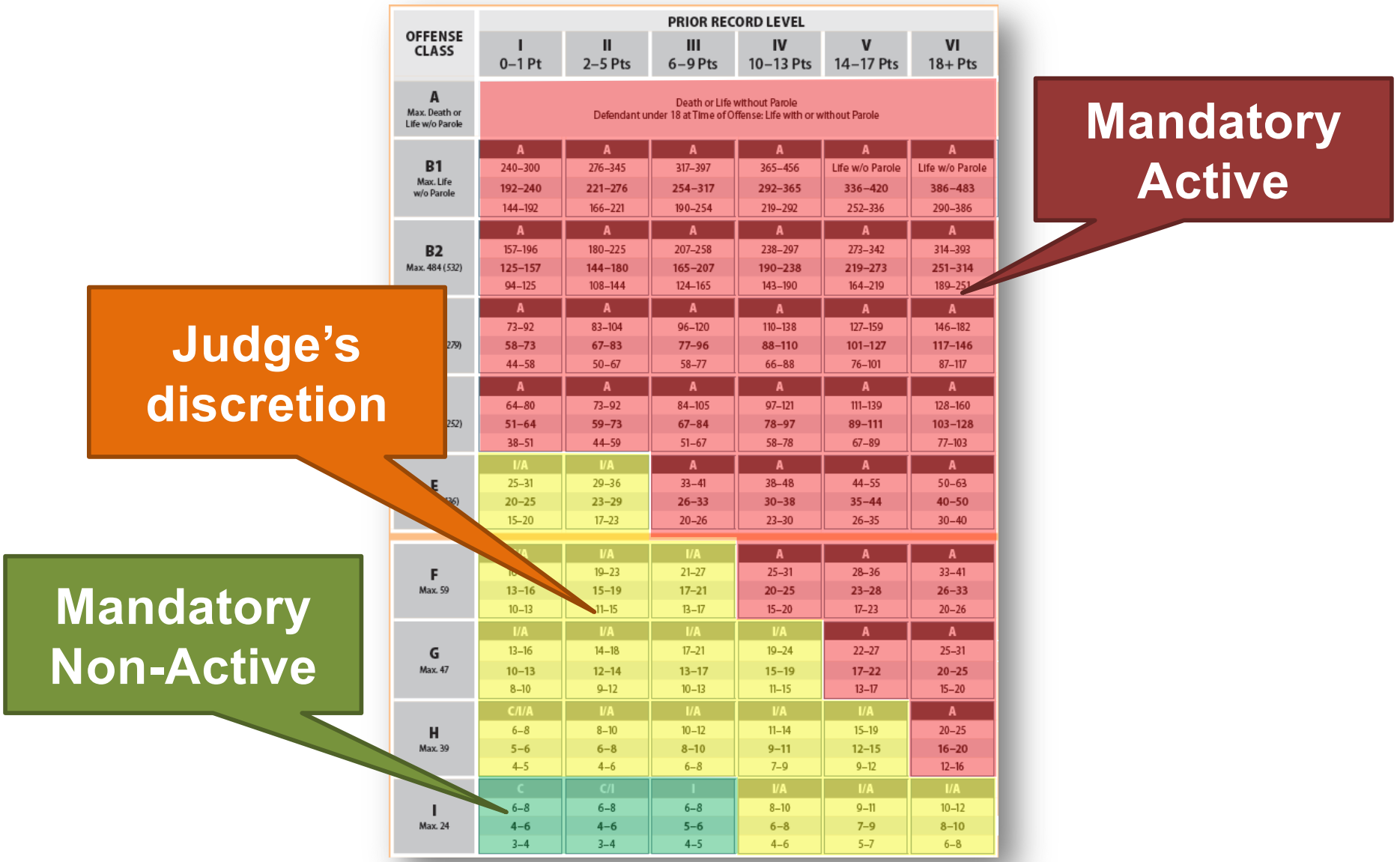
- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).


Intermediate
Supervised probation that may include a split sentence or local judicially managed accountability and recovery court
Community
Probation or just a fine
Active
Prison
Dispositional Options
C/I/A
6–8
5–6
4–5
ASR
Aggravated Range
Presumptive Range
Mitigated Range
Permissible MINIMUM term of imprisonment (months)



OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole					
B1 Max. Life w/o Parole	A 240–300 192–240 144–192	A 276–345 221–276 166–221	A 317–397 254–317 190–254	A 365–456 292–365 219–292	A Life w/o Parole 336–420 252–336	A Life w/o Parole 386–483 290–386
B2 Max. 484 (532)	A 157–196 125–157 94–125	A 180–225 144–180 108–144	A 207–258 165–207 124–165	A 238–297 190–238 143–190	A 273–342 219–273 164–219	A 314–393 251–314 189–251
279)	A 73–92 58–73 44–58	A 83–104 67–83 50–67	A 96–120 77–96 58–77	A 110–138 88–110 66–88	A 127–159 101–127 76–101	A 146–182 117–146 87–117
252)	A 64–80 51–64 38–51	A 73–92 59–73 44–59	A 84–105 67–84 51–67	A 97–121 78–97 58–78	A 111–139 89–111 67–89	A 128–160 103–128 77–103
E 36)	I/A 25–31 20–25 15–20	I/A 29–36 23–29 17–23	A 33–41 26–33 20–26	A 38–48 30–38 23–30	A 44–55 35–44 26–35	A 50–63 40–50 30–40
F Max. 59	I/A 16 13–16 10–13	I/A 19–23 15–19 11–15	I/A 21–27 17–21 13–17	A 25–31 20–25 15–20	A 28–36 23–28 17–23	A 33–41 26–33 20–26
G Max. 47	I/A 13–16 10–13 8–10	I/A 14–18 12–14 9–12	I/A 17–21 13–17 10–13	I/A 19–24 15–19 11–15	A 22–27 17–22 13–17	A 25–31 20–25 15–20
H Max. 39	C/I/A 6–8 5–6 4–5	I/A 8–10 6–8 4–6	I/A 10–12 8–10 6–8	I/A 11–14 9–11 7–9	I/A 15–19 12–15 9–12	A 20–25 16–20 12–16
I Max. 24	C 6–8 4–6 3–4	C/I 6–8 4–6 3–4	I 6–8 5–6 4–5	I/A 8–10 6–8 4–6	I/A 9–11 7–9 5–7	I/A 10–12 8–10 6–8

Exercise 1

- Felony Larceny (Class H)
- Prior Record Level I

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole. Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	**PRESUMPTIVE**
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (252)	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
	51–64	**59–73**	**67–84**	**78–97**	**89–111**	**103–128**	
	EM 38–51	ASR 44–59	ASR 51–67	58–78	67–89	77–103	
E Max. 88 (136)	I/A	I/A	A	A	A	A	
	25–31	29–36	33–41	38–48	44–55	50–63	
	20–25	**23–29**	**26–33**	**30–38**	**35–44**	**40–50**	
					26–35	30–40	
					A	A	
					28–36	33–41	
					23–28	**26–33**	
					17–23	20–26	
					A	A	
					22–27	25–31	
					17–22	**20–25**	
					13–17	ASR 15–20	
					I/A	A	
					15–19	20–25	
					12–15	**16–20**	
					9–12	ASR 12–16	
					I/A	I/A	
					9–11	10–12	
					7–9	**8–10**	
					5–7	6–8	

C/I/A

6–8

5–6

4–5

ASR

Extraordinary Mitigation (possible eligibility). *See page 10.*

Advanced Supervised Release (possible eligibility). *See page 10.*

defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

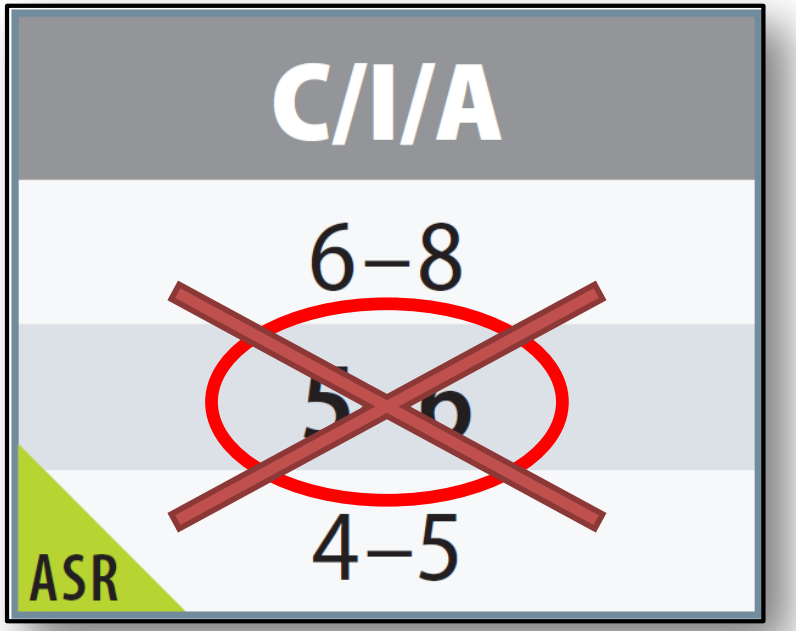
The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Exercise 1

- Give the longest possible Active sentence
- Minimum and Maximum?



Permissible MINIMUM Sentences

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117	
D Max. 204 (252)	A EM 64–80 **51–64** ASR 38–51	A EM 73–92 **59–73** ASR 44–59	A 84–105 **67–84** ASR 51–67	A 97–121 **78–97** 58–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103	
E Max. 88 (136)	I/A 25–31 **20–25** ASR 15–20	I/A 29–36 **23–29** ASR 17–23	A 33–41 **26–33** ASR 20–26	A 38–48 **30–38** ASR 23–30	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40	
F Max. 59	I/A 16–20 **13–16** ASR 10–13	I/A 19–23 **15–19** ASR 11–15	I/A 21–27 **17–21** ASR 13–17	A 25–31 **20–25** ASR 15–20	A 28–36 **23–28** ASR 17–23	A 33–41 **26–33** 20–26	
G Max. 47	I/A 13–16 **10–13** ASR 8–10	I/A 14–18 **12–14** ASR 9–12	I/A 17–21 **13–17** ASR 10–13	I/A 19–24 **15–19** ASR 11–15	A 22–27 **17–22** ASR 13–17	A 25–31 **20–25** ASR 15–20	
H Max. 39	C/I/A 6–8 **5–6** ASR 4–5	I/A 8–10 **6–8** ASR 4–6	I/A 10–12 **8–10** ASR 6–8	I/A 11–14 **9–11** ASR 7–9	I/A 15–19 **12–15** ASR 9–12	A 20–25 **16–20** ASR 12–16	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

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Corresponding MAXIMUM Sentences

The tables below show the r… maximum sentence is 120 pe… ***Sex Crimes:*** The maximum s… the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f). …340 months or more, the …ths. G.S. 15A-1340.17(e1). …er 14, Article 27A is 120 percent of

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→… (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	… (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	…	…	…	…	…	263→328 (376)	304→377 (425)
18→34 (82)	…	…	…	…	…	264→329 (377)	305→378 (426)
19→35 (83)	…	…	…	…	…	265→330 (378)	306→380 (428)
20→36 (84)	…	…	…	…	…	266→332 (380)	307→381 (429)
21→38 (86)	…	…	…	…	…	267→333 (381)	308→382 (430)
22→39 (87)	…	…	…	…	…	268→334 (382)	309→383 (431)
23→40 (88)	…	…	…	…	…	269→335 (383)	310→384 (432)
24→41 (89)	…	…	…	…	…	270→336 (384)	311→386 (434)
25→42 (90)	…	…	…	…	…	271→338 (386)	312→387 (435)
26→44 (92)	…	…	…	…	…	272→339 (387)	313→388 (436)
27→45 (93)	…	…	…	…	…	273→340 (388)	314→389 (437)
28→46 (94)	…	…	…	…	…	274→341 (389)	315→390 (438)
29→47 (95)	…	…	…	…	…	275→342 (390)	316→392 (440)
30→48 (96)	…	…	…	…	…	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→…	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→…	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→…	…4→38	30→45	36→53	42→60	48→67
7→18	13→25	…	…39	31→47	37→54	43→61	49→68
…→19	14→…	…	…	…	…	…→62	

Length of Probatio…
The original period of p… Sentencing must fall w…
- Community—12 to…
- Intermediate—18…

The court may depart f… shorter period is requir… is 5 years. G.S. 15A-134…

…on—5 years

Unless otherwise provided for a …is in the discretion of the court.

Class B1-E Maximums

Class F-I Maximums

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated **PRESUMPTIVE** Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117	
D Max. 204 (252)	A EM 64–80 **51–64** EM 38–51	A EM 73–92 **59–73** ASR 44–59	A 84–105 **67–84** ASR 51–67	A 97–121 **78–97** 58–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103	
E Max. 88 (136)	I/A 25–31 **20–25**	I/A 29–36 **23–29**	A 33–41 **26–33**	A 38–48 **30–38**	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40	
F Max. 73 (92)	I/A 20–25 **16–20** 12–16	I/A 24–30 **19–24** 15–19	A 28–36 **23–28** 17–23	A 33–41 **26–33** 20–26			
G Max. 60 (75)	I/A 16–20 **13–16** 10–12	I/A 19–24 **15–19** 12–15	A 22–27 **17–22** 13–17	A 25–31 **20–25** ASR 15–20			
H Max. 39 (49)	I/A 11–14 **8–11** 6–8	I/A 13–16 **10–13** 8–10	I/A 15–19 **12–15** 9–12	A 20–25 **16–20** ASR 12–16			
I Max. 25 (31)	I/A 6–8 **5–6** 4–5	I/A 8–10 **6–8** 5–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8			

C/I/A

6–8

5–6

4–5

ASR

Extraordinary Mitigation (possible eligibility). *See page 10.*

Advanced Supervised Release (possible eligibility). *See page 10.*

prior record level. The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*

5→15

6→17

E CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

15→27	21→35	27→42	33→49	39→56	45→63
16→29	22→36	28→43	34→50	40→57	46→65
17→30	23→37	29→44	35→51	41→59	47→66
18→31	24→38	30→45	36→53	42→60	48→67
19→32	25→39	31→47	37→54	43→61	49→68
20→33	26→41	32→48	38→55	44→62	

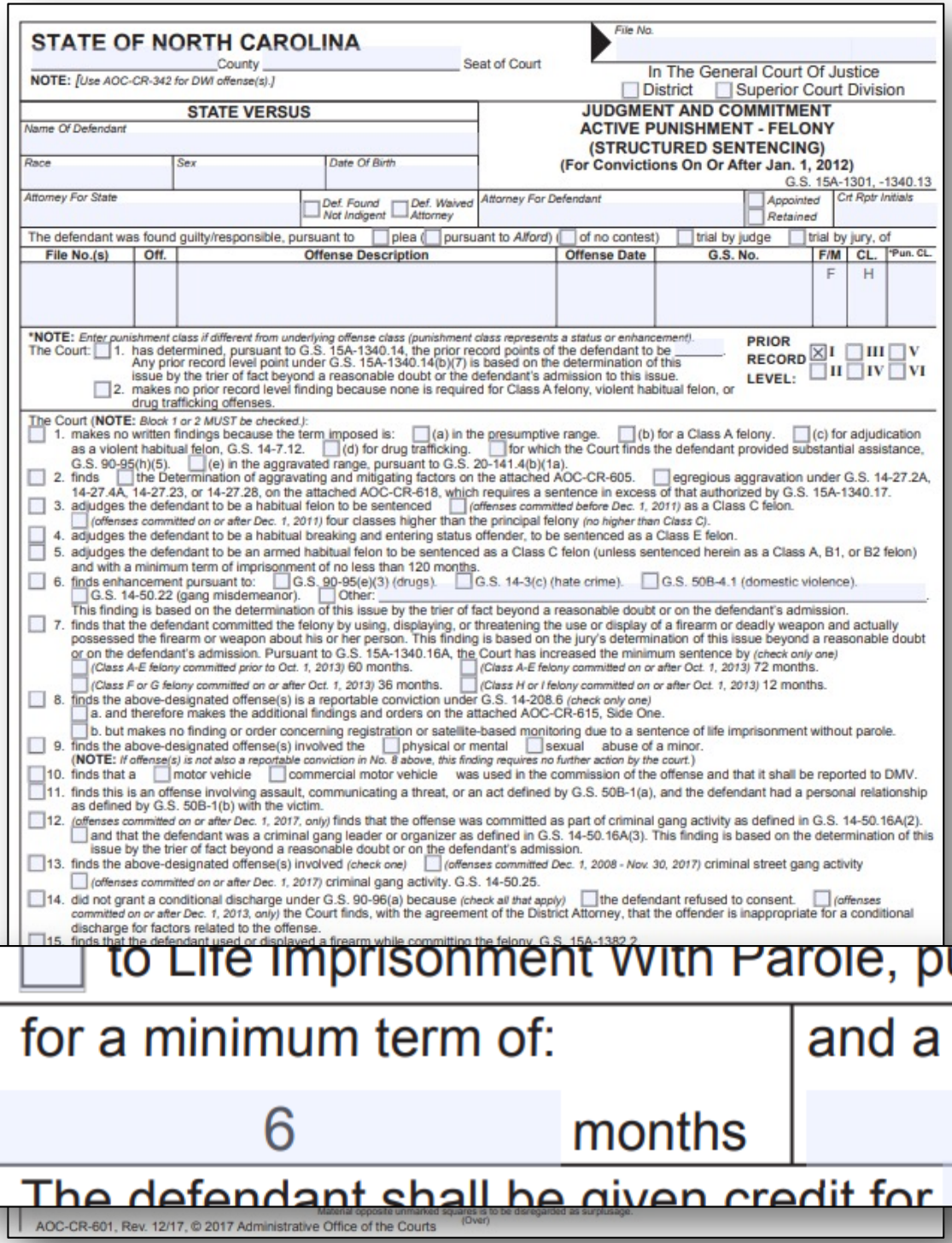
Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).



STATE OF NORTH CAROLINA

_____County _____ Seat of Court

NOTE: *[Use AOC-CR-342 for DWI offense(s).]*

File No.

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

STATE VERSUS

Name Of Defendant

Race | Sex | Date Of Birth

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT - FELONY
(STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)
G.S. 15A-1301, -1340.13

Attorney For State | ☐ Def. Found Not Indigent ☐ Def. Waived Attorney | Attorney For Defendant | ☐ Appointed ☐ Retained | Crt Rptr Initials

The defendant was found guilty/responsible, pursuant to ☐ plea (☐ pursuant to *Alford*) (☐ of no contest) ☐ trial by judge ☐ trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
					F	H	

***NOTE:** Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

The Court: ☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the determination of this issue by the trier of fact beyond a reasonable doubt or the defendant's admission to this issue.
☐ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD LEVEL: ☒ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

The Court (**NOTE:** *Block 1 or 2 MUST be checked.*):

☐ 1. makes no written findings because the term imposed is: ☐ (a) in the presumptive range. ☐ (b) for a Class A felony. ☐ (c) for adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (d) for drug trafficking. ☐ for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). ☐ (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).

☐ 2. finds ☐ the Determination of aggravating and mitigating factors on the attached AOC-CR-605. ☐ egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.

☐ 3. adjudges the defendant to be a habitual felon to be sentenced ☐ *(offenses committed before Dec. 1, 2011)* as a Class C felon. ☐ *(offenses committed on or after Dec. 1, 2011)* four classes higher than the principal felony *(no higher than Class C)*.

☐ 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.

☐ 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.

☐ 6. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang misdemeanor). ☐ Other: _____. This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.

☐ 7. finds that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and actually possessed the firearm or weapon about his or her person. This finding is based on the jury's determination of this issue beyond a reasonable doubt or on the defendant's admission. Pursuant to G.S. 15A-1340.16A, the Court has increased the minimum sentence by *(check only one)*
☐ *(Class A-E felony committed prior to Oct. 1, 2013)* 60 months. ☐ *(Class A-E felony committed on or after Oct. 1, 2013)* 72 months.
☐ *(Class F or G felony committed on or after Oct. 1, 2013)* 36 months. ☐ *(Class H or I felony committed on or after Oct. 1, 2013)* 12 months.

☐ 8. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 *(check only one)*
☐ a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.
☐ b. but makes no finding or order concerning registration or satellite-based monitoring due to a sentence of life imprisonment without parole.

☐ 9. finds the above-designated offense(s) involved the ☐ physical or mental ☐ sexual abuse of a minor.
(**NOTE:** *If offense(s) is not also a reportable conviction in No. 8 above, this finding requires no further action by the court.*)

☐ 10. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.

☐ 11. finds this is an offense involving assault, communicating a threat, or an act defined by G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

☐ 12. *(offenses committed on or after Dec. 1, 2017, only)* finds that the offense was committed as part of criminal gang activity as defined in G.S. 14-50.16A(2). ☐ and that the defendant was a criminal gang leader or organizer as defined in G.S. 14-50.16A(3). This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.

☐ 13. finds the above-designated offense(s) involved *(check one)* ☐ *(offenses committed Dec. 1, 2008 - Nov. 30, 2017)* criminal street gang activity ☐ *(offenses committed on or after Dec. 1, 2017)* criminal gang activity. G.S. 14-50.25.

☐ 14. did not grant a conditional discharge under G.S. 90-96(a) because *(check all that apply)* ☐ the defendant refused to consent. ☐ *(offenses committed on or after Dec. 1, 2013, only)* the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

☐ 15. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2

☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15

for a minimum term of:	and a maximum term of:
6 months	17 months

The defendant shall be given credit for _____ days spent in co

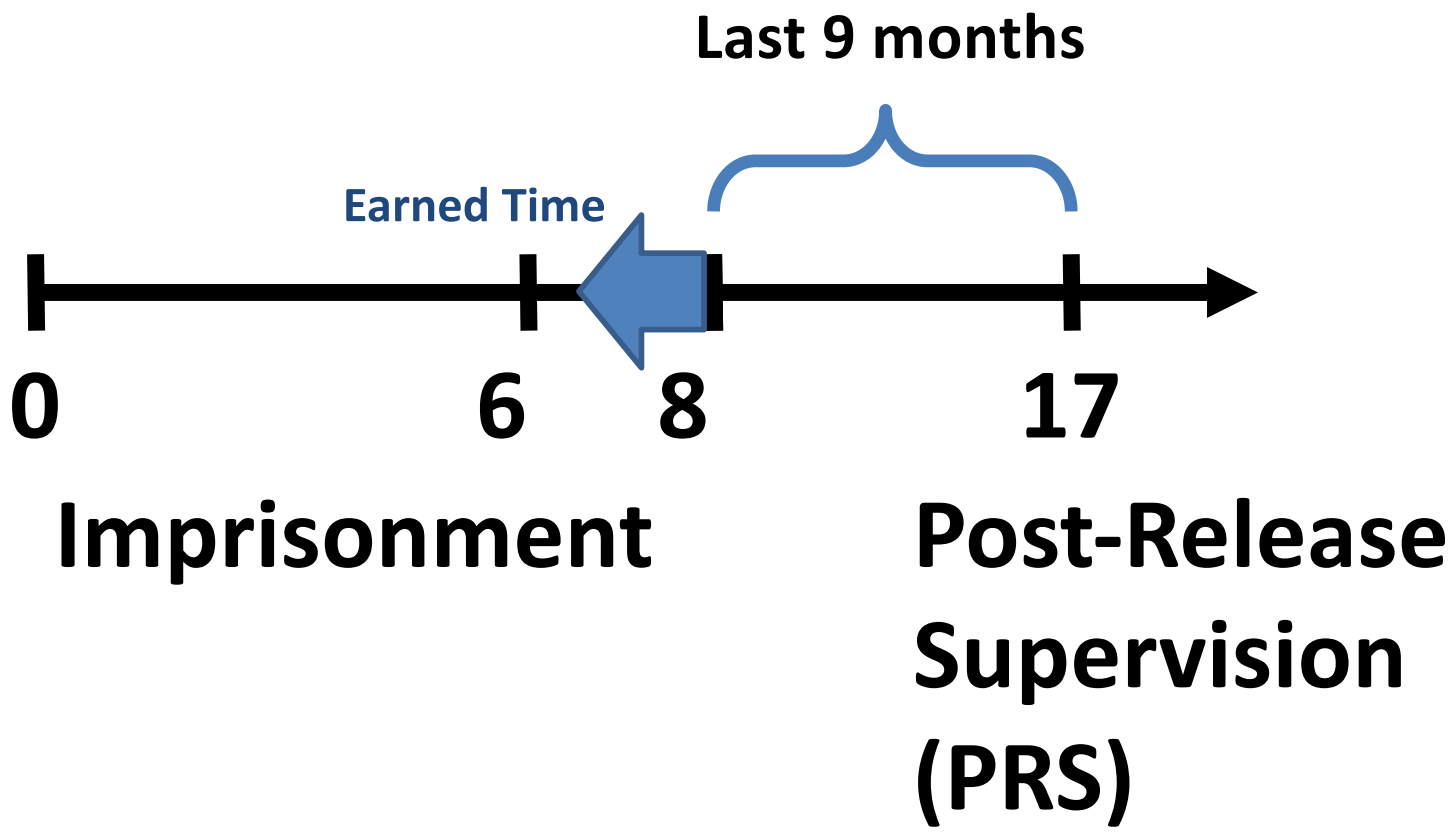
Material opposite unmarked squares is to be disregarded as surplusage.

AOC-CR-601, Rev. 12/17, © 2017 Administrative Office of the Courts (Over)

"6-17 months, Active, in the custody of DAC."

What does it mean?

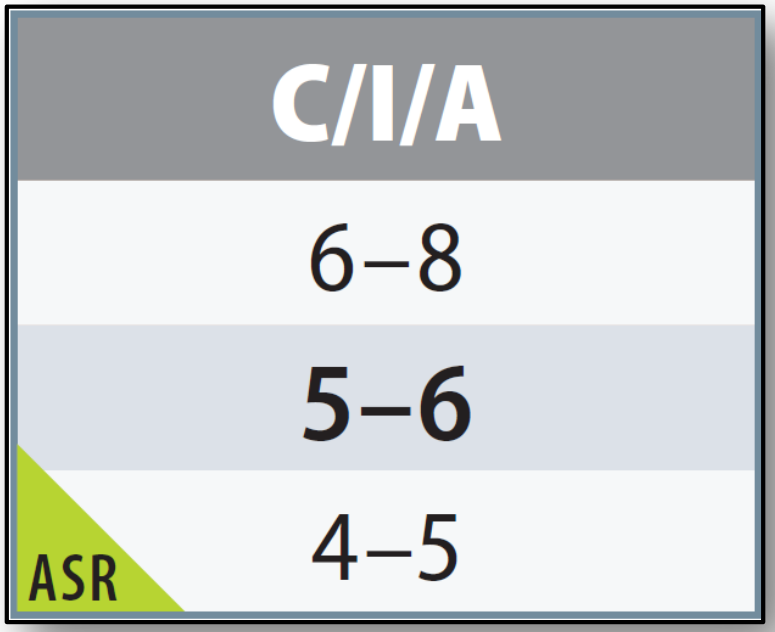
- **Around 6 months in prison**
- **9 months of PRS**



Probationary Sentences

Exercise 2

- Suspend the term of imprisonment from Exercise 1 and give the defendant an Intermediate sentence



Probationary Sentences (p. 26)

- Term of imprisonment
- Type of sentence
- Length of probation period
- Conditions of probation
- Delegated authority

Probationary Sentences (p. 26)

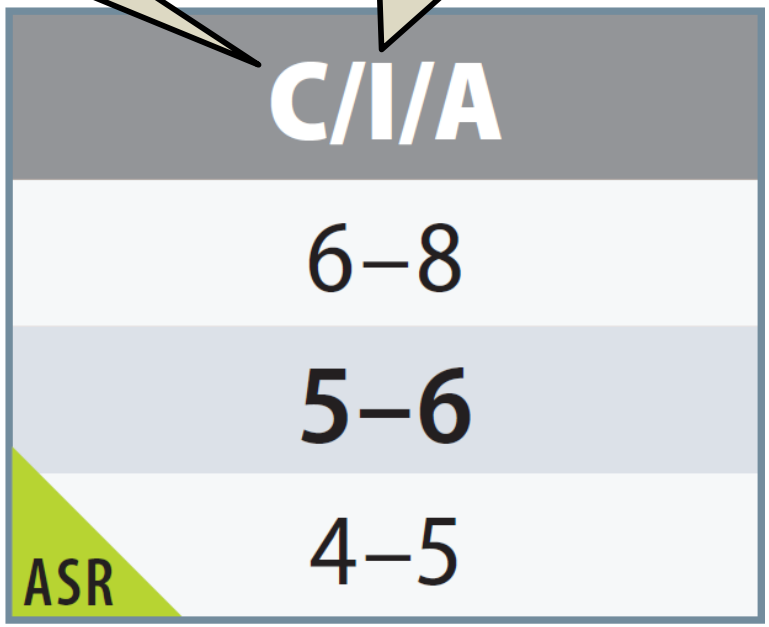
- Term of imprisonment — 6-17 months
- Type of sentence
- Length of probation period
- Conditions of probation
- Delegated authority

Probationary Sentences (p. 26)

- Term of imprisonment
- Type of sentence
- Length of probation period
- Conditions of probation
- Delegated authority

Community
Probation or just a fine

Intermediate
Supervised probation that may include a split sentence or "local judicially managed accountability and recovery court"



Probationary Sentences (p. 26)

- Term of imprisonment
- Type of sentence
- Length of probation period
- Conditions of probation
- Delegated authority

Length of Probation Period

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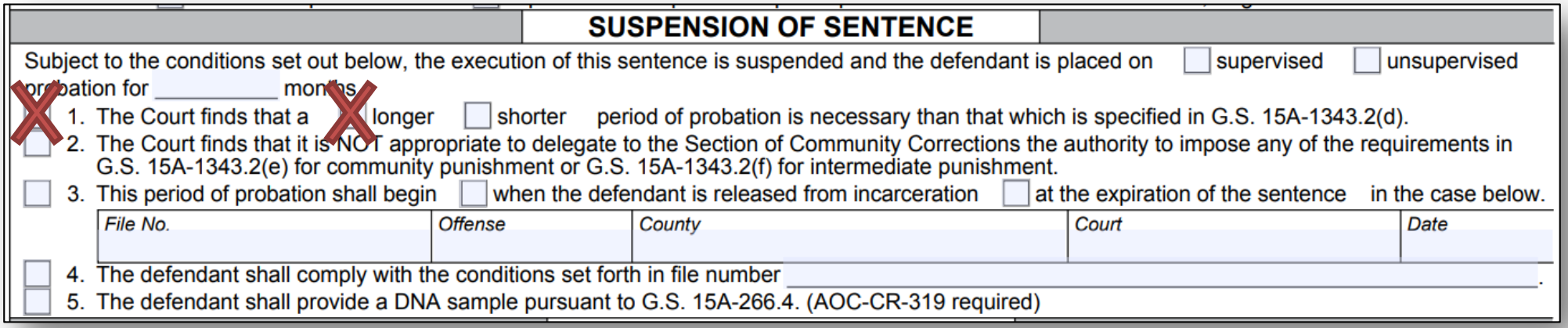

SUSPENSION OF SENTENCE

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).
2. The Court finds that it is NOT appropriate to delegate to the Section of Community Corrections the authority to impose any of the requirements in G.S. 15A-1343.2(e) for community punishment or G.S. 15A-1343.2(f) for intermediate punishment.
3. This period of probation shall begin ☐ when the defendant is released from incarceration ☐ at the expiration of the sentence in the case below.

File No.	Offense	County	Court	Date

4. The defendant shall comply with the conditions set forth in file number _____.
5. The defendant shall provide a DNA sample pursuant to G.S. 15A-266.4. (AOC-CR-319 required)

- **Average probation for a felony: 24 months**

Probationary Sentences (p. 26)

- Term of imprisonment
- Type of sentence
- Length of probation period
- Conditions of probation
- Delegated authority

Conditions of Probation

- Regular conditions
  - Apply by default, but may be stricken
- Special conditions
  - Statutory special conditions
  - Ad hoc conditions; must be "reasonably related"
- "Community and Intermediate" conditions
- Intermediate conditions
  - Apply in Intermediate cases, unless stricken
- Sex offender conditions

Regular

Special

Community and Intermediate

Intermediate-only Conditions

Default Intermediate Conditions

NDITIONS OF PROBATION - G.S. 15A-1343(b)

OTE: *Any probation … G.S. 15A-1342.* The defendant shall: (1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269. (3) Remain gainfully and suitably employed or faithfully pursue a course of study or vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) Satisfy child support and family obligations, as required by the Court. (5) Not abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer.
If the defendant is on supervised probation, the defendant shall also: (6) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. (7) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment. (8) Notify the probation officer if the defendant fails to obtain or retain satisfactory employment. (9) Submit at reasonable times to warrantless searches by a probation officer of the defendant's person and of the defendant's vehicle and premises while the defendant is present, for purposes directly related to the probation supervision, but the defendant may not be required to submit to any other search that would otherwise be unlawful. (10) Submit to warrantless searches by a law enforcement officer of the defendant's person and of the defendant's vehicle, upon a reasonable suspicion that the defendant is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court. (11) 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; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used. (12) Supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when instructed by the defendant's probation officer for purposes directly related to the probation supervision. If the results of the analysis are positive, the probationer may be required to reimburse the Division of Adult Correction for the actual costs of drug or alcohol screening and testing.

SPECIAL CONDITIONS OF PROBATION - G.S. 15A-1343(b1)

The defendant shall also comply with the following special conditions which the Court finds are reasonably related to the defendant's rehabilitation:
☐ 14. Surrender the defendant's drivers license to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles and not operate a motor vehicle for a period of _____ or until relicensed by the Division of Motor Vehicles, whichever is later.
☐ 15. Successfully pass the General Education Development Test (G.E.D.) during the first _____ months of the period of probation.
☐ 16. Complete _____ hours of community service during the first _____ days of the period of probation, as directed by the judicial service coordinator. The fee prescribed by G.S. 143B-708 is
☐ not due because it is assessed in a case adjudicated during the same term of court.
☐ to be paid ☐ pursuant to the schedule set out under Monetary Conditions above ☐ within _____ days of this Judgment and before beginning service.
☐ 17. Report for initial evaluation by _____ participate in all further evaluation, counseling, tr… other therapeutic requirements of those program…
☐ 18. Not assault, threaten, harass, be found in or on t… "Contact" includes any defendant-initiated contac… pager, gift-giving, telefacsimile machine or throug…
☐ 19. *(for offenses committed on or after December 1, 2012)* _____ ☐ days, ☐ months, the Cour… or chronic abuse.
☐ 20. Other:

Comply with … which are set forth on AOC-CR-603C, Page Two.

☐ 1. It is ORDE… certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that … be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
☐ 2. The defendant gives notice of appeal from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge

CERTIFICATION

I certify that this Judgment and the attachment(s) marked below is a true and complete copy of the original which is on file in this case.
☐ 1. Appellate Entries (AOC-CR-350)
☐ 2. Judgment Suspending Sentence, (AOC-CR-603C, Page Two) (additional conditions of probation)
☐ 3. Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ 4. Extraordinary Mitigation Findings (AOC-CR-606)
☐ 5. Restitution Worksheet, Notice And Order [Initial Sentencing] (AOC-CR-611)
☐ 6. Judicial Findings As To Required DNA Sample (AOC-CR-319)
☐ 7. Judicial Findings And Order For Sex Offenders - Suspended Sentence (AOC-CR-615, Side Two)
☐ 8. Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ 9. Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ 10. Other: _____

Date	Date Certified Copies Delivered To Sheriff	Signature Of Clerk	☐ Deputy CSC ☐ Assistant CSC ☐ CSC SEAL

AOC-CR-603C, Side Two, Rev. 12/12 Material opposite unmarked squares is to be disregarded as surplusage.
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STATE VERSUS File No.
Name Of Defendant

NOTE: Use this pag… Suspending … harge Under G.S. …

NOTE: The conditions in this section may not be imposed for defendants placed on probation for a sentence under G.S. 20-179.
…addition to complying with the regular and any special conditions of probation set forth in the "Judgment Suspending Sentence" entered in the above …ase(s), the defendant shall also comply with the following conditions of probation, which may be imposed for any community or intermediate punishment.
☐ 1. Submit to house arrest with electronic monitoring, remain at the defendant's residence for a period of _____ ☐ days, ☐ months, and abide by all rules, regulations and directions of the probation officer regarding such monitoring. The defendant may leave the residence for the following purpose(s) and as otherwise permitted by the probation officer: ☐ employment ☐ counseling ☐ a course of study ☐ vocational training.
NOTE TO CLERK: *Unless specifically ordered by the Court, do not assess the house arrest fee for this condition.*
Other:

☐ 2. Complete _____ hours of community service during the first _____ days of the period of probation, as directed by the judicial service coordinator. The fee prescribed by G.S. 143B-708 is
☐ not due because it is assessed in a case adjudicated during the same term of court.
☐ to be paid ☐ pursuant to the schedule set out under Monetary Conditions in the "Judgment Suspending Sentence." ☐ within _____ days of this Judgment and before beginning service.
Other:

☐ 3. Submit to the following period(s) of confinement in the custody of the ☐ Sheriff of this County. ☐ _____ *(other local confinement facility).* ☐ and pay jail fees. The defendant shall report in a sober condition to serve the term(s) indicated below.
NOTE: *Periods of confinement imposed here must be for two-day or three-day consecutive periods, only, for no more than six days in a single month, and in no more than three separate months during the period of probation. To impose special probation under G.S. 15A-1351, see INTERMEDIATE PUNISHMENTS, below.*

Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days	Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days	Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days
Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days	Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days	Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days
Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days	Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days	Date	Hour	☐ AM ☐ PM	for ☐ 2 days ☐ 3 days

☐ 4. Obtain a substance abuse assessment, monitoring or treatment as follows:
☐ 5. *(for offenses committed on or after December 1, 2012)* Abstain from alcohol consumption and submit to continuous alcohol monitoring for a period of _____ ☐ days, ☐ months, the Court having found that a substance abuse assessment has identified defendant's alcohol dependenc… chronic abuse.
☐ 6. P…

INTERMEDIATE PUNISHMENTS - CONTEMPT

In addition to complying with the regular and any special, community or intermediate conditions of probation set forth in the "Judgment Suspending Sentence" or herein for the above case(s), the defendant shall also comply with the following intermediate punishment(s) under G.S. 15A-1340.11(6).
☐ **1. Special Probation - G.S. 15A-1351** ☐ **Contempt - G.S. 15A-1344(e1) and 5A-11(a)**
For the defendant's active sentence as a condition of special probation, the defendant shall comply with these additional regular conditions of probation: (1) Obey the rules and regulations of the Division of Adult Correction governing the conduct of inmates while imprisoned. (2) Report to a …two (72) hours of the defendant's discharge from the active term of imprisonment.
…s ☐ hours in the custody of the …
…in serving his/her term on:
…and shall remain in custody until:

Day	Date	Hour	☐ AM ☐ PM

…o continue serving this … the same hours each …
☐ D. This sentence shall be served at the direction of the probation officer within …
☐ E. Pay jail fees. ☐ F. Work release is recommended. ☐ G. Substa…
☐ H. Other:

☐ **2. Drug Treatment Court - G.S. 15A-1340.11(3a); 15A-1340.11(6)**
Comply with the rules adopted for the program as provided for in Article 62 of Chapte… for a specified time to participate in court supervision, drug screening or testing, and dru…

INTERMEDIATE CONDITIONS OF PROBATIO…

If subject to intermediate punishment, the defendant shall, in addition to the terms and conditions imposed above, comply with the following intermediate conditions of probation. (1) If required by the defendant's probation officer, perform community service under the supervision of the Section of Community Corrections, and pay the fee required by G.S. 143B-708, but no fee shall be due if the Court imposed community service as a special condition of probation and assessed the fee in this judgment or any judgment for an offense adjudicated in the same term of court. (2) Not use, possess, or control alcohol. (3) Remain within the defendant's county of residence unless granted written permission to leave by the court or the defendant's probation officer. (4) Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer, keeping all appointments by abiding by the rules, regulations, and direction of each program.
AOC-CR-603C, Page Two, Rev. 12/12 Material opposite unmarked squares is to be disregarded as surplusage.

Probationary Sentences (p. 26)

- Term of imprisonment
- Type of sentence
- Length of probation period
- Conditions of probation
- Delegated authority

Exercise 2

- Suspend the term of imprisonment from (1) and give the defendant an Intermediate sentence

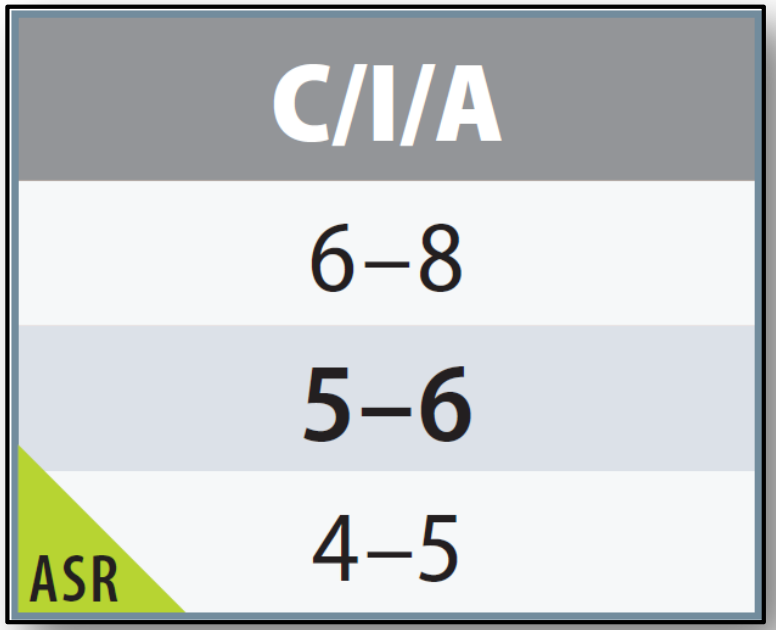
C/I/A
6–8
5–6
4–5

ASR

"6-17 months, suspended. 36 months of supervised probation."

Exercise 3

- Give the defendant from Exercise 1 a Community sentence



Community

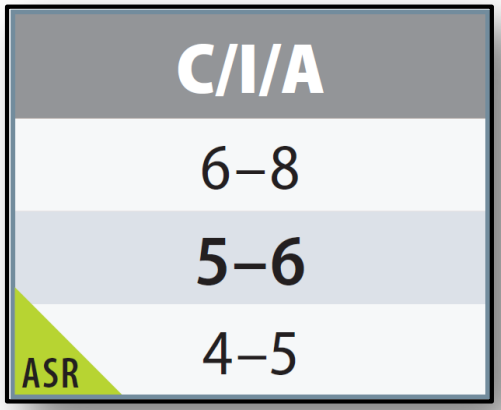
- Supervised or unsupervised probation that MAY NOT include
  - Special probation
  - Local judicially managed accountability and recovery court
- Or a fine only

Intermediate

- Supervised probation that MAY include
  - Special probation
  - Local judicially managed accountability and recovery court

Exercise 3

- Give the defendant a Community sentence



"$1,000 fine."

"6-17 months, suspended. 12 months unsupervised probation."

"6-17 months, suspended. 30 months supervised probation."

Exercise 4

- Common Law Robbery (Class G)
- Prior Record Level IV
- Sentence the defendant to Special Probation (a "split sentence")

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117	
D Max. 204 (252)	A EM 64–80 51 ASR 38	A EM 73–92	A 84–105	A 97–121	A 111–139	A 128–160	
E Max. 88 (136)	25 20 ASR 15						
F Max. 59	16 13 ASR 10						
G Max. 47	13 10 ASR 8						
H Max. 39	6 5 ASR 4						
I Max. 24	6 4 3						

I/A

19–24

15–19

11–15

ASR

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Community

- Supervised or unsupervised probation that MAY NOT include
  - Special probation
  - Local judicially managed accountability and recovery court
- Or a fine only

Intermediate

- Supervised probation that MAY include
  - Special probation
  - Local judicially managed accountability and recovery court

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated **PRESUMPTIVE** Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117	
D Max. 204 (252)	A EM 64–80 **51–64** ASR 38–5	A EM 73–92 **59–73**	A 84–105 **67–84**	A 97–121 **78–97**	A 111–139 **89–111**	A 128–160 **103–128**	
E Max. 88 (136)	I/A 25–3 **20–2** ASR 15–2						
F Max. 59	I/A 16–2 **13–1** ASR 10–1						
G Max. 47	I/A 13–1 **10–1** ASR 8–10						
H Max. 39	C/I/ 6–8 **5–6** ASR 4–5						
I Max. 24	C 6–8 **4–6** 3–4						

I/A

19–24

15–19

11–15

ASR

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

MAXIMUM

MAXIMUM SENTENCES

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FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

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17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

[Minimum Sentence → Corresponding Maximum]

3→	33→49	39→56	45→63
4→	34→50	40→57	46→65
5→	35→51	41→59	47→66
6→	36→53	42→60	48→67
7→	37→54	43→61	49→68
8→	38→55	44→62	

19 → 32

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Special Probation (Split)

- Jail/prison confinement for up to ¼ the maximum imposed sentence of imprisonment
- May be noncontinuous (e.g., weekends)
  - Noncontinuous periods must be served in jail
  - Must be complete within 2 years of conviction
- Judge may order $40/day jail fee (optional)

Maximum permissible split?
8 months

Exercise 4

- Common Law Robbery (Class G)
- Prior Record Level IV
- Sentence the defendant to “Special Probation”: Give him a 30-day split sentence

Suppose the defendant had 30 days of jail credit?

- **19-32 months, suspended**
- **36 months supervised probation**
- **30 days special probation**

Serious Felonies (Class A-E)

Exercise 5

- Discharge Weapon into Occupied Property (Class E)
- PRL V
- Aggravating and Mitigating factors: None
- Give the defendant the shortest possible Active sentence

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120	A 110–138	A 127–159	A 146–182	
D Max. 204 (252)	A EM 64–80 **51–64** 38–51 ASR	A EM 73–92 **59–73** 44–59 ASR					
E Max. 88 (136)	I/A 25–31 **20–25** 15–20 ASR	I/A 29–36 **23–29** 17–23 ASR					
F Max. 59	I/A 16–20 **13–16** 10–13 ASR	I/A 19–23 **15–19** 11–15 ASR					
G Max. 47	I/A 13–16 **10–13** 8–10 ASR	I/A 14–18 **12–14** 9–12 ASR	I/A 13–17 10–13 ASR	I/A 15–19 11–15 ASR	I/A 17–22 13–17 ASR	I/A 20–25 15–20 ASR	
H Max. 39	C/I/A 6–8 **5–6** 4–5 ASR	I/A 8–10 **6–8** 4–6 ASR	I/A 10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR	A 20–25 **16–20** 12–16 ASR	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

A
44–55
35–44
26–35

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Exercise 5

- Discharge Weapon into Occupied Property (Class E)
- PRL V
- Aggravating and Mitigating factors: None
- Give the defendant the shortest possible Active sentence

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120	A 110–138	A 127–159	A 146–182	
D Max. 204 (252)	A EM 64–80 **51–64** 38–51 ASR	A EM 73–92 **59–73** 44–59 ASR					
E Max. 88 (136)	I/A 25–31 **20–25** 15–20 ASR	I/A 29–36 **23–29** 17–23 ASR					
F Max. 59	I/A 16–20 **13–16** 10–13 ASR	I/A 19–23 **15–19** 11–15 ASR					
G Max. 47	I/A 13–16 **10–13** 8–10 ASR	I/A 14–18 **12–14** 9–12 ASR	I/A 13–17 10–13 ASR	I/A 15–19 11–15 ASR	I/A 17–22 13–17 ASR	I/A 20–25 15–20 ASR	
H Max. 39	C/I/A 6–8 **5–6** 4–5 ASR	I/A 8–10 **6–8** 4–6 ASR	I/A 10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR	A 20–25 **16–20** 12–16 ASR	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

A
44–55
35–44
26–35

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120	A 110–138	A 127–159	A 146–182	
D Max. 204 (252)	A EM 64–80 **51–64** 38–51 ASR	A EM 73–92 **59–73** 44–59 ASR					
E Max. 88 (136)	I/A 25–31 **20–25** 15–20 ASR	I/A 29–36 **23–29** 17–23 ASR					
F Max. 59	I/A 16–20 **13–16** 10–13 ASR	I/A 19–23 **15–19** 11–15 ASR					
G Max. 47	I/A 13–16 **10–13** 8–10 ASR	I/A 14–18 **12–14** 9–12 ASR	I/A 13–17 10–13 ASR	I/A 15–19 11–15 ASR	I/A 17–22 13–17 ASR	I/A 20–25 15–20 ASR	
H Max. 39	C/I/A 6–8 **5–6** 4–5 ASR	I/A 8–10 **6–8** 4–6 ASR	I/A 10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR	A 20–25 **16–20** 12–16 ASR	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

A
44–55
35–44
26–35

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

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The tables below show the maximum sentence that corresponds to the minimum sentence. The maximum sentence is 120 percent of the minimum sentence, rounded to the next month. ***Sex Crimes:*** The maximum sentence for a Class B1 through E sex crime is 120 percent of the minimum sentence, rounded to the next month, and is indicated in parentheses.

FOR OFFENSE CLASSES B

15→30 (78)	56→80 (128)					
16→32 (80)	57→81 (129)					
17→33 (81)	58→82 (130)					
18→34 (82)	59→83 (131)					
19→35 (83)	60→84 (132)					
20→36 (84)	61→86 (134)					
21→38 (86)	62→87 (135)					
22→39 (87)	63→88 (136)					
23→40 (88)	64→89 (137)					
24→41 (89)	65→90 (138)					
25→42 (90)	66→92 (140)					
26→44 (92)	67→93 (141)					
27→45 (93)	68→94 (142)					
28→46 (94)	69→95 (143)					
29→47 (95)	70→96 (144)					
30→48 (96)	71→98 (146)					
31→50 (98)	72→99 (147)					
35→54 (102)						
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
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52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21		22→36	28→43		40→57	46→65
5→15	11→23	17→30			35→51	41→59	47→66
6→17	12→24	18→31			36→53	42→60	48→67
7→18	13→		25→39	31→47		43→61	49→68
8→19	14→20	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

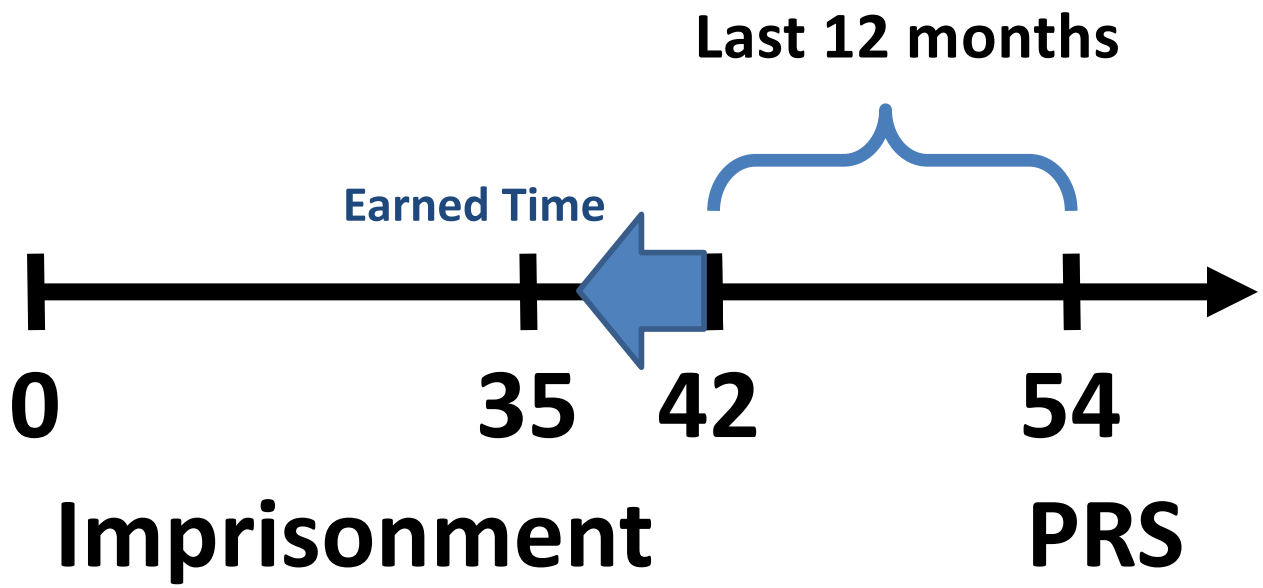
Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

"35-54 months, Active, in the custody of DAC."

What does it mean?

Class B1-E Sentence Administration



PRS period is 12 months

Exercise 6

- Discharge Weapon into Occupied Property (Class E)
- PRL V
- Aggravating factors:
  - Involved a person under the age of 16
  - The victim was very old
- Mitigating factors:
  - Honorable discharge from the Armed Forces
- Give the defendant the shortest possible Active sentence

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120	A 110–138	A 127–159	A 146–182	
D Max. 204 (252)	A EM 64–80 **51–64** 38–51 ASR	A EM 73–92 **59–73** 44–59 ASR					
E Max. 88 (136)	I/A 25–31 **20–25** 15–20 ASR	I/A 29–36 **23–29** 17–23 ASR					
F Max. 59	I/A 16–20 **13–16** 10–13 ASR	I/A 19–23 **15–19** 11–15 ASR					
G Max. 47	I/A 13–16 **10–13** 8–10 ASR	I/A 14–18 **12–14** 9–12 ASR	I/A 13–17 10–13 ASR	I/A 15–19 11–15 ASR	I/A 17–22 13–17 ASR	I/A 20–25 15–20 ASR	
H Max. 39	C/I/A 6–8 **5–6** 4–5 ASR	I/A 8–10 **6–8** 4–6 ASR	I/A 10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR	A 20–25 **16–20** 12–16 ASR	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

A
44–55
35–44
26–35

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

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Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
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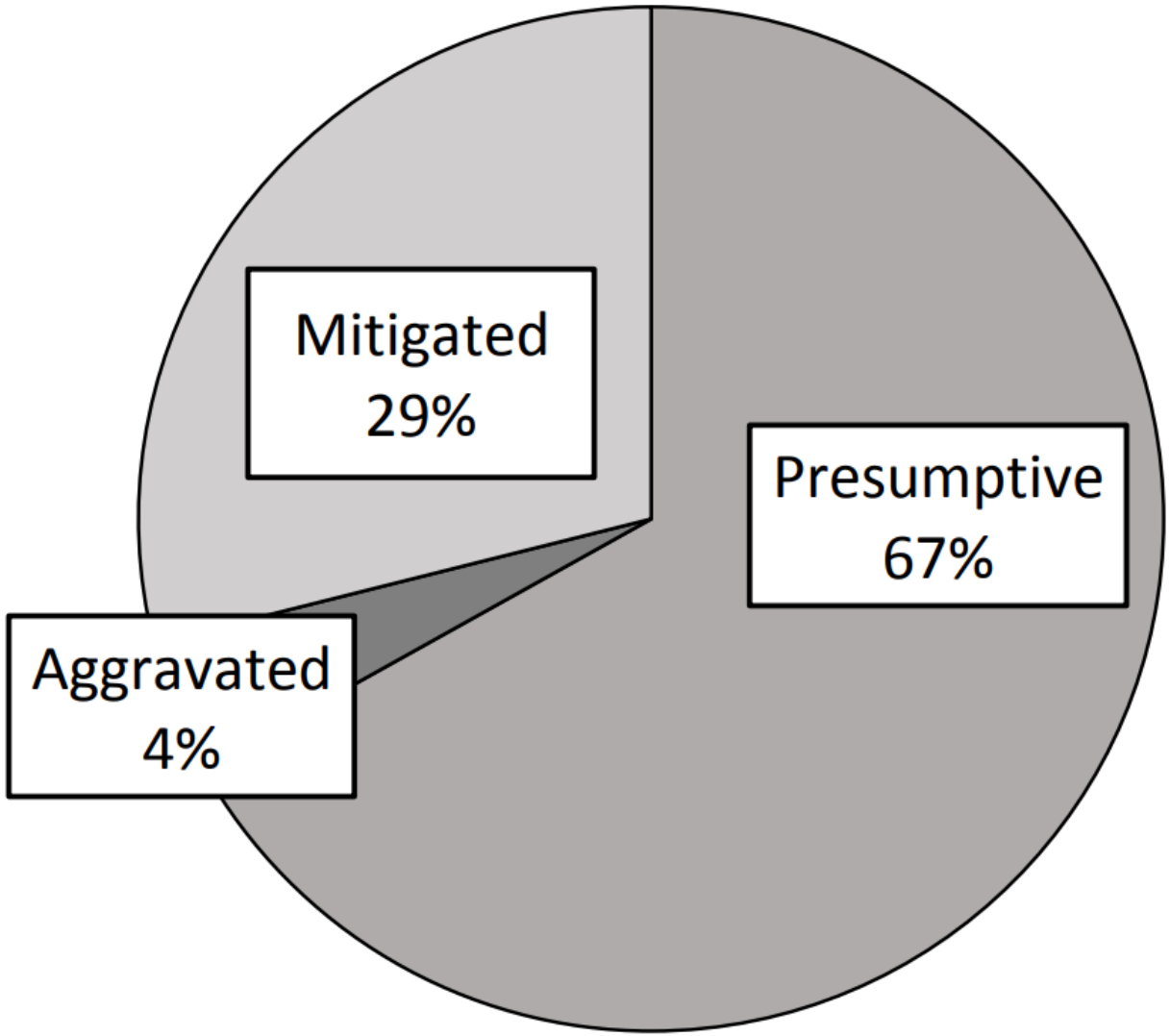

Mitigated
29%
Presumptive
67%
Aggravated
4%

Aggravating Factors: Procedure

- State must give 30-day notice of intent to prove
  - Statutory aggravators need not be pled
  - Non-statutory aggravators must be pled
- Aggravating factors must be proved to jury beyond a reasonable doubt (unless pled to)

Mitigating Factors: Procedure

- Defendant must be given an opportunity to prove mitigating factors
- Defendant must prove to the judge by a preponderance of the evidence

STATE OF NORTH CAROLINA

File No.

_____ County

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

STATE VERSUS

Name Of Defendant

Offense

FELONY JUDGMENT FINDINGS OF AGGRAVATING AND MITIGATING FACTORS (STRUCTURED SENTENCING)

G.S. 15A-1340.16

NOTE: *When consolidating offenses for judgment, findings of aggravating factors and mitigating factors should be made only for the most serious offense. Separate findings of aggravating factors and mitigating factors should be made for each offense that is not consolidated.*

AGGRAVATING FACTORS

☐ 1. The Defendant: ☐ a. induced others to participate in the commission of the offense.
☐ b. occupied a position of leadership or dominance of other participants in the commission of the offense.

☐ 2. The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

☐ 2a. The offense was committed for the benefit of, or at the direction of, any *(check one)* ☐ *(offenses committed Dec. 1, 1997 - Nov. 30, 2017)* criminal street gang, ☐ *(offenses committed on or after Dec. 1, 2017)* criminal gang as defined by G.S. 14-50.16A(1), with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.

☐ 3. The offense was committed for the purpose of: ☐ a. avoiding or preventing a lawful arrest. ☐ b. effecting an escape from custody.

☐ 4. The defendant was: ☐ a. hired to commit the offense. ☐ b. paid to commit the offense.

☐ 5. The offense was committed to: ☐ a. disrupt ☐ b. hinder the lawful exercise of a governmental function or the enforcement of laws.

☐ 6. The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Division of Adult Correction and Juvenile Justice, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

☐ 6a. The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal *(Applies to offenses committed on or after December 1, 2009.)* as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties.

☐ 7. The offense was especially heinous, atrocious or cruel.

☐ 8. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

☐ 9. *(select appropriate option depending on date of offense)*
☐ a. *(use for offenses committed prior to December 1, 2012)* The defendant held public office at the time of the offense and the offense related to the conduct of the office.
☐ b. *(use for offenses committed on or after December 1, 2012)* The defendant held public elected or appointed office or public employment at the time of the offense and the offense directly related to the conduct of the office or employment. (**NOTE:** *The court must notify the State Treasurer as required by G.S. 15A-1340.16(f).*)

MITIGATING FACTORS

☐ 1. The defendant committed the offense under:
- ☐ a. duress which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ b. coercion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ c. threat which was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- ☐ d. compulsion which was insufficient to constitute a defense but significantly reduced the defendant's culpability.

☐ 2. The defendant:
- ☐ a. was a passive participant in the commission of the offense.
- ☐ b. played a minor role in the commission of the offense.

☐ 3. The defendant was suffering from a:
- ☐ a. mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
- ☐ b. physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

☐ 4. The defendant's:
- ☐ a. age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.
- ☐ b. limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

☐ 5. The defendant has made:
- ☐ a. substantial restitution to the victim. ☐ b. full restitution to the victim.

☐ 6. The victim was more than 16 years of age and:
- ☐ a. was a voluntary participant in the defendant's conduct. ☐ b. consented to the defendant's conduct.

☐ 7. The defendant:
- ☐ a. aided in the apprehension of another felon.
- ☐ b. testified truthfully on behalf of the State in another prosecution of a felony.

☐ 8.
- ☐ a. The defendant acted under strong provocation.
- ☐ b. The relationship between the defendant and the victim was otherwise extenuating.

☐ 9. The defendant:
- ☐ a. could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear.
- ☐ b. exercised caution to avoid serious bodily harm or fear to other persons.

☐ 10. The defendant reasonably believed that the defendant's conduct was legal.

☐ 11. The defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer:
- ☐ a. at an early stage of the criminal process. ☐ b. prior to arrest.

☐ 12. The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.

☐ 13. The defendant is a minor and has reliable supervision available.

☐ 14. The defendant has been honorably discharged from the United States Armed Services.

☐ 15. The defendant has accepted responsibility for the defendant's criminal conduct.

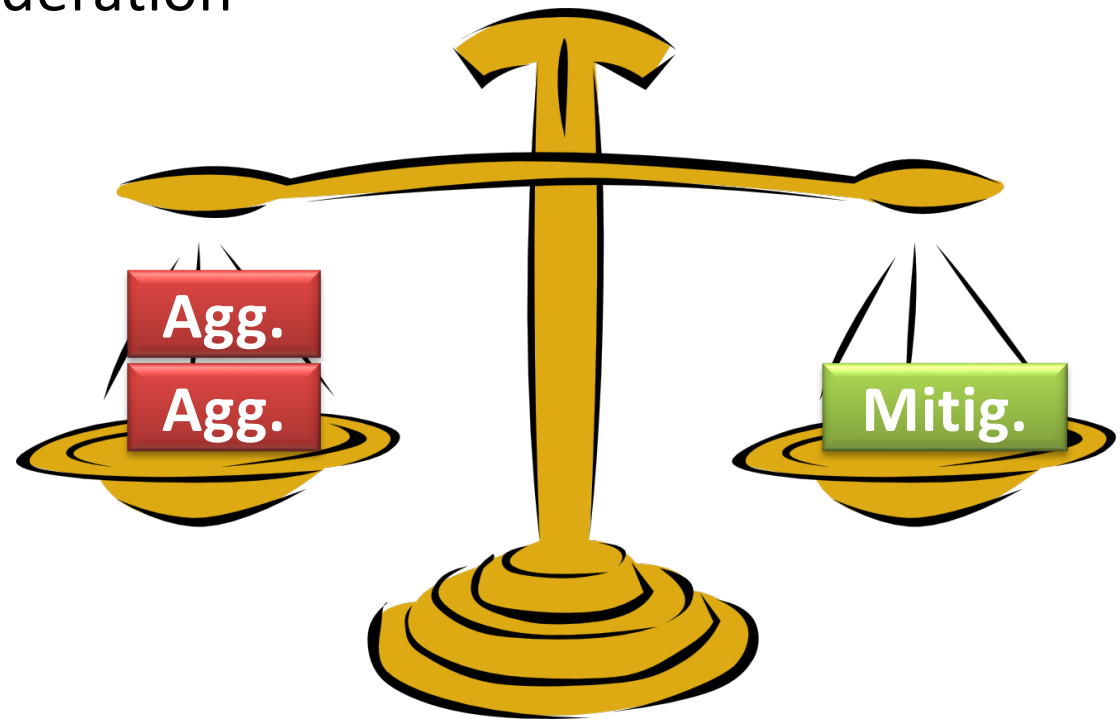
☐ 16. The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

☐ 17. The defendant supports the defendant's family.

☐ 18. The defendant has a support system in the community.

Weighing factors

- A matter of judicial discretion
- Not a mathematical balance
- Presumptive range always permissible after consideration of offered factors



Exercise 6

- Discharge Weapon into Occupied Property (Class E)
- PRL V
- Aggravating factors:
  - Involved a person under the age of 16
  - The victim was very old
- Mitigating factors:
  - Honorable discharge from the Armed Forces
- Give the defendant the shortest possible Active sentence

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120	A 110–138	A 127–159	A 146–182	
D Max. 204 (252)	A EM 64–80 **51–64** 38–51 ASR	A EM 73–92 **59–73** 44–59 ASR					
E Max. 88 (136)	I/A 25–31 **20–25** 15–20 ASR	I/A 29–36 **23–29** 17–23 ASR					
F Max. 59	I/A 16–20 **13–16** 10–13 ASR	I/A 19–23 **15–19** 11–15 ASR					
G Max. 47	I/A 13–16 **10–13** 8–10 ASR	I/A 14–18 **12–14** 9–12 ASR	I/A 13–17 10–13 ASR	I/A 15–19 11–15 ASR	I/A 17–22 13–17 ASR	A 20–25 15–20	
H Max. 39	C/I/A 6–8 **5–6** 4–5 ASR	I/A 8–10 **6–8** 4–6 ASR	I/A 10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR	A 20–25 **16–20** 12–16	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

A
44–55
35–44
26–35

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

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MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
			147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
			148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
			149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
			150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102	152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104		158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105		159→203 (251)			282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)					352 (400)	324→401 (449)
38→58 (106)	79→107 (155)						325→402 (450)
39→59 (107)	80→108 (156)						326→404 (452)
40→60 (108)	81→110 (158)						405 (453)
41→62 (110)	82→111 (159)						406 (454)
42→63 (111)	83→112 (160)						455)
43→64 (112)	84→113						
44→65 (113)	85→114						
45→66 (114)	86→116						
46→68 (116)	87→11						
47→69 (117)	88→						
48→70 (118)	89→						
49→71 (119)	90→						
50→72 (120)	91→						
51→74 (122)	92→						
52→75 (123)	93→						
53→76 (124)	94→1						
54→77 (125)	95→12						
55→78 (126)	96→128						

FOR OFFENSE

3→13	9→20					63
4→14	10→21	16				46→65
5→15	11→23	17→30				47→66
6→17	12→24	18→31				48→67
7→18	13→25	19→32	25→		43→61	49→68
8→19	14→26	20→33	26→41		44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:
- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

26→44 (92)

"26-44 months, Active, in the custody of DAC."

Sex Offenders

Exercise 7

- Attempted second-degree forcible rape
- Prior Record Level I
- Aggravating and Mitigating factors: None
- Give the longest possible Active sentence

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
				A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
				A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117	
				A 97–121 **78–97** 58–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103	
				A 38–48 **30–38** 23–30 ASR	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40	
F Max. 59	I/A 16–20 **13–16** 10–13 SR	I/A 19–23 **15–19** 11–15 ASR	I/A 21–27 **17–21** 13–17 ASR	A 25–31 **20–25** 15–20 ASR	A 28–36 **23–28** 17–23 ASR	A 33–41 **26–33** 20–26	
G Max. 47	I/A 13–16 **10–13** 8–10 SR	I/A 14–18 **12–14** 9–12 ASR	I/A 17–21 **13–17** 10–13 ASR	I/A 19–24 **15–19** 11–15 ASR	A 22–27 **17–22** 13–17 ASR		
H Max. 39	C/I/A 6–8 **5–6** 4–5 SR	I/A 8–10 **6–8** 4–6 ASR	I/A 10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR		
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7		

A 64–80 / 51–64 / 38–51 — EM (Extraordinary Mitigation) — ASR (Advanced Supervised Release)

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
				234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
				236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
				237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
				238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
				239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
				240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
				242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*		192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*		193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*		194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(1*		195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
					237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
					238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
					239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
					240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
					241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
					242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
					243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
					244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
					245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
					246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
					247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
					248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
		128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
			167 *(215)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
				212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
				213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
				214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
				215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
				216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
				217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
				218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
				219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

Minimum Sentence → Corresponding Maximum]

27→42	33→49	39→56	45→63
28→43	34→50	40→57	46→65
29→44	35→51	41→59	47→66
30→45	36→53	42→60	48→67
31→47	37→54	43→61	49→68
32→48	38→55	44→62	

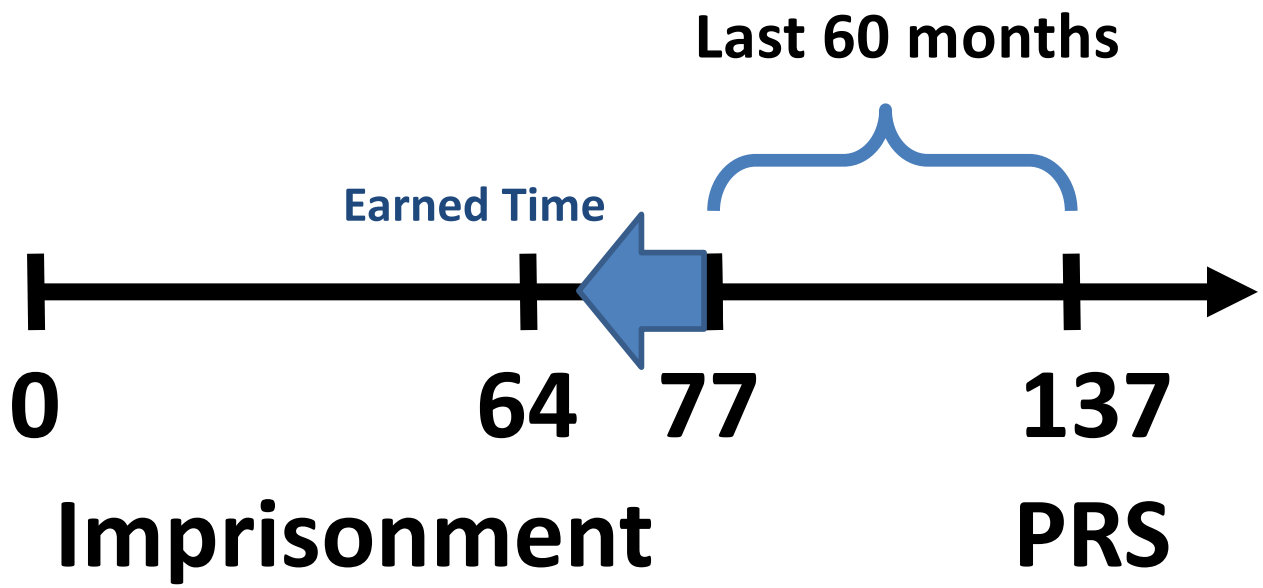
64→89 *(137)*

Sex offender maximum

"64-137 months, Active, in the custody of DAC."

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).



PRS period is 5 years

Exercise 8

- Indecent Liberties with a Child
- PRL II
- Aggravating and Mitigating factors: None
- Give the defendant probation with the longest possible split sentence

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole		Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole					
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386	Aggravated PRESUMPTIVE Mitigated
B2 Max. 484 (532)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251	
C Max. 231 (279)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117	
D Max. 204 (252)	A EM 64–80 **51–64**	A EM 73–92 **59–73**	A 84–105 **67–84**	A 97–121 **78–97** 8–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103	
E Max. 88				A 8–48 **0–38** 3–30	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40	
F Max.				A 5–31 **0–25** 5–20	A 28–36 **23–28** 17–23 ASR	A 33–41 **26–33** 20–26	
G Max.				I/A 9–24 **5–19** 1–15	A 22–27 **17–22** 13–17 ASR	A 25–31 **20–25** 15–20 ASR	
H Max. 39	6–8 **5–6** 4–5 ASR	8–10 **6–8** 4–6 ASR	10–12 **8–10** 6–8 ASR	I/A 11–14 **9–11** 7–9 ASR	I/A 15–19 **12–15** 9–12 ASR	A 20–25 **16–20** 12–16 ASR	
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8	

I/A
19–23
15–19
11–15
ASR

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14				28→43	34→50	40→57	46→65
5→15				29→44	35→51	41→59	47→66
6→17				30→45	36→53	42→60	48→67
7→18				31→47	37→54	43→61	49→68
8→19				32→48	38→55	44→62	

19→32

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Exercise 8

- Indecent Liberties with a Child
- PRL II
- Aggravating and Mitigating factors: None
- Give the defendant probation with the longest possible split sentence

- **19-32 months, suspended**
- **36 months supervised probation**
- **8 months special probation**

Prior Record Level

STATE OF NORTH CAROLINA

__________ County

File No.

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

STATE VERSUS

Name And Address Of Defendant

Social Security No. | *SID No.*

Race | *Sex* | *DOB*

WORKSHEET PRIOR RECORD LEVEL FOR FELONY SENTENCING AND PRIOR CONVICTION LEVEL FOR MISDEMEANOR SENTENCING

(STRUCTURED SENTENCING)

(For Offenses Committed On Or After Dec. 1, 2009)

G.S. 15A-1340.14, 15A-1340.21

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A Conviction	X10	
	Prior Felony Class B1 Conviction	X 9	
	Prior Felony Class B2 or C or D Conviction	X 6	
	Prior Felony Class E or F or G Conviction	X 4	
	Prior Felony Class H or I Conviction	X 2	
	Prior Class A1 or 1 Misdemeanor Conviction *(see note on reverse)*	X 1	
		SUBTOTAL ▶	

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.	+ 1	
If the offense was commited while the offender was: ☐ on probation, parole, or post-release supervision; ☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution. **NOTE:** *If part of a plea transcript, use form AOC-CR-300 ("Transcript Of Plea"), Nos. 16 and 17.* *County* / *File No.* / *State (If other than NC)*	+ 1	
	TOTAL ▶	

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

MISDEMEANOR

NOTE: *If sentencing for a misdemeanor, total the number of prior conviction(s) listed on the reverse and select the corresponding prior conviction level.*

No. Of Prior Convictions	Level
0	I
1 - 4	II
5 +	III

PRIOR CONVICTION LEVEL ▶ ☐

☐ The Court has determined the number of prior convictions to be __________ and the level to be as shown above.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

FELONY

NOTE: *If sentencing for a felony, locate the prior record level which corresponds to the total points determined in Section I above.*

Points	Level
0 - 1	I
2 - 5	II
6 - 9	III
10 - 13	IV
14 - 17	V
18 +	VI

PRIOR RECORD LEVEL ▶ ☐

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ The Court finds that all of the elements of the present offense are included in a prior offense.

☐ For each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.

☐ The Court finds that the State and the defendant have stipulated in open court to the prior convictions, points, and record level.

Date | *Name Of Presiding Judge (type or print)* | *Signature Of Presiding Judge*

AOC-CR-600B, Rev. 5/18 (Over)

III. STIPULATION

The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the information set out in Sections I and V of this form, and agree with the defendant's prior record level or prior conviction level as set out in Section II based on the information herein.

Date | *Signature Of Prosecutor* | *Date* | *Signature Of Defense Counsel Or Defendant*

IV. DNA CERTIFICATION (For Offenses Committed On Or After Feb. 1, 2011)

A review of the case record (the form required by G.S. 15A-266.3A(c)) and the records of the State Bureau of Investigation (the DCI-CCH rap sheet) indicates that *(check one)*:

☐ 1. The defendant is **NOT** required to provide a DNA sample for this conviction because (i) the offense is not covered by G.S. 15A-266.4 or (ii) a sample of the defendant's DNA has previously been obtained and the defendant's DNA record is currently stored in the State DNA database.

☐ 2. The defendant **IS** required to provide a DNA sample for this conviction because (i) the offense is covered by G.S. 15A-266.4 and (ii) a sample of the defendant's DNA has not previously been obtained and the defendant's DNA record has not previously been stored in the State DNA Database, or if previously obtained and stored, the defendant's DNA sample and record have been expunged.

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

V. PRIOR CONVICTION

NOTE: *Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.*

NOTE: *The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.*

Source Code	Offenses	File No.	Date Of Conviction	County *(Name Of State if not NC)*	Class

☐ See AOC-CR-600 Continuation for additional prior convictions.

Source Code: **1 - DCI** **2 - NCIC** **3 - AOC/Local** **4 - AOC/Statewide** **5 - ID Bureau** **6 - Other**

Date Prepared: __________

Prepared By: __________

AOC-CR-600B, Side Two, Rev. 5/18

Prior Record Level

COUNT

- All felonies
- Class 1 and Class A1 non-traffic misdemeanors
- DWI, commercial DWI, and death by vehicle
- Prayer for Judgment (PJC)
- Crimes from other jurisdictions

DON'T COUNT

- Class 2 & 3 misdemeanors
- Traffic misdemeanors (other than DWI, commercial DWI, and death by vehicle)
- Infractions
- Contempt adjudications
- Convictions used to habitualize
- Juvenile adjudications

- Count only the most serious conviction from a single calendar week of superior court, or session of district court

Bonus Points

- Under supervision (+1)
  - Committed while on probation, parole, post-release supervision, incarcerated, or on escape
  - State must give 30-day notice and prove to a jury beyond a reasonable doubt (unless admitted to)
- Same elements (+1)
  - All elements of the present offense included in a prior offense
  - No stipulations: Judge must make a finding

FELONY

NOTE: *If sentencing for a felony, locate the prior record level which corresponds to the total points determined in Section I above.*

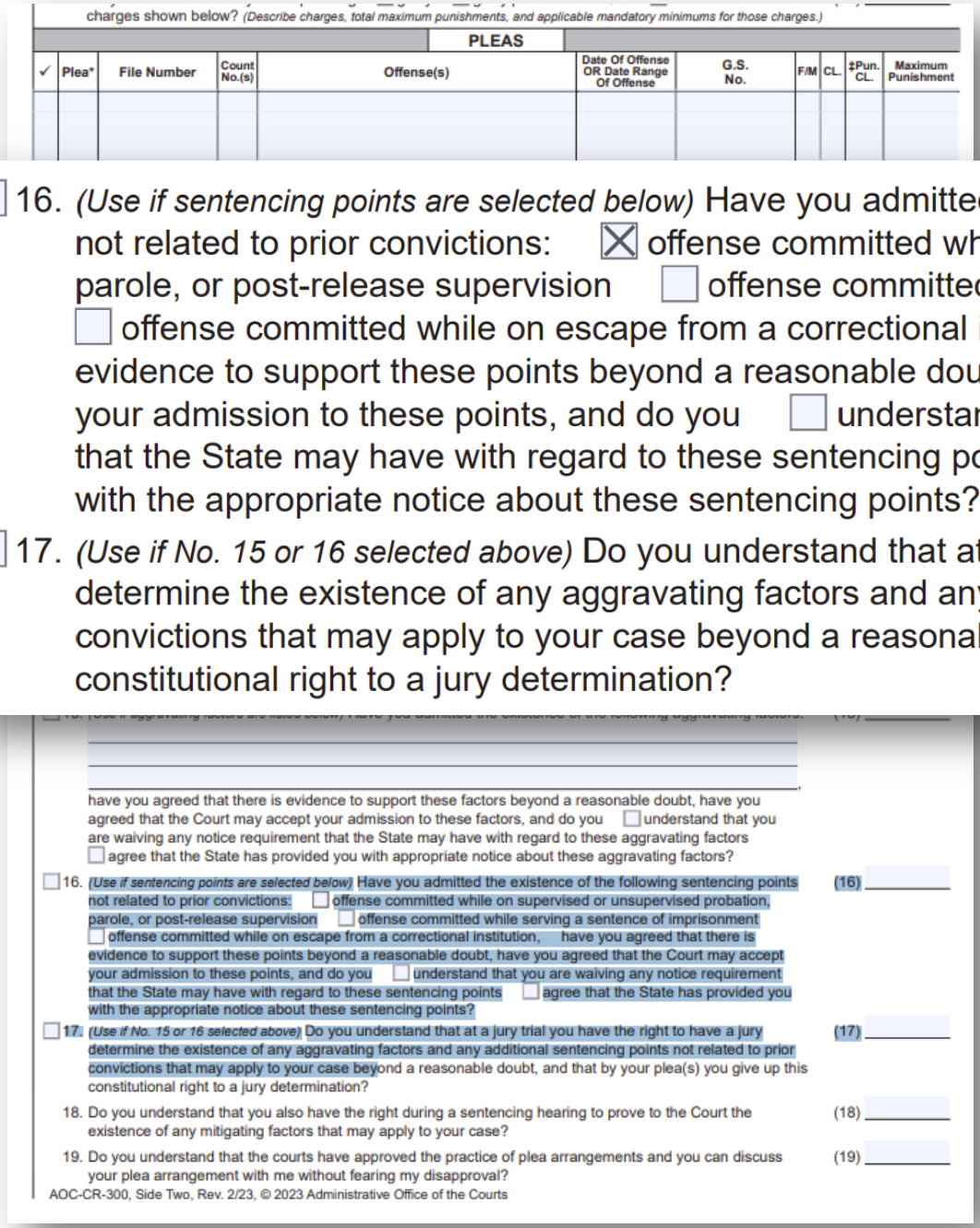
Points	Level
0 - 1	I
2 - 5	II
6 - 9	III
10 - 13	IV
14 - 17	V
18+	VI

PRIOR RECORD LEVEL

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

☒ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.



charges shown below? *(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)*

	PLEAS									
✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ 16. *(Use if sentencing points are selected below)* Have you admitted the existence of the following sentencing points not related to prior convictions: ☒ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☒ agree that the State has provided you with the appropriate notice about these sentencing points?

☐ 17. *(Use if No. 15 or 16 selected above)* Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination?

have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors?

☐ 16. *(Use if sentencing points are selected below)* Have you admitted the existence of the following sentencing points not related to prior convictions: ☐ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with the appropriate notice about these sentencing points? (16) _____

☐ 17. *(Use if No. 15 or 16 selected above)* Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination? (17) _____

18. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (18) _____

19. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (19) _____

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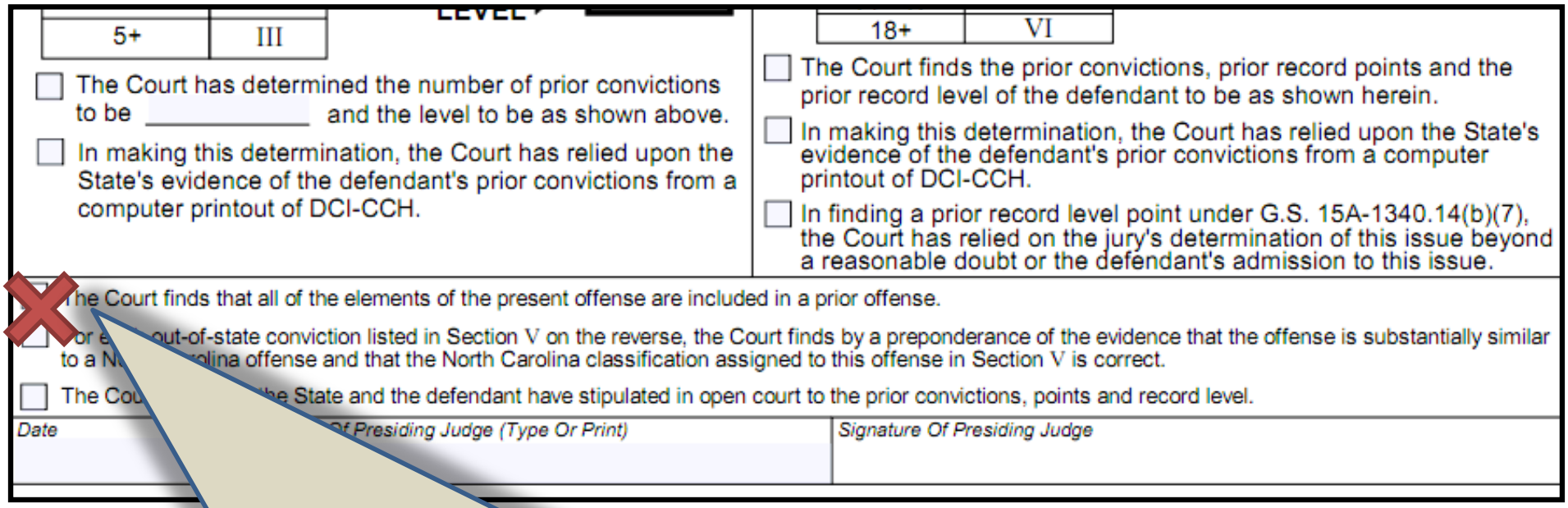
Prior record “bonus points”

- Same elements (+1)
  - All elements of the present offense included in a prior offense
  - Defendant may not stipulate to this question of law



5+	III

☐ The Court has determined the number of prior convictions to be _____ and the level to be as shown above.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

18+	VI

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ The Court finds that all of the elements of the present offense are included in a prior offense.

☐ For e… out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a N… olina offense and that the North Carolina classification assigned to this offense in Section V is correct.

☐ The Cou… he State and the defendant have stipulated in open court to the prior convictions, points and record level.

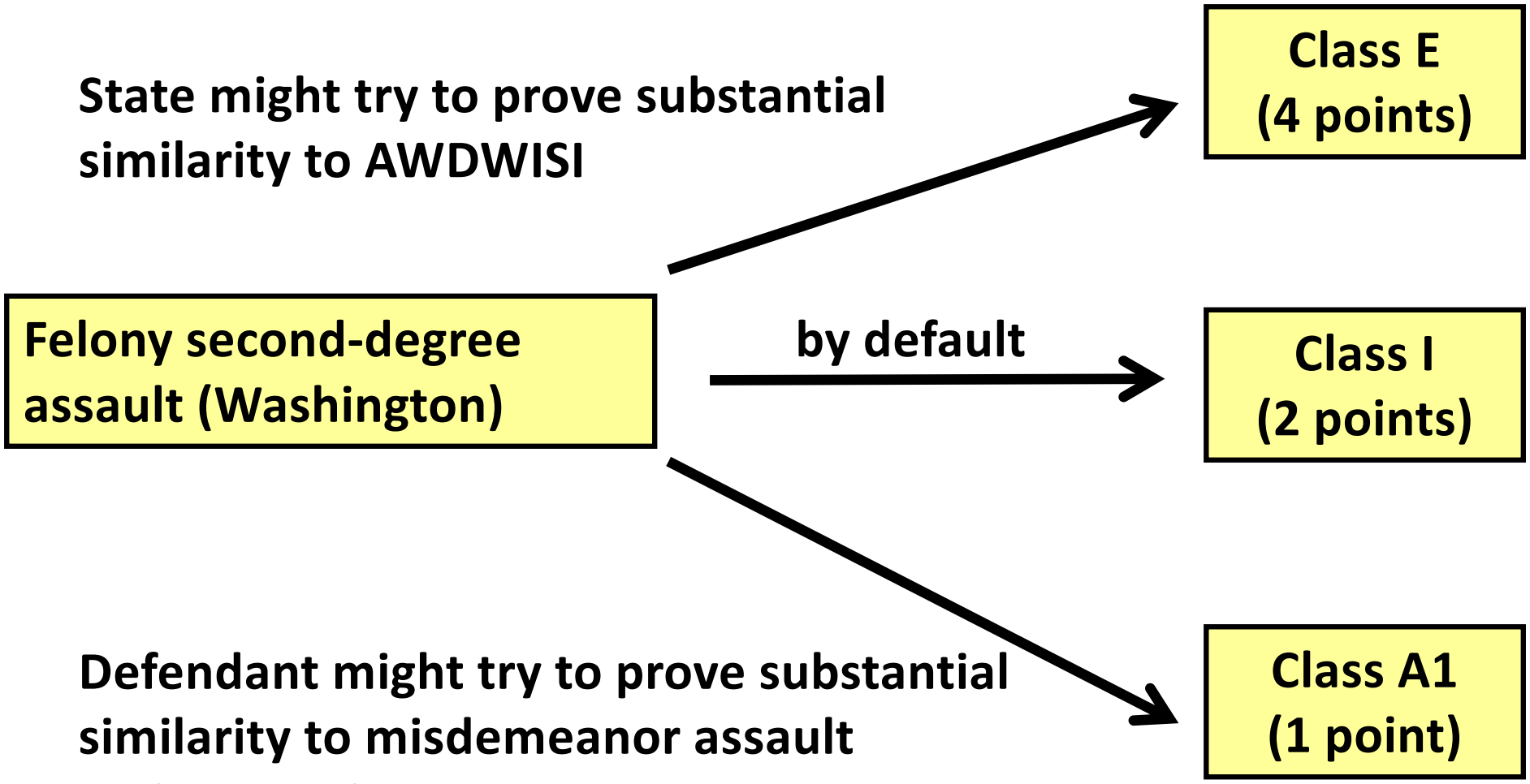
Date	*Of Presiding Judge (Type Or Print)*	*Signature Of Presiding Judge*

The Court finds that all of the elements of the present offense are included in a prior offense.

Out-of-State Prior Convictions

- By default:
  - Prior out-of-state felonies: Class I (2 points)
  - Prior out-of-state misdemeanors: Class 3 (0 points)
- With "substantial similarity" determination:
  - Count like the similar North Carolina offense
  - Proponent must prove by preponderance of evidence
  - Court must make findings; stipulations ineffective

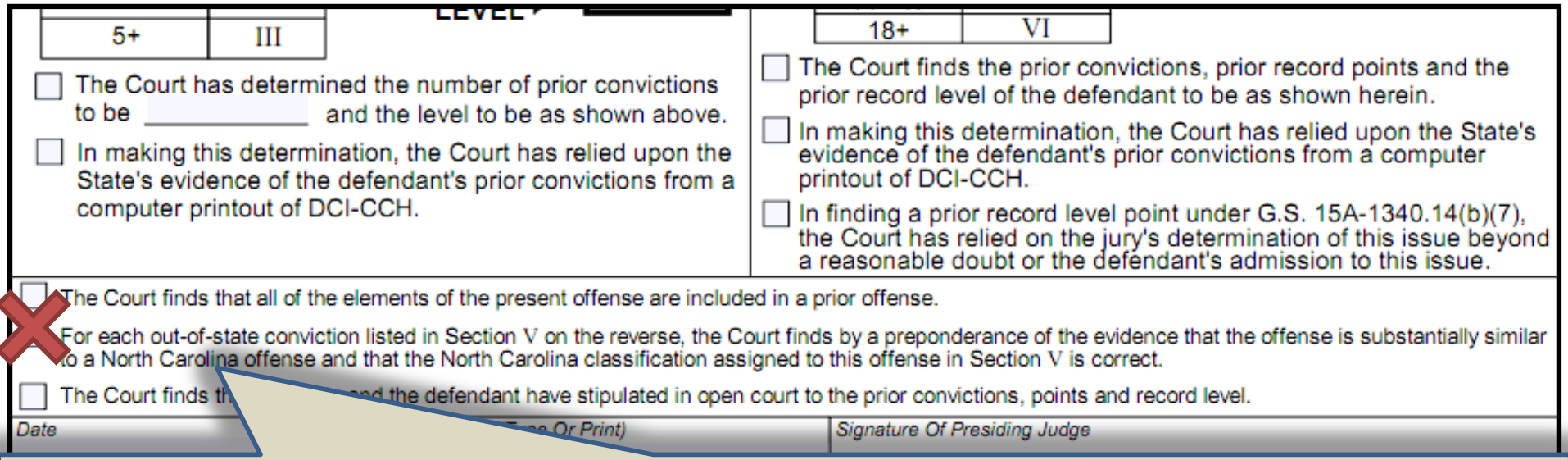
Crimes from other jurisdictions



Crimes from other jurisdictions

- No stipulations to substantial similarity
  - Similarity is a question of law
  - Must be determined by trial judge

Crimes from other jurisdictions



5+	III

☐ The Court has determined the number of prior convictions to be _____ and the level to be as shown above.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

18+	VI

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.

☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7), the Court has relied on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ The Court finds that all of the elements of the present offense are included in a prior offense.

☐ For each out-of-state conviction listed in Section V on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section V is correct.

☐ The Court finds th… …nd the defendant have stipulated in open court to the prior convictions, points and record level.

Date | *…e Or Print)* | *Signature Of Presiding Judge*

For each out-of-state conviction…the court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that …classification assigned to this offense in Section V is correct.

Multiple Convictions

Multiple convictions

- Concurrent sentences
  - If judgments are silent, sentences run concurrently

Multiple convictions

- Consecutive sentences
  - One sentence begins at the expiration of another

Multiple convictions

- Consolidated sentences
  - All convictions sentenced together may be consolidated into one sentence for the most serious offense

Multiple convictions

- Probationary sentences
  - Probation *periods* must run concurrently with one another
  - A probationary sentence may run consecutively to an Active sentence (“contingent”)

Exercise 10

- Felony breaking or entering (Class H)
- Felony larceny (Class H)
- Prior Record Level I

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	**PRESUMPTIVE**
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (252)	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
	51–64	**59–73**	**67–84**	**78–97**	**89–111**	**103–128**	
	EM 38–51	ASR 44–59	ASR 51–67	58–78	67–89	77–103	
E Max. 88 (136)	I/A	I/A	A	A	A	A	
	25–31	29–36	33–41	38–48	44–55	50–63	
	20–25	**23–29**	**26–33**	**30–38**	**35–44**	**40–50**	
					26–35	30–40	
					A	A	
					28–36	33–41	
					23–28	**26–33**	
					17–23	20–26	
					A	A	
					22–27	25–31	
					17–22	**20–25**	
					13–17	ASR 15–20	
					I/A	A	
					15–19	20–25	
					12–15	**16–20**	
					9–12	ASR 12–16	
					I/A	I/A	
					9–11	10–12	
					7–9	**8–10**	
					5–7	6–8	

C/I/A

6–8

5–6

4–5

ASR

Extraordinary Mitigation (possible eligibility). *See page 10.*

Advanced Supervised Release (possible eligibility). *See page 10.*

defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

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MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 (78)	56→80 (128)	97→129 (177)	138→178 (226)	179→227 (275)	220→276 (324)	261→326 (374)	302→375 (423)
16→32 (80)	57→81 (129)	98→130 (178)	139→179 (227)	180→228 (276)	221→278 (326)	262→327 (375)	303→376 (424)
17→33 (81)	58→82 (130)	99→131 (179)	140→180 (228)	181→230 (278)	222→279 (327)	263→328 (376)	304→377 (425)
18→34 (82)	59→83 (131)	100→132 (180)	141→182 (230)	182→231 (279)	223→280 (328)	264→329 (377)	305→378 (426)
19→35 (83)	60→84 (132)	101→134 (182)	142→183 (231)	183→232 (280)	224→281 (329)	265→330 (378)	306→380 (428)
20→36 (84)	61→86 (134)	102→135 (183)	143→184 (232)	184→233 (281)	225→282 (330)	266→332 (380)	307→381 (429)
21→38 (86)	62→87 (135)	103→136 (184)	144→185 (233)	185→234 (282)	226→284 (332)	267→333 (381)	308→382 (430)
22→39 (87)	63→88 (136)	104→137 (185)	145→186 (234)	186→236 (284)	227→285 (333)	268→334 (382)	309→383 (431)
23→40 (88)	64→89 (137)	105→138 (186)	146→188 (236)	187→237 (285)	228→286 (334)	269→335 (383)	310→384 (432)
24→41 (89)	65→90 (138)	106→140 (188)	147→189 (237)	188→238 (286)	229→287 (335)	270→336 (384)	311→386 (434)
25→42 (90)	66→92 (140)	107→141 (189)	148→190 (238)	189→239 (287)	230→288 (336)	271→338 (386)	312→387 (435)
26→44 (92)	67→93 (141)	108→142 (190)	149→191 (239)	190→240 (288)	231→290 (338)	272→339 (387)	313→388 (436)
27→45 (93)	68→94 (142)	109→143 (191)	150→192 (240)	191→242 (290)	232→291 (339)	273→340 (388)	314→389 (437)
28→46 (94)	69→95 (143)	110→144 (192)	151→194 (242)	192→243 (291)	233→292 (340)	274→341 (389)	315→390 (438)
29→47 (95)	70→96 (144)	111→146 (194)	152→195 (243)	193→244 (292)	234→293 (341)	275→342 (390)	316→392 (440)
30→48 (96)	71→98 (146)	112→147 (195)	153→196 (244)	194→245 (293)	235→294 (342)	276→344 (392)	317→393 (441)
31→50 (98)	72→99 (147)	113→148 (196)	154→197 (245)	195→246 (294)	236→296 (344)	277→345 (393)	318→394 (442)
32→51 (99)	73→100 (148)	114→149 (197)	155→198 (246)	196→248 (296)	237→297 (345)	278→346 (394)	319→395 (443)
33→52 (100)	74→101 (149)	115→150 (198)	156→200 (248)	197→249 (297)	238→298 (346)	279→347 (395)	320→396 (444)
34→53 (101)	75→102 (150)	116→152 (200)	157→201 (249)	198→250 (298)	239→299 (347)	280→348 (396)	321→398 (446)
35→54 (102)	76→104 (152)	117→153 (201)	158→202 (250)	199→251 (299)	240→300 (348)	281→350 (398)	322→399 (447)
36→56 (104)	77→105 (153)	118→154 (202)	159→203 (251)	200→252 (300)	241→302 (350)	282→351 (399)	323→400 (448)
37→57 (105)	78→106 (154)	119→155 (203)	160→204 (252)	201→254 (302)	242→303 (351)	283→352 (400)	324→401 (449)
38→58 (106)	79→107 (155)	120→156 (204)	161→206 (254)	202→255 (303)	243→304 (352)	284→353 (401)	325→402 (450)
39→59 (107)	80→108 (156)	121→158 (206)	162→207 (255)	203→256 (304)	244→305 (353)	285→354 (402)	326→404 (452)
40→60 (108)	81→110 (158)	122→159 (207)	163→208 (256)	204→257 (305)	245→306 (354)	286→356 (404)	327→405 (453)
41→62 (110)	82→111 (159)	123→160 (208)	164→209 (257)	205→258 (306)	246→308 (356)	287→357 (405)	328→406 (454)
42→63 (111)	83→112 (160)	124→161 (209)	165→210 (258)	206→260 (308)	247→309 (357)	288→358 (406)	329→407 (455)
43→64 (112)	84→113 (161)	125→162 (210)	166→212 (260)	207→261 (309)	248→310 (358)	289→359 (407)	330→408 (456)
44→65 (113)	85→114 (162)	126→164 (212)	167→213 (261)	208→262 (310)	249→311 (359)	290→360 (408)	331→410 (458)
45→66 (114)	86→116 (164)	127→165 (213)	168→214 (262)	209→263 (311)	250→312 (360)	291→362 (410)	332→411 (459)
46→68 (116)	87→117 (165)	128→166 (214)	169→215 (263)	210→264 (312)	251→314 (362)	292→363 (411)	333→412 (460)
47→69 (117)	88→118 (166)	129→167 (215)	170→216 (264)	211→266 (314)	252→315 (363)	293→364 (412)	334→413 (461)
48→70 (118)	89→119 (167)	130→168 (216)	171→218 (266)	212→267 (315)	253→316 (364)	294→365 (413)	335→414 (462)
49→71 (119)	90→120 (168)	131→170 (218)	172→219 (267)	213→268 (316)	254→317 (365)	295→366 (414)	336→416 (464)
50→72 (120)	91→122 (170)	132→171 (219)	173→220 (268)	214→269 (317)	255→318 (366)	296→368 (416)	337→417 (465)
51→74 (122)	92→123 (171)	133→172 (220)	174→221 (269)	215→270 (318)	256→320 (368)	297→369 (417)	338→418 (466)
52→75 (123)	93→124 (172)	134→173 (221)	175→222 (270)	216→272 (320)	257→321 (369)	298→370 (418)	339→419 (467)
53→76 (124)	94→125 (173)	135→174 (222)	176→224 (272)	217→273 (321)	258→322 (370)	299→371 (419)	
54→77 (125)	95→126 (174)	136→176 (224)	177→225 (273)	218→274 (322)	259→323 (371)	300→372 (420)	
55→78 (126)	96→128 (176)	137→177 (225)	178→226 (274)	219→275 (323)	260→324 (372)	301→374 (422)	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

More exercises

- Possession of meth (Class I), PRL II, D asks for Active

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	DISPOSITION
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	PRESUMPTIVE
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (252)	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
	51–64	**59–73**	**67–84**	**78–97**	**89–111**	**103–128**	
	ASR 38–51	ASR 44–59	ASR 51–67	58–78	67–89	77–103	
E Max. 88 (136)	I/A	I/A	A	A	A	A	
	25–31	29–36	33–41	38–48	44–55	50–63	
	20–25	**23–29**	**26–33**	**30–38**	**35–44**	**40–50**	

C/I

6–8

4–6

3–4

Note: shown possil maxim prior defen sex cr

age 10.

elease
age 10.

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

More exercises

- Obtaining property by false pretenses (Class H), habitual felon, aggravated (victim very old), PRL III
- Lots of restitution

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts	DISPOSITION
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole						
B1 Max. Life w/o Parole	A	A	A	A	A	A	
	240–300	276–345	317–397	365–456	Life w/o Parole	Life w/o Parole	Aggravated
	192–240	**221–276**	**254–317**	**292–365**	**336–420**	**386–483**	**PRESUMPTIVE**
	144–192	166–221	190–254	219–292	252–336	290–386	Mitigated
B2 Max. 484 (532)	A EM	A EM	A	A	A	A	
	157–196	180–225	207–258	238–297	273–342	314–393	
	125–157	**144–180**	**165–207**	**190–238**	**219–273**	**251–314**	
	94–125	108–144	124–165	143–190	164–219	189–251	
C Max. 231 (279)	A EM	A EM	A	A	A	A	
	73–92	83–104	96–120	110–138	127–159	146–182	
	58–73	**67–83**	**77–96**	**88–110**	**101–127**	**117–146**	
	44–58	50–67	58–77	66–88	76–101	87–117	
D Max. 204 (25	A EM	A EM	A	A	A	A	
	64–80	73–92	84–105	97–121	111–139	128–160	
E Max. 88 (136	I/A						
F Max. 59	10–12						
G Max. 47	8–10						
H Max. 39	6–8						
I Max. 24	ASR						

Note: Numbe
shown below
possible sent
maximum se
prior record l
defendant co
sex crime is i

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

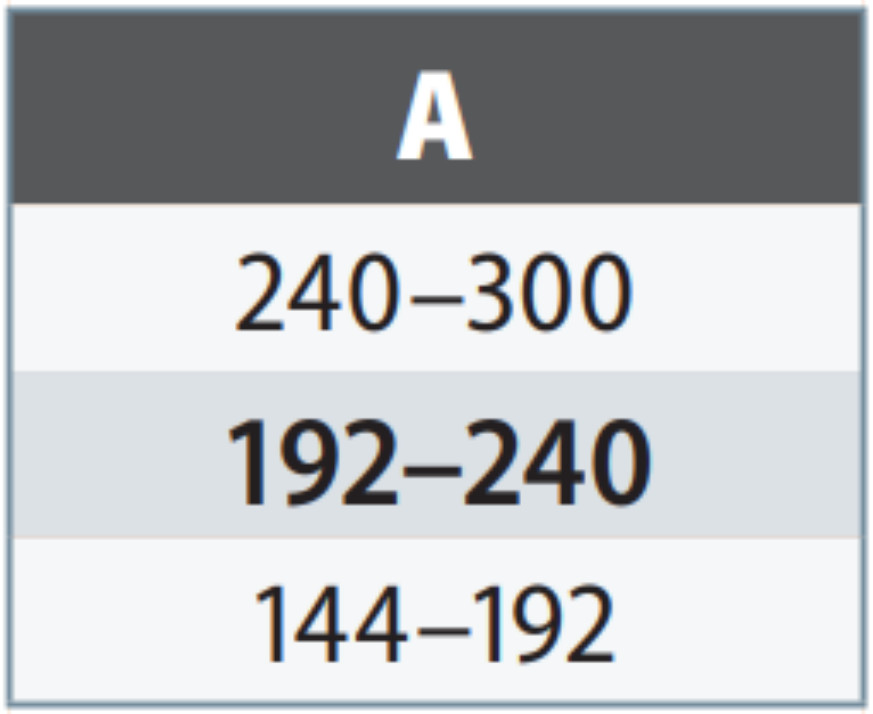
The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

More exercises

- First-degree forcible rape, PRL II (Class B1)



Max. 88 (136)	20–25 ASR 15–20	23–29 ASR 17–23	26–33 ASR 20–26	30–38 ASR 23–30	35–44 26–35	40–50 30–40
F Max. 59	I/A 16–20 **13–16** ASR 10–13	I/A 19–23 **15–19** ASR 11–15	I/A 21–27 **17–21** ASR 13–17	A 25–31 **20–25** ASR 15–20	A 28–36 **23–28** ASR 17–23	A 33–41 **26–33** 20–26
G Max. 47	I/A 13–16 **10–13** ASR 8–10	I/A 14–18 **12–14** ASR 9–12	I/A 17–21 **13–17** ASR 10–13	I/A 19–24 **15–19** ASR 11–15	A 22–27 **17–22** ASR 13–17	A 25–31 **20–25** ASR 15–20
H Max. 39	C/I/A 6–8 **5–6** ASR 4–5	I/A 8–10 **6–8** ASR 4–6	I/A 10–12 **8–10** ASR 6–8	I/A 11–14 **9–11** ASR 7–9	I/A 15–19 **12–15** ASR 9–12	A 20–25 **16–20** ASR 12–16
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See page 10.*

ASR **Advanced Supervised Release** (possible eligibility). *See page 10.*

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

More exercises

- Statutory sexual offense with a person who is 15 or younger by a defendant more than 4 but less than 6 years older than the victim (Class C), PRL I

MINIMUM

Felony Offenses Committed on or after **October 1, 2013**

MINIMUM SENTENCES AND DISPOSITIONAL OPTIONS

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts
A	Death or Life without Parole					
B1	240–300	276–345	317–397	365–456	420–525	483–604
B2	192–240	221–276	254–317	292–365	336–420	386–483
C	157–196	180–225	207–258	238–297	273–342	314–393
D	73–92	84–105	96–120	111–138	127–159	146–182
E	58–73	67–84	77–96	88–110	102–127	117–146
F	44–58	53–67	61–77	70–88	81–102	94–117
G	34–44	40–53	46–61	53–70	61–81	71–94
H Max. 39	ASR 8–10	ASR 9–12	ASR 10–13	ASR 11–15	ASR 13–17	ASR 15–20
	C/I/A	I/A	I/A	I/A	I/A	A
	6–8	8–10	10–12	11–14	15–19	20–25
	5–6	**6–8**	**8–10**	**9–11**	**12–15**	**16–20**
	ASR 4–5	ASR 4–6	ASR 6–8	ASR 7–9	ASR 9–12	ASR 12–16
I Max. 24	C	C/I	I	I/A	I/A	I/A
	6–8	6–8	6–8	8–10	9–11	10–12
	4–6	**4–6**	**5–6**	**6–8**	**7–9**	**8–10**
	3–4	3–4	4–5	4–6	5–7	6–8

A

EM

73–92

58–73

44–58

DISPOSITION
Aggravated
PRESUMPTIVE
Mitigated

Note: Numbers shown are in months. The number shown below each offense class reflects the maximum possible sentence for that class of offense (the highest maximum sentence from the aggravated range in prior record level VI). The maximum sentence for a defendant convicted of a reportable Class B1 through E sex crime is indicated in parentheses.

A—Active Punishment
I—Intermediate Punishment
C—Community Punishment

EM **Extraordinary Mitigation** (possible eligibility). *See* page 10.

ASR **Advanced Supervised Release** (possible eligibility). *See* page 10.

MAXIMUM

MAXIMUM SENTENCES

The tables below show the maximum sentence that corresponds to each minimum sentence. For minimum sentences of 340 months or more, the maximum sentence is 120 percent of the minimum sentence, rounded to the next highest month, plus 12 additional months. G.S. 15A-1340.17(e1).
Sex Crimes: The maximum sentence for a Class B1 through E felony subject to the registration requirements of G.S. Chapter 14, Article 27A is 120 percent of the minimum sentence, rounded to the next highest month, plus 60 additional months, as indicated in parentheses below. G.S. 15A-1340.17(f).

FOR OFFENSE CLASSES B1 THROUGH E [Minimum Sentence → Corresponding Maximum (*Sex Crimes*)]

15→30 *(78)*	56→80 *(128)*	97→129 *(177)*	138→178 *(226)*	179→227 *(275)*	220→276 *(324)*	261→326 *(374)*	302→375 *(423)*
16→32 *(80)*	57→81 *(129)*	98→130 *(178)*	139→179 *(227)*	180→228 *(276)*	221→278 *(326)*	262→327 *(375)*	303→376 *(424)*
17→33 *(81)*	58→82 *(130)*	99→131 *(179)*	140→180 *(228)*	181→230 *(278)*	222→279 *(327)*	263→328 *(376)*	304→377 *(425)*
18→34 *(82)*	59→83 *(131)*	100→132 *(180)*	141→182 *(230)*	182→231 *(279)*	223→280 *(328)*	264→329 *(377)*	305→378 *(426)*
19→35 *(83)*	60→84 *(132)*	101→134 *(182)*	142→183 *(231)*	183→232 *(280)*	224→281 *(329)*	265→330 *(378)*	306→380 *(428)*
20→36 *(84)*	61→86 *(134)*	102→135 *(183)*	143→184 *(232)*	184→233 *(281)*	225→282 *(330)*	266→332 *(380)*	307→381 *(429)*
21→38 *(86)*	62→87 *(135)*	103→136 *(184)*	144→185 *(233)*	185→234 *(282)*	226→284 *(332)*	267→333 *(381)*	308→382 *(430)*
22→39 *(87)*	63→88 *(136)*	104→137 *(185)*	145→186 *(234)*	186→236 *(284)*	227→285 *(333)*	268→334 *(382)*	309→383 *(431)*
23→40 *(88)*	64→89 *(137)*	105→138 *(186)*	146→188 *(236)*	187→237 *(285)*	228→286 *(334)*	269→335 *(383)*	310→384 *(432)*
24→41 *(89)*	65→90 *(138)*	106→140 *(188)*	147→189 *(237)*	188→238 *(286)*	229→287 *(335)*	270→336 *(384)*	311→386 *(434)*
25→42 *(90)*	66→92 *(140)*	107→141 *(189)*	148→190 *(238)*	189→239 *(287)*	230→288 *(336)*	271→338 *(386)*	312→387 *(435)*
26→44 *(92)*	67→93 *(141)*	108→142 *(190)*	149→191 *(239)*	190→240 *(288)*	231→290 *(338)*	272→339 *(387)*	313→388 *(436)*
27→45 *(93)*	68→94 *(142)*	109→143 *(191)*	150→192 *(240)*	191→242 *(290)*	232→291 *(339)*	273→340 *(388)*	314→389 *(437)*
28→46 *(94)*	69→95 *(143)*	110→144 *(192)*	151→194 *(242)*	192→243 *(291)*	233→292 *(340)*	274→341 *(389)*	315→390 *(438)*
29→47 *(95)*	70→96 *(144)*	111→146 *(194)*	152→195 *(243)*	193→244 *(292)*	234→293 *(341)*	275→342 *(390)*	316→392 *(440)*
30→48 *(96)*	71→98 *(146)*	112→147 *(195)*	153→196 *(244)*	194→245 *(293)*	235→294 *(342)*	276→344 *(392)*	317→393 *(441)*
31→50 *(98)*	72→99 *(147)*	113→148 *(196)*	154→197 *(245)*	195→246 *(294)*	236→296 *(344)*	277→345 *(393)*	318→394 *(442)*
32→51 *(99)*	73→100 *(148)*	114→149 *(197)*	155→198 *(246)*	196→248 *(296)*	237→297 *(345)*	278→346 *(394)*	319→395 *(443)*
33→52 *(100)*	74→101 *(149)*	115→150 *(198)*	156→200 *(248)*	197→249 *(297)*	238→298 *(346)*	279→347 *(395)*	320→396 *(444)*
34→53 *(101)*	75→102 *(150)*	116→152 *(200)*	157→201 *(249)*	198→250 *(298)*	239→299 *(347)*	280→348 *(396)*	321→398 *(446)*
35→54 *(102)*	76→104 *(152)*	117→153 *(201)*	158→202 *(250)*	199→251 *(299)*	240→300 *(348)*	281→350 *(398)*	322→399 *(447)*
36→56 *(104)*	77→105 *(153)*	118→154 *(202)*	159→203 *(251)*	200→252 *(300)*	241→302 *(350)*	282→351 *(399)*	323→400 *(448)*
37→57 *(105)*	78→106 *(154)*	119→155 *(203)*	160→204 *(252)*	201→254 *(302)*	242→303 *(351)*	283→352 *(400)*	324→401 *(449)*
38→58 *(106)*	79→107 *(155)*	120→156 *(204)*	161→206 *(254)*	202→255 *(303)*	243→304 *(352)*	284→353 *(401)*	325→402 *(450)*
39→59 *(107)*	80→108 *(156)*	121→158 *(206)*	162→207 *(255)*	203→256 *(304)*	244→305 *(353)*	285→354 *(402)*	326→404 *(452)*
40→60 *(108)*	81→110 *(158)*	122→159 *(207)*	163→208 *(256)*	204→257 *(305)*	245→306 *(354)*	286→356 *(404)*	327→405 *(453)*
41→62 *(110)*	82→111 *(159)*	123→160 *(208)*	164→209 *(257)*	205→258 *(306)*	246→308 *(356)*	287→357 *(405)*	328→406 *(454)*
42→63 *(111)*	83→112 *(160)*	124→161 *(209)*	165→210 *(258)*	206→260 *(308)*	247→309 *(357)*	288→358 *(406)*	329→407 *(455)*
43→64 *(112)*	84→113 *(161)*	125→162 *(210)*	166→212 *(260)*	207→261 *(309)*	248→310 *(358)*	289→359 *(407)*	330→408 *(456)*
44→65 *(113)*	85→114 *(162)*	126→164 *(212)*	167→213 *(261)*	208→262 *(310)*	249→311 *(359)*	290→360 *(408)*	331→410 *(458)*
45→66 *(114)*	86→116 *(164)*	127→165 *(213)*	168→214 *(262)*	209→263 *(311)*	250→312 *(360)*	291→362 *(410)*	332→411 *(459)*
46→68 *(116)*	87→117 *(165)*	128→166 *(214)*	169→215 *(263)*	210→264 *(312)*	251→314 *(362)*	292→363 *(411)*	333→412 *(460)*
47→69 *(117)*	88→118 *(166)*	129→167 *(215)*	170→216 *(264)*	211→266 *(314)*	252→315 *(363)*	293→364 *(412)*	334→413 *(461)*
48→70 *(118)*	89→119 *(167)*	130→168 *(216)*	171→218 *(266)*	212→267 *(315)*	253→316 *(364)*	294→365 *(413)*	335→414 *(462)*
49→71 *(119)*	90→120 *(168)*	131→170 *(218)*	172→219 *(267)*	213→268 *(316)*	254→317 *(365)*	295→366 *(414)*	336→416 *(464)*
50→72 *(120)*	91→122 *(170)*	132→171 *(219)*	173→220 *(268)*	214→269 *(317)*	255→318 *(366)*	296→368 *(416)*	337→417 *(465)*
51→74 *(122)*	92→123 *(171)*	133→172 *(220)*	174→221 *(269)*	215→270 *(318)*	256→320 *(368)*	297→369 *(417)*	338→418 *(466)*
52→75 *(123)*	93→124 *(172)*	134→173 *(221)*	175→222 *(270)*	216→272 *(320)*	257→321 *(369)*	298→370 *(418)*	339→419 *(467)*
53→76 *(124)*	94→125 *(173)*	135→174 *(222)*	176→224 *(272)*	217→273 *(321)*	258→322 *(370)*	299→371 *(419)*	
54→77 *(125)*	95→126 *(174)*	136→176 *(224)*	177→225 *(273)*	218→274 *(322)*	259→323 *(371)*	300→372 *(420)*	
55→78 *(126)*	96→128 *(176)*	137→177 *(225)*	178→226 *(274)*	219→275 *(323)*	260→324 *(372)*	301→374 *(422)*	

FOR OFFENSE CLASSES F THROUGH I [Minimum Sentence → Corresponding Maximum]

3→13	9→20	15→27	21→35	27→42	33→49	39→56	45→63
4→14	10→21	16→29	22→36	28→43	34→50	40→57	46→65
5→15	11→23	17→30	23→37	29→44	35→51	41→59	47→66
6→17	12→24	18→31	24→38	30→45	36→53	42→60	48→67
7→18	13→25	19→32	25→39	31→47	37→54	43→61	49→68
8→19	14→26	20→33	26→41	32→48	38→55	44→62	

Length of Probation Period
The original period of probation for a felony sentenced under Structured Sentencing must fall within the following limits:

- Community—12 to 30 months
- Intermediate—18 to 36 months

The court may depart from those ranges with a finding that a longer or shorter period is required. The maximum permissible period with a finding is 5 years. G.S. 15A-1343.2.

Post-Release Supervision
Class F–I felony—9 months
Class B1–E felony—12 months
Crimes requiring sex offender registration—5 years

Fines
Any felony sentence may include a fine. Unless otherwise provided for a specific offense, the amount of the fine is in the discretion of the court. G.S. 15A-1340.17(b).

Extraordinary mitigation

- Allows an Intermediate sentence in certain "A"-only cells of the sentencing grid based on the presence of extraordinary factor(s)

Page 10

EM

Grid cells in which EM might be possible are flagged with this symbol.

OFFENSE CLASS	PRIOR RECORD LEVEL I 0–1 Pt	II 2–5 Pts	III 6–9 Pts	IV 10–13 Pts	V 14–17 Pts	VI 18+ Pts
A Max. Death or Life w/o Parole	Death or Life without Parole Defendant under 18 at Time of Offense: Life with or without Parole					
B1 Max. Life w/o Parole	A 240–300 **192–240** 144–192	A 276–345 **221–276** 166–221	A 317–397 **254–317** 190–254	A 365–456 **292–365** 219–292	A Life w/o Parole **336–420** 252–336	A Life w/o Parole **386–483** 290–386
B2 Max. 484 (*532*)	A EM 157–196 **125–157** 94–125	A EM 180–225 **144–180** 108–144	A 207–258 **165–207** 124–165	A 238–297 **190–238** 143–190	A 273–342 **219–273** 164–219	A 314–393 **251–314** 189–251
C Max. 231 (*279*)	A EM 73–92 **58–73** 44–58	A EM 83–104 **67–83** 50–67	A 96–120 **77–96** 58–77	A 110–138 **88–110** 66–88	A 127–159 **101–127** 76–101	A 146–182 **117–146** 87–117
D Max. 204 (*252*)	A EM 64–80 **51–64** ASR 38–51	A EM 73–92 **59–73** ASR 44–59	A 84–105 **67–84** ASR 51–67	A 97–121 **78–97** 58–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103
E Max. 88 (*136*)	I/A 25–31 **20–25** ASR 15–20	I/A 29–36 **23–29** ASR 17–23	A 33–41 **26–33** ASR 20–26	A 38–48 **30–38** ASR 23–30	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40
F Max. 59	I/A 16–20 **13–16** ASR 10–13	I/A 19–23 **15–19** ASR 11–15	I/A 21–27 **17–21** ASR 13–17	A 25–31 **20–25** ASR 15–20	A 28–36 **23–28** ASR 17–23	A 33–41 **26–33** 20–26
G Max. 47	I/A 13–16 **10–13** ASR 8–10	I/A 14–18 **12–14** ASR 9–12	I/A 17–21 **13–17** ASR 10–13	I/A 19–24 **15–19** ASR 11–15	A 22–27 **17–22** ASR 13–17	A 25–31 **20–25** ASR 15–20
H Max. 39	C/I/A 6–8 **5–6** ASR 4–5	I/A 8–10 **6–8** ASR 4–6	I/A 10–12 **8–10** ASR 6–8	I/A 11–14 **9–11** ASR 7–9	I/A 15–19 **12–15** ASR 9–12	A 20–25 **16–20** ASR 12–16
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8

Extraordinary mitigation

- Permissible when court finds:
  - Extraordinary mitigating factors of a kind significantly greater than in the normal case;
  - Those factors substantially outweigh any factors in aggravation; and
  - It would be a manifest injustice to impose an active punishment in the case

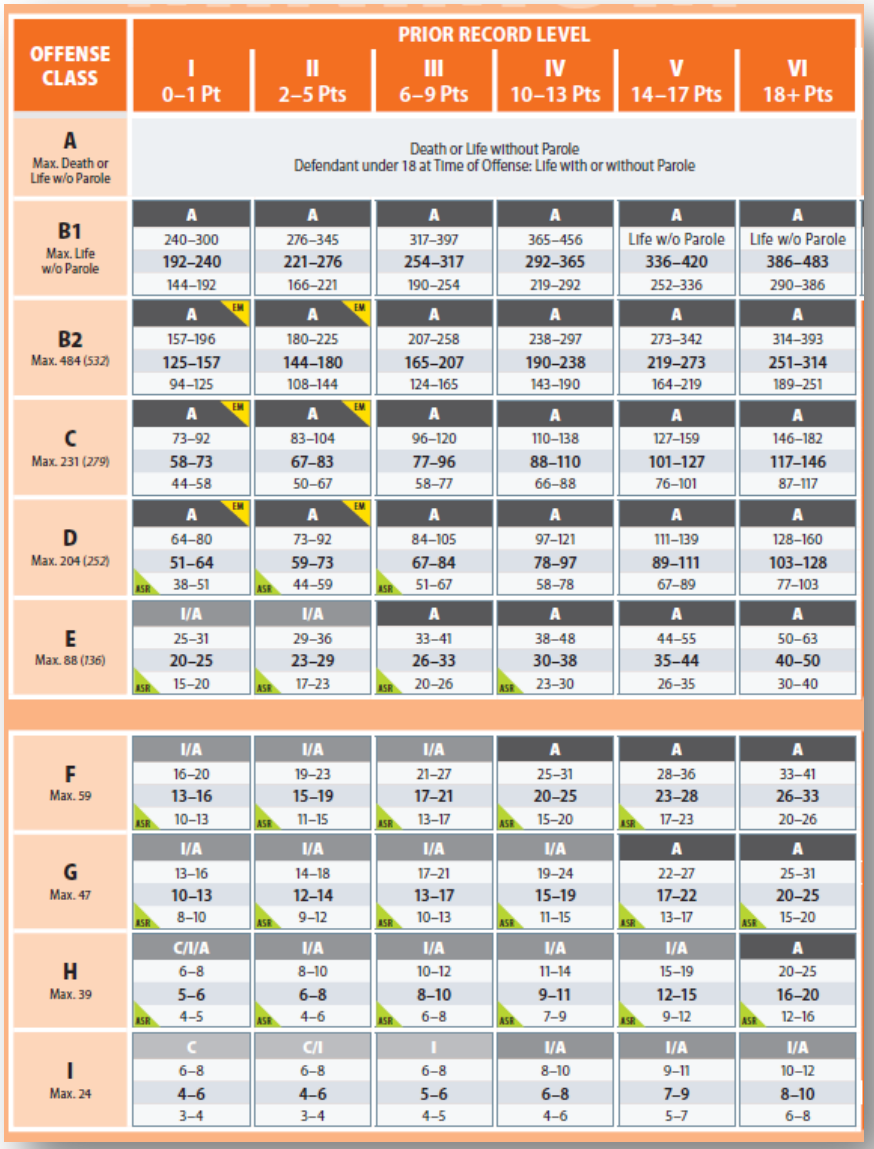
Advanced Supervised Release

Advanced Supervised Release

- Allows early release from prison to post-release supervision for identified defendants who complete “risk reduction incentives” in prison

Eligibility

- Only certain grid cells
- Only Active sentences
- Only if court-ordered at sentencing
- Never over prosecutor objection



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D Max. 204 (252)	A EM 64–80 **51–64** ASR 38–51	A EM 73–92 **59–73** ASR 44–59	A 84–105 **67–84** ASR 51–67	A 97–121 **78–97** 58–78	A 111–139 **89–111** 67–89	A 128–160 **103–128** 77–103
E Max. 88 (136)	I/A 25–31 **20–25** ASR 15–20	I/A 29–36 **23–29** ASR 17–23	A 33–41 **26–33** ASR 20–26	A 38–48 **30–38** ASR 23–30	A 44–55 **35–44** 26–35	A 50–63 **40–50** 30–40
F Max. 59	I/A 16–20 **13–16** ASR 10–13	I/A 19–23 **15–19** ASR 11–15	I/A 21–27 **17–21** ASR 13–17	A 25–31 **20–25** ASR 15–20	A 28–36 **23–28** ASR 17–23	A 33–41 **26–33** 20–26
G Max. 47	I/A 13–16 **10–13** ASR 8–10	I/A 14–18 **12–14** ASR 9–12	I/A 17–21 **13–17** ASR 10–13	I/A 19–24 **15–19** ASR 11–15	A 22–27 **17–22** ASR 13–17	A 25–31 **20–25** ASR 15–20
H Max. 39	C/I/A 6–8 **5–6** ASR 4–5	I/A 8–10 **6–8** ASR 4–6	I/A 10–12 **8–10** ASR 6–8	I/A 11–14 **9–11** ASR 7–9	I/A 15–19 **12–15** ASR 9–12	A 20–25 **16–20** ASR 12–16
I Max. 24	C 6–8 **4–6** 3–4	C/I 6–8 **4–6** 3–4	I 6–8 **5–6** 4–5	I/A 8–10 **6–8** 4–6	I/A 9–11 **7–9** 5–7	I/A 10–12 **8–10** 6–8

ASR

Grid cells in which ASR might be possible are flagged with this symbol.

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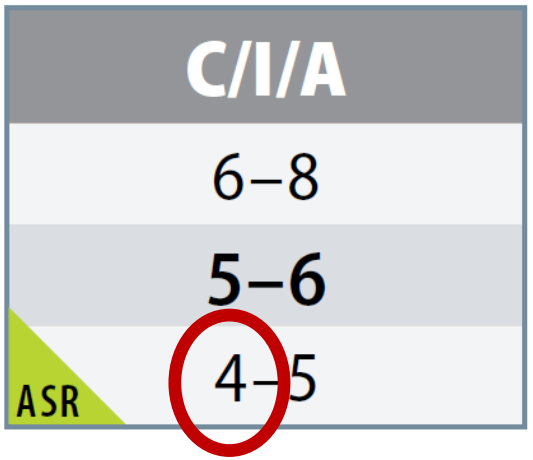
ASR Date

- Court imposes regular sentence from the grid
- ASR date, if ordered, flows from regular sentence
  - If **presumptive or aggravated**, ASR date is the lowest mitigated minimum sentence in the defendant's grid cell
  - If **mitigated**, ASR date is 80% of imposed minimum sentence



4-14 month sentence
ASR date: 3.2 months

Example

- PRL III defendant convicted of Obtaining Property by False Pretenses
  - Regular sentence: 8-19 months (presumptive)

	C/I/A	I/A	I/A
H Max. 39	6–8	8–10	10–12
	5–6	**6–8**	**8–10**
	ASR 4–5	ASR 4–6	ASR 6–8

What is the ASR date?

Example

- PRL III defendant convicted of Obtaining Property by False Pretenses
  - Regular sentence: 8-19 months

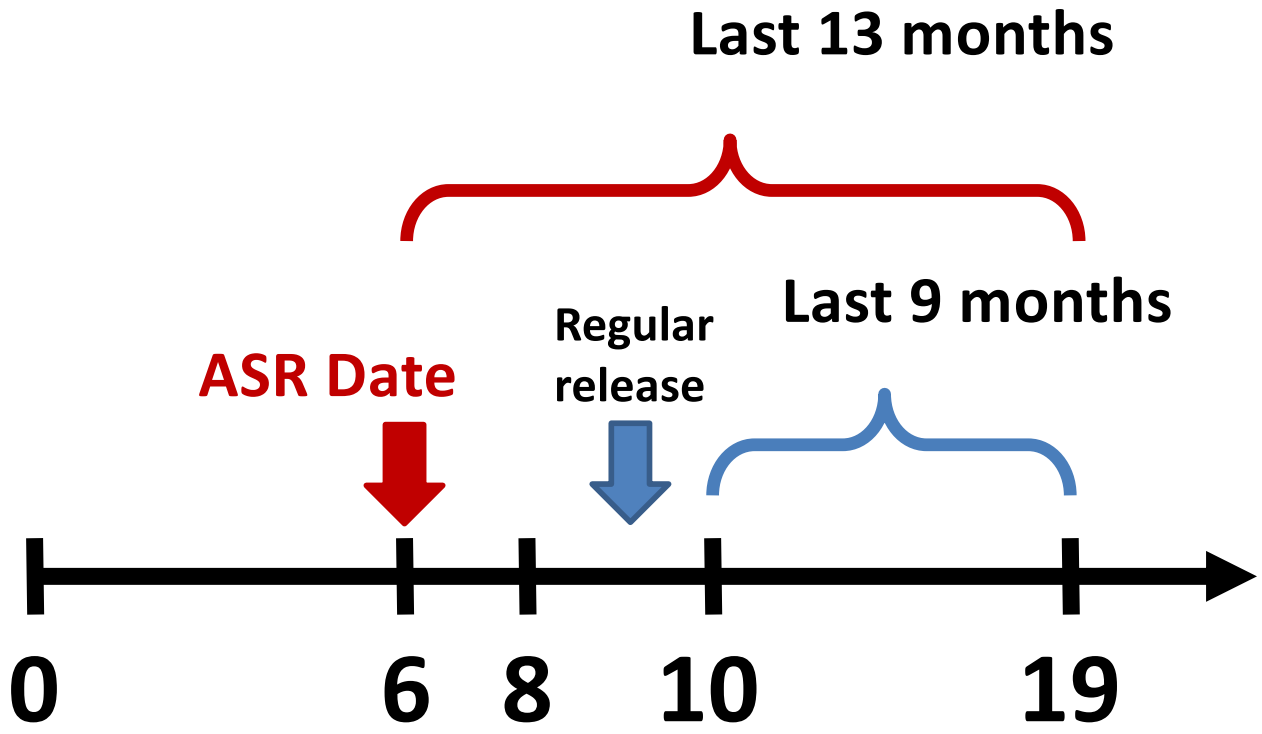
	C/I/A	I/A	I/A
H Max. 39	6–8	8–10	10–12
	5–6	**6–8**	**8–10**
	ASR 4–5	ASR 4–6	ASR 6–8

☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.

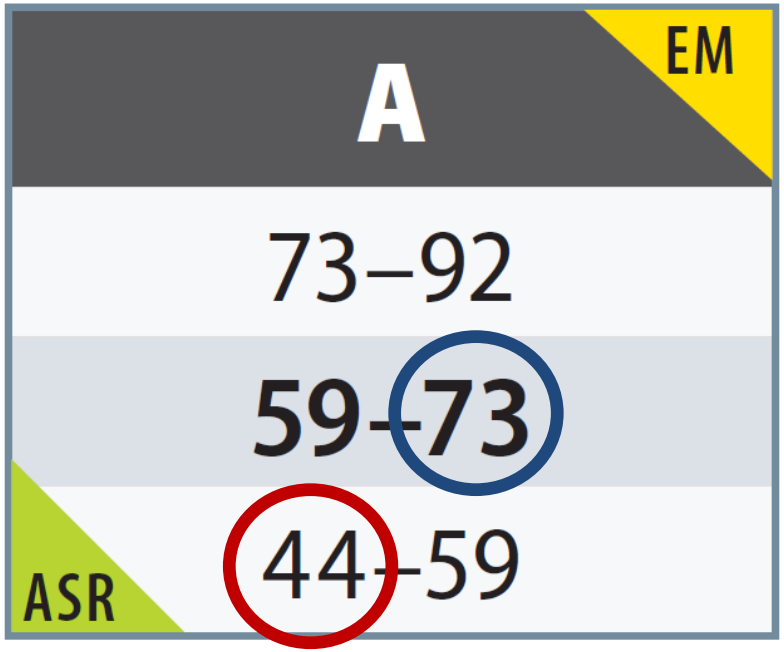
for a minimum term of:	and a maximum term of:	☒ ASR term *(Order No. 4, Side Two)*
8 months	19 months	6 months

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judg

Regular sentence: 8-19 months
ASR date: 6 months



ASR Date (Class D, Level II)

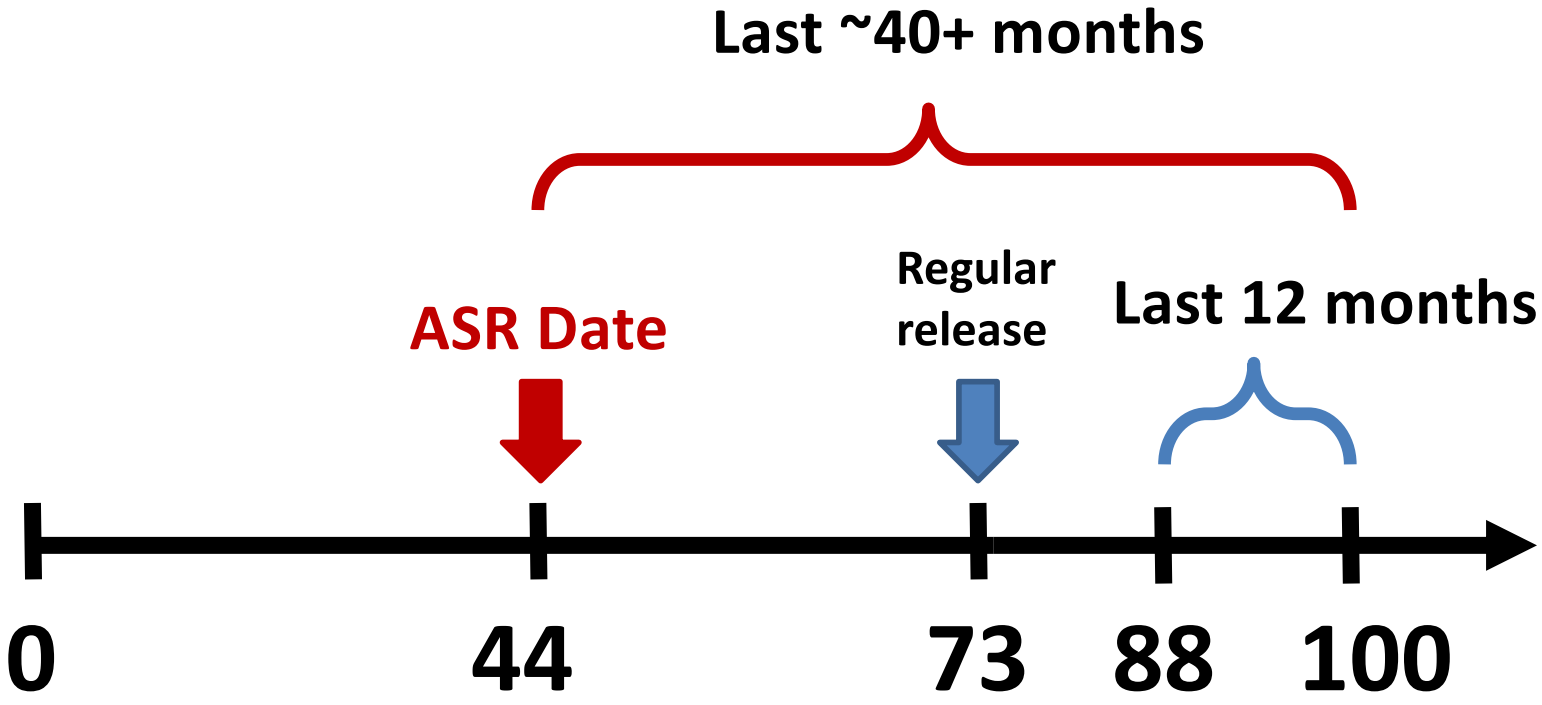


Regular sentence: 73-100 months

Regular release: ~75 months

ASR: 44 months

Regular sentence: 73-100 months
ASR date: 44 months




Questions?

CI and Defense Investigation

FEBRUARY 5, 2024

1

Those are not my pants

or

There was no heroin

A CASE STUDY

2

Agenda

- Ofc Abdullah case
  - Investigation
  - Aftermath
  - Changes
- Trafficking Cases and Defender's Dilemma
- 2 'Hypotheticals'

3

Trafficking Heroin

- By Sell
  - 70 to 93 months (4-13 g)
  - 225 to 282 months (over 28 g)
- By Possession
  - 70 to 93 months (4-13 g)
  - 225 to 282 months (over 28 g)
- By Possession
  - 70 to 93 months (4-13 g)
  - 225 to 282 months (over 28 g)

4

- Arrest – high bond
- FIR – CI that has provided reliable information in the past. Searched for contraband, officers maintained visual observation, CI returned to secured meeting location, provided 4 grams of heroin. Video and audio surveillance
- NO ONE has watched the video and audio surveillance
- CIs are biased.

5

"There was no heroin"

- March 2020
  - Assigned three cases for trafficking heroin - clients said they did not sell heroin
  - Asked the ADA, head of drug unit, if the same CI was used in all three cases – not name of CI
  - Court shuts down due to COVID
- April
  - Response – I don't know, but your clients are all part of same blood set
    - Defense investigator: nothing to support claim of gang connection
  - Request CI video – refused

6

Bond

- Client #1 (DG) - $1.5m
- Client #2 (SS) - $300k – lowered to $50k
  - Rearrested on intimidating witness charge
    - $100k lowered to $60k
  - Took defense investigator less than 48 hours to disprove allegation
- Client # 3 (KG) - $250k

7

Where to Start

- ACIS
  - Search by arresting officer
  - Get name/case number for every trafficking heroin charge
  - Contact defense attorneys
- Odyssey
  - PDs can search by charging officer
- Defense list servs
- Investigator
  - Funding: AOC-G-309 form; Motion/Order
  - File ex parte

8

- May – get video for 1 client
  - No video; audio cuts out during 'buy'
- June 5 – lab report for DG: no CS
  - Offer – possession of counterfeit substance
  - Bond lowered to $30k on PFF; released
- June 18 – ADA acknowledges issue with video; asks for list
- June 30 – SS cases dismissed; after lab comes back
- July 2 – KG case dismissed – been in custody since 3/20

9

Now What?

- Clients out of custody and/or cases dismissed
  - CI unreliable; no CS
- No action by RPD or DA
- July - Write letter to DA and IA
- September – Abdullah placed on admin leave (with pay)

10

Consequences

- Sweeping changes in how RPD handles CIs - No
- Modification to bond policies - No
- September 2021 – Dennis Williams (CI) indicted
  - Then DA says no evidence officer knew fake drugs
  - But…

11

Consequences

- #1: City of Raleigh settled - $2m – 15 plaintiffs
- #2: $350k – 3 plaintiffs
- July 2022 – Abdullah charged
- Oct 2023 – Pled to 2 charges; 24m probation; 38 day split
- "The evidence in this case, from the state's perspective, was clear," said Wake County District Attorney Lorrin Freeman.

12

Four other officers told Abdullah that the heroin Williams turned in looked like brown sugar. And the lawsuits and depositions indicate they allowed arrests to occur after field tests came back negative. In a text thread among the officers, they joked about taking " 'bets' on whether Aspirin would again produce 'fake heroin,' "

13

How was CI info kept from defense?

- No probable cause hearing
- Indict ham sandwich: "reliable CI, audio and video recorded"
- G.S. 15A-904(a1) makes an express carve-out: "the State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law."

14

CI Identity

- State only has to reveal in specific circumstances
  - CI info leads to search warrant – NO
  - CI participant in crime – Maybe, but probably no
- See SOG blog posts

15

CI Identity

- Unlikely State would have had to reveal CI identity in my Abdullah cases.
  - Evidence collected during search
  - Buy was the basis of the search warrant
- Issue – was search warrant valid?
  - 4 corners of document
  - "provided reliable information in the past"

16

Defender's Dilemma

- Plea quickly
  - Offer attempted trafficking if don't have to reveal CI – ok
    - Withhold exculpatory evidence to get plea - not ok
    - Rasmussen, 23CR334950-910; 24CR015542-910
  - Plead quickly to provide useful SA
- Watch buy video with agreement
  - Cannot give client information about CI
  - Client has to agree

17

Hypotheticals

- Deceased CI
- Use buys with CI to get search warrant
  - Do not have to reveal CI info
- Client refuses to plea – state indicts on additional charges
  - Have to reveal CI info before trial
- Compromised CI
- Need CI to prove trafficking charge
- $500k bond
- ADA informs you issue with CI on federal case – NOT this case

18

19

the Assembly

COURTS

Inside Raleigh's Fake-Heroin Scandal

Digging into more than 1,300 pages of testimony in Irving et. al v. City of Raleigh.

by Jeffrey Billman April 12, 2023

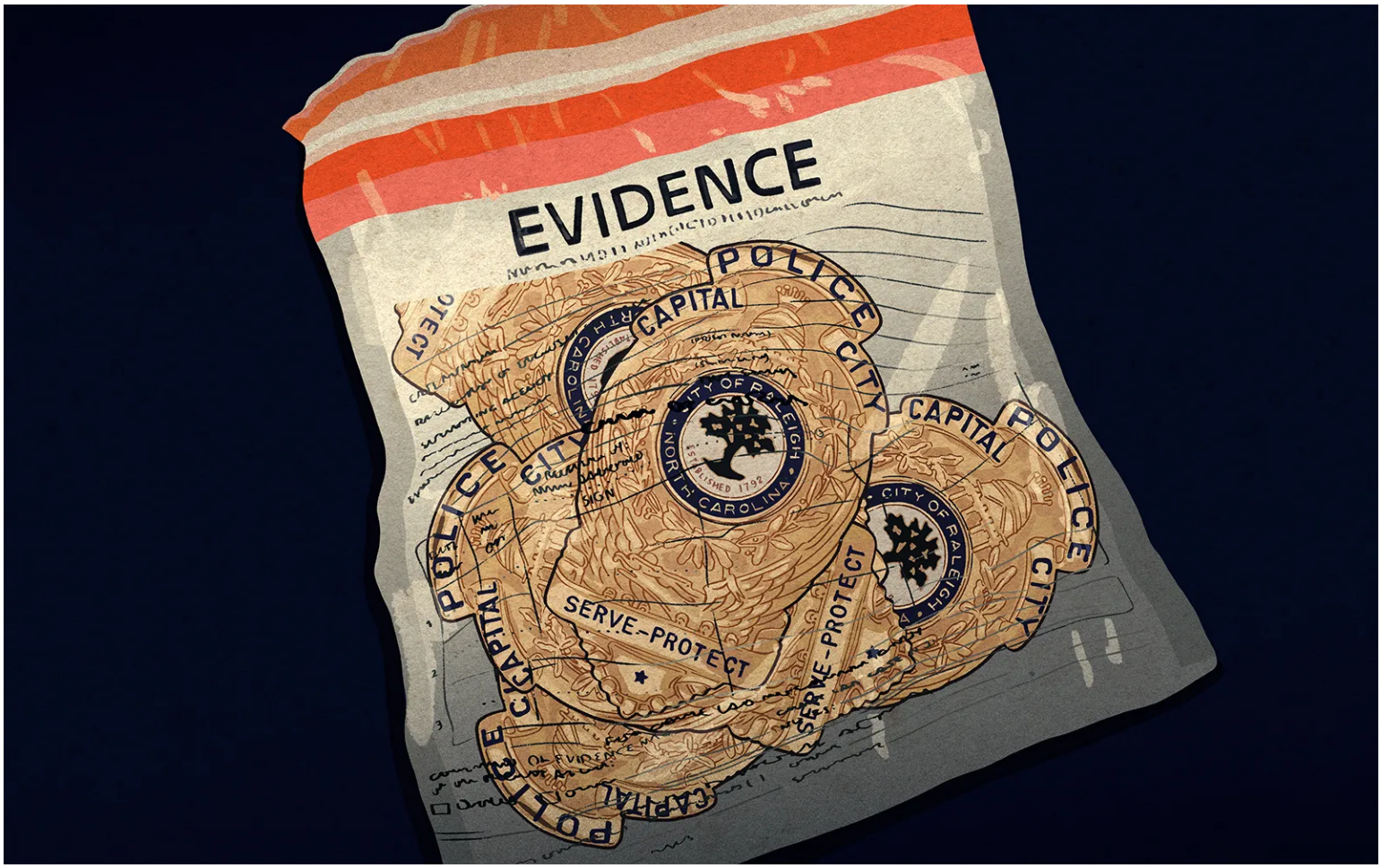


Illustration by Lily Qian, for The Assembly

On Sunday, *Rolling Stone* published a **long feature** on former Raleigh vice detective Omar Abdullah's "reign of terror." **The RPD's fake-heroin scandal** has only gotten worse since ***The Assembly* reported** on it last month.

On March 13, Judge Terrence W. Boyle granted qualified

immunity to the 10 SWAT officers who, acting on a faulty search warrant, burst into the homes of Yolanda Irving and her neighbor on May 21, 2020. Boyle said cops "do not violate any clearly established rights when they point their firearms at the unknown occupants of a residence."

Boyle also removed Emancipate NC as a co-plaintiff in Irving's lawsuit, saying the activist group lacked standing.

Then, on March 31, attorneys for three RPD vice detectives attached more than 1,300 pages of testimony **from the detectives**, **their supervisor**, **Abdullah**, and **SWAT officers** to a court filing – previously undisclosed depositions that provide insight into not only what went wrong but also how the RPD handles informants.

Here are six takeaways from the new documents:

Vice detectives knew something was off. Before Dennis Williams began working with Omar Abdullah, no RPD informant had arranged 10 trafficking-level heroin buys in six months. "It was too good to be true," one detective testified.

What Williams produced didn't look like heroin. It wasn't packaged like heroin. He often paid far less than street value. Williams' hidden cameras never recorded the transactions. And Williams made small buys before quickly jumping to larger ones, which is not how heroin dealers usually sell. Two detectives raised concerns about Williams with their supervisor, Sgt. William Rolfe.

But they said they didn't go further up the chain—at least not at first—because they didn't have proof.

The detectives did make jokes about it. The day the RPD executed the final search warrant in the Abdullah-Williams partnership, one detective texted colleagues to "Place your bets here!!" on what they'd find. He went first: "7 grams brown sugar mixture. 12 grams of weed. $230 (non-buy money). 3 red flags." Another responded: "For sure fake heroin."

Two detectives said they assumed that dealers were ripping Williams off. They didn't realize that Williams was behind the scheme until they listened to the audio recording of the last controlled buy. They said they heard Williams ask for $60 worth of something (he didn't say what). But the RPD had given him $800 to buy heroin—and the remaining $740 was never found.

One detective said he now believes Williams sometimes used the

RPD's money to purchase marijuana. After Williams claimed the men sold him heroin, the RPD paid him $200 or more for his work.

Williams shouldn't have been an informant. Abdullah first recruited Williams in 2018 after he sold another informant crushed aspirin and said it was oxycodone. Soon after, though, Williams spent time in the Nash County jail for larceny; when he was released in 2019, a condition of his probation was that he not contact anyone involved in the drug business.

To work with Williams again, Abdullah needed his probation officer's approval. His then-supervisor, Rolfe, testified in his deposition that he believed Abdullah had obtained that permission. But the RPD's Internal Affairs Division concluded that Abdullah had never contacted Williams' probation officer, let alone receive approval for Williams to become an informant.

For his part, Abdullah testified that he thought Williams "wasn't on probation," though he admitted that Williams' girlfriend told him he was.

Abdullah's defense is a lack of "initiative." Abdullah testified that before these busts, he'd never seen heroin up close. He said he charged two men with heroin trafficking despite negative field tests—and his colleagues' suspicions about whether it was real—because he didn't believe the tests were reliable.

They aren't. But as early as January 7, 2020—more than four months before the RPD cut ties with Williams—Wake County's crime lab began reporting that the substances not only weren't heroin, they weren't drugs.

Abdullah's own court filing says he "did not take the initiative to follow up and check on such results." His colleagues said he didn't know how. "It was just troubling that he was this far into his career with us and didn't know how to look up lab results," a detective testified.

The detective tried to teach him. Asked during his deposition if he used that training in cases involving Williams, Abdullah took the Fifth.

The RPD doesn't field test suspected heroin. Abdullah pointed out in his deposition that, as policy, the RPD did not field test suspected heroin. The police weren't just concerned about the test's accuracy; they also worried that most things sold as heroin were cut with fentanyl, and that mere exposure to fentanyl during

testing could, one detective testified, "cause an overdose."

Experts are skeptical of **such claims**, and **leading toxicologists** have long maintained that "incidental contact" is "unlikely to cause opioid toxicity."

Still, that fear kept the RPD from conducting tests that might have uncovered Williams' scheme earlier, Sgt. William Rolfe told Internal Affairs investigators. He said he lobbied for the department to buy equipment that allows officers to test drugs without removing their packaging and called the RPD "negligent" for not taking his advice.

The RPD has since purchased that equipment, but Rolfe—who recently retired—said he believes officers still don't field-test anything that might contain fentanyl. The RPD has not responded to *The Assembly*'s questions about its field-testing policy.

Abdullah's colleagues believed higher-ups protected him. Fellow detectives described him as a "lone wolf" who was "in over his head." "You have to be sharp to succeed in a drug world, and I think Abdullah just—it wasn't a good fit for him," one testified.

They thought Rolfe treated him with kid gloves because Abdullah is Black and Muslim. "It would have been terrifying to supervise Abdullah out of fear of retaliation from supervisors or being transferred out if he was to file a complaint," a detective explained.

The same detective said the former chief of police, Cassandra Deck-Brown, was "very fond" of Abdullah and "just gushed all over" him at an employee appreciation dinner in 2018.

Rolfe denied going easy on Abdullah. He said he had long tried to get Abdullah transferred and blamed others for "kick[ing] the can down the road."

"Pretty much everywhere he had gone in the department, he had conflicts on his squads," Rolfe said.

Rolfe thinks he took the fall for RPD dysfunction. Other than Abdullah, who was fired, Rolfe was the only officer punished for the debacle. He was demoted and transferred five months before his scheduled retirement.

Rolfe told Internal Affairs that "all of the responsible entities"—including the district attorney's office and others in the police

department—wanted to "distance themselves from their contribution to the problems and past failures" and "assign them all to me."

While he was demoted in part for allowing his detectives to violate RPD policies, including one forbidding them from meeting alone with informants, he said this was "extremely common."

"There are hundreds of policies that are on paper that are supposed to be followed as a practice and are not," Rolfe explained.

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Jeffrey Billman reports on politics and the law for The Assembly. *Email him at* ***jeffrey@theassemblync.com***.

More by this author

North Carolina Criminal Law Blog

Confidential Informants, Motions to Reveal Identity, and Discovery: Part I, Roviaro v. U.S.

April 22, 2024 **Daniel Spiegel** <https://nccriminallaw.sog.unc.edu/author/spiegel/>

Today I begin a series of blog posts discussing the law around confidential informants, motions to reveal identity, and discovery. Technological developments have made it more common for law enforcement to document the activity of a confidential informant ("CI") through video and audio recording. This change raises challenging legal questions, such as whether the identity of the confidential informant must be revealed to the defense and what must be turned over in discovery. Today's post discusses the landmark case of ***Roviaro v. U.S.*** *<https://supreme.justia.com/cases/federal/us/353/53/#tab-opinion-1941497>* and introduces the basic issues, focusing on the factors that weigh toward or against the disclosure of the CI's identity to the defense. Future posts will discuss the relevant statutes, key state cases, and federal courts' analysis of these questions, along with procedural and strategic considerations.

The law on confidential informants and specifically, when the State must reveal the identity of the CI to the defense, is grounded in *Roviaro v. U.S.*, 353 U.S. 53 (1957). *Roviaro* has been cited more than 5,000 times by subsequent courts. The *Roviaro* Court expressly declined to create a "fixed rule," instead setting forth a framework for analysis. The basic test involves determining whether the CI was an "active participant" in the crime alleged (State must likely disclose identity) or more of a "tipster" (State may likely withhold identity). However, the analysis has been refined and explicated in the lower courts, as the U.S. Supreme Court has not addressed the issue in depth since the 1950's and 60's. *See Roviaro*; *McCray v. State of Ill.*, 386 U.S. 300 (1967) (State need not disclose the CI's identity before a motion to suppress where the CI was a mere tipster).

The question of whether the identity of a confidential informant should be turned over to the defense involves tension between various objectives. On the one hand, the State has an interest in facilitating cooperation by protecting those who work with law enforcement. On the other hand, the Defense has a fundamental right to a fair trial and a due process right to effectively prepare its case under the Fifth and Fourteenth Amendments, as well Sixth Amendment confrontation rights.

Roviaro is important and interesting not only because the case is so fundamental to our modern understanding of the law of confidential informants, but also because the facts are unusual and dramatic.

Two federal narcotics agents were working with two Chicago police officers to bring a drug case against the defendant, Albert Roviaro. The four law enforcement officers secured the services of a CI, "John Doe." As one might only expect to see in the movies, one of the police officers "secreted himself in the trunk of Doe's Cadillac, taking with him a device with which to raise the trunk lid from the inside." *Roviaro* at 56. The CI drove the Cadillac to a particular location followed by the three other law enforcement officers. The defendant entered the Cadillac and sat in the passenger seat beside the CI. They then proceeded on a "circuitous route." When the CI finally stopped the car, one of the federal agents stepped out of his car and saw the defendant get out of the Cadillac, walk a few feet to a tree, pick up a small package, return to the Cadillac, and deposit the package on the passenger side. The federal agent immediately retrieved the package from the floor of the Cadillac.

Throughout, the officer hidden in the trunk of the Cadillac was listening carefully to the conversation between the CI and the defendant. He overheard a variety of important details: defendant's urging the CI to pull over and cut the motor so as to lose a "tail," defendant's inquiry into money the CI owed him, and defendant's statement regarding bringing "three pieces this time." *Roviaro* at 57. The hidden officer raised the lid of the trunk once the car came to a stop and peeked out the crack to see the defendant walk to the tree and retrieve the package. He then climbed out of the trunk to find his fellow officer holding the package which contained three glassine envelopes of white powder, later determined to be heroin.

The essential question for the U.S. Supreme Court was whether a fair trial required that the Government reveal the identity of the CI. The Government asserted that the identity need not be revealed, as the law enforcement witnesses could supply all the necessary detail at trial. After all, the officer in the trunk had essentially a front row seat to the transaction (albeit with only aural rather than visual access), and the other officers observed many of the crucial details. Essentially, the Government argued that no testimony the CI could offer at trial would have any bearing on the guilt or innocence of the defendant, and the case could clearly be made with the law enforcement officers.

The defense, on the other hand, stressed that the CI was directly involved in the transaction and was the only true witness to what occurred. He was sitting next to the defendant, he knew the context of what happened and what was said, and it was imperative that the defense have access to his testimony at trial.

Ultimately, the Supreme Court sided with the defense and determined that the identity of the CI must be revealed. The CI was simply too wrapped up in the facts on which the charges were based; he was the "one material witness" to the transaction who could "controvert, explain, or amplify" the testimony of the law enforcement officers. *Roviaro* at 64. The Court emphasized that the charge did not assert mere possession of heroin but *knowing* possession of the drug. The Court reasoned that the testimony could have a bearing on a variety of defenses, including entrapment, identity, or lack of knowledge of the contents of the package. The Court also pointed out that the CI denied knowing the defendant when he subsequently encountered him at the police station. (In the dissent, Justice Clark argued strenuously that the CI said this only to maintain the ruse.)

North Carolina courts have relied on *Roviaro* (along with *McCray*), in determining when the identity of the CI must be revealed in a series of cases, including *State v. McEachern*, 114 N.C. App. 218 (1994), and *State v. Dark*, 204 N.C. App. 591 (2010) (*Dark* was discussed by my colleague, Jeff Welty, **here** <https://nccriminallaw.sog.unc.edu/the-informers-privilege/>). In *Roviaro*, the hint of *Brady* (would the CI have denied knowing the defendant at trial?) and the array of possible ways the CI's testimony might have bolstered a defense led the Supreme Court to side with Roviaro. However, North Carolina appellate courts appear to be moving toward requiring more of the defendant than floating possible defenses; they often require the defendant to put forward a specific defense and articulate how the CI's testimony would make a difference. I will explore the facts of these cases and their strategic implications further in future blog posts.

Examining *Roviaro* and its progeny, the following factors support disclosure of the CI's identity:

- The CI was an "active participant" in the crime alleged
- If not an active participant, the CI's involvement is bound up with facts at issue at trial
- The defendant has asserted a defense, such as lack of knowledge, alibi, or entrapment, and the CI's testimony is relevant to a determination of whether the defense is valid

The following factors weigh against disclosure of the CI's identity:

- The CI is a "mere tipster"
- The defendant has failed to show how the CI's testimony would be relevant or helpful to establish a defense
- The defendant already knows the identity of the CI

The *Roviaro* Court concluded that the officer in the trunk was no substitute for the man in the driver's seat, requiring disclosure of the CI's identity for a full and fair trial. But what if a video or audio recording captures the entire transaction? And when a video is made, how does the State comply with open file discovery requirements while attempting to maintain the confidentiality of the informant's identity? Stay tuned.

Knapp-Sanders Building
Campus Box 3330, UNC Chapel Hill
Chapel Hill, NC 27599-3330
T: (919) 966-5381 | F: (919) 962-0654

North Carolina Criminal Law Blog

Confidential Informants, Motions to Reveal Identity, and Discovery: Part II, What Statutes Apply?

May 29, 2024 **Daniel Spiegel** <https://nccriminallaw.sog.unc.edu/author/spiegel/>

In Part I of a series of posts on confidential informants, **I revisited the landmark case of *U.S. v. Roviaro*** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-i-roviaro-v-u-s/> , which began when a Chicago police officer hid in the trunk of an informant's car to listen in on a heroin deal. The U.S. Supreme Court held that the officer in the trunk was no substitute for the confidential informant ("CI") in the driver's seat and required disclosure of the CI's identity to the defense. I also introduced the basic dichotomy set out in *Roviaro*: generally, where the CI is more of a tipster, the CI's identity need not be revealed, but where the CI is an active participant, the defense is entitled to it. The constitutional underpinnings of this distinction, based on due process and confrontation principles, continue to guide courts today, although the analysis has evolved.

This second post will address the North Carolina statutes at play. These statutes complicate and refine the basic constitutional question of whether fundamental fairness requires the State to turn over the CI's identity.

G.S. 15A-903 – Open File Discovery

First, there is the baseline statutory requirement that essentially the entire investigatory file must be provided to the defense under G.S. 15A-903. This "open file" discovery requirement has been the law in North Carolina since 2004. Defining the scope of the investigatory file is at times difficult. Especially in drug cases, the "file" may be a sprawling, many-tentacled series of investigations. In cinematic terms, it can be difficult to determine where the movie should begin and which sub-plots are part of the film. For example, in a drug trafficking case, if investigators have been aware of the defendant for decades, and his name has come up in several interviews, is the complete history properly considered part of the file that must be turned over per G.S. 15A-903? Must all the related cases that touched on the defendant be turned over? Or just the immediate actions that led up to the drug transaction at issue at trial?

The trial court must ultimately draw these lines where the parties disagree, and questions of relevance and admissibility at trial will influence the court's decision-making. For the purposes of this series, the two most common types of CI interaction are almost always properly considered part of the investigative file. These two types of CI activity are what I will refer to as "main event" drug transactions (drug activity for which the defendant has been indicted) and "lead-up buys" (drug activity that is used to develop probable cause for a future search or to build up to a "main event"). As "main event" and "lead-up" activity are generally going to be relevant to the subject of the trial, the baseline statutory principle is that the investigative file pertaining to these CI activities (including police reports, interviews, videos, and more) should be shared with the defense.

G.S. 15A-904(a1) – Exception for Identity of CI

Not so fast, though. G.S. 15A-904(a1) makes an express carve-out: "the State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law." In practice, this often means that the State turns over reports in which law enforcement refers to the CI as only "CI" rather than revealing the CI's name. The State may also attempt to conceal additional details that would lead the defendant to identify the CI, by providing reports that refer to a period of time rather than a particular date, or a generalized location rather than an exact spot. The State may desire to go further to protect the CI by omitting an episode involving the CI entirely. However, where the CI activity naturally builds to the main event, it is likely improper for the State to "start the movie" just before the main event and cut the CI out of the picture, as such a reading of the statute strains the definition of "investigative file" under G.S. 15A-903.

But what is the State to do if including details as to the precipitating incident would almost certainly reveal the CI's identity? For starters, the State may want to avoid the type of investigation where law enforcement springs from the bushes immediately after the CI calls the defendant on the phone (such techniques are likely to render efforts to conceal the CI's identity useless in the first place). As will be discussed in a future blog post on video recordings, the court may also approve of the use of redaction, muting, blurring, and other approaches to comply with constitutional and statutory requirements while shielding the CI's identity.

G.S. 15A-908 – Protective Orders

The State may also choose to apply in writing under G.S. 15A-908 for a protective order preventing or limiting disclosure of certain materials upon a showing of "substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment." Given G.S. 15A-904(a1), it doesn't appear that such action is necessary where the State is merely withholding the CI's name. However, invoking 15A-908 is likely necessary where the State desires to withhold large swaths of the investigative file, such as a video in its entirety or a myriad of investigative details.

The court will then have to balance the State's interest in protecting the CI against the defendant's constitutional and statutory rights. Tricky questions can arise, especially given that the statute allows the State to apply for a protective order ex parte. However, the defense is entitled to notice that an order was granted per G.S. 15A-908(a). Where the defense has concerns that key information necessary to an effective defense has been withheld, the defense may litigate the question. Further, the "affidavits or statements" supporting the State's motion must be sealed and preserved for appellate review.

G.S. 15A-978 – When CI's Identity Must Be Revealed for a Motion to Suppress

Finally, there is G.S. 15A-978, located in the part of Chapter 15A dealing with motions to suppress rather than discovery. I will dedicate a separate blog post to this statute, but for now, it is worth observing that G.S. 15A-978 addresses the circumstances under which the State must reveal the CI's identity in the context of a *motion to suppress*, whereas *Roviaro* and the vast majority of the cases address the question of whether the State must reveal the CI's identity *before trial*. Note that *McCray v. Illinois*, 386 U.S. 300 (1967), mentioned alongside *Roviaro* in **Part I** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-i-roviaro-v-u-s/> , also dealt with the question of what the defense should be entitled to in challenging a search warrant pursuant to a motion to suppress, not the question of whether the State must provide the defense with the CI's identity to ensure a fair trial.

In the next post on CI's, I will begin to tackle the challenging question of how to handle videos of CI activity. Stay tuned.

Knapp-Sanders Building
Campus Box 3330, UNC Chapel Hill
Chapel Hill, NC 27599-3330
T: (919) 966-5381 | F: (919) 962-0654

North Carolina Criminal Law Blog

Confidential Informants, Motions to Reveal Identity, and Discovery: Part III, How to Handle the Video

June 24, 2024 **Daniel Spiegel** <https://nccriminallaw.sog.unc.edu/author/spiegel/>

This is Part III of a multi-part series on confidential informants. Earlier posts focused on the foundational concepts of *U.S. v. Roviaro*, 353 U.S. 53 (1957), **here** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-i-roviaro-v-u-s/> , and the applicable North Carolina statutes **here** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-ii-what-statutes-apply/> . Today's post explores the novel issues that arise as more and more confidential informant ("CI") interactions are recorded on video.

The tension between concealing the CI's identity for the CI's protection and revealing the CI's identity to ensure that the defendant has a fair opportunity to challenge the State's case has been highlighted in earlier posts. However, the existence of video evidence introduces new complexity and nuance into the dilemma. Where the State attempts to withhold video evidence depicting the CI's involvement, defense counsel may justifiably object that a rich trove of information from the investigative file is being denied to the defendant in contravention of G.S. 15A-903 ("Disclosure of Evidence by the State"). The video may contain key details such as location, pattern of behavior, body language, or statements (when the video includes audio). The State may counter that turning over the video all but assures that the CI will be put in danger, as even where the CI's name is kept secret, the CI's face, appearance, or other identifying information may be gleaned from the recording.

Four options

The following four options of limiting or modifying disclosures may be useful in balancing the competing concerns while navigating constitutional and statutory requirements. For the court to approve of the options below, the State must likely make an adequate showing of "substantial risk" to a person of "physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment," under G.S. 15A-908.

1) Blurring out. When technologically feasible, this is an appealing option in some cases, as modifying the video by blurring the CI's face may allow the defense to receive much of what is useful on the video, while shielding the identity of the CI. G.S. 15A-908 may authorize such a modification. The statute contemplates situations where the court can allow the State to withhold entire portions of the investigative file. Withholding only a face on a video is a lesser measure that may strike an appropriate balance between concerns of CI safety and disclosure of evidence to the defense. Of course, the defense may still be able to articulate compelling reasons why the original, unblurred footage must be turned over, and may be constitutionally entitled to the unedited video, depending on the facts of the case.

2) Redaction. Similar to the blurring option above, sharing portions of the video but "cutting out" segments that tend to reveal the CI's identity could be a potential solution. Defense counsel may have concerns that key portions are being withheld, and the court may choose to exercise caution by reviewing the entire video in chambers after hearing arguments to ensure that the correct balance is struck. The court may also receive the entire video under seal to allow for appellate review of the decision to withhold discovery (note that G.S. 15A-908(b) appears to contemplate sealing and preserving the State's "supporting affidavits and statements" rather than the video footage itself, but it would seem proper to receive the video footage under seal with appropriate safeguards).

3) Muting. Muting portions of a video to avoid revealing the CI's identity could be another potential solution. Of course, as was the case in *Roviaro*, the specifics of what was said, especially in a drug transaction, could be critical in determining whether the defendant had knowledge of the substance sold, or whether some other defense, such as entrapment, exists. If so, the defendant may have a strong argument that the defense is entitled to the sound along with the visual. Related options include voice alteration or transcription of recorded statements.

4) Sharing video with defense counsel, but disallowing disclosure to the defendant. The court may issue a protective order covering the video, allowing defense counsel to view it but preventing the video from being shared with anyone not party to the case. In cases with heightened concern of danger, the protective order may go so far as to prohibit defense counsel from showing the video to the defendant. *See* G.S. 15A-908 (providing that the court may "restrict" discovery or inspection, or "make other appropriate orders"). My anecdotal sense is that this kind of protective order is used with some frequency in federal court.

On one hand, the solution is attractive in that it alleviates some of the concerns that the defense is being deprived of crucial information, while avoiding the risks that may arise when the defendant directly views the CI on the video or shares the footage with others.

On the other hand, this practice raises some thorny questions. For one, it seems likely that the defense lawyer would have to relate some of the details observed on the video to the client as a matter of providing effective assistance of counsel. Once sufficient details are shared, the defendant might discover the CI's identity. For another, North Carolina is unusual among states in the relative emphasis our courts place on the client's wishes when describing the principal-agent relationship between a client and defense attorney. *See State v. Ali*, 329 N.C. 394 (1991) (where lawyer and client come to an absolute impasse on tactical decisions, such as what jurors to strike, the client's wishes must control). It is arguably problematic for the principal in the relationship—the client—to be denied access to an important piece of evidence, especially where he or she has important knowledge pertaining to the larger context of an interaction that the lawyer lacks. Furthermore, this kind of selective sharing of the video evidence could inject tension into the lawyer-client relationship and set the stage for a future claim of ineffective assistance of counsel. Nonetheless, this fourth option may be worth considering at times.

Two common types of video: "main event" and "lead-up buy"

The four approaches discussed above could be used when dealing with videos capturing CI activity. There are commonly two types of CI video: "main event" video and "lead-up buy" video.

"Main event" video. "Main event" video, or video depicting the actual drug transaction for which the defendant is indicted, is obviously highly relevant to the issues at trial, and on first blush, it is difficult to see how it could be constitutional to withhold video from the defense where it offers a front-row seat to the crime alleged. Recall that in ***Roviaro*** *<https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-i-roviaro-v-u-s/>* , the defendant successfully argued that the CI's identity must be revealed, as the CI was directly involved in the alleged drug transaction between the CI/driver and the defendant/front seat passenger, and the officer crouching in the trunk was no substitute. If the transaction in *Roviaro* had been videotaped, and North Carolina's open-file discovery statutory framework applied, it seems likely that the *Roviaro* Court would require the State to turn the video over.

However, state law has evolved somewhat since *Roviaro*, and the State might argue that recent caselaw allows it to withhold main event video footage, or alternatively, to provide blurred or redacted video to the defense in the interest of protecting the CI's identity. Several more modern North Carolina cases seem to require more of the defendant than floating possible defenses which could potentially be impacted by CI testimony (this seemed to be enough in *Roviaro*, where the court enumerated several "possible defenses"). For example, in *State v. Dark*, 204 N.C. App. 591 (2010) (discussed by my colleague, Jeff Welty, **here** <https://nccriminallaw.sog.unc.edu/the-informers-privilege/>), the Court of Appeals seemed to demand that the defendant put forward a specific defense and articulate how the CI's testimony would have a bearing on that particular theory. In *Dark,* an undercover officer was driving the car, and the CI was also sitting in the car after arranging the drug transaction over the telephone. The drug transaction occurred between the defendant, who was standing outside the car, and the undercover officer/driver. In conducting the analysis of whether the CI's identity should have been disclosed, the court emphasized the defendant's failure to show how the CI's testimony might resolve some contradiction between the defense's theory and the State's theory. Though the CI was a direct participant in the crime alleged and was present on scene, the Court of Appeals upheld the trial court's decision allowing the State to withhold the CI's identity. Comparing *Dark* with *Roviaro*, the State may argue that the analysis has evolved.

Where the main event video captures the defendant's participation in the drug transaction, the State may argue that the case is open and shut, as common defenses such as identity, alibi, or mistake, are foreclosed. Where the defendant is unable to demonstrate how the CI's testimony would support or undercut a theory of defense, it may be a more open question as to whether the CI's identity (and the main event video) must be disclosed to the defense, even where the CI directly participated in the transaction at issue. *See Dark*; *see also*, *State v. Watson*, 303 N.C. 533 (1981) (upholding denial of disclosure of CI's identity where "defendant made no showing… as to his particular need for knowing the identity of the source").

Of course, such interpretation depends on state case law and the defense may argue that *Roviaro* and federal constitutional due process protections demand more. After all, where the CI is directly engaged in the hand-to-hand transaction on which the trial is based, characteristics such as truthfulness, motivation, and bias seem to be at least somewhat relevant in virtually every case. Often, the analysis will depend on the unique facts at play.

"Lead-up buy" video. Where the video of CI activity shows a series of controlled purchases designed to establish probable cause to search a particular location, the State has a stronger argument that the CI's identity, and the video depicting the transactions, may properly be withheld. This argument is based on the original *Roviaro* dichotomy whereby tipster activity generally does not require disclosure of the CI's identity, but direct participation generally does (despite the trend discussed above in *Dark* and *Watson*). The defense might argue that a series of purchases is more than mere "tipster" behavior, but the State can respond that it is appropriate to cabin off this activity as it only established a legal justification to search a given location and does not directly relate to the drugs at issue at trial. Thus, although G.S. 15A-908 must likely be invoked to withhold pieces of the investigative file, the State may be justified in seeking to prevent the defense from learning the CI's identity through review of the lead-up buy video.

Crucially, the analysis changes significantly if the State seeks to introduce evidence pertaining to these lead-up buys at trial. The State may want to get these lead-up buys before the jury pursuant to Rule 404(b), to show defendant's knowledge of drugs in the closet of a given house, opportunity to sell a given drug, or other possible uses under Rule 404(b). But where the State desires to include the lead-up buys in their case-in-chief, the defense argument becomes much stronger that the disclosure of the CI's identity as well as video footage of the lead-up buys is necessary to ensure a fair defense and effective representation. As we will see in a future post on how these issues are playing out in federal trial courts, judges are much more reluctant to grant the government's request to withhold video of lead-up buys if the government wishes to introduce evidence of these lead-up episodes at trial. *See United States v. Loden*, No. 1:18-cr-00016-HSM-SKL-2, 2018 WL 6308725 (E.D. Tenn. Dec. 3, 2018).

Stay tuned for a closer look at how a federal district court reckoned with the thorny issues discussed above!

Knapp-Sanders Building
Campus Box 3330, UNC Chapel Hill
Chapel Hill, NC 27599-3330
T: (919) 966-5381 | F: (919) 962-0654

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Confidential Informants, Motions to Reveal Identity, and Discovery: Part V, Asserting a Defense Theory

October 28, 2024 **Daniel Spiegel**

<https://nccriminallaw.sog.unc.edu/author/spiegel/>

This is Part V of a multi-part series on confidential informants ("CI's"), motions to reveal the identity of CI's, and discovery.

As discussed in earlier posts in this series (**here** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-iii-how-to-handle-the-video/> and **here** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-iv-how-federal-and-state-courts-are-handling-ci-video-and-audio-recordings/>), the defense is more likely to win a motion to reveal the identity of CI when the defendant is able to tie the potential CI testimony to a particular theory of defense and explain how it furthers that defense. In the landmark case of *Roviaro v. U.S.*, the U.S. Supreme Court listed a variety of ways in which the CI's testimony might be helpful for the defense and ruled that the CI's identity must be turned over. However, North Carolina appellate courts have repeatedly stated that the defense cannot merely speculate about how the CI's testimony might be relevant; the defense must clear an initial hurdle of showing how the testimony might resolve a material conflict at trial in order to prevail on a motion to reveal the identity of the CI. *See State v. Dark*, 204 N.C. App. 591, 593 (2010); *State v. Watson*, 303 N.C. 533 (1981). While defenders may invoke their federal due process rights in challenging whether this should be a requirement, they should be aware of what North Carolina appellate courts are demanding.

An interesting strategic implication of *Dark* and *Watson* is that in CI cases, the defense may benefit from committing to a particular theory of defense and "showing its cards" to the state in a pretrial hearing. Defenders are often reluctant to call their client to the stand, even in a pretrial hearing, unless the defendant's testimony appears to be necessary or exceptionally persuasive. Defenders may be concerned about the risk of damaging cross-examination and the possibility that the testimony of an unsavvy client might hurt the case, even where the client is telling the truth (discussions of this dilemma in the media can be found **here** <https://www.npr.org/2012/06/20/155440684/deciding-whether-defendants-should-take-the-stand> and **here** <https://www.nytimes.com/2015/11/03/business/dealbook/when-to-put-the-defendant-on-the-witness-stand.html#:~:text=There%20simply%20is%20no%20checklist,if%20the%20person%20remains%20silent>). In cases where there is a viable motion to reveal the identity of the CI, though, the risk will sometimes be worth the possible reward. The prospect of winning a dismissal, a concession in plea negotiations, or suppression of key evidence may counterbalance a tendency by the defense to avoid putting the client on the stand in a pretrial hearing.

Case in point: *McEachern*. *State v. McEachern*, 114 N.C. App. 218 (1994), is illustrative. In *McEachern*, police officers worked with a confidential informant to build a drug case on the defendant, Toney McEachern. The CI stated that he had seen a large amount of cocaine in McEachern's trailer home and knew McEachern was selling it. The officers set up a controlled purchase. They provided the CI with money and drove him to McEachern's trailer. The CI went into the home and returned to the officer's car, showing the officer cocaine that he stated he had purchased from "Toney." The same day, the officers obtained a search warrant for the trailer and searched it. They found evidence of drug dealing and charged McEachern with various drug offenses.

Why McEachern won. The key factor in *McEachern* was that the defendant took the stand during the pretrial hearing on the motion to reveal the CI. He gave a detailed account of what occurred on the day in question (and the day before). According to McEachern, the day before the controlled purchase and the search of McEachern's trailer home, McEachern allowed his nephew, Charles Jackson, to use his home for a party. McEachern said he left the trailer to stay with his uncle in the nearby town of Lumber Bridge. He stayed in Lumber Bridge until the evening of the incident when his next-door neighbor, Charles McLaughton, called and asked for a ride to Red Springs. When McEachern drove back to his neighborhood to pick up McLaughton, he encountered the police, who had already performed the controlled purchase out of McEachern's trailer that day and were about to execute the search warrant. McEachern maintained that there were no drugs in his house when he offered his home for his nephew's party and that he had no idea who might have come and gone while he was staying in Lumber Bridge. He also added that he hadn't seen his nephew since the incident and his attempts to locate his nephew were to no avail.

The defendant's account, the "I-was-at-my-uncle's-house-while-my-nephew-threw-a-party"-defense, may not have been the most plausible. However, in taking the stand and sharing his defense theory and alibi, the defendant succeeded in rendering the CI's testimony material to a determination of guilt and potentially helpful. It was the trial judge's task to assess the credibility of the witnesses at the pretrial hearing on the motion to reveal the identity of the CI, and the judge found McEachern credible enough to rule that the defendant had "established the informant as a material and necessary witness to… corroborate the defendant's alibi, point toward third party guilt, and show nonexclusivity of the defendant's premises." *See McEachern*, 114 N.C. App. at 220. The judge thus sided with the defendant in ordering the State to disclose the CI's identity. When the State refused to do so, the court dismissed all charges with prejudice based on a violation of the defendant's constitutional due process rights. *Id.* at 220-21.

On appeal, the appellate court stressed that the only evidence connecting Mr. McEachern to the drug crimes was what the CI told the officer about what the CI observed inside the home. The court agreed with the trial judge that the CI could provide critical testimony as to the identity of the individual who sold the drugs and the CI's testimony could corroborate or controvert Mr. McEachern's alibi. Interestingly, the Court of Appeals cited to *Brady v. Maryland*, 373 U.S. 83 (1963), for the proposition that suppression of evidence "favorable to an accused" violates due process where material to guilt. *Id.* at 222. It doesn't seem clear that the CI's testimony would have been favorable to the defense, although it clearly would have been material to guilt or innocence. Ultimately, the Court of Appeals upheld the trial court's decision.

The State's strategic considerations. In reflecting on *McEachern,* one might ask whether the State intended to present evidence regarding the controlled purchase and the CI's involvement in the case at trial. As we've seen in a previous **post** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-iv-how-federal-and-state-courts-are-handling-ci-video-and-audio-recordings/> in this series, the court's decision on a motion to reveal the identity of a CI may be influenced by the State's choices as to what evidence they attempt to present at trial. If the State planned to introduce evidence pertaining to the controlled purchase, it seems unlikely that the State would be able to introduce the CI's account of what occurred without calling the CI to the stand (and thus revealing the CI's identity) given hearsay and confrontation concerns. But could the State introduce the officer's observations of the controlled purchase without divulging the CI's identity? Perhaps, although this might render the controlled purchase more of a "main event," tending toward disclosure of the CI's identity, rather than a "lead-up buy," tending toward non-disclosure (see **this prior post** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-iii-how-to-handle-the-video/> for a discussion of main events and lead-up buys, and **this post** <https://nccriminallaw.sog.unc.edu/confidential-informants-motions-to-reveal-identity-and-discovery-part-i-roviaro-v-u-s/> for a discussion of the foundational principles established in *Roviaro*). Perhaps the State had no intention of introducing testimony pertaining to the CI's involvement, and instead planned to rely on the drugs found during the ultimate search of the trailer, the defendant's proximity to the home, and the defendant's dominion over the premises to prove its case. It's not clear from the opinion what course the State intended to take, and the appellate court's analysis does not appear to depend on the State's decisions in this regard.

Lessons from *McEachern* and Concluding Thoughts

Practitioners today can draw valuable lessons from *McEachern*. In cases where the defense is considering a motion to reveal the identity of the CI, defenders should carefully consider the potential advantage and risk of asserting a defense theory by calling their client to the stand in a pretrial hearing.

There are risks associated with this strategy. On the one hand, the State is likely prohibited from introducing the defendant's pretrial testimony on the issue of guilt at trial. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (a defendant should not have to jeopardize one constitutional right, the privilege against self-incrimination, to protect another; although note that the Fourth Amendment was implicated in *Simmons*, rather than the Fifth and Sixth Amendments rights implicated in pretrial litigation involving a CI). However, the State can still use the pretrial testimony as impeachment material should the defendant take the stand at trial. *See State v. Bracey*, 303 N.C. 112 (1981). Pretrial testimony offered by a defendant "must often be highly prejudicial," as it may well "link" the defendant to a key piece of evidence for the prosecution. *See Simmons*, 390 U.S. at 391. This rings especially true for CI cases, where the defendant may acknowledge proximity to contraband or involvement in an incident, while maintaining some other defense, such as lack of knowledge or entrapment. Consider *McEachern*, where the defendant conceded ownership of the premises where drug activity occurred, while asserting an alibi.

Note that the defendant is not bound by any pretrial defense asserted and may rely on a different defense at trial as long the defense complies with the statutory deadlines set forth in G.S. 15A-905(c).

Defenders should weigh the risks above, listen carefully to their client, and consider whether it is advantageous to call their client to the stand during the pretrial hearing, as the defense did successfully in *McEachern*.

Knapp-Sanders Building
Campus Box 3330, UNC Chapel Hill
Chapel Hill, NC 27599-3330
T: (919) 966-5381 | F: (919) 962-0654

Suppression of Evidence 101

Phil Dixon
UNC School of Government
*Based on work by Susan Seahorn

1

Reasons to file a suppression motion

1- You have great facts, and the law is good for you. You should win

2- You need to know what a witness for the State will say, and have a record of their sworn testimony for use at trial

3- The DA needs to hear how weak the evidence is, or the client needs to hear how bad it is

4- It is a serious case, and you need to preserve every issue

2

Reasons to file suppression motions

5- Earn your client's trust by demonstrating zealous advocacy

6- There is no defense other than suppression and if you win, the case is over

7- Some DA's don't want to do the work and will make a better offer

3

TYPES OF EVIDENCE YOU CAN SUPPRESS

1- IDENTIFICATION of your client

2- STATEMENTS of your client

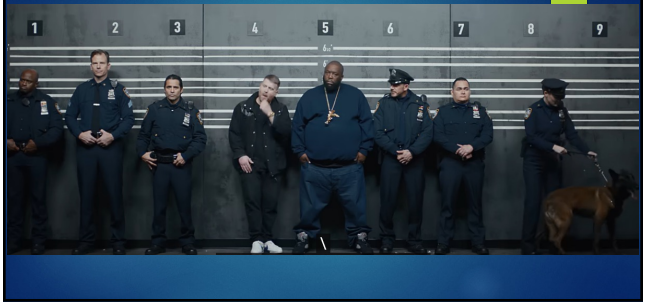
3- PHYSICAL EVIDENCE that hurts your client's case

4

SUPPRESSING IDENTIFICATIONS

- When a tainted IDENTIFICATION is involved, you should move to suppress
- The issue is the reliability of the identification
- It is an issue of fundamental fairness or due process whenever the facts shows tainted reliability

5



6

SUPPRESSING IDENTIFICATIONS

Fifth Amendment Due Process Clause of the U.S. Const.

Article I, §19 of the N.C. Const.

Statutory Grounds : EIRA (G.S. 15A-284.50-53); jailhouse informant law (G.S. 15A-981); substantial statutory violations (G.S. 15A-974)

RAISE AND PRESERVE ARGUMENT UNDER ALL THREE!

7

Suppressing Statements Made Before a Formal Arrest

1- Your client must have been in CUSTODY when the statement was made

2- Your client was questioned by police OR the police said something to goad your client to respond

3- Your client did not voluntarily waive his *Miranda* rights

*** There can also be a violation when client has said doesn't want to talk and police continue to question ***

8

Suppressing Statements for Right to Counsel Violations

1- Your client was charged AND has asked for a lawyer (or has a lawyer), AND someone working for the police elicited a statement from your client

Does not matter whether the client is in custody

2- Client is in jail AND Client has asked for an attorney AND Police go to see your client UNSOLICITED by the client to question about the case for which is in jail

9

Authority to Suppress for Right to Counsel Violations

- Sixth Amendment to the U.S. Const.
- Article 1, §23, N.C. Const.
- G.S. 15A-980* (for uncounseled prior convictions)

10

Suppressing Physical Evidence

- Usually, Fourth Amendment and Article 1, Sec. 20 of the N.C. Constitution (but can be any constitutional violation)
- Substantial violations of Chapter 15A (G.S. 15A-974)
- Equal Protection for selective enforcement or pretextual stops

11

RULES YOU MUST OBEY

1- Must file motion **no later than 10 working days** after receiving notice of intent to use evidence by the state. G.S. §15A-976

2- Motion **must be accompanied by an affidavit that alleges facts** to support the violations you allege. If your motion doesn't state sufficient facts on its face to support the violations you are alleging, the motion may be dismissed without a hearing

3- Unless your client's **standing** to raise the claim is obvious, the motion or affidavit must state why he/she has standing

12

PRACTICAL CONSIDERATIONS

1- Always cite the **State Constitution** in addition to the Federal Const. and any statutory grounds

2- Consider preparing **a memorandum of law** to support your argument. Unless judge will have a problem with it, do not file it prior to the hearing

3- The judge MUST rule on the motion in the session it is heard UNLESS you agree on the record to the ruling being out of session, or out of term, or out of county

13

SELF TEST ON SUPPRESSION

1) Name 3 types of evidence that may be suppressed through a suppression motion?

2) List 5 tactical reasons to file a suppression motion other than that you have great facts and should win?

3) List 3 technical requirements that may cause a suppression motion to be denied without a hearing if you fail to meet these requirements?

14

ANSWERS TO QUESTION 1

1) Name 3 types of evidence that may be suppressed through a suppression motion?

a. Identifications

b. Statements

c. Physical evidence

15

ANSWERS TO QUESTION 2

2) List 5 tactical reasons to file a suppression motion other than that you have great facts and should win?

a. The DA may make a **better plea offer** rather than having to do the work to do the motion or may fear losing and make a better offer

b. You get to **question witnesses** who may not consent to be interviewed, and you get their answers under oath and on the record for later use

c. Your **client will see the evidence** and hear testimony against him so that he will have a better idea of the case against him and may become more realistic about the case

d. It is a **serious case,** and you need to **preserve** all the **issues**

e. Your **only defense** is to get the evidence suppressed

16

ANSWERS TO QUESTION 3

3) List 3 technical requirements that may cause a suppression motion to be denied without a hearing if you fail to meet these requirements?

a. If it is not **filed in a timely manner –** within 10 days after they State gives you notice of intent to use the evidence if that notice was received at least 20 days before trial (unless the deadline is extended)

b. If it is not accompanied by an **affidavit**

c. If it **does not raise a legal issue on its face** that would justify suppression and that is **supported by facts** set forth in the motion that show the issue exists

17

Problem 1

About 10:30 pm two officers on bike patrol saw two black males standing in the roadway in a part of the town that is known to have a high drug trade and usage. One of the men, A, was known to the officers as a drug user and alcoholic. The second man, B, who later becomes the defendant, is not known to the police. According to the police reports generated, the man B handed something to the man known to the police, A. The officer suspected a drug transaction and moved towards the men to investigate. The two officers approached the two men. One of the officers saw that man B appeared to have something clutched in his fist which was not visible. The officer upon approaching the man, immediately, ordered man B to put his hands on his head with his fingers interlaced on his head. Man B put his hands on his head, but did not interlace his fingers. The officer then grabbed Man B's arm and pulled it in front of Man B. The officer continued to order Man to place his hands with interlocked fingers on his head. Man B refused to comply. The officer then began to tell Man B that he would taze Man B if he did not get on his knees. Man B got on his knees. The officer tried to force Man B to put his hands behind his back and continued to order him to open his hands. Man B failed to comply. The Officer pushed Man B onto his chest, and the other officer tazed Man B. Man B was handcuffed. Man B was found to have a crack rock inside a Newport cigarette box that was crushed in his hand.

18

Issues in Problem_1

1. Information known to the police was not sufficient to make the encounter more than a consensual encounter from the outset because it was based wholly on a hunch

2. No reasonable suspicion existed because Officer didn't know anything specific when he approached Man B. Suspected he knew that something was in D.'s hand, but didn't know what. Didn't ask any investigatory questions. Immediately exerted authority over D. before establishing any more information by questioning. No particularized suspicion as to D. or what crime if any was committed

19

More Issues in Problem 1

3. D. was not free to leave as soon as the officer began to order him around. No basis for the seizure of D.'s person

4. The most that the officer was entitled to do was to conduct a consensual encounter, during which the D. had the right to refuse to comply

5. The officer exceeded the bounds of his authority based on his current knowledge

20

Problem 2

An early morning cleaning crew in a church hears a noise and believes there has been a break-in and that the person is still in the building. Police are called. Police respond and reportedly see a man in the parking lot carrying wine. When the officer yells at the man to stop, he runs into the woods. Client is apprehended in the woods and is handcuffed. Police are escorting client to the police car, and he has not been Mirandized or waived his rights. Client says, "this is a motherfucker." The policeman says back to client, "Breaking into a church is a motherfucker." Client responds, "the door was open."

21

Issue in Problem 2

1. Client is in custody at the time the exchange occurred. No Miranda warning had been given or rights waiver made. Was the officer's remark intended to get a response?

If so, does that count as questioning by the police?

22

Problem 3

A home invasion robbery occurs. One of the perpetrators was wearing a mask and was described as being 6' 2", 200lbs., black male with medium length hair. A few days later, client is stopped. Client is 5'11", 175lbs. black male with short braids that stick out from his head. Client is shown to the witness. At the time the witness views the client, he is sitting alone in the rear of a marked patrol car. The officer told the witness at the time that they contacted the witness to view client because, "they thought they had the guy".

23

Issues in Problem 3

1. It is a single person show up. It is per se suggestive
2. It is not shortly after the crime, so there is less justification for a show up. No need to keep looking or to know if should let person go immediately
3. Remarks of the officer are inappropriate and suggestive. In addition, the fact the person is inside a police car is suggestive
4. Person doesn't really fit the description

24

Problem 4

- 1) Read the Search Warrant in your folder and brainstorm the issues
- 2) What FACTS or OMISSIONS support your legal theories of suppression?

25

Issues in Problem 4

1. The application fails to implicate the premises to be searched. No connection between client living in Durham 4 months before and having stolen property confiscated from him in Durham, and new apartment in Carrboro.

2. The affiant makes a personal conclusion that probable cause exists without supplying any factual information to establish that probable cause exists to search for the property at the place to be searched. Does not set out facts that support his conclusion.

3. The information concerning break-ins and burglaries was stale as to a search for the current residence of the accused because it was between 4 to 7 months old on the date of the application for the warrant.

26

More Issues in Problem 4

4. Property that was allegedly stolen in the break-ins and burglaries being investigated that previously was found to be in the possession of the accused at his previous residence had already been confiscated by the Durham Police Department on May 3, 2004. There was no reason stated in the application to believe that the accused was still in possession of additional stolen property and no facts stated to establish that if such property was in the accused's possession that it was probably located at his new residence.

5. Investigator Vaughn executed a warrant outside his territorial jurisdiction which is a violation of G.S. 15A-247. Observations are fruit of the poisonous tree.

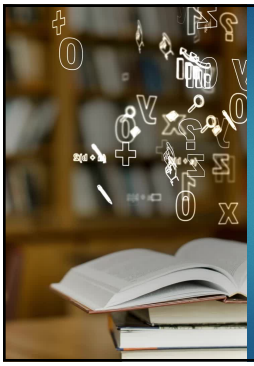
27

More Issues in Problem 4

6. Because the warrant was facially invalid, the investigators were not legally in the place searched and any observations made by them during the search must also be suppressed. Observations are fruit of the poisonous tree.

7. The warrant application is for a general warrant, to look for things that they cannot name that they hope might be there, and that is prohibited by North Carolina Statutes, the Constitution of North Carolina and the Constitution of the United States.

28



Suppression Resources

- Defender Trial Manual, vol. 1, chapter 14 & 15
- NCIDS Motions Bank and listservs
- Arrest, Search, & Investigation in NC book
- Pulled Over: The Law of Traffic Stops in NC

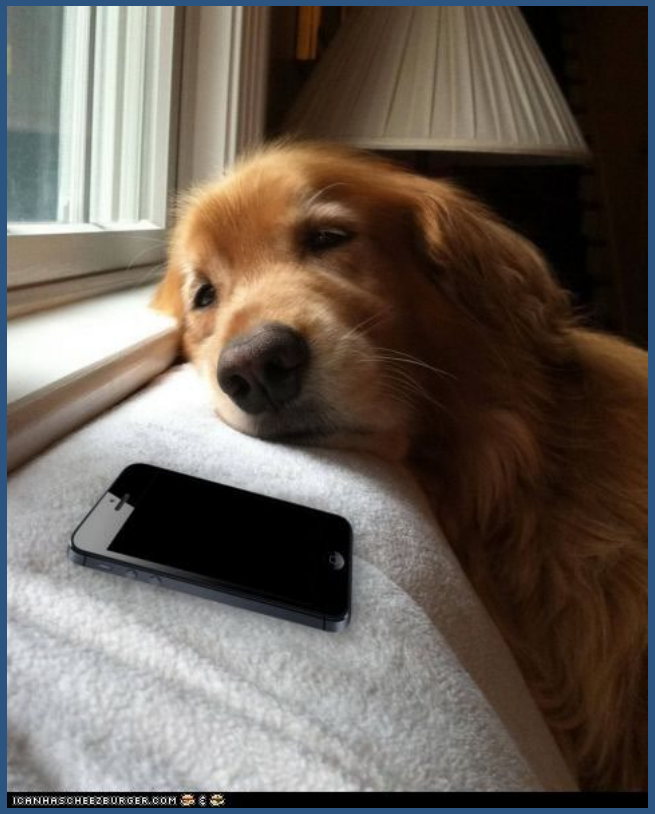
29

Forensic Resources
North Carolina Office of Indigent Defense Services

Understanding Lab Reports and Challenging Scientific Evidence

Sarah Rackley Olson,
IDS Forensic Resource Counsel
www.forensicresources.org

Case Consultations



Sarah Olson

Sarah.R.Olson@nccourts.org

919-354-7217

#34 State's exhibit

North Carolina
STATE BUREAU OF INV
Department of Jus
RALEIGH
LABORATORY RE

TO: Agent Don Pagani
City-County Bureau of Identification
316 Fayetteville Street Mall
Raleigh, N.C. 27602

DAT
SBI
SBI

TYPE OF CASE: Homicide

AGE

LOCATION: Wake County

EXA

SUBJECT: JACQUETTE LASHAWN THOMAS (VICTIM)
GREGORY F. TAYLOR (SUSPECT)
JOHNNY BECK (SUSPECT)

MAT
DAT
DAT

ITEMS SUBMITTED:

Item #16: One automobile fender liner. - # Front
Item #17: Stained thread sample. - Victim
Item #18: Stained thread sample. - Back
Item #21: One "Merit" cigarette butt. - right Front
Item #37: An SBI Sexual Assault Evidence Collec
articles of evidence identified as co
victim, Jacquetta Thomas:
a. Two liquid blood samples.
b. Two vaginal smears.
c. Four vaginal swabs.
d. Panties.
e. Two rectal smears.
f. Four rectal swabs.
g. Two oral smears.
h. Four oral swabs.
i. Pubic hair combings.
j. Known head hair sample.
k. Known head hair sample.
Item #40: One dried blood sample identified as
Item #45: One piece of tissue paper. - inside -

I, Lacy H. Thornburg, Attorney General of the State of North Carol
North Carolina State Bureau of Investigation, Department of Justic
the purpose stated in G.S. 90-95(g) and approved by me in complian

COPIES TO:

Mr. Colon Willoughby, D.A.

THIS REPORT IS
CRIMINAL INVEST

This report rep
on the item(s)

CONFIDENTIAL. This is an official file of the North Carolina State
the contents thereof to any unauthorized person is a violation of

ITEMS SUBMITTED (CONTINUED):

Item #46: One pair of pants with belt. - victim
Item #51: An SBI Suspect Evidence Collection Kit composed of the following articles of evidence collected and/or prepared from the suspect, Gregory Taylor:
a. Two liquid blood samples.
b. Two saliva swabs.
c. Known pubic hair sample.
d. Known head hair sample.
e. Pubic hair combing.
Item #52: An SBI Suspect Evidence Collection Kit composed of the following articles of evidence collected and/or prepared from the suspect, Johnny Beck:
a. Two liquid blood samples.
b. Two saliva swabs.
c. Known pubic hair sample.
d. Known head hair sample.
e. Pubic hair combing.

TYPE ANALYSIS REQUESTED:

Blood analysis, semen analysis, and bloodspatter pattern interpretation.

RESULTS OF ANALYSIS:

Examination of Item #45 revealed the presence of human blood. Analysis of a cutting from the panties (Item #37d) revealed the presence of semen. Items #37d and #45 and the liquid blood samples gave the following blood group reactions:

Items	ABO	Secretor	PGM	PGMsub	EsD	Hp	Gc	PepA	Hb
#37a (victim's blood)	O	Nonsecretor	1	1+	1	2	1F1S	1	A
#51a (Taylor's blood)	AB	Secretor	1	1+	5-1	INC	2IS	1	A
#52a (Beck's blood)	B	Secretor	1	1+	1	1	1F1S	1	A
#37d (panties)	INC		NR	NT	NT	NT	NT	NR	NT
#45 (tissue paper)	O	?	1	1+	1	2	1F1S	INC	A

INC = inconclusive NR = no reaction NT = not tested

Examination of the cigarette butt (Item #21) gave chemical indications for the presence of saliva and gave reactions for ABO group AB.

Examination of Items #16, #18, and #46 gave chemical indications for the presence of blood. Examination of Item #17 failed to reveal the presence of blood.

A bloodstain examination of the pants (Item #46) failed to reveal any stains on the outside of the pants and several small stains on the inside of the left leg.

Innocence panel sets Greg Taylor free

ARTICLE | GALLERY | 0 COMMENTS

BUY PHOTO

SHAWN ROCCO - SROCCO@NEWSOBSERVER.COM

Greg Taylor reacts as he hears the decision of the N.C. Innocence Commission exonerating him of murder charges Wednesday. One of Taylor's attorneys, Christine Mumma, is at right.

POV

R91185Z

Notes

Item # 16: Several 5bpbs taped together

1 piece of molded plastic

from an automobile

Several stains on the back I circled the stains

phenol + ouchterlony x4 NT HC NT GCNT

takayama -

NEA

1991

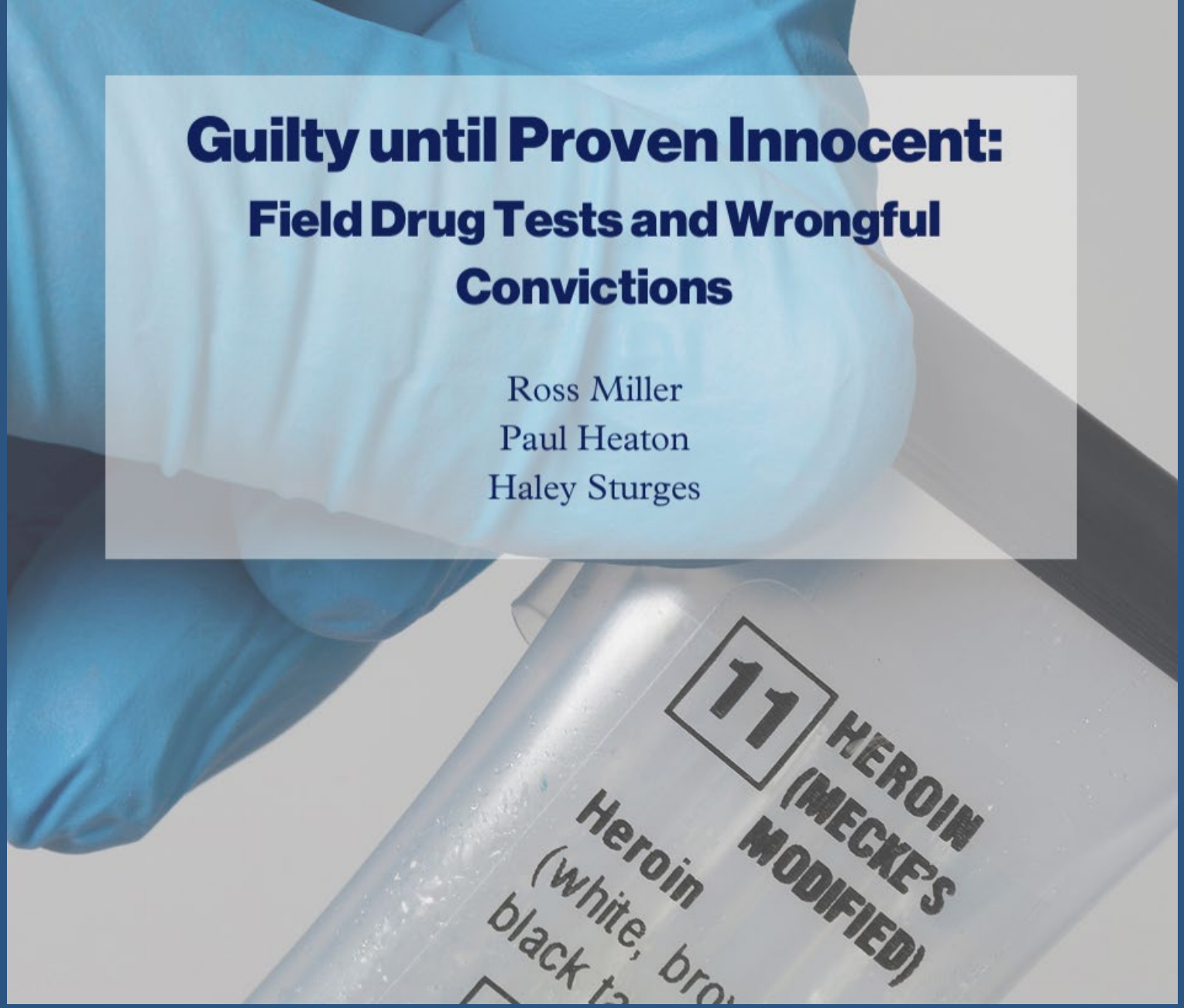
Examination of Items #16, #18, and #46 gave chemical indications for the presence of blood. Examination of Item #17 failed to reveal the presence of blood.

2020

Examination of a sample taken from the DNA swab from point of entry to business (Item 1), using the Kastle-Meyer Test, gave chemical indications for the presence of blood. No confirmatory blood testing was performed.

Admissibility of presumptive drug tests

- Object to identification based on field drug tests!
- *State v. Ward,* 364 N.C. 133 (2010) – visual inspection not enough, chemical test needed for an expert to testify to the identify of a substance
- *State v. Carter*, 237 N.C. App. 274 (2014) - state did not show that a field test was reliable and testimony about results of a field test should not have been admitted
- *State v. Pinnix*, 246 N.C. App. 190 (2016) - testimony about results of field test for cocaine are inadmissible absent requisite expert testimony regarding a field test's reliability
- *State v. Cobb*, 845 S.E.2d 870 (2020) - the testimony regarding the field test should have been excluded, not limited via judicial instruction
- *State v. Osborne*, 2020 N.C. App. LEXIS 908 – testimony about field drug test kits "might have been excluded had Osborne objected"



https://www.law.upenn.edu/live/files/12890-fdt-guilty-until-proven-innocent

Lab Reports

Getting Lab Reports

- Sample discovery motions - forensicresources.org
- Make sure you have underlying data, not just the final report
- DO NOT ACCEPT A 1-2 PAGE LAB REPORT IN SUPERIOR COURT!!!!

Forensic Advantage Web

Every lab report from the NCSCL has these parts, even if the DA doesn't give them to you!

Case Record

1. "Lab Report" = a summary of the results
2. Chain of Custody
3. Request for Laboratory Examination/Submission paperwork
4. Worksheets – where analysts record notes
5. Quality Assurance (blanks, standards, equipment maintenance)
6. Communication log (between analysts and between law enforcement and the lab)
7. Analyst's CV
8. Test data

PriorVerions.pdf = all draft worksheets and prior reports

Resources.pdf = lists instruments used and maintenance info

Raw Data files

Not getting full discovery?

- Is it a lab problem or a DA problem?
- Usually the DA's office has not downloaded the full report
- If it is a lab problem -
  - NC State Crime Lab Legal Counsel: Jason Caccamo jcaccamo@ncdoj.gov

FA Web Issues

- DAs can download sections of the packet separately – they can customize what they view and download only a portion of the report.
- Only what is downloaded will be paginated

Forensic Advantage Discovery Packet

Released Information

Regarding: R2020[redacted]

Requested: 12/14/2020 9:00:02 AM FA

Packet: Case Record (Full)

All information and files related to the published case record.

Table of Contents:

Lab Report Issue Spotting

1. Read Communication Logs and "Review History"
2. Are there rescinded reports? Why?
3. Read the top and bottom of the page to understand what graphs are showing
4. Was a blank or negative control run immediately before the evidence sample?
5. Look for notations like "out of range," "manual integration," "outlier," "re-run" or any handwritten notes.
6. Check the dates/times of testing, quality control, and report writing – does it make sense?

“Review History”

Review History

Date	By	Action – Comment
09/01/2016 20:30	Smith, James	Requested:
09/02/2016 10:43	Martinez, Carla	Accepted: I acccept the review.
09/02/2016 10:44	Martinez, Carla	Returned: - extraction page; add reagents- allele call table: remove RMP statement, stats not calculated on known- main page: correct agency item numbers for item 11 and 12 (11 is Item 9 and 12 is Item 10)

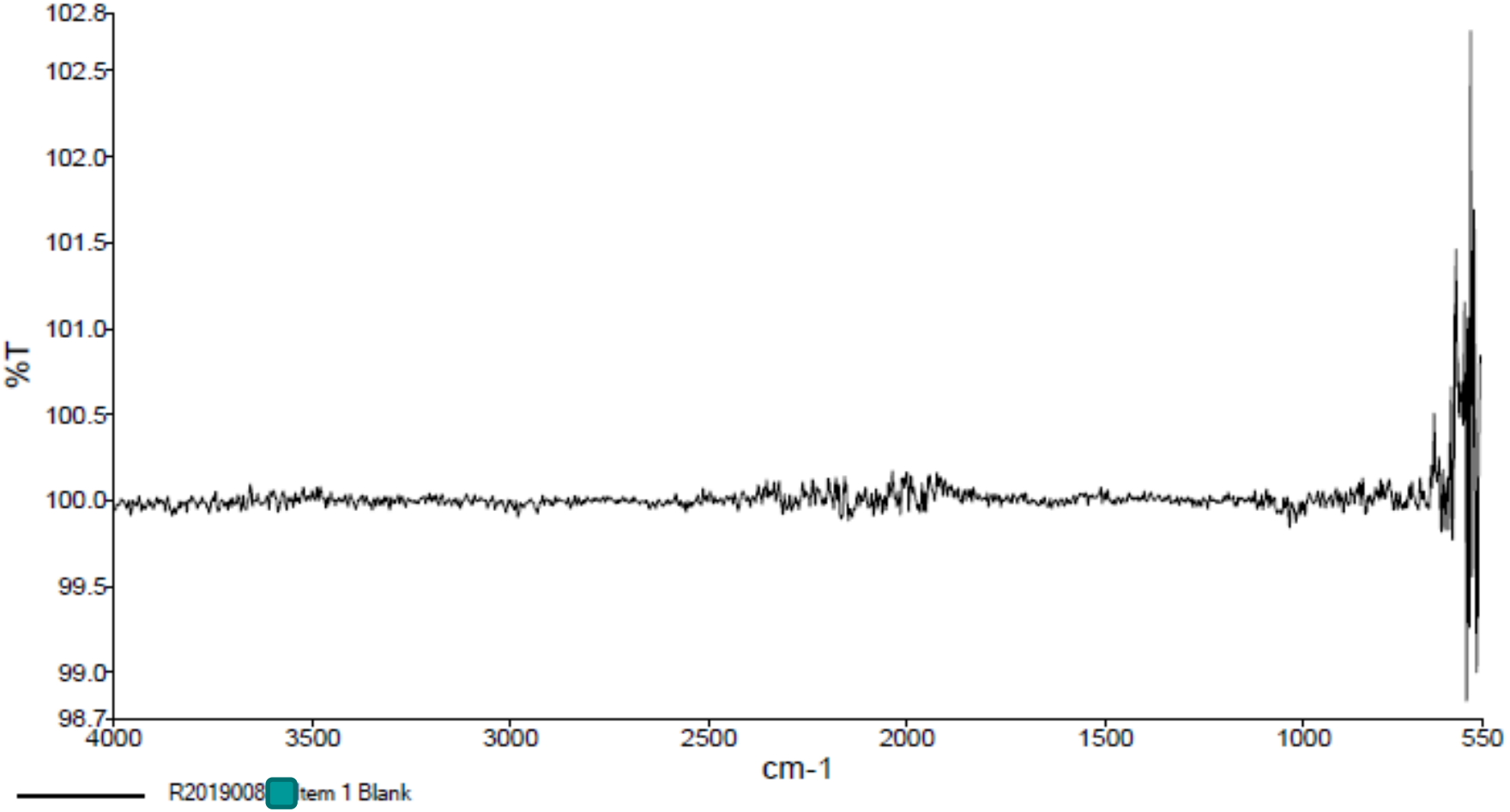
Read the top and bottom of the page

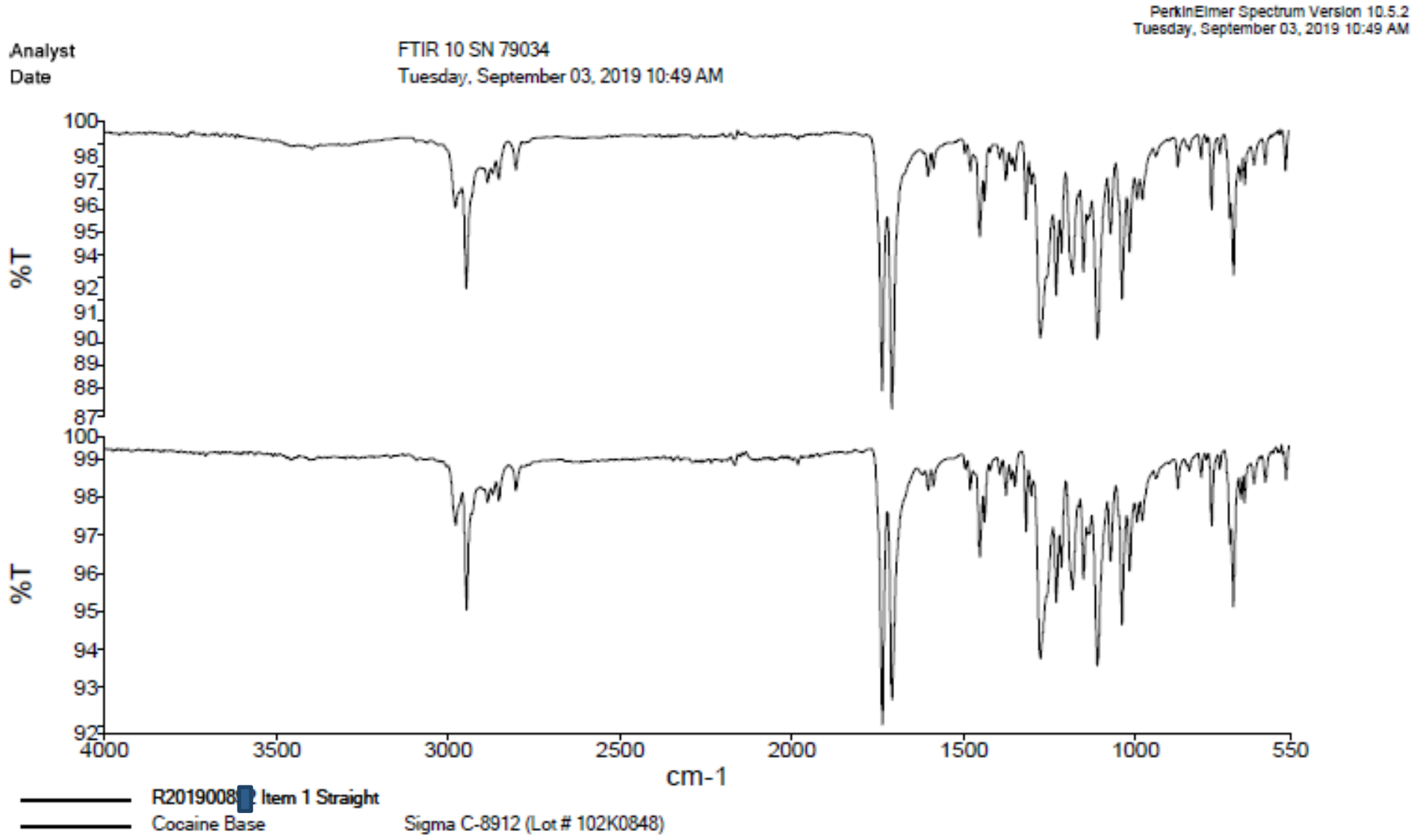
- Look for terms like calibration, blank, evidence numbers, dates/times, method name
- What will this tell you?
  - Which items were tested (or not)
  - What tests were performed
  - Who performed them
  - Where there any unexpected results
  - What you have received in discovery (or not)
  - What quality assurance measures are in place

PerkinElmer Spectrum Version 10.5.2
Tuesday, September 03, 2019 10:49 AM

Analyst
Date

FTIR 10 SN 79034
Tuesday, September 03, 2019 10:49 AM

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cm-1
R2019008 Item 1 Straight
Cocaine Base
Sigma C-8912 (Lot # 102K0848)

Look for notations

Attention! One or more validation criteria failed!

Plate
Date
Time

Attention! One or more validation criteria failed!

Validation criteria

Exp. Group Num 1
Validation criteria : Raw data
SM1_1>SM1_2 --> TRUE
SM1_2>SM1_4 --> TRUE
SM1_3>SM1_2 --> FALSE
SM1_3>SM1_4 --> TRUE

QCNEG failed positive, all positive samples were repeated.-Zuchero, Matthew - 07/01/2016

QCNEG failed positive, all positive samples were repeated.-Zuchero, Matthew - 07/01/2016

1 Plate T
2 Sample
3 Raw da
4 B/B0
5 Cutoff

	1				
A1	6				
B1	6				
C1	6				
D1	6				
E1	6	16201215-001-1A	2.895	88.722	ND
F1	6	16201002-001-1A	2.858	87.588	ND

Case #:	R20181112
Status:	Complete
Type:	Forensics Exam
Examiner:	Miller, J.
Case Note:	
Sequence:	5
Working Days:	0
Discipline #:	
Priority:	1
Backlog Priority:	

Case Record #:	1
Lab:	Raleigh
Section:	Drug Chemistry
Submitted Date:	10/30/2018 10:24:08 AM
In Section Date:	7/9/2019 7:08:30 AM
Assignment Date:	8/19/2019 7:10:10 AM
Exam Start Date:	9/03/2019 10:48:47 AM
Exams Completed:	9/03/2019 10:49:04 AM
Due Date:	
Worksheet Date:	
Completion Date:	9/03/2019 10:49:04 AM

☐ **Confidential Case**


Certification Exams

Certification Exams

- Forensic Sciences Act of 2011 requires State Crime Lab analysts become certified in their field
  - https://forensicresources.org/2019/analyst-certification-information/
- Several analysts failed their certification exams one or more times
- After the third round of ABC certification exams given, 98.7% of "eligible" analysts were certified
- *Look on analyst's CV to see if they are certified or not – if newer analyst, consider whether they have sufficient experience/are eligible to take the exam*

PROFESSIONAL AFFILIATIONS AND CERTIFICATIONS

- American Board of Criminalistics-Diplomate- 2013 (Hair and Fiber)
- American Board of Criminalistics- Diplomate 2021 (Drug Analysis)
- American Society of Trace Evidence Examiners- 2011
- American Chemical Society- 2008
- Southern Association of Forensic Scientists
- OSAC- Organization of Scientific Area Committee- Seized Drug Subcommittee Member 2020-present

COURTROOM TESTIMONY

Discipline	Date Authorized	Approximate Testimony Appearances
Hair	October 2012	2
Drugs	February 2018	10

Read lab procedures

- Locate the written procedures
  https://ncdoj.gov/crime-lab/iso-procedures/
  -or-
  https://forensicresources.org/crime-labs/

- As of July 1, 2016, local labs must also be accredited if the state intends to introduce a forensic report using notice and demand statute (NC Gen Stat 8-58.20)

https://forensicresources.org/2023/how-to-access-nc-state-crime-lab-procedures-and-quality-records/

Attorney General
Jeff Jackson

ABOUT DOJ | I WANT TO... | HOW WE HELP | LAW ENFORCEMENT TRAINING + CERTIFICATION | NEWSROOM | SEXUAL ASSAULT

NCDOJ > State Crime Lab > Procedures and Records

Procedures and Records

The North Carolina State Crime Laboratory and forensic laboratories across the nation are now subject to the ISO/IEC 17025 accreditation standards. These international standards provide a global basis for laboratory accreditation in management and technical requirements. We welcome public comment on laboratory protocols. To share your comments, please **Contact the Crime Laboratory**.

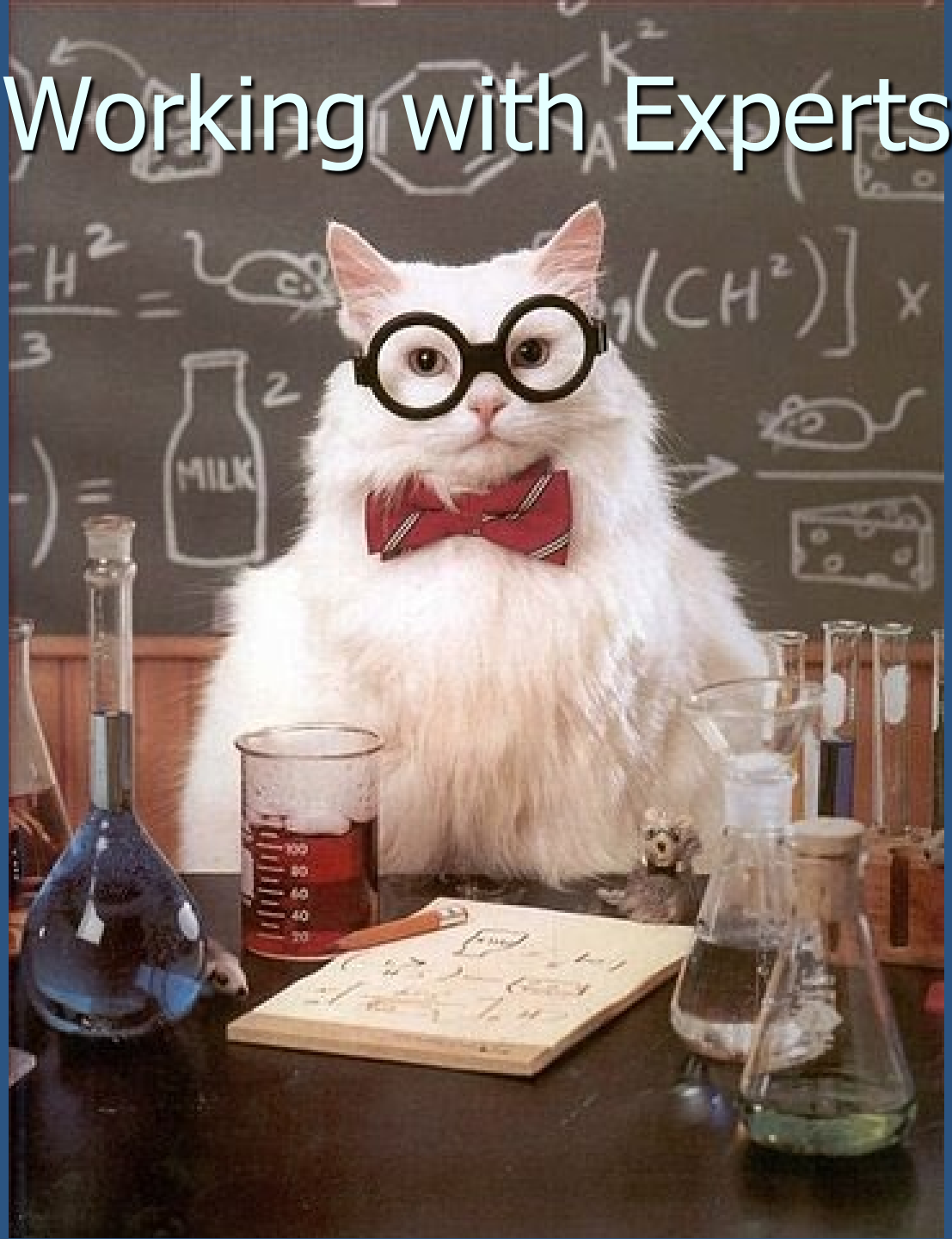
The official version of all documents are on the Crime Laboratory's internal server. Any documents that are printed are considered uncontrolled.

If you would like to view current or archived versions of Laboratory procedures as well as accreditation reports, please **Contact the Crime Laboratory**.

Access to the Laboratory's procedures and accreditation reports requires an active Microsoft account. If you do not have an account, you can create one for free during the login process.

If you have previously been granted access, please use this link to access the site: **Crime Laboratory Policies and Procedures**.

Working with Experts



Working with Experts

- Database of experts:
  - https://forensicresources.org/browse-all-experts/
  - Please provide feedback on experts!
- "Guide to Working with Experts"

  (in materials)
  - Vetting an expert
  - Referral questions
  - Questions to ask during your first conversation with the expert

https://www.ncids.org/expert-services-project/

IDS OFFICE OF INDIGENT DEFENSE SERVICES
SAFEGUARDING JUSTICE

About Defense Team Clients Public Info

Expert Services Project

IDS launched a pilot project on Apr. 1, 2022, to improve attorney access to expert consultation. Experts in a limited number of fields will be available to consult *only with public defender and IDS contract attorneys* through a contract with IDS. Please complete the form below to request expert assistance with Digital Forensic or Drug Chemistry evidence. If your request is approved, you can begin working with an expert without seeking funding through the court. More information about the program is available here. Contact Sarah Olson (Sarah.R.Olson@nccourts.org) if you have questions.

Request for Expert Consultation

Please submit the following information. Expert assistance through IDS is currently available only in public defender and IDS Contractor cases.

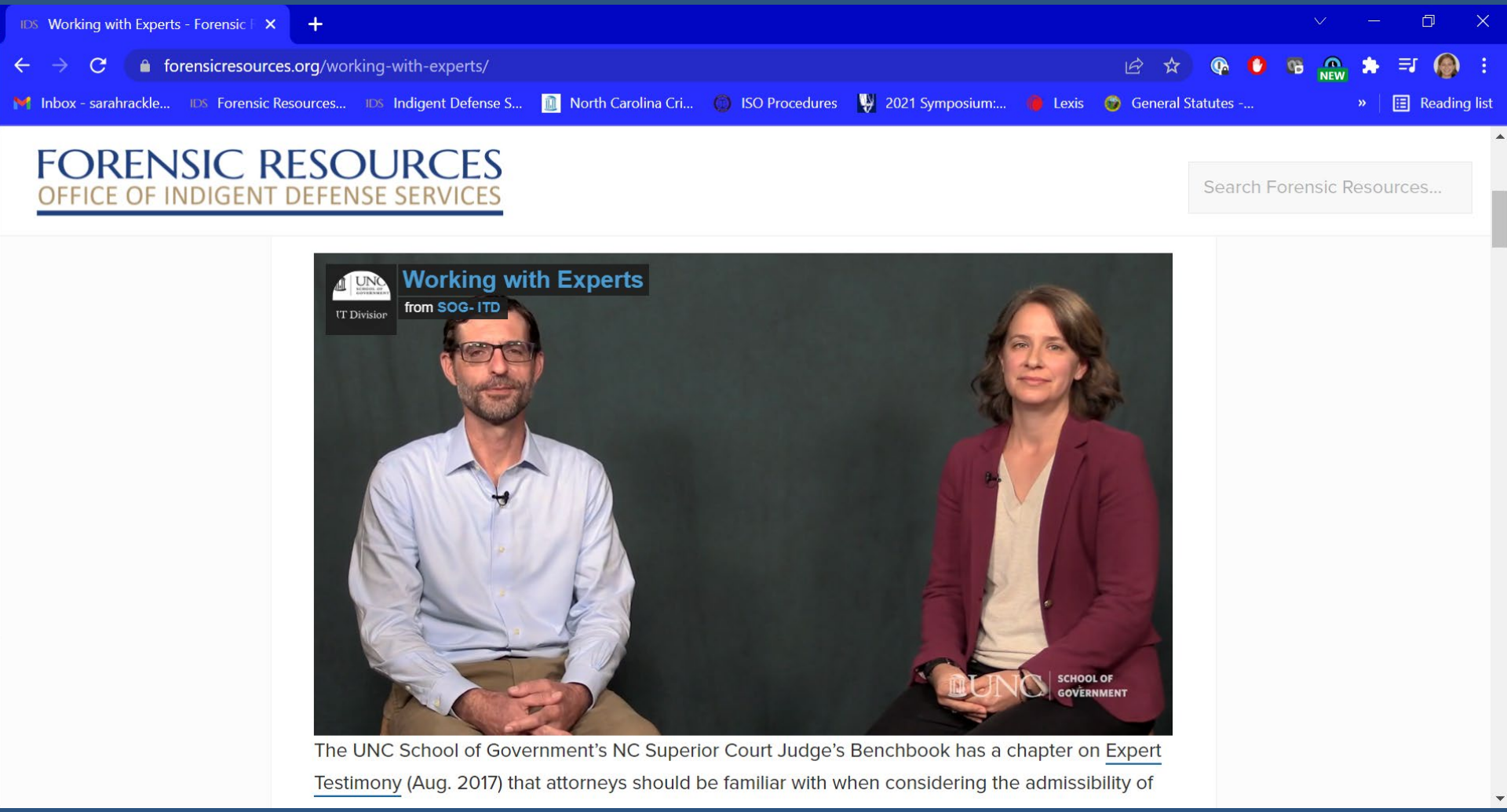
How were you appointed on this case? *(Required)*

Select one

Name of Defendant *(Required)*

Working with Experts Video

https://forensicresources.org/working-with-experts/



Vetting the State's Expert

- Who is the analyst? Substitute analyst issue?
- Verify the expert's degree, certifications, memberships, professional discipline
- Assess experience in the lab/in a particular field
- Review the analyst's corrective action reports
- Meet with the analyst
- MAKE A 702 CHALLENGE!

Substitute Analyst Testimony

- Smith v. Arizona, 602 U.S. 779 (2024) - When an expert testifying at a criminal trial conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, the statements come into evidence for their truth.
- State v. Clark No. COA23-1133 (2024), temporary stay allowed
  - COA held: The opinion testimony of a substitute expert witness who relies solely upon the "testimonial hearsay" statements contained in a lab report or notes prepared by another analyst who tested the substance in question implicates a defendant's right under the Confrontation Clause of the Sixth Amendment. Lab reports created solely for an evidentiary purpose, made in aid of a police investigation, rank as testimonial statements under the Confrontation Clause.
  - In PDR, State argued it remains undecided whether the Supreme Court's decision in *Smith* implicates situations like the one here, and like those in *Ortiz-Zape* and *Brent*, where a substitute analyst relies on machine-generated data to form an independent opinion regarding the identity of a controlled substance.

Admissibility of Expert Testimony

Rule 702 – Testimony by experts

(a) 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:

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.

Rule 702 – Testimony by experts

(a) Will the testimony assist the trier of fact? (Daughtridge)

Is the expert qualified? (McGrady)

1. Based on sufficient facts or data (or assumptions?) (Babich)
2. Based on reliable principles and methods (is the field as a whole reliable?) (Phillips)
3. Was it applied reliably to this case? (McPhaul)

Select 702 opinions

- *State v. McGrady*, 368 N.C. 880 (2016) – 2011 amendment to Rule 702(a) adopts the federal standard for admission of expert testimony articulated in Daubert line of cases. The trial court is not required 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" Trial court did not abuse discretion by excluding defense expert use of force expert testimony for various reasons, including expert qualifications.
- *State v. Daughtridge*, 789 S.E.2d 667 (2016) - ME's testimony on homicide vs suicide that was based on non-medical evidence failed to meet standards of new 702. ME was not in a better position than jurors to evaluate whether homicide or suicide, but not plain error.
- *State v. Babich*, 797 S.E.2d. 359 (2017) - admission of state's expert's testimony on retrograde extrapolation was abuse of discretion – failed "fit" test – expert's analysis was not properly tied to the facts of the case because she made assumptions, but error not prejudicial.

702 opinions, cont.'d

- *State v. Phillips*, 836 S.E.2d 866 (2019) - Prosecutor had DNA analyst testify about an inconclusive mixture. Such testimony was not "based on sufficient facts or data" nor "the product of reliable principles and methods."
- *State v. McPhaul*, 808 S.E.2d 294 (2017), *review improvidently allowed*, 371 N.C. 467 (2018) - admission of state's expert's fingerprint comparison testimony was abuse of discretion because she failed to demonstrate the methods were reliably applied in the case at hand.

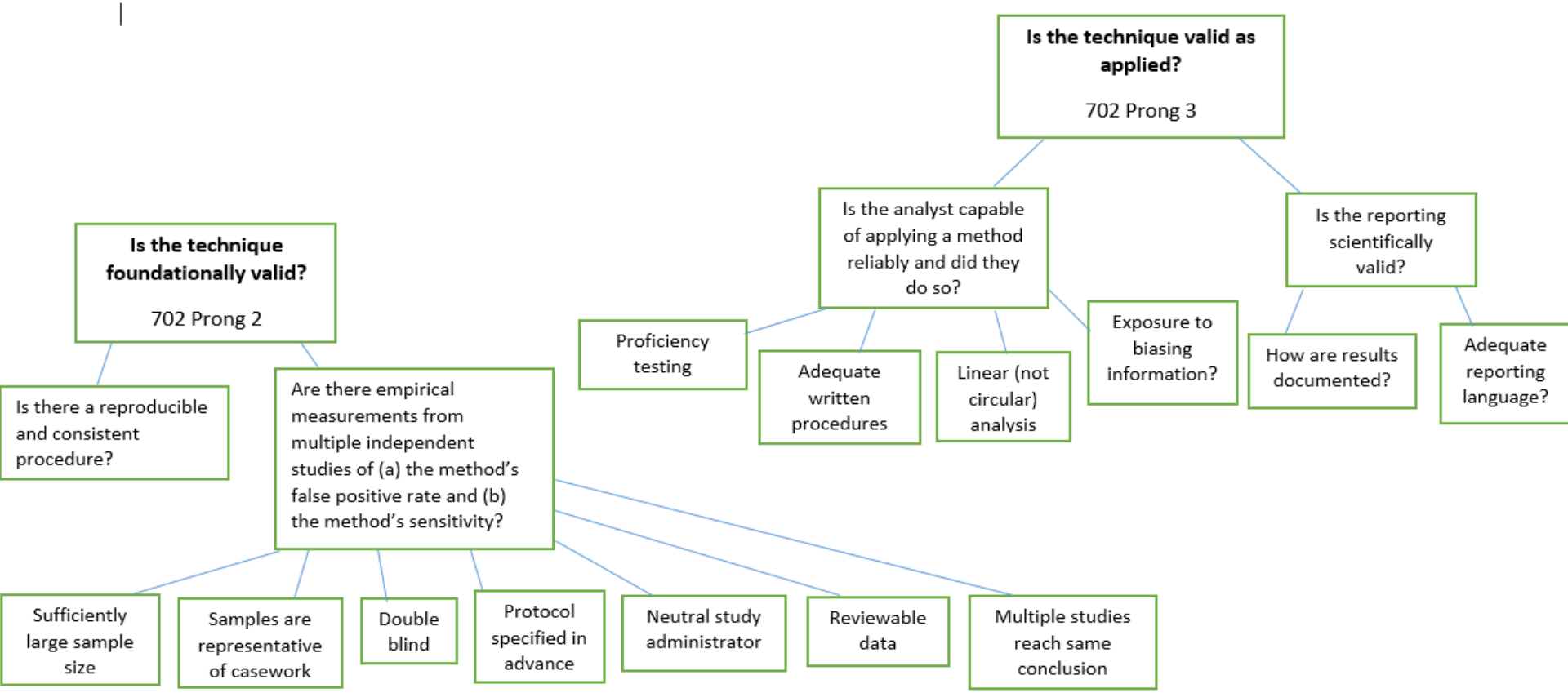
REPORT TO THE PRESIDENT

Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods

Executive Office of the President
President's Council of Advisors on
Science and Technology

September 2016

Roadmap for scientific validity under Rule 702 (prongs 2 and 3)/PCAST Report



PCAST Report: Foundational Validity

Yes

- DNA – single source samples and simple mixtures
- Fingerprint comparison

No

- DNA – complex mixtures
- Firearm comparisons (one study complete, need two)
- Footwear comparison
- Microscopic hair comparison (invalid)
- Bitemark comparison (invalid)

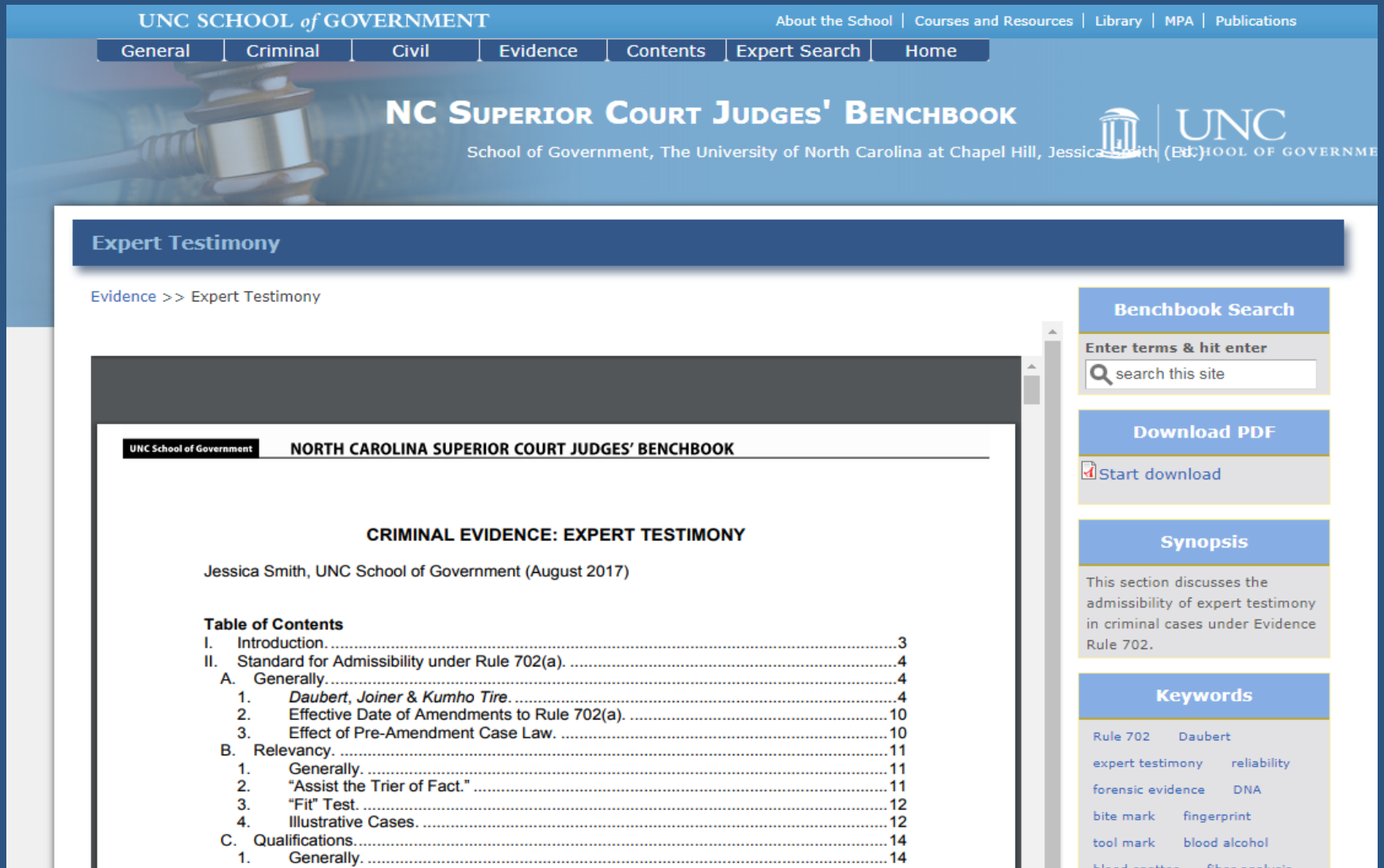
Didn't consider:

Digital evidence, Drug chemistry, Toxicology, Autopsies, GSR testing, Blood spatter, mtDNA analysis, Y-STR DNA analysis

NC Superior Court Judges' Benchbook

Chapter on Expert Testimony:

https://benchbook.sog.unc.edu/evidence/expert-testimony



Stay Informed!

- Website: www.forensicresources.org
- Blog: https://forensicresources.org/subscribe/
- Webinars: https://forensicresources.org/2025/2025-ids-forensic-science-education-series/
- Mar. 7 – Whiskey in the Courtroom – Digital Footprints: What We Leave Behind @Duke Law School
- Available for no-cost case consultation:

  Sarah.R.Olson@nccourts.org

  919-354-7217

Forensic Advantage Discovery Packet

Released Information

Regarding:	P202400102 4
Requested:	4/16/2024 7:15:02 AM FA
Packet:	Case Record (Full)
	All information and files related to the published case record.

Table of Contents:

Additional Files:

The following files were included separately from the packet document:

PriorVersions.pdf

- Lab Report-Released-(1503069v1).pdf

Resources.pdf

- Worksheet Resources P202400102 Record #4.pdf

North Carolina Department of Justice

North Carolina State Crime Laboratory

Proficiency

Laboratory Report Summary

TO:	Timothy Suggs Production Test Agency 0000 Test Case Drive Nowhere, NC 27885	DATE: CRIME LAB NO.: CASE RECORD NO.: AGENCY FILE NO.: EXAMINED BY:	April 16, 2024 P202400102 4 2023-07-25-1234 Amanda Venable
LOCATION:	Out of State	DATE OF OFFENSE:	July 25, 2023
TYPE OF CASE:	Attempted First Degree Murder		
SUBJECT(S):	Donnie Defendant	Victoria Victim (Victim)	

ITEMS SUBMITTED BY TIMOTHY SUGGS ON APRIL 11, 2024:

Item 2 Plastic bag containing white powder. (Your item 1)

TYPE OF EXAMINATION REQUESTED:

Examine for controlled substances

RESULTS OF EXAMINATION AND CONCLUSIONS (The following results relate only to the items tested):

Item 2
One plastic bag was analyzed and found to contain:
Cocaine Hydrochloride.
Net weight of material - 2.49 (+/- 0.03) gram(s).

Analysis was conducted using the following methods: color test, microcrystalline test, IR. Measurement uncertainty of reported net weights is at a 99.7% level of confidence.

DISPOSITION:

All item(s): Retained For Pickup unless otherwise authorized.

End of Report

I, Joshua H. Stein, Attorney General of the State of North Carolina, hereby certify that the form identified as: North Carolina State Crime Laboratory, Department of Justice, Laboratory Report Summary is a form approved by me for the purpose stated in G.S. 90-95(g) and G.S. 8-58.20 and approved by me in compliance with the said statutes.

THIS REPORT IS TO BE USED ONLY IN CONNECTION WITH AN OFFICIAL CRIMINAL INVESTIGATION.

COPIES TO: Out of State Out of State

This report summary contains the opinions/interpretations of the examiner(s) who issued the report. The Laboratory Report with all supporting documentation generated during the examination is available from the State Crime Laboratory's Forensic Advantage Web portal.

Amanda Venable

Amanda Venable

Full Case Report for Case #P202400102

Raleigh Crime Laboratory
121 East Tryon Rd.
Raleigh, NC 27603
P: (919)-582-8700

Triad Crime Laboratory
2306 W. Meadowview Road
Suite 110
Greensboro, NC 27407
P: (336)-315-4900

Western Crime Laboratory
300 St Paul's Road
Hendersonville, NC 28792
P: (828)-654-0525

Prepared by justice\avenable

Tuesday, 16 April 2024 07:02 AM

Case #P202400102

Case Status: In Process - Multiple Cases
Open Date: April 11, 2024
☐ **Confidential Case**

Offense: Attempted First Degree Murder
Offense Date: July 25, 2023

Jurisdiction: Out of State

Court: Out of State

Statement of Facts:

Up until July 25, 2023, Donnie Defendant worked in construction, He broke up with his longtime girlfriend, Victoria, in late 2021. They have a three year-old child together, and they have had a very tumultuous co-parenting relationship ever since the breakup. On July 24, 2023, Donnie learned that Victoria had recently gotten engaged to her new boyfriend, Clark Kent. Upon hearing the news, Donnie started drinking heavily and ingested "cocaine" he purchased from an acquaintance in his neighborhood. Donnie called Victoria on the phone and began yelling at her about her recent engagement. Victoria eventually hung up on him, silenced her phone, and went to bed.

In the early morning hours of July 25th, Donnie drove over to Victoria's house to confront her about the situation and demand full custody of their child. Victoria was home alone at the time and unwilling to open the door, but Donnie forced his way into her house. Donnie continued drinking as he began yelling more aggressively at Victoria, and the argument eventually escalated to violence. In a jealous rage, Donnie sexually assaulted Victoria. Afterward, Victoria slipped away and tried to get to her phone to call the police, and when Donnie realized what she was trying to do he pulled out a handgun and shot her. Donnie then flees the house, but fortunately a neighbor heard the shot and called 911. The neighbor couldn't see the driver, but reported seeing an older red Ford Bronco fleeing the scene shortly after hearing the shot. Responding officers spotted a matching vehicle driving erratically a couple miles away. They stopped the vehicle and Donnie was apprehended. Officers collected a cell phone, a small bag of white powder, and a 9mm Glock pistol from the truck. Donnie was arrested and charged with multiple felonies. Based on his apparent state of intoxication, the officers obtained a sample of his blood with a search warrant. Donnie's clothing was later submitted to the Lab for testing, along with the other seized/collected evidence in the case.

Victoria survived the assault, and she generally remembers that she was attacked inside her home and even recalls that she was shot when she tried to call the police, but she otherwise has no memory of what happened. Donnie denies being at the house that night, and says he was just out partying and bar-hopping.

Comments:

Submission #1

Date Submitted:	April 11, 2024	**Lab:**	Proficiency
Submission Type:	Forensic Examination	**Primary Section:**	Firearms
Delivery Method:	Hand to Hand Transfer	**Primary Examiner:**	
Return Method:	Hand to Hand Transfer		
Comments:			

Agency Name	Type	ORI	Case #(s)
Production Test Agency	Submitting	0	2023-07-25-1234

Officer Name	Type	Phone Number	E-mail
Suggs, Timothy	Investigating	(919)582-8912	tsuggs@ncdoj.gov
Suggs, Timothy	Submitting	(919)582-8912	tsuggs@ncdoj.gov
Out of State, Out of State	Carbon Copy		

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

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Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

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Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Requested Exam(s): Audio Video v1, Mobile Device Examination v1, Blood Identification v1, Semen Identification v1, DNA v1, Drug Chemistry-Drugs v1, Firearms Caliber v1, Firearms Comparison v1, Firearms IBIS/NIBIN v1, Latent v1, DWI-Blood Alcohol v1, DWI-Blood Drugs v1, Trace GSR v1, Trace Hair v1

Person/Business of Interest	Type	Gender	DOB	SID
Defendant, Donnie	Suspect	Male	01/24/1991	
Victim, Victoria	Victim	Female	03/01/1996	

Evidence	Description	Agency #
Item 1	DWI blood kit collected from Donnie Defendant	5
Item 2	Plastic bag containing white powder	1
Item 3	Cardboard box containing a Glock 9mm pistol	2
Item 4	Plastic bag containing cell phone	3
Item 5	GSR collection kit from Donnie Defendant	4

Item 6	Latent lifts	6
Item 7	Paper bag with alcohol bottle	7
Item 8	Two shell casings	8
Item 9	Sexual assault evidence collection kit from Victoria Victim	9
Item 10	Bullet recovered from Victoria Victim during surgery.	10
Item 11	USB drive with footage from Ring doorbell camera	11
Item 12	Clothing seized from Donnie Defendant at time of arrest	12
Item 13	Subject evidence collection kit from Donnie Defendant	13
Item 14	Fingerprint card from Donnie Defendant	14
Item 15	Fingerprint card from Victoria Victim	15

Case Record #4

Case #: P202400102 **Case Record #:** 4 ☐ **Confidential Case**

Status: Complete
Type: Forensics Exam
Examiner: Venable, Amanda
Case Note:
Sequence: 5
Working Days: 0
Discipline #:
Priority: 5
Backlog Priority:

Lab: Proficiency
Section: Drug Chemistry
Submitted Date: 4/11/2024 9:07:47 AM
In Section Date: 4/15/2024 11:52:59 AM
Assignment Date: 4/15/2024 11:55:07 AM
Exam Start Date: 4/15/2024 11:55:19 AM
Exams Completed: 4/15/2024 2:19:02 PM
Due Date:
Worksheet Date:
Completion Date: 4/16/2024 7:02:20 AM

Comments:

Assignment History:

Transfer Date: 4/15/2024 11:55:07 AM

From: Proficiency

To: Venable, Amanda
Proficiency

Status: Backlog - Evidence Available
Reason: Exam
Comments:

Exam Type	Evidence	Description
Drug Chemistry-Drugs v1	Item 2	Plastic bag containing white powder *Plastic bag containing white powder.*

Lab Report(s):

Report ID: 1503069 **Report Type:** Basic Report
Case #: P202400102 **Record #:** 4 **Status:** Released
Report Date: 4/15/2024 2:21:12 PM **Release Date:** 4/16/2024 7:02:20 AM
Examiner: Venable, Amanda
Typist: Venable, Amanda
Comments:

********** End of Report **********

P202400102 Record #4 - Chain of Custody Report

Raleigh Laboratory
121 East Tryon Road
Raleigh, NC 27603

Evidence

The signatures of North Carolina State Crime Laboratory employees appearing below indicate that the evidence described below was delivered to the person (or approved carrier), on the date stated, and was delivered in essentially the same condition as received.

P202400102 Sub #1 **Agency Case #2023-07-25-1234**

Item 2 Plastic bag containing white powder

Transfers

P202400102 - Item 2

4/11/2024 9:07:47 AM Submitted by Officer Suggs, Timothy from Production Test Agency. Received by Porter, Megan at Raleigh - Evidence Control. Delivery Method: Hand to Hand Transfer.

Signatures: From To: Megan Porter

4/11/2024 9:07:47 AM Placed in Storage at Room 1150B - R-1150B R-33 S-10 by Porter, Megan at Raleigh - Evidence Control

Signatures: From Megan Porter To:

4/15/2024 9:47:09 AM Removed from Storage by Suggs, Timothy G. at Raleigh - Evidence Control.

Signatures: From To: Timothy G. Suggs

4/15/2024 9:47:09 AM Placed in Lock Box #613882 by Suggs, Timothy G. at Raleigh - Evidence Control.

Signatures: From Timothy G. Suggs To:

4/15/2024 10:13:12 AM Removed from Lock Box #613882 by Venable, Amanda at Triad - Drug Chemistry.

Signatures: From To: AmandaVenable

4/15/2024 11:52:59 AM Hand to Hand Transfer from Venable, Amanda at Triad - Drug Chemistry to Venable, Amanda at Proficiency - Drug Chemistry.

Signatures: From AmandaVenable To: AmandaVenable

North Carolina State Crime Laboratory

REQUEST FOR EXAMINATION OF PHYSICAL EVIDENCE

By submitting this form, you acknowledge and approve laboratory personnel to use the most appropriate and up to date methods authorized by our laboratory and/or sample submission to another laboratory to best meet your needs.

Part A

Previous Crime Laboratory Number: (Required if re-submitting evidence to laboratory)

Requesting Agency:	Production Test Agency	Jurisdiction:	Out of State - General District Court
Agency Address:	0000 Test Case Drive, Nowhere, NC 27885		
Type of Case:	Death At - Attempted First Degree Murder	Agency File Number:	2023-07-25-1234
Date of Offense:	7/25/2023	County of Offense:	Out of State
Requesting Officer:	Suggs, Timothy	Other Investigating Officers:	
Submitting Officer:	Suggs, Timothy		
Submission Method:	Hand to Hand Transfer		
Return Method:	Hand to Hand Transfer		
Gang Related:	☐ Yes ☑ No		
Cross-Reference Case:	☐ Yes ☑ No		

Extra Instructions

Other Investigating Agencies

Agency Name	Officer Name	Agency File Number

Victims / Suspects

Name	DOB	Sex	Race	Victim/Suspect
Defendant, Donnie	1/24/1991	Male	White	Suspect
Victim, Victoria	3/1/1996	Female	Hispanic	Victim

Business Victims / Suspects

Business Name	Business City	Victim / Suspect

Evidence

Has any evidence in this case been submitted to the laboratory previously? ☐ Yes ☑ No

If yes, to which section(s)?

Laboratory Item #	Agency Item #	Evidence Description	Exact Location Found	Examine For
	5	DWI blood kit collected from Donnie Defendant	Donnie Defendant	DWI-Blood Alcohol, DWI-Blood Drugs
	1	Plastic bag containing white powder	Defendant's Bronco	Drug Chemistry-Drugs
	2	Cardboard box containing a Glock 9mm pistol	Defendant's Bronco	Firearms IBIS/NIBIN, Firearms Comparison
	3	Plastic bag containing cell phone	Defendant's Bronco	Mobile Device Examination

4	GSR collection kit from Donnie Defendant	Donnie Defendant	Trace GSR
6	Latent lifts	Front exterior door of Victim's house	Latent
7	Paper bag with alcohol bottle	Inside Victim's house	DNA, Latent
8	Two shell casings	Victim's house	Firearms Comparison, Firearms IBIS/NIBIN
9	Sexual assault evidence collection kit from Victoria Victim	Victoria Victim	DNA, Semen Identification
10	Bullet recovered from Victoria Victim during surgery.	Hospital	Firearms Caliber, Firearms Comparison
11	USB drive with footage from Ring doorbell camera	Victim's neighbor's house	Audio Video - Combined Analysis
12	Clothing seized from Donnie Defendant at time of arrest	Donnie Defendant	Blood Identification, Trace Hair
13	Subject evidence collection kit from Donnie Defendant	Donnie Defendant	DNA, Trace Hair
14	Fingerprint card from Donnie Defendant	Donnie Defendant	Latent
15	Fingerprint card from Victoria Victim	Victoria Victim	Latent

Complete Part B or attach a copy of the investigative report

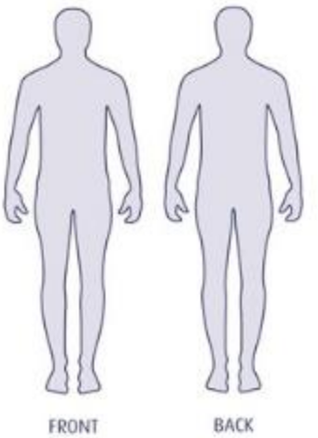
Part B: Description of the incident (Brief summary of the events of the crime). Provide details as to who may have been bleeding in cases involving body fluid/DNA evidence.

Statement of Facts

Up until July 25, 2023, Donnie Defendant worked in construction, He broke up with his longtime girlfriend, Victoria, in late 2021. They have a three year-old child together, and they have had a very tumultuous co-parenting relationship ever since the breakup. On July 24, 2023, Donnie learned that Victoria had recently gotten engaged to her new boyfriend, Clark Kent. Upon hearing the news, Donnie started drinking heavily and ingested "cocaine" he purchased from an acquaintance in his neighborhood. Donnie called Victoria on the phone and began yelling at her about her recent engagement. Victoria eventually hung up on him, silenced her phone, and went to bed.

In the early morning hours of July 25th, Donnie drove over to Victoria's house to confront her about the situation and demand full custody of their child. Victoria was home alone at the time and unwilling to open the door, but Donnie forced his way into her house. Donnie continued drinking as he began yelling more aggressively at Victoria, and the argument eventually escalated to violence. In a jealous rage, Donnie sexually assaulted Victoria. Afterward, Victoria slipped away and tried to get to her phone to call the police, and when Donnie realized what she was trying to do he pulled out a handgun and shot her. Donnie then flees the house, but fortunately a neighbor heard the shot and called 911. The neighbor couldn't see the driver, but reported seeing an older red Ford Bronco fleeing the scene shortly after hearing the shot. Responding officers spotted a matching vehicle driving erratically a couple miles away. They stopped the vehicle and Donnie was apprehended. Officers collected a cell phone, a small bag of white powder, and a 9mm Glock pistol from the truck. Donnie was arrested and charged with multiple felonies. Based on his apparent state of intoxication, the officers obtained a sample of his blood with a search warrant. Donnie's clothing was later submitted to the Lab for testing, along with the other seized/collected evidence in the case.

Victoria survived the assault, and she generally remembers that she was attacked inside her home and even recalls that she was shot when she tried to call the police, but she otherwise has no memory of what happened. Donnie denies being at the house that night, and says he was just out partying and bar-hopping.



For firearms examination (show entrance and exit wounds)

Part C: For Body Fluid/DNA cases

Have samples from all possible bleeders or body fluid donors been included? ☑ Yes ☐ No ☐ NA

Have any of the above persons been transfused in the last 120 days? ☐ Yes ☑ No ☐ NA

In sexual offense cases answer the following:

1.	Was the alleged assailant known to the victim?	☑ Yes	☐ No	☐ NA
2.	Did the victim have sex with someone within 72 hours prior to the incident?	☐ Yes	☑ No	☐ NA
3.	Is a known DNA sample from the consenting sex partner available at this time?	☐ Yes	☐ No	☑ NA
4.	Do you plan to submit this sample?	☐ Yes	☐ No	☑ NA
5.	Has/have the suspect(s) made any statement that the act was consensual?	☐ Yes	☑ No	☐ NA

Note: No DNA testing will be conducted on evidence samples unless known DNA samples from all victims and suspects are submitted. In sexual offense cases, a known DNA sample must also be submitted from any consensual sexual partners of the victim within 72 hours of the incident, if DNA typing is requested.

Part D: For Hair, Fiber and other particle analysis cases

Crime occured: (Check all the apply)

☐ Suspect's Residence	☑ Victim's Residence
☐ Suspect's Vehide	☐ Victim's Vehicle
☐ Other location (describe):	

Have the suspects and victims lived at the same residence or shared a common environment? ☑ Yes ☐ No

If this is a rape case, has consent or common environment been involved? ☐ Yes ☑ No

IF YES, HAIR SAMPLES SHOULD NOT BE SUBMITTED FOR EXAMINATION

Be sure to indicate the race of the victim(s) and suspect(s) listed on page 1

Please retain all hair and fiber evidence until either (1) the hair samples from all suspects and victims **are obtained** for hair analysis, **OR** (2) all fiber standards (carpeting, upholstery, clothing or suspect/victim) **are obtained** for fiber analysis. **YOU MUST SUBMIT THE NECESSARY STANDARDS BEFORE ANALYSIS CAN BE PERFORMED.**

Requestor: Suggs, Timothy RFLE Id: 366049

NORTH CAROLINA
STATE CRIME LABORATORY

Case # :	P202400102-4
Analyst :	Venable, Amanda
Date Started :	04/15/2024
Date Completed :	04/15/2024

- Drugs Worksheet

Type of Exam: **Examine for controlled substances**

Results of Examination:

Item 2
One plastic bag was analyzed and found to contain:
Cocaine Hydrochloride.
Net weight of material - 2.49 (+/- 0.03) gram(s).

Analysis was conducted using the following methods: color test, microcrystalline test, IR. Measurement uncertainty of reported net weights is at a 99.7% level of confidence.

Disposition

☑ **Disposition is the same for all Items**

Disposition:
Retained For Pickup unless otherwise authorized

North Carolina State Crime Laboratory

Case Record Review History

P202400102 #4

Review Type: Combined Admin and Technical	**Review Status: Completed**

Activity:	04/15/2024 02:21 PM	SYSTEM, FA	Requested: New Lab Report drafted.
Activity:	04/15/2024 03:45 PM	Meyers, Brittnee	Accepted: I accept the review.
Activity:	04/15/2024 03:55 PM	Meyers, Brittnee	Completed

Reviewer Questions	**Reviewer Response**
Do the analyst's notes correctly reflect the analysis data?	Yes
Were appropriate and sufficient tests done to support the final results for each item?	Yes
Does the report correctly represent the conclusions of the analysis, the appropriate disposition, and the case information?	Yes

Messages

No Messages were recorded for:

P202400102 4

North Carolina State Crime Laboratory Drug Chemistry Section

Case #:	P202400102
Analyst:	A Venable

Item #	2	Plastic bag containing white powder.	Delete
		One plastic bag was analyzed and found to contain: Cocaine Hydrochloride. Net weight of material - 2.49 (+/- 0.03) gram(s).	

Item #	

	Analysis was conducted using the following methods: color test, microcrystalline test, IR. Measurement uncertainty of reported net weights is at a 99.7% level of confidence.

Drug Stats - Overview (sharepoint.com)

Approved for use by:
Kathryn M. Schell

Item 2

Packaging

S Evid PB containing SZLPB containing				
	Knotted	plastic bag(s) containing		white powder

Item description: Plastic bag containing white powder.

Sampling — Number Analyzed:

○ Sample Selection ○ Hypergeometric ◉ Not Applicable

Notes

Method of Analysis

☑ Color Tests ☑ Microcrystalline ☐ Tablet ID ☐ Plant Material ☑ Infrared ☐ GC-MS

Color Test

Marquis	NSR
Cobalt	
Modified Duquenois-Levine	
Comments	

Note: Negative quality control checks were performed on reagents where required. All negative checks were negative unless otherwise noted.

Microcrystalline

Gold Chloride in 20 % Acetic Acid	Cocaine Crystals - Crosses
Hashish in Chloroform	
Comments	

Note: Negative quality control checks were performed on reagents where required. All negative checks were negative unless otherwise noted.

Infrared

Straight Results	Cocaine HCl
Subtraction Comments	
Subtraction Results	
Extraction/Wash Comments	
Extraction/Wash Results	

Results

Cocaine Hydrochloride.

Delete

Results

One plastic bag was analyzed and found to contain:
Cocaine Hydrochloride.
Net weight of material - 2.49 (+/- 0.03) gram(s).

☐ Returned in laboratory-provided packaging

☐ Residue Amount ☐ External Weight Sheet / No Weight Recorded ☐ Weight Reporting Not Required (Tablets) ☐ Weight Reporting Not Required (Other)

Item #	Weight Rec'd (g)	Weight Ret'd (g)
2	2.49	2.48

$U_{final} = \sqrt{N} \times U_{balance}$

Where:

U_{final} = Final uncertainty for the measurement

$U_{balance}$ = Total Expanded Uncertainty for the interval

Net weight of material received (g) =	**2.49**
Net weight of material returned (g) =	**2.48**
N=	**1**
$U_{balance}$ (g) =	**0.03**
U_{final} (g) =	**0.03**

Approved for use by:

Kathleen M. Schell

Name: Amanda B. Venable
Laboratory: Triad Regional Crime Laboratory
Job Title: Forensic Scientist Manager
Date: April 3, 2024

CASEWORK

Laboratory Section: Drug Chemistry Section
Discipline(s) of Casework: Drug Chemistry Analysis

EDUCATION

Institution	Dates Attended	Major	Degree Completed
Virginia Commonwealth University	2009 – 2010	Forensic Science/Chemistry Track	B.S. in Forensic Science
Virginia Tech	2006 – 2009	Human Nutrition, Foods, and Exercise	Transferred to VCU

PROFESSIONAL AFFILIATIONS AND CERTIFICATIONS

- American Board of Criminalistics (ABC) – Affiliate, Drug Analysis (Certified October 2014)
- Clandestine Laboratory Response Certification – November 2015
- Clandestine Laboratory Investigating Chemists (CLIC) – Member since 2016
- Southern Association of Forensic Scientists (SAFS) – Member since 2016 (President-elect 2023)
- North Carolina General Instructor Certification – February 2018
- American Society of Crime Laboratory Directions (ASCLD) – May 2023

COURTROOM TESTIMONY

Discipline	Date Authorized	Approximate Testimony Appearances	Provide Testimony Feedback
Drug Chemistry	November 2012	50+ in NC Superior Court	
Drug Chemistry	November 2012	3 in US District Court	

Appearances from the previous four years:

Laboratory Case Number	Appearance Date	Court (District/Superior/Federal and Location/ County)	Defendant	Court Case Number
T201906196	February 11, 2020	Union Superior	Dallas Walters	18CRS56245
T202000920	February 12, 2020	Federal Court	Adrian White	1:19CR571-1

T201901039; T201901051	March 10, 2020	Federal Court	Zannie Lothrap	1:19CR448-1
T201500116	August 5, 2021	Guilford Superior	Gregory Baskins	14CRS088609
T201907903	June 29, 2022	Surry Superior	Steven Cregory	19CRS053389
T202102671	January 23, 2023	Union Superior	Anthony Hancock	21CRS50781
T202104590	April 3, 2024	Guilford Superior	Brian Altman	21CRS75304-307

TRAINING AND EXPERIENCE

Drug Chemistry

Date	**Title**
July 2012 to November 2012	North Carolina State Crime Laboratory Drug Chemistry Training Program *A 10-module training program covering specific topics related to Drug Chemistry analysis, instrumentation, and identification of controlled substances. Included laboratory practical's as well as written examinations, and successful completion of a mock case and moot court testimony. Western Regional Crime Laboratory, Asheville, North Carolina*
December 2012	North Carolina State Forensic Science Symposium; *North Carolina State University*
March 2013	Drug Enforcement Administration (DEA) Forensic Chemists Seminar *A forty hour in depth course covering topics in the field of Forensic Drug Chemistry, including emerging areas and instrumentation. DEA Special Testing Laboratory, Dulles, Virginia*
May 2013	Workshop on Materials Characterization by Perkin Elmer; *Charlotte, North Carolina*
May 2013	Emerging Trends in Synthetic Drugs Workshop and Webcast; *NIST and DEA*
June 2014	North Carolina State Crime Laboratory Forensic Scientist Academy *A ten week course covering general topics in the field of Forensic Science. Raleigh, North Carolina*
February 2015	Introduction of IR Microscopy Sample Handling; *Sponsored by Thermo Scientific*
February 2015	Chemistry in the Courtroom: Demystifying Science for Judge and Jury; *Sponsored by the American Chemical Society*
April 2015	Advances in FTIR – How New Technology is Changing Infrared Analysis; *Sponsored by Agilent*
September 2016	Advanced Clan Labs: Beyond the Basics; *Presented by NES, SAFS*
September 2017	Fentanyl and Fentanyl Analogs Workshop; *SAFS*
March 2019	Whiskey in the Courtroom; *Duke University*
May 2019	Combining a Theoretical and Practical Approach to Method Development and Validation in a Forensic Drug Chemistry Laboratory; *SAFS*
November 2019	Hemp Testing 101; *Waters Corporation*
March 2020	Hemp/CBD Screening; *Sirchie Education and Training.*
February 2021	A New Realm of NPS Opioids and NPS Benzodiazepines; *AAFS*
February 2021	Analytical Approaches for Hemp/Marijuana Differentiation; *AAFS*
January 2022	2022 Current Trends in Seized Drug Analysis Symposium; *CFSRE*
October 2023	Forensic Science Symposium 2023; *UNODC*

Other Trainings

Date	**Title**
November 2015	Clandestine Laboratory Certification Training

	A forty-hour course facilitated by NorthFourth, in conjunction with the North Carolina State Bureau of Investigation, covering topics related to safety at illicit manufacturing operations as well as the various methodologies utilized at such labs. Raleigh, North Carolina
2016 – 2023	State Bureau of Investigation Clandestine Laboratory Re-Certification *An eight-hour course including information on case law, methods of manufacturing, drugs trends, and NPLEx, as well as a safety refresher and an annual fit test. Performed at various locations across NC.*
July 2016	Leading at all Levels (LAAL) – Individual Contributor Series *Five classes discussing the foundations of being an individual contributor, dealing with change, out of the box thinking, communicating with your team, and exploring supervision. (NC OSHR)*
February 2018	General Instructor Training and Certification *A seventy-eight-hour course administered by the North Carolina Justice Education and Training Standards Commission designed to provide the information necessary to research, plan, prepare, evaluate, and present a block of instruction. Salemburg, North Carolina*
October 2018	ISO 17025:2003 Overview of Requirements for Internal Auditors *An eight-hour instructor-led course covering the ISO17025 international accreditation standard and how to perform internal audits of policies and procedures developed around ISO17025. North Carolina State University; Hendersonville, North Carolina*
August 2019	Leading at all Levels (LAAL) – Supervisor Series *Four classes discussing the foundations of being a supervisor, coaching, leading teams, and managing work at the supervisory level. (NC OSHR)*
August 2021	Advanced Skills for Managers *A course designed to provide supervisors with strategies to effectively carry out theleadership aspects of the management role. (NC OSHR)*
August 2021	Equal Employment Opportunity and Diversity Fundamentals (EEODF) *A course providing supervisors and managers with applicable information to help them manage teams more effectively while promoting diversity and inclusion. (NC OSHR)*
October 2023	Clandestine Laboratory Recertification *An eight-hour refresher course including information on relevant topics, emphasizing current trends and safety topics critical to successfully processing methamphetamine labs. Annual fit testing done by NCSCL. (Multijurisdictional Counterdrug Task Force Training)*

Meetings and Conferences

Date	**Title**
October 2013	Midwestern Association of Forensic Scientists (*Dayton, Ohio)*
October 2014	Midwestern Association of Forensic Scientists (*St. Paul, Minnesota)*
October 2015	Southern Association of Forensic Scientists (*Atlanta, Georgia)*
September 2016	Southern Association of Forensic Scientists (*Sarasota, Florida)*
September 2017	Southern Association of Forensic Scientists (*Cincinnati, Ohio)*
May 2019	Southern Association of Forensic Scientists (*Asheville, North Carolina*)
September 2020	Midwestern Association of Forensic Scientists (*Virtual)*
February 2021	73rd Annual AAFS Scientific Meeting (*Virtual*)
September 2021	Clandestine Laboratory Investigating Chemists Association (*Nashville, Tennessee)*
June 2022	Midwestern Association of Forensic Scientist *(Dayton, Ohio)*
April 2023	Southern Association of Forensic Scientists (*Gulf Shores, Alabama*)

May 2023 American Society of Crime Laboratory Directors *(Austin, Texas)*

EMPLOYMENT HISTORY

Tenure: July 2022 – Present

- **Employer:** North Carolina State Crime Laboratory
- **Job Title:** Forensic Scientist Manager
- **Primary Duties:** Responsible for the daily operations of the Triad Regional Laboratory. Directly supervise approximately four members of the Triad Lab leadership team. Oversee operations forEvidence Control, Latent Evidence, Toxicology, and Drug Chemistry sections within the lab. Conduct the chemical analysis of evidence for the presence of controlled substances using the following instruments and techniques: FTIR, GC-MS, color testing, microcrystalline testing, microscopy, solubility, and extractions and separations. Issuance of written laboratory reports, and testifying in court as necessary to explain and defend findings. Review laboratory reports for accuracy, content, and consistency with the approved policies and procedures of the North Carolina State Crime Laboratory. Respond to clandestine laboratory crime scenes and collect and analyze evidence, as needed. Act as an Administrator for the Laboratory Information Management System (LIMS) (Forensic Advantage) for the Triad Laboratory.

Tenure: August 2020 – July 2022

- **Employer:** North Carolina State Crime Laboratory
- **Job Title:** Forensic Scientist Supervisor
- **Primary Duties:** Directly supervise approximately four forensic scientists in the Drug Chemistry section. Conduct the chemical analysis of evidence for the presence of controlled substances using the following instruments and techniques: FTIR, GC-MS, color testing, microcrystalline testing, microscopy, solubility, and extractions and separations. Issuance of written laboratory reports, and testifying in court as necessary to explain and defend findings. Review laboratory reports for accuracy, content, and consistency with the approved policies and procedures of the North Carolina State Crime Laboratory. Serve as the Training Assistant of the Triad Laboratory, as well as the Technical Leader for the Drug Chemistry Section. Respond to clandestine laboratory crime scenes and collect and analyze evidence, as needed. Act as an Administrator for the Forensic Advantage (FA) system, for the Triad Laboratory.

Tenure: December 2019 – August 2020

- **Employer:** North Carolina State Crime Laboratory
- **Job Title:** Forensic Scientist III
- **Primary Duties:** Conduct the chemical analysis of evidence for the presence of controlled substances using the following instruments and techniques: FTIR, UV/Vis, GC-MS, color testing, microcrystalline testing, microscopy, solubility, and extractions and separations. Issuance of written laboratory reports, and testifying in court as necessary to explain and defend findings. Review laboratory reports for accuracy, content, and consistency with the approved policies and procedures of the North Carolina State Crime Laboratory. Serve as the Training Assistant of the Triad Laboratory, as well as the Technical Leader for the Drug Chemistry Section. Respond to clandestine laboratory crime scenes and collect and analyze evidence, as needed. Act as the Document Custodian, as well as an Administrator for the FA system, for the Triad Laboratory.

Tenure: June 2017 – December 2019

- **Employer:** North Carolina State Crime Laboratory

- **Job Title:** Forensic Scientist II
- **Primary Duties:** Conduct the chemical analysis of evidence for the presence of controlled substances using the following instruments and techniques: FTIR, UV/Vis, GC-MS, color testing, microcrystalline testing, microscopy, solubility, and extractions and separations. Issuance of written laboratory reports, and testifying in court as necessary to explain and defend findings. Review laboratory reports for accuracy, content, and consistency with the approved policies and procedures of the North Carolina State Crime Laboratory. Serve as the Training Assistant of the Triad Laboratory, aiding the Training Coordinator in teaching units within the Drug Chemistry Section. Function as the balances and weights coordinator back-up, as well as the GC-MS coordinator back-up within the Drug Chemistry Section. Serve as FTIR coordinator, standards coordinator, UV, and balance and weights coordinator at various points. Respond to clandestine laboratory crime scenes and collect and analyze evidence, as needed. Act as the Document Custodian, as well as an Administrator for the FA system, for the Triad Laboratory.

Tenure: July 2012 – June 2017

- **Employer:** North Carolina State Crime Laboratory
- **Job Title:** Forensic Scientist I
- **Primary Duties:** Conduct the chemical analysis of evidence for the presence of controlled substances using the following instruments and techniques: FTIR, UV/Vis, GC-MS, color testing, microcrystalline testing, microscopy, solubility, and extractions and separations. Issuance of written laboratory reports, and testifying in court as needed. Review laboratory reports for accuracy, content, and consistency with the approved policies and procedures of the North Carolina State Crime Laboratory. Serve as the balances and weights coordinator within the Drug Chemistry Section with daily/monthly duties to ensure balances and weights are properly maintained and serviced. Ensure standards are received and processed swiftly and properly. Act as an Administrator for the FA system at the Triad Laboratory.

Tenure: March 2012 – July 2012

- **Employer:** City of Charlotte
- **Job Title:** Telecommunicator
- **Primary Duties:** Responsible for answering emergency calls from citizens and evaluating the needs of callers in order to quickly and effectively dispatch the appropriate personnel and/or agency.

Tenure: August 2010 – January 2011

- **Employer:** Richmond City Police Department
- **Job Title:** Intern with the Major Crimes Division
- **Primary Duties:** Worked with the Detectives to learn the proper policy and procedure for the collection and preservation of evidence. Assisted with the execution of search warrants.

OTHER QUALIFICATIONS

- Successful completion of a proficiency test in the field of Drug Chemistry, provided by an external organization
  - Annually since 2013
- Drug Chemistry Section Technical Leader (2018 – 2023)
- Member of the North Carolina State Crime Lab internal audit team

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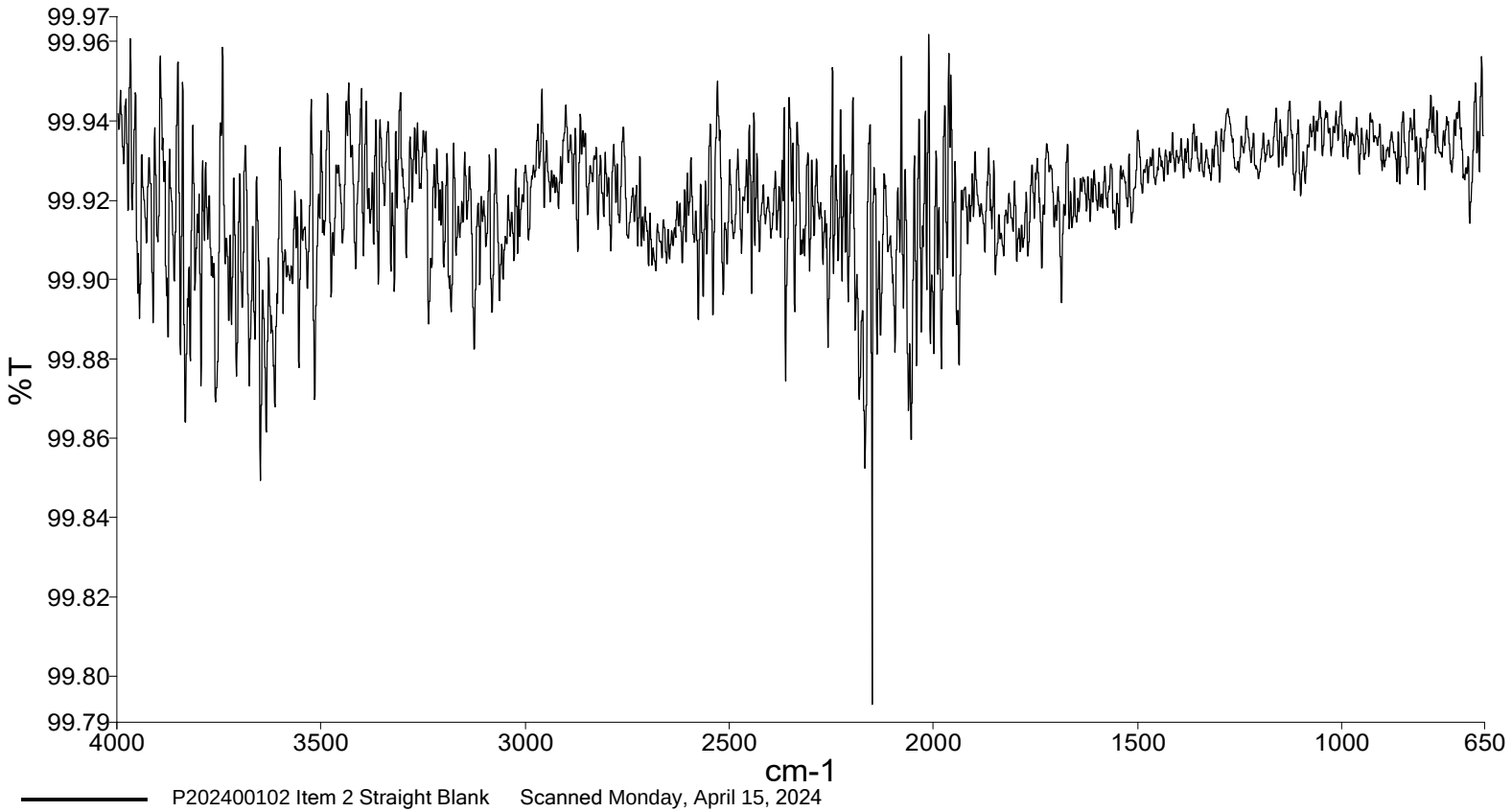
Date Monday, April 15, 2024 12:39 PM



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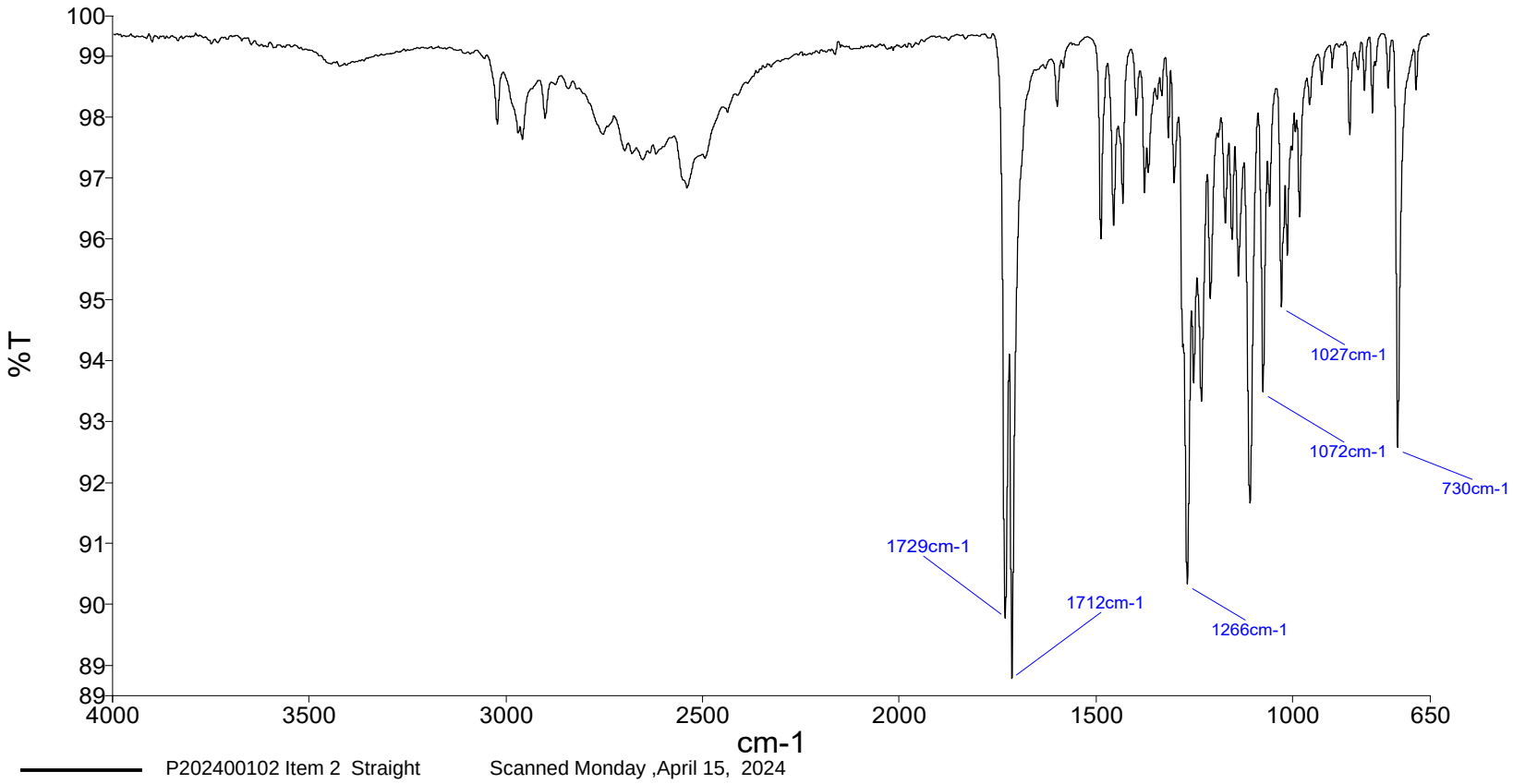
Monday, April 15, 2024 12:39 PM

Analyst
Date

FTIR #5 (Serial # 108968)
Monday, April 15, 2024 12:39 PM



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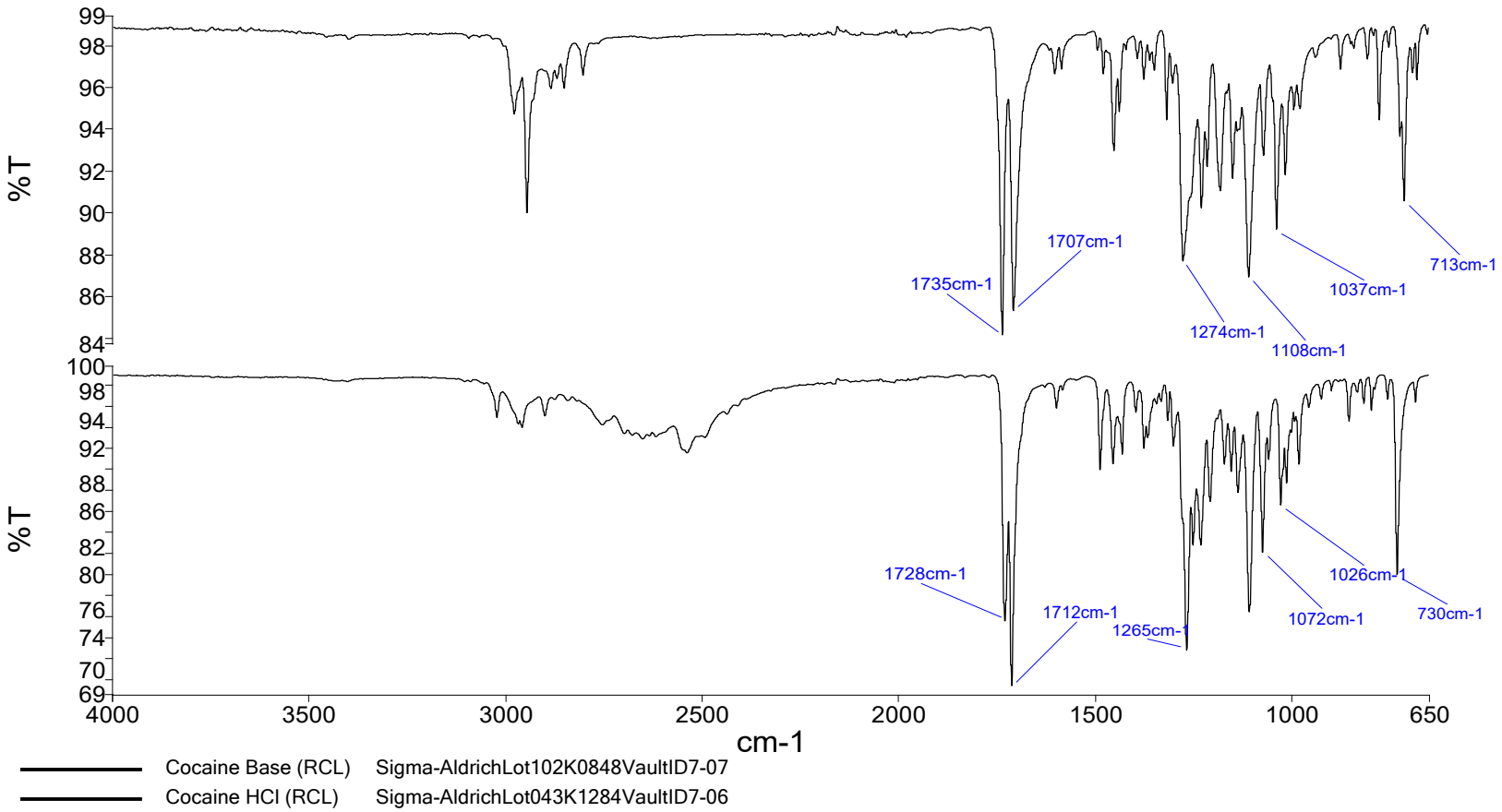

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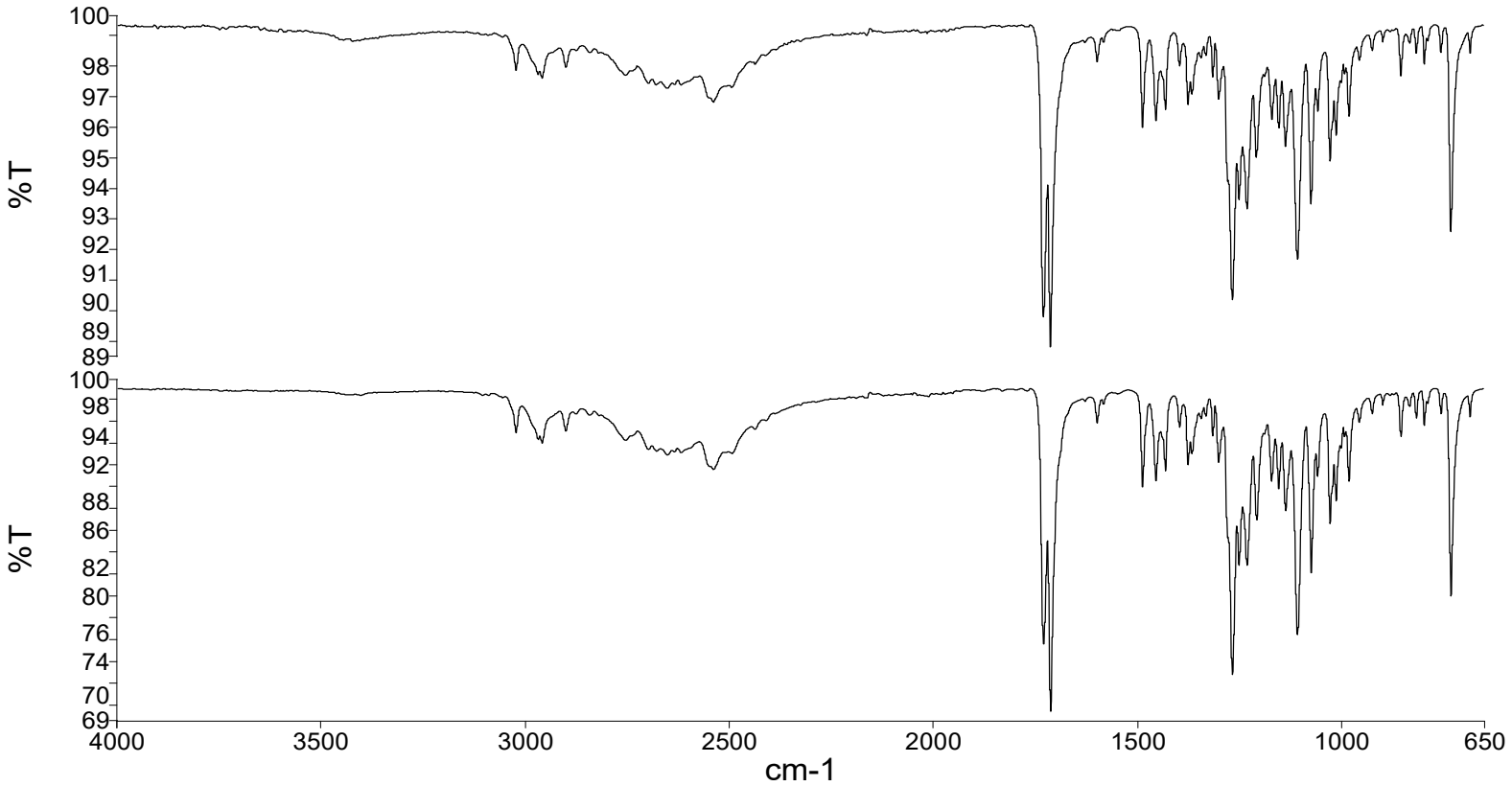


Submitted By Agency - Production Test Agency

To North Carolina State Crime Laboratory

Evidence Submitted

Submission Date: 4/11/2024 9:07:47 AM

---------- LAB ----------				---------- Agency ----------	
Case#	**Sub#**	**Item#**	**Evidence Description**	**Case#**	**Item#**
P202400102	1	1	DWI blood kit collected from Donnie Defendant	**2023-07-25-1234**	**5**
P202400102	1	2	Plastic bag containing white powder	**2023-07-25-1234**	**1**
P202400102	1	3	Cardboard box containing a Glock 9mm pistol	**2023-07-25-1234**	**2**
P202400102	1	4	Plastic bag containing cell phone	**2023-07-25-1234**	**3**
P202400102	1	5	GSR collection kit from Donnie Defendant	**2023-07-25-1234**	**4**
P202400102	1	6	Latent lifts	**2023-07-25-1234**	**6**
P202400102	1	7	Paper bag with alcohol bottle	**2023-07-25-1234**	**7**
P202400102	1	8	Two shell casings	**2023-07-25-1234**	**8**
P202400102	1	9	Sexual assault evidence collection kit from Victoria Victim	**2023-07-25-1234**	**9**
P202400102	1	10	Bullet recovered from Victoria Victim during surgery.	**2023-07-25-1234**	**10**
P202400102	1	11	USB drive with footage from Ring doorbell camera	**2023-07-25-1234**	**11**
P202400102	1	12	Clothing seized from Donnie Defendant at time of arrest	**2023-07-25-1234**	**12**
P202400102	1	13	Subject evidence collection kit from Donnie Defendant	**2023-07-25-1234**	**13**
P202400102	1	14	Fingerprint card from Donnie Defendant	**2023-07-25-1234**	**14**
P202400102	1	15	Fingerprint card from Victoria Victim	**2023-07-25-1234**	**15**

Submitting Officer:

Suggs, Timothy

Received By: Porter, Megan

Publish History

P202400102	**1**	4/16/2024 7:02 AM	Venable, Amanda
			Initial Publication.

Packet History

Requested by:

Requested date:

Comments:

CRIMINAL EVIDENCE: EXPERT TESTIMONY

Jessica Smith, UNC School of Government (August 2017)

Table of Contents

I. Introduction. This chapter discusses the admissibility of expert testimony under North Carolina's amended Evidence Rule 702. The 2011 amendments to subsection (a) of the rule adopted the federal standard for the admission of expert testimony, as articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). State v. McGrady, 368 N.C. 880, 884 (2016). Before the rule was amended, making North Carolina a "*Daubert* state," the standard for admissibility of expert testimony came from a case called *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004). Under both the *Daubert* and *Howerton* tests, the trial court determines admissibility of expert testimony by examining relevancy, qualifications, and reliability. *McGrady*, 368 N.C. at 892. However, under the *Daubert* standard the trial court applies a more rigorous reliability analysis. *Id.*; *see also* State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 257 (2015) (*Daubert* is a "heightened" standard). In its discussion of the reliability prong of the analysis, this chapter focuses on the new *Daubert* standard.

For discussion of the proper scope of expert testimony in sexual assault cases, see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses* in this Benchbook.

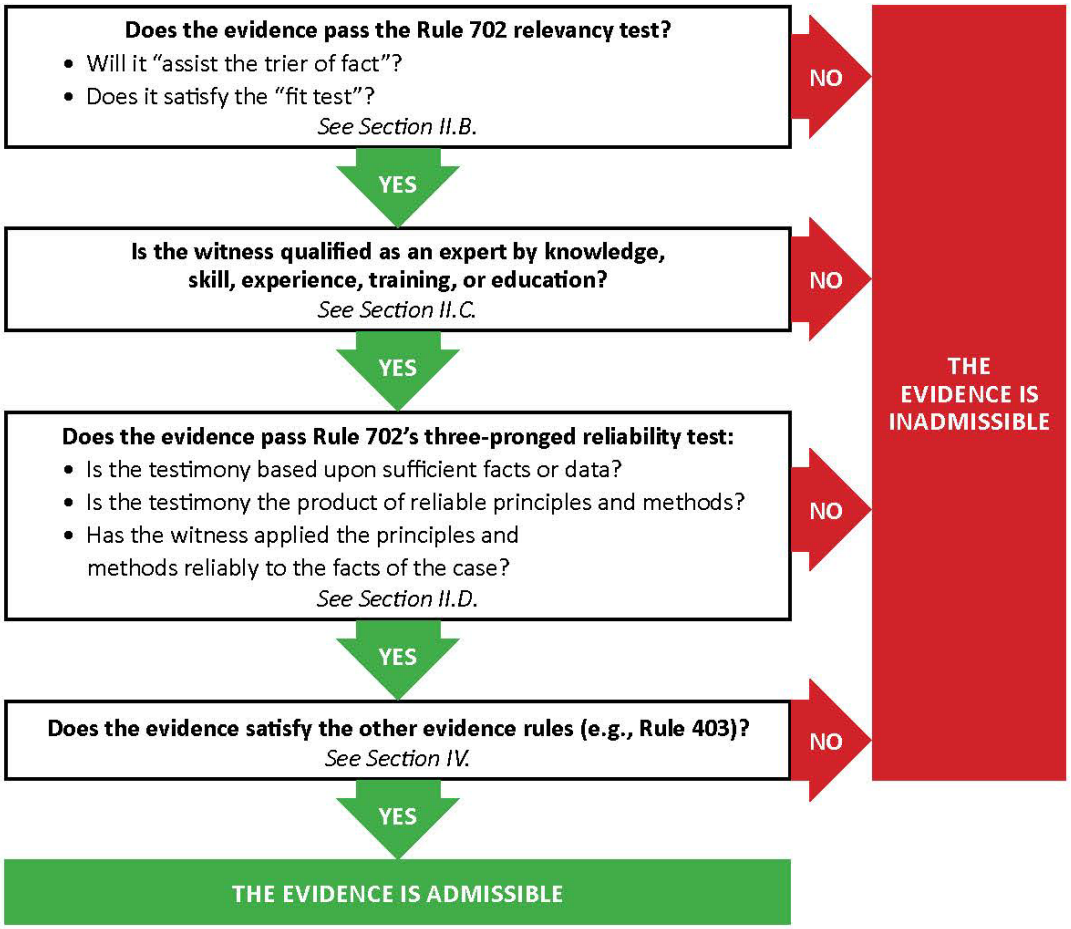
For a discussion of Confrontation Clause issues that can arise with respect to expert testimony, see *Guide to Crawford and the Confrontation Clause* in this Benchbook.

For a discussion of what discovery must be provided in connection with expert witnesses, see *Discovery in Criminal Cases* in this Benchbook.

The text of Rule 702 is set out immediately below.

> Rule 702. Testimony by experts
>
> (a) 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:
>
> (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.
>
> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
>
> (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.
>
> *[subsections (b)-(f), dealing with medical malpractice cases, are not reproduced here]*
>
> (g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.
>
> *[subsection (h), which deals with medical malpractice cases, is not reproduced here]*
>
> (i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Figure 1. Analysis for Determining Admissibility of Expert Testimony



II. Standard for Admissibility under Rule 702(a).

A. Generally. As illustrated in Figure 1 above, Evidence Rule 702(a) sets forth a three-step framework for determining the admissibility of expert testimony: relevance, qualifications, and reliability, where reliability is assessed under the stricter *Daubert* standard rather than the old *Howerton* standard. *See supra* Section I.

1. *Daubert*, *Joiner* & *Kumho Tire*. The "*Daubert* standard" refers to a standard of admissibility laid out by the United States Supreme Court in a trio of cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Those three foundational cases are summarized here.

Daubert was a civil case in which children and their parents sued to recover for birth defects allegedly sustained because the mothers had taken Bendectin, a drug marketed by the defendant pharmaceutical company. The defendant moved for summary judgment, arguing that the

drug does not cause birth defects in humans and that the plaintiffs could not present admissible evidence establishing otherwise. The defendant supported its motion with an expert's affidavit concluding that Bendectin has not been shown to be a risk factor for human birth defects. The plaintiffs countered with eight experts; each of whom concluded that Bendectin can cause birth defects. The experts' conclusions were based on animal studies; pharmacological studies purporting to show that Bendectin's chemical structure was similar to that of other substances known to cause birth defects; and the "reanalysis" of previously published human statistical studies. Relying on the "general acceptance" test for admission of scientific evidence formulated in *Frye v. United States*, 293 F. 1013 (1923), the trial court found that because it was not generally accepted as reliable in the relevant scientific community the plaintiffs' expert evidence was inadmissible and granted the defendant's motion for summary judgment. After the Ninth Circuit affirmed, the United States Supreme Court agreed to hear the case, to resolve a split among the courts regarding whether the "general acceptance" test was the proper standard for admission of expert testimony.

The Court began by holding that the *Frye* "general acceptance" test for admission of expert testimony was superseded by the adoption of the Federal Rules of Evidence. Addressing the standard for admissibility under Rule 702, the Court stated that to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. 509 U.S. at 590. It explained: "[T]he requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Id.* The Court continued, noting that Rule 702 "further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" a condition going primarily to relevance. *Id.* at 591. It clarified: "Expert testimony which does not relate to any issue with the case is not relevant and, ergo, non-helpful." *Id.* (quotation omitted). This prong of the admissibility analysis, it noted, has been described as one of "fit." *Id.* It continued:

> Faced with a proffer of expert scientific testimony . . . , the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592–93 (footnotes omitted). The Court noted that many factors will bear on the inquiry and that it would not "presume to set out a definitive checklist or test." *Id.* at 593. However, it went on to offer five "general observations" relevant to the analysis:

1. A "key question" is whether the theory or technique can be (and has been) tested. *Id.* ("Scientific methodology . . . is based on generating hypotheses and testing them to see if they can be

falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry" (quotation omitted)).

2. Whether the theory or technique has been subjected to peer review and publication. *Id.* The Court noted that publication (one element of peer review) is not a "sine qua non of admissibility;" publication does not necessarily correlate with reliability, and in some cases well-grounded but innovative theories will not have been published. *Id.* It explained: "Some propositions . . . are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Id.* Thus, "[t]he fact of publication (or lack thereof) in a peer reviewed journal . . . will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.* at 594.
3. The theory or technique's known or potential rate of error. *Id.* at 594.
4. The existence and maintenance of standards controlling the technique's operation. *Id.*
5. The "general acceptance" of the theory or technique. *Id.* at 594. The Court explained:

> "A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community. Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism."

Id. (quotations and citations omitted).

The Court was careful to note that the inquiry to be applied by the trial court in its "gatekeeping role," *id.* at 597, is "a flexible one" in which the focus "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594-95. In the end, the Court remanded for further proceedings consistent with the new test for admissibility. *Id.* at 597-98.

The second case in the *Daubert* trilogy was *Joiner,* another civil case. *Joiner,* 522 U.S. 136. Its main contribution to the trilogy is to establish that a trial court's decision to admit or exclude expert testimony under Federal Rule 702 is reviewed under an abuse of discretion standard and to illustrate application of that standard to a trial court's exclusion of expert testimony. In *Joiner*, an electrician who had lung cancer sued the manufacturer of PCBs and the manufacturers of electrical transformers and dielectric fluid for damages. The plaintiff, who

was a smoker and had a family history of lung cancer, claimed that his exposure on the job to PCBs and their derivatives promoted his cancer. In deposition testimony, the plaintiff's experts opined that his exposure to PCBs was likely responsible for his cancer. The district court found the testimony from these experts to be inadmissible and granted the defendants' motion for summary judgment. The Eleventh Circuit reversed and the Supreme Court granted certiorari.

The Court held that a trial court's decision to admit or exclude expert testimony will be reviewed under an abuse of discretion standard and that here, no abuse of discretion occurred. *Id.* at 143. The plaintiff proffered the deposition testimony of two expert witnesses: (1) Dr. Arnold Schecter, who testified that he believed it "more likely than not that [the plaintiff's] lung cancer was causally linked to cigarette smoking and PCB exposure;" and (2) Dr. Daniel Teitlebaum, who testified that the plaintiff's "lung cancer was caused by or contributed to in a significant degree by the materials with which he worked." *Id.* The defendants asserted that the experts' statements regarding causation were speculation, unsupported by epidemiological studies and based exclusively on isolated studies of laboratory animals. *Id.* The plaintiff responded, claiming that his experts had identified animal studies to support their opinions and directing the court to four epidemiological studies relied upon by his experts. *Id.* at 143-44. The district court had agreed with the defendants that the animal studies did not support the plaintiff's contention that PCB exposure contributed to his cancer. *Id* at 144. The studies involved infant mice that developed cancer after being exposed to massive doses of concentrated PCBs injected directly into their bodies. *Id.* The plaintiff, by contrast, was an adult human whose alleged exposure was far less and in lower concentrations. *Id.* Also, the cancer that the mice developed was different than the plaintiff's cancer, no study demonstrated that adult mice developed cancer after being exposed to PCBs, and no study demonstrated that PCBs lead to cancer in other species. *Id.* The Court concluded: "[t]he studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." *Id.* at 144-45.

The trial court also had concluded that the epidemiological studies were not a sufficient basis for the experts' opinions. After reviewing the studies, the Court found that they did not sufficiently suggest a link between the increase in lung cancer deaths and exposure to PCBs. *Id.* at 145-46. The Court went on to disagree with the plaintiff's assertion that *Daubert* requires a focus "solely on principles and methodology," not the conclusions that they generate, and that the trial court erred by focusing on the experts' conclusions, stating:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. The Court went on to hold that the trial court did not abuse its discretion by concluding that the studies on which the experts relied were not sufficient to support their conclusions that the plaintiff's exposure to PCBs contributed to his cancer. *Id.* at 146-47.

The final case in the trio was *Kumho Tire,* 526 U.S. 137. It answered a question left open by *Daubert:* Does the *Daubert* standard apply only to "scientific" expert testimony or to all expert testimony, including testimony based on technical or other specialized knowledge? The Court held that the test applies to *all* expert testimony. In *Kumho Tire* the Court also clarified the nature of the *Daubert* inquiry.

In *Kumho Tire,* the plaintiffs brought a products liability action against a tire manufacturer and distributor for injuries sustained when a vehicle tire failed. The plaintiffs rested their case on deposition testimony provided by an expert in tire failure analysis, Dennis Carlson. Carlson's testimony accepted certain background facts about the tire in question, including that it had traveled far; that the tire's tread depth had been worn down to depths that ranged from 3/32 of an inch to zero; and that the tire tread had at least two inadequately repaired punctures. Despite the tire's age and history, Carlson concluded that a defect in the tire's manufacture or design caused the blowout. His conclusion rested on several undisputed premises, including that the tread had separated from the inner carcass and that this "separation" caused the blowout. *Id.* at 143-44. However, his conclusion also rested on several disputed propositions. First, Carlson said that if a separation is not caused by a kind of misuse called "overdeflection" then ordinarily its cause is a tire defect. Second, that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain symptoms, which he identified. Third, that where he does not find at least two such symptoms, he concludes that a manufacturing or design defect caused the separation. Carlson conceded that the tire showed a number of symptoms, but in each instance he found them to be not significant and he explained why he believed they did not reveal overdeflection. He thus concluded that a defect must have caused the blowout.

The defendant moved to exclude Carlson's testimony on the ground his methodology failed Rule 702's reliability requirement. The trial court conducted a *Daubert* reliability analysis and granted the motion to exclude. The Eleventh Circuit reversed, holding that the *Daubert* analysis only applied to scientific evidence. The United States Supreme Court granted certiorari to resolve the question of whether or how *Daubert* applies to expert testimony based not on "scientific" knowledge but on "technical" or "other specialized" knowledge.

The Supreme Court began by holding that the *Daubert* standard applies to all expert testimony, not just scientific testimony. *Id.* at 147-49. It went on to hold that when determining the admissibility of the expert testimony at issue--engineering testimony--the trial court *may* consider the five *Daubert* factors: whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant

scientific community. *Id.* at 149-50. Emphasizing the word "may" in this holding, the Court explained:

> Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. . . . [T]here are many different kinds of experts, and many different kinds of expertise. . . . We agree . . . that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. at 150 (quotations and citations omitted). It continued:

> *Daubert* . . . made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.
>
> At the same time . . . some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

Id. at 151. The Court emphasized that the purpose of *Daubert*'s gatekeeping requirement "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field." *Id.* at 152. It further emphasized the considerable leeway that must be afforded to the trial court in determining whether particular expert testimony is reliable. *Id.* It clarified that when assessing reliability, the trial court must have flexibility in determining whether special briefing or other proceedings are necessary, and that, as it held in *Joiner,* the court's decision will be reviewed under an abuse of discretion standard. *Id.*

Turning to the case at hand, the Court held that the trial court did not abuse its discretion by excluding the testimony. The district court had found unreliable the methodology employed by the expert in analyzing the data obtained through his inspection of the tire, and the scientific basis, if any, for his analysis. The Court noted that, among other things, the trial court could reasonably have wondered whether the expert's method of visual and tactile inspection was sufficiently precise, and these concerns might have been amplified by Carlson's repeated reliance on the subjectiveness of his analysis and the fact that he had inspected the tire for the first time the morning of his deposition, and only for a few hours, having based his initial conclusions on photographs. *Id.* at 155. Additionally, the trial court found that none of the *Daubert* factors, including that of general acceptance, indicated that Carlson's testimony was reliable. *Id.* at 156. With respect to Carlson's claim that his method was accurate, the court noted that, as stated in *Joiner*, "nothing . . . requires a district court to admit opinion evidence that it is connected to existing data only by the ipse dixit of the expert." *Id.* at 157. For these and other reasons, the Court concluded that the trial court did not abuse its discretion by excluding the expert testimony. *Id.* at 158.

Stated broadly, these three cases hold that when assessing *any* type of expert testimony under Rule 702, the *Daubert* standard applies; the inquiry is a flexible one; and the trial court will be reversed only for an abuse of discretion.

2. Effective Date of Amendments to Rule 702(a). As noted above, the 2011 amendments to Rule 702(a) incorporate the *Daubert* standard. The amendments to section 702(a) apply to "actions commenced" on or after October 1, 2011. *See* S.L. 2011-283, secs. 1.3, 4.2. "[T]he trigger date" for applying the amended version of the rule is the date that the bill of indictment is filed. State v. Walston, 229 N.C. App. 141, 152 (2013), *rev'd on other grounds*, 367 N.C. 721 (2014); State v. McLaughlin, ___ N.C. App. ___, 786 S.E.2d 269, 286 (2016); State v. Gamez, 228 N.C. App. 329, 332-33 (2013). If a second indictment is filed on or after October 1, 2011 and is joined for trial with an indictment filed before the statute's effective date, the proceeding is deemed to have commenced on the date the first indictment was filed. *Gamez,* 228 N.C. App. at 333. However, in a case involving one indictment in which a superseding indictment is filed, the date of the superseding indictment controls. *Walston*, 229 N.C. App. at 152.

3. Effect of Pre-Amendment Case Law.
The North Carolina Supreme Court has stated that the 2011 amendments did not abrogate all North Carolina precedents interpreting that rule. Specifically, it has stated: "Our previous cases are still good law if they do not conflict with the *Daubert* standard." State v. McGrady, 368 N.C. 880,

at 888 (2016). It is not entirely clear what that statement means. The 2011 amendments adopting the *Daubert* standard changed only the reliability prong of the Rule 702 analysis; the relevancy and qualifications prongs were not changed. Thus, this Chapter assumes that this statement means: (1) that cases applying the relevancy and qualifications prongs of the analysis remain good law; and (2) that cases applying the more lenient pre-*Daubert* standard to the reliability prong are inconsistent with the analysis under the new *Daubert* rule. However, cases applying the pre-*Daubert* standard to the reliability prong to hold that evidence is inadmissible are likely to be consistent with a result that obtains from application of the *Daubert* standard (after all, evidence that could not pass muster under the earlier standard is unlikely to do so under the new stricter standard). By contrast, cases applying the more lenient pre-*Daubert* standard to the reliability prong to hold that evidence is admissible may not be consistent with a result that obtains under the stricter *Daubert* test, and perhaps should be viewed with some skepticism.

B. Relevancy.

1. Generally. Rule 702 requires that the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." This prong of the analysis is referred to as the "relevancy test." *Daubert,* 509 U.S. at 591 ("This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." (quotation omitted)); *see also McGrady*, 368 N.C. at 889. As with any evidence, the expert testimony must meet the minimum standard for logical relevance under Rule 401. *McGrady*, 368 N.C. at 889. "In other words, the testimony must 'relate to [an] issue in the case.'" *Id. (*quoting *Daubert*)*; see also* State v. Oakes, 209 N.C. App. 18, 28-29 (2011) (the defendant was not prejudiced by the trial court's decision to exclude testimony by the defendant's use of force expert on the issue of the defendant's intent to kill where intent to kill was irrelevant to the charge of felony-murder); *see generally* Relevancy in this Benchbook (discussing relevancy under Rule 401).

2. "Assist the Trier of Fact." As used in this prong of the inquiry, the term relevance means something more than standard relevancy under Rule 401. *McGrady*, 368 N.C. at 889. As the North Carolina Supreme Court has explained, "In order to 'assist the trier of fact,' expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Id.* (going on to note: "An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own" (citation and quotation omitted)). Thus, in *McGrady*, the court held that the trial court did not abuse its discretion by excluding a defense expert proffered to testify to "pre-attack cues" and "use of force variables" to support the defense of self-defense and defense of others. 368 N.C. at 894-95. According to the expert, pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack" including "actions consistent with an assault, actions consistent with retrieving a

weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." *Id*. at 894. He said that "use of force variables" refer to circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as the age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id*. at 895. The court held that the trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common knowledge. The court noted: the factors the expert "cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." *Id*.

3. **"Fit" Test.** Another aspect of relevancy is the "fit" of the expert testimony to the facts of the case. *Daubert*, 509 U.S. at 591-92. As referred to in this way, the fit test ensures that proffered "'expert testimony . . . is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" State v. Babich, ___ N.C. App. ___, 797 S.E.2d. 359, 362 (2017) (quoting *Daubert*). Thus for example, the North Carolina Court of Appeals held that expert testimony on retrograde extrapolation that assumed, with no evidence, that the defendant was in a post-absorptive state failed the fit test and was inadmissible. *Id.* Issues of "fit" overlap with the third-prong of the reliability analysis, that the witness has applied the principles and methods reliably to the facts of the case, as discussed below in Section II.D.

4. **Illustrative Cases.** Illustrative cases addressing this prong of the test are annotated below. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases listed below include those decided both before and after the 2011 amendments.

> *State v. McGrady*, 368 N.C. 880, 894–95 (2016). In this murder case, the trial court did not abuse its discretion by excluding a defense expert proffered to testify to "pre-attack cues" and "use of force variables" to support the defense of self-defense and defense of others. The expert's report stated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack" including "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." He indicated that "use of force variables" refer to additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a perceived threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. The trial court did not abuse its discretion by concluding that the expert's testimony about pre-attack cues and use of force variables would not assist the jury because these matters were within the jurors' common

knowledge. The court noted: the factors the expert "cited and relied on to conclude that defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions." In fact, the expert's own report stated that, even without formal training, individuals recognize and respond to these cues and variables when assessing a potential threat.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d. 359, 361-64 (2017). Holding that an expert's retrograde extrapolation testimony that assumed, with no evidence, that the defendant was in a post-absorptive state failed the "fit" test and was inadmissible. The court held:

> [W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.
>
> When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.

State v. Daughtridge, ___ N.C. App. ___, 789 S.E.2d 667, 675-76 (2016). The trial court improperly allowed a medical examiner to testify, as an expert in forensic pathology, that the victim's death was a homicide when that opinion was based not on medical evidence but rather on non-medical information provided to the expert by law enforcement officers involved in the investigation of the victim's death. The State failed to adequately explain how the medical examiner was in a better position than the jurors to evaluate whether the information provided by the officers was more suggestive of a homicide than a suicide.

State v. Martin, 222 N.C. App. 213, 216–18 (2012). The trial court did not abuse its discretion by excluding testimony by a defense

> proffered "forensic scientist and criminal profiler." During voir dire the witness identified what he considered to be inconsistencies in the victim's version of events leading up to and during the alleged sexual assaults and evidence consistent with what he described as "investigative red flags." The witness's testimony, which would have discredited the victim's account of the defendant's action on the night in question and commented on the manner in which the criminal investigation was conducted "appears to invade the province of the jury."
>
> *State v. Fox*, 58 N.C. App. 231, 233 (1982). The trial court did not err by refusing to allow a psychiatrist testifying as an expert witness to give his opinion that the defendant believed he was acting in self-defense. The court held: "we do not find error in the trial court's conclusion that it was for the jury to ascertain defendant's motive for the killing." The court concluded that the expert
>
> > certainly was qualified to give an opinion as to [the defendant's] mental capacity and any mental disorders he may have identified, and the record shows he was permitted to do so. Indeed, the psychiatrist was permitted to testify that defendant had told him he had acted in the belief that the victim was going to kill him and that he had been frightened. We find nothing in the record to indicate that the witness was better qualified than the jury to judge the defendant's veracity based on all the evidence.

C. Qualifications.

1. Generally. The second requirement for admissibility of expert testimony is that the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." N.C. R. EVID. 702(a). "This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony." *McGrady*, 368 N.C. at 889. It asks: "Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" *Id.*

The North Carolina Supreme Court has noted that "[e]xpertise can come from practical experience as much as from academic training" and that:

> The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise.

Id. at 889-90. It also has noted that "[d]ifferent fields require different 'knowledge, skill, experience, training, or education,'" id. at 896, explaining:

> For example, a witness with a Ph.D. in organic chemistry may be able to describe in detail how flour, eggs, and sugar react on a molecular level when heated to 350 degrees, but would likely be less qualified to testify about the proper way to bake a cake than a career baker with no formal education.

Id.

Once a witness is found to be qualified to testify as an expert, issues sometimes arise about whether the expert is being asked to testify outside of his or her area of expertise. For a discussion of that issue, see Section III.E. below.

2. Illustrative Cases. Examples of North Carolina cases addressing this prong of the test are provided below. This list is meant to be illustrative, not exhaustive. Because this prong of the Rule 702(a) admissibility inquiry was not altered by the 2011 amendments to the rule, the cases below include those decided both before and after the 2011 amendments to the Rule.

> *State v. McGrady*, 368 N.C. 880, 895–96 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert, Mr. Cloutier, was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. Cloutier's report stated that an instinctive survival response to fear "can activate the body's sympathetic nervous system" and the "'fight or flight' response." He indicated that the defendant's perception of an impending attack would cause an adrenalin surge "activat[ing] instinctive, powerful and uncontrollable survival responses." He maintained that this nervous system response causes "perceptual narrowing," focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. According to Cloutier, this nervous system response also can cause "fragmented memory," or an inability to recall events. The expert, a former police officer, testified that he was not a medical doctor but had studied "the basics" of the brain in general college psychology courses. He also testified that he had read articles and been trained by medical doctors on how adrenalin affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses. Noting that Rule 702(a) "does not create an across-the-board requirement for academic training or credentials," the court held that it was not an abuse of discretion to require a witness who intended to testify about the

functions of an organ system to have some formal medical training.

State v. Morgan, 359 N.C. 131, 159–61 (2004). The trial court did not abuse its discretion by holding that the State's witness was qualified to testify as an expert in the field of bloodstain pattern interpretation where the witness completed two training sessions on bloodstain pattern interpretation, had analyzed bloodstain patterns in dozens of cases, had previously testified in a homicide case as a bloodstain pattern interpretation expert, and described in detail to the judge and jury the difference between blood spatter and transfer stains and produced visual aids to illustrate his testimony. The witness's "qualifications are not diminished, as defendant suggests, by the fact that he has never written an article, lectured, or taken a college-level course on bloodstain or blood spatter analysis."

State v. Cooper, 229 N.C. App. 442, 461-63 (2013). In this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by concluding that a defense expert proffered to testify that the defendant's computer had been tampered with was not qualified to give expert testimony. The witness had worked for many years in the computer field, specializing in computer network security. However, the witness had no training and experience as a forensic computer analyst. The trial court erred by concluding that because the digital data in question was recovered using forensic tools and methods, only an expert forensic computer analyst was qualified to interpret and form opinions based on the data recovered. It concluded: "Nothing in evidence supports a finding that [the expert] was not qualified to testify using the data recovered by the State. [The expert], based upon expertise acquired through practical experience, was certainly better qualified than the jury to form an opinion as to the subject matter to which his testimony applie[d]." (quotation and citation omitted).

State v. Dew, 225 N.C. App. 750, 760-61 (2013). In this child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to the victims. Among other things, the witness had a master's degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse.

State v. Britt, 217 N.C. App. 309, 314-15 (2011). SBI agents were properly qualified to give expert testimony regarding firearm tool mark identification.

State v. Norman, 213 N.C. App. 114, 122-24 (2011). The trial court did not abuse its discretion by qualifying the State's witness, Mr. Glover, as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. Glover was the head of NC Department of Health and Human Services Forensic Test for Alcohol branch. He oversaw training of officers on the operation of alcohol breath test instruments and of drug recognition experts, who observed the effects of drugs in individuals. Glover had a bachelor of science and a master's degree in biology and was certified as a chemical analyst on breath test instruments used in North Carolina. He attended courses at Indiana University regarding the effects of alcohol on the human body, the various methods for determining alcohol concentrations, and on the effects of drugs on human psychomotor performance. Glover published several works and previously had been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. The court concluded that despite Glover's lack of a formal degree or certification in the fields of physiology and pharmacology, his extensive practical experience qualified him to testify as an expert. *See also* State v. Green, 209 N.C. App. 669, 672-75 (2011) (holding that the trial court did not abuse its discretion by finding that Glover was qualified to testify as an expert in the areas of pharmacology and physiology).

State v. Norton, 213 N.C. App. 75, 80-81 (2011). The trial court did not abuse its discretion by finding that a forensic toxicologist was qualified to testify about the effects of cocaine on the body. The court concluded: "As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness . . . was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

State v. Hargrave, 198 N.C. App. 579, 584-85 (2009). The court rejected the defendant's argument that the trial court erred by admitting testimony from the State lab technician (who testified that the substances found by law enforcement contained cocaine) because the expert did not have an advanced degree. The witness had a Bachelor's degree in chemistry, completed basic law

enforcement training and in-house training to be a forensic drug chemist and testified as an expert in that field on approximately forty previous occasions.

D. Reliability.

1. Generally. The third requirement of Rule 702(a) is the three-pronged reliability test that is new to the amended rule:

(1) the testimony must be based upon sufficient facts or data;
(2) the testimony must be the product of reliable principles and methods; and
(3) the witness must have applied the principles and methods reliably to the facts of the case.

N.C. R. EVID. 702(a). These three prongs together constitute the reliability inquiry discussed in the *Daubert* line of cases, *McGrady,* 368 N.C. at 890, discussed in Section II.A.1. above. Citing extensively from those cases, the North Carolina Supreme Court has noted that:

- Although the primary focus of this inquiry is the reliability of the witness's principles and methodology, not the conclusions that they generate, conclusions and methodology are not entirely distinct. Thus, when a trial court concludes that there is simply too great an analytical gap between the data and the opinion proffered, "the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *McGrady*, 368 N.C. at 890 (quotations and citations omitted).
- "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony" and the trial court has discretion in determining how to address the reliability analysis. *Id*.
- The five factors identified in *Daubert* (whether the theory or technique can and has been tested; whether it has been subjected to peer review and publication; the theory or technique's known or potential rate of error; whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within the relevant scientific community) bear on the reliability of the evidence, but the trial court should use whatever factors it thinks most appropriate for the inquiry. *Id.*
- Other factors considered by courts in the reliability inquiry include whether:

  (1) the expert is testifying based on research conducted independent of the litigation;
  (2) the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
  (3) the expert has adequately accounted for obvious alternative explanations;

(4) the expert has employed the same care in reaching litigation-related opinions as the expert employs in performing the expert's regular professional work; and
(5) the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

McGrady, 368 N.C. at 891.

- The inquiry remains a flexible one; neither *Daubert*'s five factors nor this additional list of factors constitute a checklist; the trial court is free to consider other factors, depending on the type of testimony at issue. *Id.* at 891-92.

Cases decided since *McGrady* have reiterated these points. *See, e.g.,* State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016); State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 258 (2015).

Note that the third-part of the reliability analysis—that the witness has applied the principles and methods reliably to the facts of the case—overlaps, in some respect, with issues of "fit" with respect to the relevancy prong of the analysis, discussed above in Section II.B.3.

2. Illustrative Cases. Examples of North Carolina cases applying *Daubert* to this prong of the analysis include:

State v. McGrady, 368 N.C. 880, 897–99 (2016). In this murder case, the trial court did not abuse its discretion by concluding that a defense expert's testimony regarding reaction times was unreliable. The testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sherriff's Department; and visited the crime scene, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. This failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case.

State v. Hunt, 790 N.C. App. 874, 877, 880-81 (2016). In this drug case, the trial court properly allowed the State's witness, a special

agent and forensic chemist with the State Crime Lab, to testify as an expert in forensic chemistry. The expert testified that following Crime Lab administrative procedure, he applied a testing procedure called the "administrative sample selection" to the pharmaceutically manufactured pills in question. This involves visually inspecting the shape, color, texture, and manufacturer's markings or imprints of all units and comparing them to an online database to determine whether the pills are pharmaceutically prepared. After the chemist determines that the units are similar and not counterfeit, the protocol requires the chemist to weigh the samples, randomly select one, and chemically analyze that tablet, using gas chromatography and a mass spectrometer. The expert testified that upon receiving the pills, he divided them into four categories based on their physical characteristics. Using administrative sample selection, he tested one pill from the first three groups. Each tested positive for oxycodone. The combined weight of the pills in these categories exceeded the trafficking amount. Upon inspecting the pills that he did not chemically analyze according to their physical characteristics, he found them consistent with a pharmaceutical preparation containing oxycodone. The court held that, based on the expert's detailed explanation of his use of lab procedures, his testimony was the "product of reliable principles and methods." The court rejected the defendant's argument that the expert's testimony regarding the pills that were not chemically analyzed was not "based upon sufficient facts or data" and did not reflect application of "the principles and methods reliably to the facts of the case." Specifically, the defendant pointed to lab rules and regulations stating that under administrative sampling selection, no inferences about unanalyzed materials are to be made. The expert testified however that the lab rules and regulations regarding no inferences for unanalyzed substances does not apply to pharmaceutically prepared substances. For other cases involving sampling in drug testing, see Section II.F.14. below.

State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 864-65 (2016). In this drug case, the trial court did not abuse its discretion by admitting expert testimony identifying the substance at issue as marijuana. At trial, Agent Baxter, a forensic scientist with the State Crime Lab, testified that she examined the substance, conducted relevant tests, and found that the substance was marijuana. The court rejected the defendant's argument that the expert's testimony was not "the product of reliable principles and methods" and that the evidence failed to show that she applied the principles and methods reliably to the facts of the case. Baxter's testimony established that she analyzed the substance in accordance with State Lab procedures, providing detailed testimony regarding each step in her process. Specifically, identifying the substance as marijuana involves the following steps: separating weighable materials from packaging; recording the weight; conducting a preliminary analysis, such as a color test;

conducting a microscopic examination, looking for identified characteristics of marijuana (e.g., unique characteristics of the leaves); and conducting the Duquenois–Levine color test. The court concluded: "Based on her detailed explanation of the systematic procedure she employed to identify the substance . . ., a procedure adopted by the NC Lab specifically to analyze and identify marijuana, her testimony was clearly the 'product of reliable principles and methods' sufficient to satisfy . . . Rule 702(a)." The court went on to reject the defendant's argument that Baxter's testimony did not establish that she applied the principles and methods reliably to the facts of the case. Based on Baxter's testimony regarding her handling of the sample at issue, the court held that Baxter's testimony established that the principles and methods were applied reliably the substance at issue.

E. Procedural Issues.

1. Preliminary Question of Fact. The admissibility of expert testimony is determined by the trial court pursuant to Rule 104(a). *McGrady*, 368 N.C. at 892. *See generally* N.C. R. EVID. 104(a). In determining admissibility, the trial judge is not bound by the rules of evidence, except those with respect to privileges. *McGrady*, 368 N.C. at 892 (quoting N.C. R. EVID. 104(a)).

To the extent that factual findings are necessary to determine admissibility, the trial judge acts as the trier of fact. *Id.* at 892 (citing Commentary to N.C. R. EVID. 104(a)). The standard for factual findings is the greater weight of the evidence *Id.* at 892–93.

2. Burden of Proof. The proponent of the evidence bears the burden of establishing that the evidence is admissible. State v. Ward, 364 N.C. 133, 140 (2010) (pre-amendment expert witness case).

3. Flexible Inquiry. Because Rule 702(a) does not mandate any particular procedure for the court to determine the admissibility of expert testimony, the trial court has the discretion to determine how to best handle the matter*. Kumho Tire,* 526 U.S. at 152 ("The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."); *see also McGrady*, 368 N.C. at 892; State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (citing *McGrady* and noting that "Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony"); State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 866 (2016) (quoting *McGrady*). In simple cases, an appropriate foundation may be laid on direct examination. *McGrady*, 368 N.C. at 893. In more complex cases, the trial court may opt for special briefings, submission of affidavits, voir dire testimony, or an *in limine* hearing. *Id*. Whatever the case, the trial court "should use a procedure that, given the circumstances of the case, will secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (quotation omitted).

Noting the difficulty a silent record creates for purposes of appeal, a concurring opinion in one post-*McGrady* cases suggests:

> [B]est practice dictates parties should challenge an expert's admissibility through a motion *in limine*. In the event a trial court delays its ruling on the matter, or in the event a party fails to raise the challenge until the expert is called upon at trial, our trial courts should afford parties a *voir dire* hearing to examine the witness and submit evidence into the record, which this Court can review on appeal.

Abrams, ___ N.C. App. at ___, 789 S.E.2d at 869 (Hunter, J., concurring).

4. **Findings of Fact & Conclusion of Law.** In *McGrady,* the North Carolina Supreme Court stated that the trial court must find the relevant facts pertaining to admissibility and then, based on these findings, determine whether the proffered expert testimony meets the rule's requirements of qualification, relevance, and reliability. *McGrady*, 368 N.C. at 892–93. Although some language in at least one subsequent court of appeals case suggests that the trial courts are not required to make findings of fact or conclusions of law regarding the admissibility of expert testimony, *Abrams*, ___ N.C. App. at ___, 789 S.E.2d at 868 (Hunter, J., concurring) ("At the present, trial courts are not required to make findings of fact or conclusions of law when they accept or reject an expert witness."), that same case suggests that the better practice in light of *McGrady* is to make such findings and conclusions on the record. *Id.* at 869 ("[T]he trial court should identify the *Daubert* factors and make findings of fact and conclusions of law, either orally or in writing, as to the expert's admissibility.").

5. **Informing the Jury of Witness's Expert Status.** Some commentators and authority from other jurisdictions suggest that it is preferable for the trial court not to advise the jury that it has found a witness to be an expert, to avoid undue influence that the jury might place on the witness's testimony. *See e.g.,* Advisory Committee Notes to FED. R. EVID. 702 ("[T]here is much to be said for a practice that prohibits the use of the term 'expert' by both the parties and the court at trial. Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness's opinion, and protects against the jury's being overwhelmed by the so-called 'experts.'" (quotation omitted)); National Commission on Forensic Science, Views of the Commission Regarding Judicial Vouching (June 21, 2016) ("The Commission is of the view that it is improper and misleading for a trial judge to declare a witness to be an expert in the presence of the jury."), https://www.justice.gov/ncfs/file/880246/download; United States v. Johnson, 488 F.3d 690, 697-98 (6th Cir. 2007) (agreeing with decisions that have articulated "good reasons" for not informing the jury that a witness has been qualified as an expert); Michael H. Graham, *Expert Witness Testimony: Fed. R. Evid. 702-705 Primer; Hypothetical Question Discretionary Use*, 52 No. 5 CRIM. L. BULL Art. 8 (2016) ("It is preferable that the court not advise the jury of its determination if it decides that the witness is in fact qualified as an expert as to a particular subject matter."). However, several older North Carolina criminal cases

found no error when a trial court determined that a witness was an expert in the presence of the jury. State v. Frazier, 280 N.C. 181, 197, *vacated on other grounds*, 409 U.S. 1004 (1972) (the trial court determined, in the presence of the jury, that two witnesses were qualified to testify as experts; stating: "It has never been the general practice in the courts of this State for the trial judge to excuse the jury from the courtroom when ruling upon the qualification of a witness to testify as an expert."); State v. Edwards, 24 N.C. App. 303, 305 (1974) (citing *Frazier* and holding that the trial court did not err by stating, in the presence of the jury, that it found a medical doctor to be expert witness). Additionally, N.C. Pattern Instruction – Crim 104.94 (Testimony of Expert Witness) expressly informs the jury of the witness's status as an expert and at least one unpublished case indicates that the better practice is to give this instruction. State v. Dunn, 220 N.C. App. 524, *9 (2012) (unpublished) (holding that no error occurred when the trial court failed to give the pattern instruction but noting: "the better practice is for the trial court to specifically instruct the jury on expert testimony when an expert has testified at trial"); *see generally* State v. Prevatte, 356 N.C. 178, 224 (2002) (noting that the court has approved of the pattern instruction).

F. Particular Types of Experts. Several common types of expertise are explored in the sections immediately below. This Chapter does not attempt to present an exhaustive evaluation of these areas of expert testimony. Rather, it provides the trial judge with an overview of the current state of North Carolina law with respect to each category and alerts the trial court to potential issues. As science and technology evolve, new tests and analyses may be developed providing a better understanding as to the strengths and weakness of tests and analyses currently being done and resulting in new tests and analyses. Either or both developments may impact existing law.

When discussing certain forensic science disciplines, this Chapter cites the following report: PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) [hereinafter PCAST REPORT], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. This report is cited because it is the most recent comprehensive evaluation of the relevant forensic science disciplines. Although some, such as the National Association of Criminal Defense Lawyers, have applauded that report, it was not adopted by the Department of Justice and others, including the National District Attorneys Association, have been critical of it or have challenged it. Jack D. Roady*, The PCAST Report: A Review and Moving Forward−A Prosecutor's Perspective*, CRIMINAL JUSTICE, Summer 2017, at 9 (discussing the reaction to the report by prosecutors, defense attorneys, and the forensic science community).

For discussion of the proper scope of expert testimony in sexual assault cases, see *Evidence Issues Criminal Cases Involving Child Victims and Child Witnesses* in this Benchbook.

1. Use of Force & Self-Defense Experts. Although use of force and self-defense experts are used in North Carolina criminal trials, *see, e.g.,* State v. McDowell, 215 N.C. App. 184, 189 (2011) (noting that Mr. Cloutier testified as an expert in "use-of-force science" and self-defense tactics),

few published cases directly address the admissibility of such evidence. One case that does is *State v. McGrady*, 368 N.C. 880 (2016), decided under amended Rule 702(a) and the *Daubert* standard. In *McGrady*, the North Carolina Supreme Court held that the trial court did not abuse its discretion by excluding testimony by a defense proffered expert. At trial the defendant sought to call Dave Cloutier as an expert in "the science of the use of force" *Id.* at 883. Cloutier was proffered to testify on three topics:

> (1) that, based on the "pre-attack cues" and "use of force variables" present in the interaction between defendant and the victim, the defendant's use of force was a reasonable response to an imminent, deadly assault that the defendant perceived;
> (2) that defendant's actions and testimony are consistent with those of someone experiencing the sympathetic nervous system's "fight or flight" response; and
> (3) that reaction times can explain why some of defendant's defensive shots hit the victim in the back.

Id. at 894. The Supreme Court held that the trial court did not abuse its discretion in excluding the expert's testimony about "pre-attack cues" and "use of force variables" on grounds that it was not relevant. *Id.* Cloutier's report indicated that pre-attack cues are actions "exhibited by an aggressor as a possible precursor to an actual attack," and include "actions consistent with an assault, actions consistent with retrieving a weapon, threats, display of a weapon, employment of a weapon, profanity and innumerable others." *Id.* According to Cloutier, "use of force variables" include additional circumstances and events that influence a person's decision about the type and degree of force necessary to repel a threat, such as age, gender, size, and number of individuals involved; the number and type of weapons present; and environmental factors. *Id.* at 895. The court found this this testimony would not assist the jury because these matters were within the juror's common knowledge. *Id.*

Next, the *McGrady* court found that the trial court did not abuse its discretion by concluding that Cloutier was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system. *Id.* Cloutier's report stated that an instinctive survival response to fear "can activate the body's sympathetic nervous system" and the "'fight or flight' response." *Id.* He indicated that the defendant's perception of an impending attack would cause an adrenalin surge "activat[ing] instinctive, powerful and uncontrollable survival responses." *Id.* He further maintained that this nervous system response causes "perceptual narrowing," focusing a person's attention on the threat and leading to a loss of peripheral vision and other changes in visual perception. *Id.* According to Cloutier, this nervous system response also can cause "fragmented memory," or an inability to recall specific events related to the threatening encounter. *Id.* at 895-96. The court held that it was not an abuse of discretion to require "a witness who intended to testify about the functions of an organ system to have some formal medical training." *Id.* at 896.

Finally, the court held that the trial court did not abuse its discretion by finding that the expert's testimony regarding reaction times

was unreliable. *Id.* at 897. This testimony was offered to rebut any assumption in the jurors' minds that the defendant could not have acted defensively if he shot the victim in the back. *Id.* Because the expert testified on voir dire that he interviewed the defendant and other witnesses; reviewed interviews of the defendant and a witness, the case file, and physical evidence collected by the Sherriff's Department; and visited the location of the incident, the expert's testimony satisfied the "sufficient facts or data" requirement in Rule 702(a)(1). *Id.* However, the expert based his testimony about average reaction times on statistics from two studies, but did not know whether or not those studies reported error rates and, if so, what those error rates were. Thus, a trial judge could reasonably conclude that the expert's degree of unfamiliarity with the studies rendered unreliable his testimony about them and the conclusions about the case that he drew from them. *Id.* at 898-99. Also, while the expert established that a disability could affect reaction time, he failed to account for the defendant's back injury in his analysis. The court found that this failure relates both to the sufficiency of the facts and data relied upon and to whether the expert applied his own methodology reliably in this case. *Id.*at 899.

2. DNA Identification Evidence. "Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms." FEDERAL JUDICIAL CENTER & NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 131 (3d ed. 2011) [hereinafter REFERENCE MANUAL ON SCIENTIFIC EVIDENCE], https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf. "DNA analysis involves comparing DNA profiles from different samples to see if a known sample may have been the source of an evidentiary sample." PCAST REPORT at 69. It is important to understand, however, that the term "DNA testing" encompasses different kinds of testing methods, different sources of bodily material, and differing statistical means of assessing the significance of a match, all of which has changed and likely will continue to change as science and technology advance. 4 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 157 (2016-17 ed.) [hereinafter MODERN SCIENTIFIC EVIDENCE]. Although some forms of DNA evidence are now admissible in all jurisdictions, there are many types of forensic DNA analysis, and more are being developed. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131. Questions of admissibility will continue to arise as advancing methods of analysis and novel applications of established methods are introduced. *Id.*

This Chapter does not attempt to explain the wide variety of DNA testing that has been and currently is being done in forensic labs and potential issues regarding that testing. For a discussion of the history of DNA evidence, the types of scientific expertise that go into the analysis of DNA samples, the scientific principles behind DNA typing, issues regarding sample quantity and quality and laboratory performance, issues in the interpretation of laboratory results, special issues in human DNA testing for identification, and forensic analysis of nonhuman DNA, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 131-210. For the PCAST REPORT's assessment of DNA testing using single source samples,

simple mixture samples, and complex mixture samples, see PCAST REPORT at 69-83.

Although expert testimony regarding DNA analysis repeatedly has been found to be admissible in North Carolina prior to the 2011 amendments to Rule 702, *see, e.g.,* State v. Pennington, 327 N.C. 89, 98-101 (1990), there do not appear to be any published North Carolina cases directly assessing any form of DNA testing under the new *Daubert* standard. Courts in other jurisdictions have allowed expert testimony regarding the polymerase chain reaction and short tandem repeats method of DNA typing under the *Daubert* standard. *See generally* 33A FED. PROC., L. ED. § 80:226 ("Applying the *Daubert* test, expert DNA evidence has generally been found to be admissible. More specifically, based on overwhelming scientific and forensic acceptance, as well as acceptance by the vast majority of courts, the polymerase chain reaction and short tandem repeats (PCR/STR) method of DNA typing has been held reliable and admissible under the rule governing expert opinion and *Daubert*.").

Separate from *Daubert* standard issues, expert testimony that amounts to a "prosecutor's fallacy" is improper. "The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." McDaniel v. Brown, 558 U.S. 120, 128 (2010). The U.S. Supreme Court has explained:

> In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is . . . error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a .01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Id.; see also State v. Ragland, 226 N.C. App. 547, 558-60 (2013) (the State's expert improperly relied on the prosecutor's fallacy, erroneously assuming that the random match probability was the same as the probability that the defendant was not the source of the DNA sample; this testimony was inadmissible).

3. Bite Mark Identification Evidence. Bite mark analysis "typically involves examining marks left on a victim or an object . . . and comparing those marks with dental impressions taken from a suspect." PCAST REPORT at 83. For a discussion of the technique involved with this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 103-08.

North Carolina cases decided prior to the 2011 amendment to Rule 702 have held that the trial court did not abuse its discretion by

admitting expert bite mark identification testimony. *See, e.g.,* State v. Temple, 302 N.C. 1, 10-13 (1981) (deciding an issue of first impression, the court held that the trial court properly admitted expert testimony that bite marks appearing on the victim's body were made by the defendant's teeth); State v. Green, 305 N.C. 463, 470-72 (1982) (citing *Temple,* the court held that the trial court properly allowed an expert to testify that a bite mark on the victim's arm had been made by the defendant). However, there do not appear to be any published North Carolina cases analyzing bite mark identification analysis under the new *Daubert* standard. Research revealed only one North Carolina bite mark case decided under amended Rule 702(a), but that case did not deal with bite mark *identification* evidence. *See* State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (trial court did not commit plain error by allowing the State's forensic pathology expert to opine that victim's death was due to bites from a dog).

Although questions have been raised about the validity of bite mark analysis, *see, e.g.,* PCAST REPORT at 83-87 ("[B]itemark analysis does not meet the scientific standards for foundational validity, and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of bite mark with reasonable accuracy."), courts in other jurisdictions have continued to admit the evidence. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 112.

4. Fingerprint Identification Evidence. Fingerprint identification evidence refers to the use of fingerprints as a means of personal identification, e.g., that fingerprints found at the murder scene match fingerprints on file for the defendant. For a discussion of the methodology used in fingerprint identification analysis, see REFERENCE MANUAL OF SCIENTIFIC EVIDENCE at 73-76, and PCAST REPORT at 88-91.

Expert testimony regarding fingerprint analysis has been admissible in North Carolina for many years under the state's pre-*Daubert* standards. State v. Irick, 291 N.C. 480, 488-89 (1977); *see also* State v. Hoff, 224 N.C. App. 155, 163 (2012) (citing *Irick* and noting "our Supreme Court's long-standing acceptance of the reliability of fingerprint evidence"); State v. Parks, 147 N.C. App. 485, 490-91 (2001) (no abuse of discretion in admitting officer's expert testimony in fingerprint analysis given that the state Supreme Court has "recognized that fingerprinting is an established and scientifically reliable method of identification"). There do not appear to be any published North Carolina criminal cases evaluating fingerprint analysis under the *Daubert* standard. Courts in other jurisdictions have—for the most part—held such testimony to be sufficiently reliable expertise under *Daubert*. *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 82-83. The Fourth Circuit is among the courts to have found fingerprint evidence sufficiently reliable under *Daubert*. United States v. Crisp, 324 F.3d 261, 266-69 (4th Cir. 2003) (citing other circuit courts that have held similarly).

For a discussion of the empirical record regarding this type of identification, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 76-81, and PCAST REPORT at 91-100. For an assessment as to the foundational validity and validity as applied of fingerprint evidence, see PCAST

REPORT at 101-103 (finding that "latent fingerprint analysis is a foundationally valid subjective methodology" and that "[c]onclusions of a proposed identification may be scientifically valid, provided that they are accompanied by accurate information about limitations on the reliability of the conclusion"; going on to identify a number of issues regarding validity as applied).

5. **Firearm Identification.** In firearms identification analysis, sometimes called "ballistics," "examiners attempt to determine whether ammunition is or is not associated with a specific firearm based on marks produced by guns on the ammunition." PCAST REPORT at 104. For a discussion of the methodology of this this analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 91-97, and PCAST REPORT at 104.

Pre-*Daubert* North Carolina cases had allowed this type of expert testimony. *See, e.g.,* State v. Britt, 217 N.C. App. 309, 314 (2011) ("Courts in North Carolina have upheld the admission of expert testimony on firearm toolmark identification for decades."). There do not appear to be any published North Carolina cases applying the new *Daubert* standard to this type of evidence.

Although testimony by firearms experts is widely admitted nationwide with little judicial scrutiny, provided the expert is qualified, 3 BARBARA E. BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE § 13:59 (15th ed.) [hereinafter WHARTON'S CRIMINAL EVIDENCE] (but noting: "Little justification appears to warrant such a cavalier attitude toward this testimony."), some post-*Daubert* decisions have excluded or limited expert firearms analysis testimony. *See* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 101-02 (discussing cases). Questions have been raised about the foundational validity of firearms analysis. *See* PCAST REPORT at 112 ("PCAST finds that firearms analysis currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability. The scientific criteria for foundational validity require more than one such study, to demonstrate reproducibility."); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 97-100 (discussing the empirical record on this type of evidence and noting, in part: "The issue of the adequacy of the empirical basis of firearms identification expertise remains in dispute . . . ."). Additionally, it has been suggested that if firearms analysis is allowed in court, validity as applied requires that the expert has undergone rigorous proficiency testing and that certain disclosures be made. PCAST REPORT at 113.

6. **Blood Alcohol Extrapolation.** "Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time." State v. Cook, 362 N.C. 285, 288 (2008).The analysis determines the prior blood alcohol level based on (1) the time elapsed between the earlier event, such as a vehicle crash, and the blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. *Id.*

North Carolina cases decided under both *Howerton* and *Daubert* have held that the trial court does not abuse its discretion by admitting expert testimony regarding blood alcohol extrapolation. *See, e.g.,* State v. Turbyfill, ___ N.C. App.___, 776 S.E.2d 249, 255-58 (2015) (applying

Daubert and holding that testimony by the State's expert "confirmed that blood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts"); State v. Green, 209 N.C. App. 669, 677-680 (2011) (same, under earlier *Howerton* standard).

However, for expert testimony on retrograde extrapolation to be admissible it must be based on sufficiently reliable data and a reliable method of proof. Faulty assumptions in the expert's application of retrograde extrapolation analysis can render the expert testimony inadmissible. *Compare* State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361-364 (2017) (the trial court erred by admitting retrograde extrapolation expert testimony where the expert assumed that the defendant was in a post-absorptive state at the time of the stop (meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining) but there were no facts to support this assumption; reasoning that such testimony was inadmissible "as a matter of law" because it failed *Daubert's* "fit" test in that the expert's analysis was not properly tied to the facts of the case; going on to hold: "[W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive . . . state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol."), *and* State v. Davis, 208 N.C. App. 26, 31-35 (2010) (holding, under the earlier and more lenient *Howerton* standard that the trial court committed reversible error by allowing expert Paul Glover to testify to the defendant's blood-alcohol level based on retrograde extrapolation where the alcohol concentration upon which Glover based the extrapolation was estimated to be .02 based on the fact that an officer smelled alcohol on the defendant's breath more than ten hours after the incident; Glover's "odor analysis" was not a sufficiently reliable method of proof), *with* State v. Green, 209 N.C. App. 669, 677-80 (2011) (holding, under the earlier and more lenient *Howerton* standard that the trial court did not abuse its discretion by allowing expert Paul Glover to testify regarding retrograde extrapolation notwithstanding the defendant's argument that Glover's testimony was based on impermissible factual assumptions regarding the amount of wine in the defendant's glass and when it was consumed).

7. Blood Spatter Analysis. Blood spatter analysis, sometimes called blood spatter interpretation or bloodstain analysis, is a forensic tool in which stains of blood at a crime scene are examined to provide information about the incident, such as where the victim was killed. For the purposes of this discussion, blood spatter analysis includes the process of examining blood that has struck a surface, and applying knowledge regarding the characteristics of blood and the shapes or patterns made by its impact, in order to determine things like the direction, angle, and speed of its flight prior to impact, and, ultimately, to assist in reconstructing events occurring in connection with an alleged crime. *See generally* Danny R. Veilleux, *Admissibility, in Criminal Prosecution, of Expert*

Opinion Evidence as to "Blood Splatter" Interpretation, 9 A.L.R.5th 369 (originally published 1993) (discussing the admissibility of evidence so described). For more information about the history of bloodstain analysis and the biology, physics and mathematics associated with it, see Aaron D. Gopen & Edward J. Imwinkelried, *Bloodstain Pattern Analysis Revisited*, 45 No. 3 CRIM. L. BULL. ART. 7 (2009) [hereinafter *Bloodstain Pattern Analysis Revisited*].

In cases decided under the old *Howerton* standard, North Carolina courts have found bloodstain analysis to be a sufficiently reliable area for expert testimony. *See, e.g.,* State v. Goode, 341 N.C. 513, 530-31 (1995) (rejecting the defendant's argument that bloodstain pattern interpretation has not been established as a scientifically reliable field; also rejecting the defendant's argument that Agent Duane Deaver did not have sufficient qualifications to testify as an expert in the field); *see also* State v. Morgan, 359 N.C. 131, 160 (2004) (citing *Goode* for that proposition, although it was not an issue in that case); State v. Bruton, 165 N.C. App. 801, 809 (2004) (citing *Goode* and holding that the trial court did not err by allowing an expert in forensic serology to testify regarding the nature of blood spatter over the defendant's challenge to her qualifications as an expert).

There do not appear to be any North Carolina cases addressing the admissibility of this evidence under the *Daubert* standard. For a discussion of how this evidence is handled in other jurisdictions, see 9 A.L.R.5th 369 and *Bloodstain Pattern Analysis Revisited*, *supra* p. 28.

8. Fiber Analysis. In criminal cases, expert testimony may be offered to show that certain fibers do or do not "match", typically in the context of proving or disproving that the suspect had contact with a particular person or place. This section refers to this sort of testimony as fiber analysis.

In pre-*Daubert* North Carolina cases, fiber analysis testimony has been found to be admissible. *See, e.g.,* State v. Vestal, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing fibers to testify "concerning the similarity of the drapes found in the defendant's warehouse with that found upon the body"). There do not appear to be any North Carolina cases analyzing this evidence under the *Daubert* standard. Some have raised questions about whether fiber analysis satisfies the *Daubert* standard. *See, e.g,* 4 MODERN SCIENTIFIC EVIDENCE at 114 ("The validity of fiber identification techniques is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of fiber examination is unknown. The validity of the interpretation of the significance of a match in fiber evidence has not been subjected to systematic testing of the sort countenanced by *Daubert*.").

9. Hair Analysis. "Forensic hair examination is a process by which examiners compare microscopic features of hair to determine whether a particular person may be the source of a questioned hair." PCAST REPORT at 118. For a discussion of the technique used in this type of analysis, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 113-14.

Several North Carolina cases decided prior to the 2011 amendment to Rule 702 approved of admitting expert testimony regarding hair analysis. *See, e.g.*, State v. Green, 305 N.C. 463, 470 (1982) ("This Court has previously approved of testimony similar to that employed in the case before us and we are not inclined to reverse that holding."

(citation omitted)); State v. Vestal, 278 N.C. 561, 593–94 (1971) (no error to allow an expert in the field of analyzing and comparing hair to testify regarding the similarity of hairs found in a warehouse and trunk of the defendant's automobile with hairs taken from the head of the victim's body); State v. McCord, 140 N.C. App. 634, 659 (2000) (the trial court did not abuse its discretion by admitting expert testimony that a pubic hair taken from the victim was microscopically consistent with a known sample of defendant's pubic hair; "because the comparison of hair samples has been accepted as reliable scientific methodology in this State, the trial court properly allowed [the analyst] to testify regarding the results of his testing"); State v. Suddreth, 105 N.C. App. 122, 132 (1992) ("Our courts have liberally permitted the introduction of expert testimony as to hair analysis when relevant to aid in establishing the identity of the perpetrator.").

However, case law suggests that hair analysis is conclusive, if at all, only as to negative identify—that is, to exclude a suspect. State v. Stallings, 77 N.C. App. 189, 191 (1985). For example, if the hair in question is blonde, straight, and 12 inches long, an individual with black, curly, two inch long hair can be excluded as the source of the sample. 4 MODERN SCIENTIFIC EVIDENCE at 111. Cases also hold that microscopic hair analysis evidence is insufficient on its own to positively identify a defendant as the perpetrator. *Stallings,* 77 N.C. App. at 191 (hair analysis "must be combined with other substantial evidence to take a case to the jury"); State v. Bridges, 107 N.C. App. 668, 671 (1992) (citing *Stallings* and stating that it "may not be used to positively identify a defendant as the perpetrator of a crime"), *aff'd per curiam*, 333 N.C. 572 (1993); State v. Faircloth, 99 N.C. App. 685, 692 (1990) (same). As the court stated in *Stallings:* "Unlike fingerprint evidence . . . comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *Stallings*, 77 N.C. App. at 191.

Additionally, some pre-*Daubert* cases limit the scope of a hair analysis expert's testimony. *See Bridges*, 107 N.C. App. at 671-75 (the trial court erred by admitting the expert's testimony about the statistical probability of two Caucasians having indistinguishable head hair because there was insufficient foundation for this testimony); *Faircloth*, 99 N.C. App. at 690-92 (the trial court erred by allowing a hair examination and identification expert to testify that it was "improbable" that pubic hairs obtained from the victim's body and from a sheet on the victim's bed came from an individual other than the defendant and that it would be "impossible" for another person whose hair was consistent with the defendant's to have come in contact with the victim's bedsheets).

There do not appear to be any North Carolina cases ruling on the admissibility of this evidence under the *Daubert* standard. It should be noted that in recent years, serious questions have been raised about the validity of forensic hair analysis and associated expert testimony. *See, e.g.*, Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, THE WASHINGTON POST, April 18, 2015 (reporting that "[t]he Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all

trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000"); 4 MODERN SCIENTIFIC EVIDENCE at 112 ("The validity of hair evidence is susceptible of objective testing, although this has not been accomplished on a scale and in such a manner as to satisfy *Daubert*. The error rate of hair examination is unknown."); PCAST REPORT 118-122 (finding that materials provided by the Department of Justice "do not provide a scientific basis for concluding that microscopic hair examination is a valid and reliable process"). Although many cases have continued to admit hair analysis post-*Daubert,* that is not universally true and "growing judicial support" for the view that this type of analysis is unreliable has been noted. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 119.

10. Shoe Print Analysis. "Footwear analysis is a process that typically involves comparing a known object, such as a shoe, to a complete or partial impression found at a crime scene, to assess whether the object is likely to be the source of the impression." PCAST REPORT at 114.

Although some North Carolina cases state that a non-expert may testify to shoe print comparisons, *see, e.g.,* State v. General, 91 N.C. App. 375, 379 (1988) (citing State v. Jackson, 302 N.C. 101, 107 (1981)); State v. Plowden, 65 N.C. App. 408, 410 (1983) (same), trial courts have admitted expert testimony on this topic. *See, e.g.,* State v. Williams, 308 N.C. 47, 60–61 (1983) (noting that an SBI Agent was accepted as an expert witness and testified extensively concerning the unique characteristics of the tread on the shoes taken from the defendant and the shoe prints found at the scene of the crime). However, there do not appear to be any North Carolina cases examining the admissibility of this evidence under the *Daubert* standard. Although federal courts have admitted expert shoe print testimony under *Daubert*, *see, e.g.,* United States v. Ford, 481 F.3d 215, 217-21 (3d Cir. 2007); United States v. Allen, 390 F.3d 944, 949-50 (7th Cir. 2004); United States v. Mahone, 328 F. Supp. 2d 77, 90-92 (D. Me. 2004), *aff'd*, 453 F.3d 68 (1st Cir. 2006), questions have been raised about the foundational validity of this analysis. *See* PCAST REPORT at 117 (concluding that "there are no appropriate empirical studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks (sometimes called []randomly acquired characteristics). Such conclusions are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid.").

11. Handwriting Analysis. Handwriting analysis seeks to determine the authorship of a piece of writing by examining the way in which the letters are inscribed, shaped and joined and comparing it to samples by a known author. 4 MODERN SCIENTIFIC EVIDENCE at 561-62. For a discussion of the technique used in this type of analysis and the empirical record regarding its validity, see REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 83-89.

North Carolina civil cases decided before the amendment to Rule 702(a) upheld admission of expert testimony regarding handwriting analysis, *see, e.g.,* Taylor v. Abernethy, 149 N.C. App. 263, 270-74 (2002) (trial court erred by refusing to allow a handwriting expert to give his opinion regarding the validity of a signature on a contract). There do not appear to be any published North Carolina cases on point after North

Carolina became a *Daubert* state. In other jurisdictions, there is a three-way split of authority regarding this type of expert testimony:

> The majority of courts permit examiners to express individuation opinions. As one court noted, "all six circuits that have addressed the admissibility of handwriting expert [testimony] . . . [have] determined that it can satisfy the reliability threshold" for nonscientific expertise. In contrast, several courts have excluded expert testimony, although one involved handprinting and another Japanese handprinting. Many district courts have endorsed a third view. These courts limit the reach of the examiner's opinion, permitting expert testimony about similarities and dissimilarities between exemplars but not an ultimate conclusion that the defendant was the author ("common authorship" opinion) of the questioned document. The expert is allowed to testify about "the specific similarities and idiosyncrasies between the known writings and the questioned writings, as well as testimony regarding, for example, how frequently or infrequently in his experience, [the expert] has seen a particular idiosyncrasy." As the justification for this limitation, these courts often state that the examiners' claimed ability to individuate lacks "empirical support."

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE at 90. The Fourth Circuit is among the courts that have held that expert handwriting testimony passes muster under *Daubert*. *See* United States v. Crisp, 324 F.3d 261, 270-71 & n.5 (4th Cir. 2003) (deciding the issue as a matter of first impression; citing circuit court decisions that have held similarly but noting that some district courts recently had held that handwriting analysis does not meet the *Daubert* standard).

12. Horizontal Gaze Nystagmus (HGN). A leading treatise explains horizontal gaze nystagmus as follows:

> Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. Proponents of HGN tests believe that alcohol and drug use increases the frequency and amplitude of HGN and cause it to occur at a smaller angle of deviation from forward. Nystagmus tests are not done in a laboratory, but rather are given by police officers in the field or in a police station subsequent to arrest. The results of an HGN test are frequently introduced as part of the state's case in drunk driving prosecutions and they also may be used when an individual is suspected to be under the influence of some other substance . . . .

5 MODERN SCIENTIFIC EVIDENCE at 459 (quotation omitted).

Rule 702(a1) provides that a witness qualified under Rule 702(a) "and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to . . . [t]he results of a [HGN] Test when the test is administered by a person who has successfully completed training in HGN." This subsection obviates the State's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable. State v. Younts, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017) (post-amendment case); State v. Smart, 195 N.C. App. 752, 755-56 (2009) (pre-amendment case); *see also* State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (2017) ("Furthermore, with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State."). Whether there are due process limits on the legislature's ability to declare certain expert testimony to be reliable is beyond the scope of this Chapter.

According to the text of the Rule 702(a1) HGN expert testimony is admissible when the witness is qualified under Rule 702(a) and a proper foundation is laid. N.C. R. EVID. 702(a1); *see also* State v. Torrence, ___ N.C. App. ___, 786 S.E.2d 40, 42 (2016) ("[I]f an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation."). Although the better practice may be to do so, the court is not required to expressly determine that the witness is so qualified; such a determination can be implied from the record. *Godwin*, ___ N.C. ___, 800 S.E.2d 47, 52-53 (2017) (holding that the trial court implicitly found that the witness was qualified to testify but noting that "the appellate division's ability to review the trial court's oral order would have benefited from the inclusion of additional facts supporting its determination that [the] Officer . . . was qualified to testify as an expert regarding his observations of defendant's performance during the HGN test"). Presumably a proper foundation would include establishing that the test was performed according to accepted protocol.

Once the witness is qualified and a proper foundation is laid, the witness may give expert testimony regarding the HGN test results, subject to the additional limitations in subsection (a1), namely, the witness may testify solely on the issue of impairment and not on the issue of specific alcohol concentration. N.C. R. EVID. 702(a1); *see also Torrence*, ___ N.C. App. ___, 786 S.E.2d at 43 (prejudicial error where officer testified to a specific alcohol concentration); *see also* State v. Turbyfill, ___ N.C. App. ___, 776 S.E.2d 249, 259 (2015) (officer's testimony as to the defendant's BAC appears to have violated Rule 702(a1)) but the error did not have a probable impact on the verdict).

13. Eyewitness Identification Experts. Several North Carolina appellate decisions have found no abuse of discretion where the trial court excluded testimony regarding reliability of eyewitness identification evidence when the expert's testimony did not relate to the facts of the particular case, *see, e.g.,* State v. McLean, 183 N.C. App. 429, 435 (2007) (expert did not interview the witnesses, visit the crime scene, or listen to court testimony), or because its prejudicial value outweighed its

probative value under Rule 403, *see, e.g., McLean*, 183 N.C. App. at 435 (no abuse of discretion where the trial court found that the value of the evidence was "marginally weak" and that it would confuse the jury, unnecessarily delay the proceeding, and would not significantly help the jury); State v. Cotton, 99 N.C. App. 615, 621-22 (1990), *aff'd*, 329 N.C. 764 (1991) (similar). However, a recent decision of the North Carolina Supreme Court suggests that it is not proper to exclude such testimony simply because the expert has not interviewed or examined the witness. State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017) (holding that the trial court did not abuse its discretion by excluding testimony from a defense expert regarding repressed memory and the suggestibility of memory; the court clarified that to be admissible, the expert need not have examined or interviewed the witness, noting: "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts").

The United States Supreme Court has noted that "some States . . . permit defendants to present expert testimony on the hazards of eyewitness identification evidence." Perry v. New Hampshire, 565 U.S. 228, 247 (2012) (quoting State v. Clopten, 223 P.3d 1103, 1113 ("We expect … that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].")). Commentators have noted that while eyewitness testimony identifying the perpetrator of the crime is often important evidence for the State in a criminal trial, such testimony has been found to be erroneous in some cases. 2 MODERN SCIENTIFIC EVIDENCE at 578 (noting that in cases where DNA evidence exonerated defendants, eyewitness evidence identified the defendant as the perpetrator). They argue that expert testimony may help explain why such testimony can be wrong, by, for example, describing the impact of "estimator variables" (factors that might affect the eyewitnesses ability to perceive the events accurately, e.g., lighting conditions, or to describe accurately what was perceived) and "system variables" (factors outside the control of the eyewitness, such as the suggestiveness of a photo array). *Id.*

14. Drug Identification & Quantity.

a. Chemical Analysis Generally Required. In *State v. Ward*, 364 N.C. 133 (2010), a case decided under the more lenient *Howerton* standard, the North Carolina Supreme Court held that "[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Id.* at 147.

At least one post-*Ward* North Carolina case applying the *Daubert* standard has found no error when an expert testified to drug identification based on a chemical analysis. *See, e.g.,* State v. Abrams, ___ N.C. App. ___, 789 S.E.2d 863, 865-67 (2016) (expert testified that the substance was marijuana based on a chemical analysis; the expert's testimony was "clearly" the product of reliable principles and methods and her testimony established

that she applied those principles and methods reliability to the facts of the case).

b. **Visual Identification.** In *Ward,* the North Carolina Supreme Court held that the visual inspection methodology proffered by the State's expert was not sufficiently reliable to identify the pills at issue as containing a controlled substance. *Ward*, 364 N.C. at 142-48 (method of proof was not sufficiently reliable); *see also* State v. Brunson, 204 N.C. App. 357, 359-61 (2010) (holding, in a pre-*Ward* case, that it was plain error to allow an expert to opine that the substance at issue was hydrocodone, an opium derivative, based on visual identification and Micromedex Literature). It is unlikely that the court's reasoning would lead it to a different result under the more stringent *Daubert* standard. And in fact, one court of appeals case has applied that rule to a case in which the amended rule applied. State v. Alston, __ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017) (even if officer had been an expert it would have been error to allow him to testify that pills found at the defendant's home were Oxycodone and Alprazolam, where the basis of his identification was a visual inspection and comparison of the pills with a website).

In cases decided after *Ward,* the Court of Appeals has held that visual identification cannot be used to identify a substance as cocaine, State v. Jones, 216 N.C. App. 519, 526 (2011), or pills as a controlled substance. State v. Alston, __ N.C. App. ___, ___ S.E.2d ___ (June 20, 2017). However, it has allowed visual identification to identify a substance as marijuana. State v. Johnson, 225 N.C. App. 440, 455 (2013) (holding that the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana); State v. Mitchell, 224 N.C. App. 171, 178-79 (2012) (an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment"; a chemical analysis of the marijuana was not required); *Jones*, 216 N.C. App. at 526 (visual identification of marijuana was permissible); State v. Garnett, 209 N.C. App. 537, 546 (2011) (Special Agent, who was an expert in forensic chemistry, properly made an in-court visual identification of marijuana).

It is difficult to reconcile the Court of Appeals' post-*Ward* decisions on visual identification with respect to substances that are not controlled substances. *Compare* State v. Hanif, 228 N.C. App. 207, 209-13 (2013) (applying *Ward* in a counterfeit controlled substance case where the defendant was charged with representing tramadol hydrochloride, a substance that is not a controlled substance, as Vicodin, a Schedule III controlled substance; holding that the trial court committed plain error by admitting evidence identifying the substance as tramadol hydrochloride based solely upon an expert's visual inspection (a comparison of the tablets' markings to a Micromedex online database)), *with* State v. Hooks, ___ N.C. App. ___, 777 S.E.2d 133, 140-41 (2015) (in a case involving charges of possession of

the precursor chemical pseudoephedrine with intent to manufacture methamphetamine, the court rejected the defendant's argument that the evidence was insufficient because the substance was not chemically identified as pseudoephedrine; holding that *Ward* was limited to identifying controlled substances, and pseudoephedrine is not listed as such a substance).

c. Narcotics indicator field test kits (NIKs) & "NarTest" Machines. In several cases decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held that the State failed to establish the reliability of certain narcotics indicator field tests. State v. Meadows, 201 N.C. App. 707, 708-12 (2010) (the trial court committed prejudicial error by admitting expert testimony on the identity of a controlled substance based on the results of a NarTest machine where the State failed to demonstrate the machine's reliability); State v. Jones, 216 N.C. App. 519, 523-25 (2011) (following *Meadows* and holding that the trial court erred by allowing a police captain to testify that the results from a NarTest machine analysis showed that the substance at issue was a controlled substance; also holding that the trial court erred by admitting testimony by the State's expert in forensic chemistry, a NarTest employee, regarding the reliability of the NarTest machine where the machine had not been licensed or certified by any state agency or department, the expert had not done any independent research on the machine outside of his duties as a company employee, the State presented no evidence that the machine had been recognized as a reliable method of testing by other experts in the field, the State presented no publications or research performed by anyone unassociated with NarTest, and although the State offered a visual aid to support the expert's testimony, that aid was a NarTest promotional video); State v. Carter, 237 N.C. App. 274, 281-84 (2014) (following *Meadows* and holding that the State failed to demonstrate the reliability of a NIK—apparently a wipe that turns blue when it comes into contact with cocaine—and that therefore the trial court abused its discretion by admitting an investigator's testimony that the NIK indicated the presence of cocaine). Absent different evidence, it is unlikely that the court's reasoning would lead it to a different result under the stricter *Daubert* standard.

d. Other Methods of Drug Identification. In *Ward,* the Supreme Court held that *"[u]nless the State establishes . . . that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt*, some form of scientifically valid chemical analysis is required" to identify a substance as a controlled substance. *Ward,* 364 N.C. at 147 (emphasis added). This language opens the door, in certain circumstances, to the use of methods of drug identification other than chemical testing.

In *State v. Woodard*, 210 N.C. App. 725 (2011), an opium trafficking case arising from a pharmacy break-in, the court rejected the defendant's argument that the evidence was

insufficient to support the conviction because no chemical analysis was done on the pills at issue. *Id.* at 730-31. In so holding the court approved a method of drug identification other than chemical analysis. Citing *Ward*, the court determined that the State is not required to conduct a chemical analysis on a controlled substance, provided it establishes the identity of the controlled substance beyond a reasonable doubt by another method of identification. Here, the State did that through the drug store's pharmacist manager, Mr. Martin, who testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every inventory item throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with an identifying sticker, date of purchase and a partial pharmacy account number. These stickers helped the pharmacist to determine that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen pills was approximately 1,472 grams. The court concluded:

> Based on Mr. Martin's thirty-five years of experience dispensing the same drugs that were stolen from the . . . Drugstore, and based on Mr. Martin's unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, we are persuaded that Mr. Martin's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* . . . .

Id. at 732.

e. Sampling. The *Ward* court stated that its ruling regarding visual identification did not mean that every single item at issue must be chemically tested. In that case, the State submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory for testing. *Ward,* 364 N.C. at 148. The court held:

> A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable

determination of the chemical composition of the batch of evidence under consideration.

Id. Cases decided since *Ward* finding sampling analysis sufficient include:

State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881-83 (2016). Testimony from the State's expert sufficiently established a trafficking amount of opium; following lab protocol, the forensic analyst grouped the pharmaceutically manufactured pills into four categories based on their physical characteristics and then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone; he did not test the pill in the final category because the quantity was already over the trafficking amount; the pills that were not chemically analyzed were visually inspected; the analyst was not required to chemically analyze each tablet and his testimony provided sufficient evidence to establish a trafficking amount.

State v. Lewis, ___ N.C. App. ___, 779 S.E.2d 147, 148-49 (2015). In this conspiracy to traffic in opiates case, the evidence was sufficient where the State's expert analyzed only one of 20 pills, determined its weight and that it contained oxycodone, an opium derivative, and confirmed that the remaining pills were visually consistent with the one that was tested, in terms of size, shape, form and imprints; a chemical analysis of each individual pill was not necessary.

State v. James, 240 N.C. App. 456, 459 (2015). In this opium trafficking case, the evidence was sufficient to establish a trafficking amount where the expert chose at random certain pills for chemical testing and each tested positive for oxycodone; the expert visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" the pills that tested positive for oxycodone.

State v. Dobbs, 208 N.C. App. 272, 275-76 (2010). The trial court did not err by denying the defendant's motion to dismiss a trafficking charge where the State's expert testified that all eight tablets were similar with respect to color and imprint and that a test on one tablet revealed it to be an opiate derivative.

f. Unlicensed & Unaccredited Labs. In a case decided under the more lenient *Howerton* standard, the North Carolina Court of Appeals held to be inadmissible results from a lab that was neither licensed nor accredited by any agency. State v. Jones, 216 N.C.

> App. 519, 525-26 (2011) (the trial court improperly admitted evidence that an individual tested the substances at issue at a NarTest company laboratory using SBI protocol and determined that the substances were cocaine and marijuana). By comparison, test results from a NarTest lab showing that a substance was cocaine have been found to be admissible where the lab was not accredited but was licensed by the State of North Carolina and the Drug Enforcement Agency to perform analytical testing of controlled substances. State v. McDonald, 216 N.C. App. 161, 163-67 (2011) (note that a NarTest machine was not used in the testing of the substances at issue).

15. Fire Investigation Experts. In arson cases, an expert may be offered to opine on, for example, where or how the fire started and whether the fire was intentionally set. WHARTON'S CRIMINAL EVIDENCE § 13:55. At the outset, it should be noted that "fire and explosion investigation consists of a wide array of distinctive methods, techniques, and principles," 5 MODERN SCIENTIFIC EVIDENCE at 74, which must be assessed separately.

There do not appear to be any published North Carolina cases applying the *Daubert* standard to this type of expert testimony. Although one recent Court of Appeals case held that if a proper foundation is laid as to expertise, a fire marshal may offer his expert opinion that a fire was intentionally set, State v. Jefferies, ___ N.C. App. ___, 776 S.E.2d 872, 875 (2015), that case did not mention *Daubert* and it is not clear that amended Rule 702 applied to that case. Citing case law decided prior to the 2011 amendments to Rule 702, that court reasoned:

> Generally, the admission of expert opinion testimony is only allowed where "the opinion expressed is ... based on the special expertise of the expert[.]' State v. Wilkerson, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). However, our Supreme Court has held that, with a proper foundation laid as to his expertise, a fire marshal may offer his expert opinion as to whether a fire was intentionally set. State v. Hales, 344 N.C. 419, 424–25, 474 S.E.2d 328, 330–31 (1996).

Id. The only other published criminal case decided after *Daubert* became the law in North Carolina declined to address the defendant's argument that the trial court erred by failing to evaluate, under *Daubert,* testimony by an investigator with the Fire Prevention Bureau of a city fire department that the fire in question was intentionally set. State v. Hunt, ___ N.C. App. ___, 792 S.E.2d 552, 560-61 (2016). Instead, that court concluded that even if error occurred, it did not rise to the level of plain error. *Id.*

It has been noted that after *Daubert* and *Kumho Tire,* some courts have examined this type of expert testimony more critically. 5 MODERN SCIENTIFIC EVIDENCE at 75, 78; *see also* WHARTON'S CRIMINAL EVIDENCE § 13:55 (noting that "[s]ince *Daubert* the qualifications and conclusions of arson investigators have been questioned with increasing frequency" and stating that scholarship has revealed that some investigators fail to base their conclusions adequately upon the scientific method or scientific tests

and has debunked several theories upon which investigators have historically relied; further indicating that inherent problems in the investigatory process have surfaced, and it has become apparent that some fire investigators over-exaggerate arson occurrence as well as the incidence of fire-related injury and death). For a survey of cases dealing with expert opinions in arson cases, see Jay M. Zitter, *Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense—Modern Case*s, 85 A.L.R.5th 187 (originally published 2001).

16. Accident Reconstruction. In North Carolina, "[a]ccident reconstruction opinion testimony may only be admitted by experts." State v. Maready, 205 N.C. App. 1, 17 (2010) (error to allow officers' opinion testimony concerning their purported accident reconstruction conclusions where the officers were not qualified as experts).

Subsection (i) of Rule 702 provides that "[a] witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving."

There do not appear to be any North Carolina criminal cases evaluating accident reconstruction experts under the *Daubert* standard. However, a number of criminal cases decided prior to the 2011 amendments to Rule 702(a) have admitted such evidence. *See, e.g.,* State v. Brown, 182 N.C. App. 115, 120 (2007); State v. Speight, 166 N.C. App. 106, 116-17 (2005), *vacated on other grounds*, 548 U.S. 923 (2006); State v. Holland, 150 N.C. App. 457, 461-464 (2002); State v. Purdie, 93 N.C. App. 269, 274-76 (1989). Additionally, at least one North Carolina civil case has allowed accident reconstruction testimony under the new *Daubert* standard. Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 369-78 (trial court did not abuse its discretion by admitting expert accident reconstruction testimony), *review denied*, ___ N.C. ___, 775 S.E.2d 861 (2015). For a general discussion of courts' treatment of expert accident reconstruction testimony, *see* 5 MODERN SCIENTIFIC EVIDENCE at 829-59.

17. Pathologists & Cause of Death. In cases decided both before and after the amendments to Rule 702(a), North Carolina courts have admitted expert pathologist testimony regarding cause of death. Cases decided under the earlier version of Rule 702(a) include, for example: *State v. Johnson*, 343 N.C. 489, 492 (1996) (the trial court did not err in this murder case by allowing a fellow in the Chief Medical Examiner's office to testify as an expert in pathology as to cause of death and the possible range from which the shots were fired where the witness was not yet certified and had not completed formal training as a forensic pathologist but had performed a number of autopsies prior to performing the one in question); *State v. Miller*, 302 N.C. 572, 580 (1981) (the trial court did not err by allowing an expert forensic pathologist to testify regarding the size or gauge of the gun used as the murder weapon); *State v. Morgan*, 299 N.C. 191, 206-07 (1980) (rejecting the defendant's challenge to expert testimony offered by the N.C. Chief Medical Examiner that the cause of death was "a shotgun wound, shotgun blast" and noting: "It has long been the rule in North Carolina that the cause of an individual's death is the

proper subject of expert testimony."); *State v. Borders*, 236 N.C. App. 149, 175-76 (2014) (the trial court did not err by allowing the State's forensic pathologists to testify that the cause of death was asphyxiation, even where no physical evidence supported that conclusion; the experts knew that the victim's home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her underwear was torn, and that DNA obtained from a vaginal swab containing sperm matched the defendant's DNA samples; the experts' physical examination did not show a cause of death, but both doctors drew upon their experience performing autopsies in stating that suffocation victims often do not show physical signs of asphyxiation and they eliminated all other causes of death before arriving at asphyxiation); *State v. Smith*, 157 N.C. App. 493, 498 (2003) (the trial court did not err by allowing the medical examiner to offer an opinion that the victim was killed when struck by the passenger side of the truck's door frame); *State v. Evans*, 74 N.C. App. 31, 35 (1985) (in this involuntary manslaughter case, the trial properly allowed a pathologist to testify that the child victim's injuries were not self-inflicted, that the child would not have died but for them, and that a subdural hematoma was a significant cause of death; he further testified that the hematoma could have been caused by violent shaking, causing tearing of the blood vessels between the dura and the brain, adding that death could result either from swelling of the brain or from rapid trauma to the brain from alteration of the blood supply), *aff'd*, 317 N.C. 326 (1986).

For a case decided under the amended version of Rule 702(a), see *State v. Ford,* ___ N.C. App. ___, 782 S.E.2d 98, 107-08 (2016) (in this involuntary manslaughter case, where the defendant's pit bull attacked and killed the victim, the trial court did not commit plain error by allowing a forensic pathologist to opine that the victim's cause of death was exsanguination due to dog bites).

For a discussion of expert testimony using the words "homicide" or "homicidal," see Section III.B. below.

18. Polygraphs. In a case decided prior to the amendment to Rule 702(a), the North Carolina Supreme Court held that polygraph evidence is inadmissible at trial because of the inherent unreliability of polygraph tests. State v. Grier, 307 N.C. 628, 642–45 (1983) (polygraph evidence is inadmissible, even if the parties stipulate to its admissibility); *see also* State v. Ward, 364 N.C. 133, 146 (2010) (noting this holding). Absent some change in the relevant technology, there is little reason to think that the court would rule otherwise under the stricter *Daubert* standard.

19. Penile Plethysmography. Penile plethysmography tests a man's level of sexual arousal. Michael C. Harlow & Charles L. Scott, *Penile Plethysmography Testing for Convicted Sex Offenders*, 35 J. OF AM. ACADEMY OF PSYCHIATRY & LAW 536 (2007), http://jaapl.org/content/35/4/536. It "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, in determining his level of sexual attraction by measuring minute changes in his erectile responses." *Id.* at 536 (quotation omitted).

Deciding an issue of first impression in a child sex case decided before the 2011 amendments to Rule 702(a), the North Carolina Court of Appeals held that the trial court did not abuse its discretion by excluding opinion testimony by a defense expert in clinical psychology based on penile plethysmograph testing administered to the defendant. State v. Spencer, 119 N.C. App. 662, 664-68 (1995) (the expert would have testified that the defendant had a normal arousal pattern and that there was no evidence of his being sexually aroused by children; the trial court did not abuse its discretion in finding the defendant's plethysmograph testing data insufficiently reliable to provide a basis for the opinion testimony).

Although there do not appear to be any North Carolina cases deciding this issue under the new, stricter *Daubert* test, the Fourth Circuit has held that a trial court did not abuse its discretion by ruling that a penile plethysmograph test did not meet *Daubert*'s scientific validity prong. United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding, in a child sex case, that the district court did not err by excluding the testimony of a clinical psychologist who would have testified that the results of a penile plethysmograph test did not indicate that the defendant exhibited pedophilic characteristics).

20. Experts in Crime & Criminal Practices. A number of North Carolina appellate cases decided under the pre-amendment version of Rule 702(a) found no error where the trial court allowed a law enforcement officer to testify as an expert regarding criminal practices and activity. For example, in *State v. Jennings*, 209 N.C. App. 329 (2011), a child sexual assault case, the court noted:

> [T]his Court has held that law enforcement officers may properly testify as experts about the practices criminals use in concealing their identity or criminal activity. *See* State v. Alderson, 173 N.C. App. 344, 350–51, 618 S.E.2d 844, 848–49 (2005) (holding trial court properly permitted SBI agent to "give her opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner can indicate those acting illegally may have a 'jumpstart' if they know which police frequencies to monitor."); State v. White, 154 N.C. App. 598, 604, 572 S.E.2d 825, 830–31 (2002) ("Lieutenant Wood had 'training, and various courses and experience in working certain cases' which led him to conclude that 'there are times that the significance of an object such as a pillow or a cloth being placed over somebody's face can mean in a case that the perpetrator knew the victim and did not want to see their face or have their face appear either before, during, or after the crime.' Since Lieutenant Wood testified in the form of an opinion based on his expertise, and the testimony was likely to assist the jury making an inference from the circumstances of the crime, the trial court properly admitted the testimony.").

Id. at 337–38. *Jennings* went on to hold that a law enforcement officer qualified as an expert in forensic computer examination properly was allowed to testify that those who have proof of criminal activity on a computer will attempt to hide that evidence and that the defendant would have been unlikely to save an electronic conversation that would have implicated him. That testimony was elicited by the State to explain why, despite the victim's testimony that she and the defendant routinely communicated through instant messaging and their MySpace web page and that the defendant took digital photographs of her vaginal area during sex, no evidence of these communications or photographs were recovered from the defendant's electronic devices.

There do not appear to be any published North Carolina criminal cases analyzing this type of expert testimony under the new *Daubert* standard. A number of federal circuit courts have allowed such testimony under that standard. For example, law enforcement officers have been allowed to testify as experts regarding:

- Drug code words. *See, e.g.,* United State v. York, 572 F.3d 415, 422 (7th Cir. 2009) ("[W]e allow officers whose testimony is based on some aspect of that understanding (such as the meaning of drug code words), rather than on first-hand knowledge of the particular investigation in the case, to testify as experts."); United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003) ("[W]e have consistently upheld the use of expert testimony to explain both the operations of drug dealers and the meaning of coded conversations about drugs. In particular, we have recognized that drug dealers often camouflage their discussions and that expert testimony explaining the meanings of code words may 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" (citation omitted)).
- The use of firearms in the drug trade and common practices of drug dealers. *See, e.g.,* United States v. Garza, 566 F.3d 1194, 1199 (10th Cir. 2009) ("[W]e do not believe that *Daubert* and its progeny . . . provide any ground for us to depart from our pre-*Daubert* precedents recognizing that police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade."); United States v. Norwood, 16 F. Supp. 3d 848, 852-54 (E.D. Mich. 2014) (citing cases and holding to be admissible testimony by a DEA agent with fifteen years' experience regarding drug trafficking and use of firearms in drug trafficking).
- Gang practices. *See, e.g.,* United States v. Hankey, 203 F.3d 1160, 1167-70 (9th Cir. 2000) (the trial court did not abuse its discretion in admitting an officer's expert opinion testimony regarding the co-defendants' gang affiliations and the consequences an individual would suffer if he were to testify against the defendant; among other things, the expert had been with the police department for twenty-one years, worked undercover "with gang members in the thousands," received formal training in gang structure and organization, and he

> taught classes about gangs; stating: "The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.").

However, some federal court *Daubert* decisions have excluded such testimony as unreliable, at least in certain circumstances. *See, e.g., Norwood*, 16 F. Supp. 3d at 854-64 (excluding proffered expert testimony concerning gangs where the witness formed his opinions based on his experience in Oklahoma, California, and Connecticut and from a national perspective while in Washington, D.C. but the case in question concerned a gang that operated in Flint, Michigan; the witness never investigated the gang in question or other Michigan gangs; "Simply put, [the witness's] lack of familiarity with the particular gang or locale at issue in this case makes his opinions unreliable to be placed before the jury.").

Other courts, while noting that an officer involved in an investigation may testify as both a fact and expert witness, also have noted the "inherent dangers" associated with this type of "dual testimony." *See, e.g., York,* 572 F.3d at 425; *Dukagjini*, 326 F.3d at 53 ("While expert testimony aimed at revealing the significance of coded communications can aid a jury in evaluating the evidence, particular difficulties, warranting vigilance by the trial court, arise when an expert, who is also the case agent, goes beyond interpreting code words and summarizes his beliefs about the defendant's conduct based upon his knowledge of the case."). Those dangers include that the witness's dual role might confuse the jury, that the jury might be impressed by an expert's "aura of special reliability" and thus give his or her factual testimony undue weight, or that "the jury may unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial." *York,* 572 F.3d at 425 (citing cases); *see also Dukagjini*, 326 F.3d at 53 (noting other dangers as well). Precautions that can mitigate these dangers include ensuring that the jury knows when an officer is testifying as an expert versus as a fact witness, through the use of cautionary instructions or witness examination that is structured to make clear when the witness is testifying to facts and when he or she is offering an expert opinion. *York*, 572 F.3d at 425-26 (discussing other precautions and going on to hold that admission of certain "dual testimony" by the officer in question was improper). And courts have noted that the trial court should be careful to ensure that the law enforcement officer expert does not "stray from his proper expert function" of offering opinions based on expertise and opine about matters based on his or her investigation in the case. *Dukagjini*, 326 F.3d at 54-55 (witness improperly acted "as a summary prosecution witness" when, for example, he testified about the meaning of conversations in general, as opposed to interpretation of drug code words).

Some commentators have been critical of decisions that reflexively allow police officers to testify as expert on criminal practices. *See* 1 MODERN SCIENTIFIC EVIDENCE at 101, 104 (although not advocating for a wholesale exclusion of such testimony, stating: "Somewhat disappointing has been the courts' willingness to admit prosecution

> experts who have little research or data to support their opinions. While there is some evidence that this is changing in some areas, such as the forensic sciences, courts continue to permit many prosecution experts with hardly a glance at the methods underlying their testimony. Perhaps the best example is the testimony of police officers testifying as expert witnesses.").

III. Form & Scope of Expert's Opinion. For a discussion of the proper scope of an expert's opinion in sexual assault cases, see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, in this Benchbook, and more current cases annotated in Smith's Criminal Case Compendium (under Evidence; Opinions; Experts; Sexual Assault Cases).

A. Form of Testimony. Rule 702(a) allows for flexibility as to the form of the expert's testimony, providing that the expert may testify to "an opinion, or otherwise." Rule 705 provides that "[t]here shall be no requirement that expert testimony be in response to a hypothetical question." *See, e.g.,* State v. Fearing, 304 N.C. 499, 503-04 (1981) (no requirement that testimony of a forensic pathologist be given only in response to a hypothetical question); State v. Morgan, 299 N.C. 191, 205 (1980) ("It is settled law in North Carolina that an expert witness need not be interrogated by means of a hypothetical question . . . .").

B. Opinion on Ultimate Issue & Legal Standards. Although an expert may not testify to an opinion as to the defendant's guilt or innocence, *see, e.g.,* State v. Heath, 316 N.C. 337, 341-42 (1986), Evidence Rule 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See also* State v. Hill, 116 N.C. App. 573, 581 (1994) (noting this rule and rejecting the defendant's argument that testimony by the State's DNA expert regarding a DNA match improperly stated an opinion that the defendant had committed the rape in question).

The North Carolina Supreme Court has explained, however:

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Parker, 354 N.C. 268, 289-90 (2001) (internal citations and quotation marks omitted). Applying this rule, cases have held that it is not error to allow:

- a pathologist to testify that a killing was a "homicide" or "homicidal," *see, e.g.,* State v. Flippen, 344 N.C. 689, 699 (1996) (no error to allow the State's forensic pathologist expert to testify that the victim died as

a result of a "homicidal assault"); State v. Parker, 354 N.C. 268, 290 (2001) (citing *Flippen* and holding that it was not error to allow the State's forensic pathologist expert to testify that the victim's death was a homicide); State v. Hayes, 239 N.C. App. 539, 549-50 (2015) (no error to allow forensic pathology experts to testify that the cause of death was "homicide by unde[te]rmined means" and "homicidal violence");

- an expert in psychiatry and addiction medicine to testify that the defendant lacked the capacity to form the specific intent to kill, *see, e.g.,* State v. Daniel, 333 N.C. 756, 760-64 (1993) (trial court erred by excluding testimony from a defense expert to this effect; noting that although it has held that expert testimony regarding precise legal terms should be excluded, "specific intent to kill" is not one of those precise legal terms that is off limits);
- a mental health expert to testify that the defendant lacked the capacity to plan, think, or reflect, *Daniel,* 333 N.C. at 760-64 (first-degree murder case), that the defendant's capacity to make and carry out plans was impaired, State v. Shank, 322 N.C. 243, 246-251 (1988) (new trial required in first-degree murder case where the trial court excluded this evidence); *see also* State v. Fisher, 336 N.C. 684, 704 (1994) (noting that a defense expert properly was allowed to opine regarding the defendant's ability to formulate and carry out a plan), or that the defendant acted while under the influence of a mental or emotional disturbance, *Shank,* 322 N.C. at 246-51 (new trial required in a first-degree murder case where the trial court excluded this evidence);
- an expert to testify that the defendant acted with an intent to cause death*,* State v. Teague, 134 N.C. App. 702, 708–09 (1999) (proper to allow expert to opine that one of the victim's "gunshot wounds to the head was consistent with an intent to cause death");
- an endocrinologist, in a case involving a defense of automatism, to testify that the defendant's actions were "not caused by automatism due to hypoglycemia" and that he reached this conclusion because the defendant did not experience amnesia, a characteristic feature of automatism caused by hypoglycemia, State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017);
- a forensic pathologist who performed the autopsy to testify that the victim was "tortured," where the defendant was charged with first-degree murder on the basis of torture, State v. Jennings, 333 N.C. 579, 597-600 (1993);
- a forensic pathologist who conducted the autopsy to testify that the victim experienced a "sexual assault," *Jennings*, 333 N.C. at 600-601; *see also* State v. O'Hanlan, 153 N.C. App. 546, 553-57 (2002) (citing *Jennings* and holding that medical doctors who examined the victim properly testified that she was sexually assaulted);
- a pathologist who did the autopsy to testify that that defendant's account of the shooting was inconsistent with the type of wound suffered by victim and that the wound was not a self-defense type wound, even though self-defense was an ultimate issue in the case, State v. Saunders, 317 N.C. 308, 314 (1986);

- a physician to testify that a sexual assault victim's injuries were caused by a male penis, State v. Smith, 315 N.C. 76, 99-100 (1985) (noting that the witness did not testify that the victim had been raped or that the defendant had raped her);
- a radiologist to testify, in an assault inflicting serious injury case, that based on the victim's CT scan, the "trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered," State v. Liggons, 194 N.C. App. 734, 743-44 (2009) (concluding that the expert's opinion was not inadmissible on the basis that it embraced an ultimate issue to be determined by the jury).

However, it is improper to allow:

- an expert in pathology and medicine, in a homicide case, to testify that injuries suffered by the victim were a "proximate cause of [the victim's] death," State v. Ledford, 315 N.C. 599, 617-19 (1986) (error to allow the expert to testify that a legal standard—"proximate cause"—had been met);
- a mental health expert to testify, in a murder case, that a defendant did or did not premeditate or deliberate, State v. Weeks, 322 N.C. 152, 166–67 (1988) (proper to exclude defense proffered expert testimony that the defendant did not act with deliberation); State v. Cabe, 131 N.C. App. 310, 313-14 (improper to allow the State's expert to testify that the defendant acted with premeditation and deliberation, but allowable here where the defendant opened the door), or that the defendant possessed or lacked the capacity to premeditate or deliberate, State v. Rose, 323 N.C. 455, 459-60 (1988) (*Rose* I) (proper to exclude such testimony); State v. Rose, 327 N.C. 599, 601-05 (1990) (*Rose* II) (the trial court committed reversible error by allowing the State's expert to testify that the defendant was capable of "premeditating"); State v. Mash, 328 N.C. 61, 65-66 (1991) (proper to exclude defense proffered expert testimony regarding the defendant's ability to premediate and deliberate);
- a mental health expert to testify, in a murder case, that the defendant did not act in a "cool state of mind," *Weeks*, 322 N.C. at 165–67; State v. Boyd, 343 N.C. 699, 708-10 (1996) (holding that under *Weeks* and Rule 403, the trial court did not err by preventing a forensic psychologist from using the phrase "cool state of mind" to convey his opinion that the defendant lacked the specific intent necessary to commit premeditated and deliberate murder at the time of the shootings), or under a suddenly aroused violent passion, *Weeks,* 322 N.C. at 165-67.
- a mental health expert to testify that the defendant lacked the capacity to conspire, State v. Brown, 335 N.C. 477, 489 (1994) (no error to exclude testimony of defense expert in forensic psychiatry with a specialty in addictive medicine where the term "conspiracy" had a specific legal definition);

- a medical doctor who examined the victim to testify that she had been "raped" and "kidnapped," State v. O'Hanlan, 153 N.C. App. 546, 557-58 (2002);
- a mental health expert to testify about the law of voluntary intoxication and its effect on the defendant's insanity defense, State v. Silvers, 323 N.C. 646, 655-57 (1989) (agreeing with the defendant's argument that a defense expert was erroneously permitted to offer legal conclusions during cross-examination by the State).

C. Opinion on Credibility of Witness. Expert testimony on the credibility of a witness is not admissible. State v. Heath, 316 N.C. 337, 340-43 (1986) (holding that the expert's testimony was improper for this reason); State v. Aguallo, 318 N.C. 590, 598-99 (1986) (citing *Heath* and holding that the trial court erred by allowing a pediatrician to testify that a rape victim was "believable"); State v. Green, 209 N.C. App. 669, 676-77 (2011) (so stating this rule but holding that in this case, the expert's testimony regarding the defendant's blood alcohol level did not constitute impermissible opinion testimony). Thus, it is error to allow an expert to testify that she believed the victim and to the reason for this belief. State v. Teeter, 85 N.C. App. 624, 631-32 (1987) (testimony by a nurse tendered as an expert for the State with respect to sexually abused mentally retarded adults). However, drawing the line between permissible and impermissible expert testimony in this area can be difficult. In *Teeter,* for example, it was not error for a mental health expert to testify that an adult sexual assault victim who suffered certain mental impairments showed no evidence of a disorder that would impair her ability to distinguish reality from fantasy. *Id.* at 628-29. The court rejected the defendant's argument that this testimony amounted to an impermissible expert opinion concerning the victim's credibility. *Id.* Consider by contrast, *Heath,* in which clinical psychologist Deborah Broadwell testified as an expert for the State in a child sexual assault case involving victim Vickie. At trial, defense counsel asked Vickie if her sister thought she was lying about the attack because Vickie "had lied about so many other things," asked Vickie's mother if she had experienced difficulties with Vickie "making up stories," and cross-examined Broadwell about alleged discrepancies in Vickie's statements to hospital emergency room and mental health clinic personnel. *Heath,* 316 N.C. at 339-40. On redirect, the prosecutor asked Broadwell: "do you have an opinion . . . as to whether or not Vickie was suffering from any type of mental condition . . . which could or might have caused her to make up a story about *the* sexual assault?" *Id.* at 340 (emphasis added). Broadwell responded: "There is nothing in the record or current behavior that indicates that she has a record of lying." *Id.* The court held, in part that the question, focusing as it did on "*the* sexual assault," was improper. It explained:

> We would be confronted with an entirely different situation had the assistant district attorney . . . asked the psychologist if she had an opinion as to whether Vickie was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general or even had the witness confined her response to the subject of a "mental condition."

Id. at 341. But because the question focused on *the* specific incident in question, it was improper under Evidence Rules 608 and 405(a), which "together, forbid an

expert's opinion as to the credibility of a witness." *Id.* at 342. *Heath* thus emphasizes how fine the line can be between permissible and impermissible testimony. *See also* State v. O'Hanlan, 153 N.C. App. 546, 555 (2002) ("[T]he cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one.").

Issues regarding impermissible expert opinion testimony on the credibility of a witness arise most frequently in child sexual assault cases. For a more detailed discussion of this issue in that context see *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, in this Benchbook. For more decisions decided after publication of that Benchbook Chapter, see *Smith's Criminal Case Compendium* (under Evidence; Opinions; Experts; Sexual Assault Cases).

D. Basis for Expert's Opinion.

1. Scope & Adequacy. Evidence Rule 703 provides that "[t]he facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703. *See generally* State v. Morgan, 299 N.C. 191, 206 (1980) (testimony of Chief Medical Examiner regarding identification of human remains and cause of death was based on adequate data where the witness examined the remains, measuring, sorting and photographing them); State v. McClary, 157 N.C. App. 70, 79 (2003) (a forensic psychiatrist properly testified as an expert based on his own meetings with the defendant and his review of psychiatric evaluations done by other psychiatrists); State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report, and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

An opinion based on inadequate facts or data should be excluded. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 742 (2011) [hereinafter BRANDIS & BROUN] (citing cases). As noted above, when expert testimony is not sufficiently tied to the facts of the case, it may fail the "fit test" that is part of the relevancy inquiry. *See* Section II.B.3. above.

2. Of a Type Reasonably Relied Upon. Rule 703 provides that the facts or data underlying the expert's opinion must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.C. R. EVID. 703. *Compare* State v. Demery, 113 N.C. App. 58, 65-66 (1993) (State's forensic serologist expert properly relied on statistical information concerning the frequency of blood group factors or characteristics in the North Carolina population compiled by the SBI with blood provided by the Red Cross and blood obtained in criminal cases; "The statistics on which he relied are commonly used and accepted in his field in North Carolina, and similar statistics are commonly used and accepted in forensic serology throughout the country"), State v. Purdie, 93 N.C. App. 269, 275-76 (1989) (expert in accident

reconstruction properly based his opinion on physical evidence), *and* State v. Teeter, 85 N.C. App. 624, 628-30 (1987) (clinical psychologist and expert in adult mental retardation and sexual abuse properly testified to the opinion that the victim exhibited behavioral characteristics consistent with sexual abuse; his opinion was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the victim, all sources reasonably relied upon by experts in the field), *with* State v. Galloway, 145 N.C. App. 555, 564-65 (2001) (the trial court properly excluded statements made by the State's expert in the victim's medical discharge summary referencing the victim's psychiatric history, including substance abuse; because the expert was qualified as an expert in surgery, not psychiatry, the court rejected the defendant's assertion that the statements were admissible under Rule 703, finding that they did not contain facts or data reasonably relied upon by experts in the field of surgery).

3. **Need Not Be Admissible.** Rule 703 provides that if of a type reasonably relied upon by experts in the field, the facts or data forming the basis of the expert's opinion "need not be admissible in evidence." N.C. R. EVID. 703; *see, e.g.,* State v. Jones, 322 N.C. 406, 410-14 (1988) (trial court did not err by admitting hearsay evidence as the basis of an expert's opinion); State v. Purdie, 93 N.C. App. 269, 277 (1989) (same).

   For a discussion of confrontation clause issues related to the basis of the expert's opinion, see *Guide to Crawford and the Confrontation Clause*, in this Benchbook.

4. **Expert Need Not Interview Victim.** Evidence Rule 703 provides that the facts or data on which an expert bases an opinion "may be those perceived by or made known to him at or before the hearing." N.C. R. EVID. 703; *see Purdie*, 93 N.C. App. at 276 ("It is well-settled that an expert witness need not testify from first-hand personal knowledge . . . ."). Furthermore, the North Carolina Supreme Court has clarified that an expert "is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial," noting that "[s]uch a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." State v. Walston, ___ N.C. ___, 798 S.E.2d 741, 747 (2017); *accord* State v. McCall, 162 N.C. App. 64, 71-73 (2004) (it was not error for an expert witness to testify that a child victim's behaviors suggested exposure to trauma, probably sexual abuse, where the expert did not personally examine the child; the expert obtained information about the child from a summary of the child's testimony, a DSS report and the child's statement to the police; rejecting the defendant's argument that the expert's failure to examine the child rendered her expert opinion unreliable).

5. **Disclosure & Cross-Examination of Basis at Trial.**
   Although an expert may testify without prior disclosure of the basis for his or her opinion, disclosure is required when requested by the other side. Rule 705 provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C. R. EVID. 705; *see, e.g.,* State v. Brown, 101 N.C. App. 71, 76-77 (1990) (noting that under Rule 705 an expert does not have to identify the basis of his opinion, absent a specific request by opposing counsel; rejecting the defendant's argument that the State's failed to establish a proper foundation for its expert's opinion as to the weight of the cocaine where the expert testified to his opinion but the defendant made no inquiry as to basis on cross-examination); State v. Fletcher, 92 N.C. App. 50, 57 (1988) ("The basis of an expert's opinion need not be stated unless requested by an adverse party and here defendant made no such request.").

Courts have noted that "[d]isclosure of the basis of the opinion is essential to the factfinder's assessment of the credibility and weight to be given to it." State v. Jones, 322 N.C. 406, 412 (1988). If the party requesting disclosure does not specify disclosure on voir dire, the trial court probably can allow for disclosure on voir dire or direct examination without committing error. 2 BRANDIS & BROUN at 738 (so noting)*; see* State v. Pretty, 134 N.C. App. 379, 382-83 (1999) (no error where disclosure occurred during direct and cross-examination rather than on voir dire and no prejudice was shown from the delay in obtaining the evidence). But, if the party seeking disclosure specifically asks for disclosure on voir dire and the trial court allows disclosure only on direct examination, prejudicial error may occur if improper evidence is presented to the jury. 2 BRANDIS & BROUN at 738. When disclosure is ordered through voir dire and the trial court admits the opinion, it has been suggested that the trial court has discretion to require the expert to state the facts or data before giving the opinion or leave them to be brought out on cross-examination. *Id.*

"Wide latitude is generally given to a cross-examiner in his attempts to discredit the expert witness, including questioning the expert in order to show that the facts or data forming the basis of the expert's opinion were incomplete." State v. Black, 111 N.C. App. 284, 293–94 (1993). As has been explained:

> On cross-examination ... opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect

> the expert's opinion. Similarly the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry ... the cross-examiner is not limited to facts finding support in the record. It is, however, improper to inquire of the expert whether his opinion differs from another expert's opinion, not expressed in a learned treatise, if the other expert's opinion has not itself been admitted in evidence. An expert witness may, of course, be impeached with a learned treatise, admissible as substantive evidence . . . .

Id. at 294 (quoting MCCORMICK, MCCORMICK ON EVIDENCE § 13 (1992), and going on to hold that the trial court properly allowed the defendant to elicit on cross-examination that the expert never examined certain medical records, that in formulating similar opinions she often relied upon such records, and that examination of the records would in fact have assisted the expert in formulating her opinion in this case; however, the trial could properly limit the defendant's cross-examination when he sought to question the expert regarding the contents of data that the expert had not considered or used in formulating her opinion and which was not contained in any recognized learned treatise); *see also* State v. White, 343 N.C. 378, 393 (1996) (the trial court properly allowed the State to cross-examine a defense psychiatry expert about the work of a clinical psychologist upon which the expert had relied where the expert disagreed with a conclusion drawn by the clinical psychologist).

Cases have held it to be error when the trial court prohibits defense counsel from asking a defense expert about the basis of his or her opinion. State v. Davis, 340 N.C. 1, 25-26 (1995) (error to sustain the State's objections to questions posed to the defendant's mental health expert about the basis of the expert's opinion); State v. Allison, 307 N.C. 411, 413-17 (1983) (the trial court committed prejudicial error in a case involving the insanity defense where it prohibited defense mental health experts from testifying to the basis of their opinions that the defendant was unable to distinguish between right and wrong with respect to his behavior at the time of the alleged crimes).

For a discussion of what discovery must be provided in connection with expert witnesses, see *Discovery in Criminal Cases* in this Benchbook.

6. Status as Substantive Evidence; Limiting Instruction. When evidence is admissible as the basis of an expert's opinion, it is not substantive evidence unless it qualifies for admission under some independently recognized principle, such as an exception to the hearsay rule. 2 BRANDIS & BROUN at 744-45. One exception to the hearsay rule that might apply is N.C. R. EVID. 803(18) (hearsay exceptions, availability of declarant immaterial), which provides an exception to the hearsay rule as follows:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct

> examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

If the evidence does not qualify for admission as substantive evidence, its admission should be accompanied by an appropriate limiting instruction. *See* State v. Jones, 322 N.C. 406, 414 (1988) (noting that the defendant is entitled to a limiting instruction upon request).

E. Testimony Outside of Expert's Expertise. An expert's testimony should relate to the expert's area of expertise. State v. Ward, 364 N.C. 133, 146 n.5 (2010) ("[c]aution should be exercised in assuring that the subject matter of the expert witness's testimony relates to the expertise the witness brings to the courtroom" (quotation omitted)). For example, in one recent case the North Carolina Supreme Court noted that while a defense proffered witness who was a former police officer and trainer in police use of force matters would have been qualified to testify about standard police practices regarding the use of force, he was not qualified to testify about the human body's sympathetic nervous system. State v. McGrady, 368 N.C. 880, 896 (2016). By contrast, in another case the Court of Appeals rejected the defendant's argument that testimony by a forensic serologist that the defendant's blood profile was the same as .2% of the population and the victim's blood profile was the same as 8.2% of the population was beyond the scope of witness's expertise. State v. Demery, 113 N.C. App. 58, 63-64 (1993).

F. Terminology.

Although not binding authority for a judge, the PCAST REPORT asserts that statements by experts suggesting or implying greater certainty than is shown by the empirical evidence "are not scientifically valid and should not be permitted." PCAST REPORT at 145. It continues:

> In particular, courts should never permit scientifically indefensible claims such as: "zero," "vanishingly small," "essentially zero," "negligible," "minimal," or "microscopic" error rates; "100 percent certainty" or proof "to a reasonable degree of scientific certainty;" identification "to the exclusion of all other sources;" or a chance of error so remote as to be a "practical impossibility."

Id.; see also Paul C. Giannelli, *The NRC Report and Its Implications for Criminal Litigation*, 50 JURIMETRICS J. 53, 57-60 (2009) (discussing a similar position in the 2009 report by the National Research Council, entitled, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, and relevant cases).

IV. Interplay Between Rule 403 & the 700 Rules. Evidence that is admissible under Rule 702 still may be inadmissible under Rule 403. *See* N.C. R. EVID. 702(g) ("This section

does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section."). *Compare, e.g.,* State v. King, 366 N.C. 68, 75-76 (2012) (holding that the trial court did not abuse its discretion by excluding under Rule 403 the expert testimony regarding repressed memory that was admissible under Rule 702), *and* State v. Walston, ___ N.C. ___, 798S.E.2d. 741, 746 (2017) (citing *King* and noting that Rule 403 would allow for the exclusion of expert testimony—in that case, regarding repressed memory and the suggestibility of memory—even if such evidence was admissible under Rule 702), *with* State v. Cooper, 229 N.C. App. 442, 463 (2013) (in this murder case where files recovered from the defendant's computer linked the defendant to the crime, the trial court abused its discretion by excluding under Rule 403 a defense expert proffered to testify that the defendant's computer had been tampered with).

Likewise, evidence admissible under Rule 705 may be excluded under Rule 403. State v. Coffey, 336 N.C. 412, 420-22 (1994) (although Rule 705 allows a party cross-examining an expert to inquire into the facts on which the expert's opinion is based, that Rule "does not end the inquiry" and the trial court may exclude such evidence under Rule 403; where the probative value of evidence of the defendant's convictions was substantially outweighed by the danger of unfair prejudice, evidence of the convictions was not admissible on grounds that they constituted a basis of the expert's opinion).

V. Court Appointed Experts. Evidence Rule 706(a) provides for court appointed experts. It provides:

> The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

N.C. R. EVID. 706(a); *see also* State v. Robinson, 368 N.C. 596, 597 (2015) (instructing that on remand the trial court may, in its discretion appoint an expert under the rule).

If the court appoints an expert, the witness is "entitled to reasonable compensation in whatever sum the court may allow." N.C. R. EVID. 706(b).

The rule allows the court, in the exercise of its discretion, to "authorize disclosure to the jury of the fact that the court appointed the expert witness." N.C. R. EVID. 706(c). And it specifies that nothing in the rule limits the parties in calling expert witnesses of their own selection. N.C. R. EVID. 706(d).

VI. Defendant's Right to Expert Assistance.

For a discussion of a criminal defendant's right to expert assistance and the procedure for obtaining such assistance, see Chapter 5, Experts and Other Assistance, in JOHN

RUBIN & ALYSON A. GRINE, NORTH CAROLINA DEFENDER MANUAL VOL. 1, PRETRIAL (2013), http://defendermanuals.sog.unc.edu/defender-manual/2.

VII. Standard of Review on Appeal.

In reviewing a trial court's decision regarding the admissibility of expert testimony, the appellate courts apply the deferential abuse of discretion standard. *See, e.g., Walston*, ___ N.C. ___, 798 S.E.2d at 745; *McGrady,* 368 N.C. at 893; State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359, 361 (2017); State v. Hunt, ___ N.C. App. ___, 790 S.E.2d 874, 881 (2016).

GUIDE TO WORKING WITH EXPERTS

- **PRELIMINARY CONSIDERATIONS**

    - Review your case, client's records (medical, educational, etc.), and discovery prior to contacting experts. This will help you determine exactly what type of expert assistance is needed and have a more productive conversation with an expert.
    - Do not engage a mental health expert before obtaining substantial social history records unless the client is floridly psychotic upon you entry into the case. See IDS Policy on the Effective Use of Mental Health Experts in Potentially Capital Cases.
    - Educate yourself on the issues. Consult the IDS Forensics website for information on topics of forensic science, such as DNA, firearms, fingerprints, death investigation, etc. Scholarly articles are available such as Google Scholar and PubMed.
    - Do you need an expert?
        - Is the forensic evidence adverse to the defense theory of the case?
        - Do you need evidence re-tested?
        - Are you critiquing the state's testing of the evidence?
        - Even if the State is not using an expert, consider whether there are affirmative uses of experts that would support your theory of the case, such as crime scene experts, use of force experts, or mental health experts.

- **FINDING AN EXPERT:**

    - Don't wait until the last minute – your desired expert may not be available. Any expert will need time to review your case prior to forming an opinion.
    - Consider consulting with Sarah Olson, Forensic Resource Counsel or the Elaine Gordon, Trial Resource Counsel for additional ideas about what type of expert to use.
    - Know what particular expertise you need before you start making phone calls: i.e., rather than looking for a "DNA expert," consider whether you need an expert on DNA mixtures, an expert who can challenge contamination, or an expert who can challenge the statistical computation.
    - Consider the role of the expert: Do you need an expert to assist in evaluating the quality of the evidence? To explain the science to you or to the jury? Do you need an expert to develop mitigation evidence or to establish a defense such as self-defense or diminished capacity? Will assistance require access to a laboratory? Can a professor or academic fulfill the role or do you need a practicing analyst or scientist? Is the expert willing to testify?

- **RESEARCH THE EXPERT:**

    - You should research your potential expert as thoroughly as you would research a State's witness that you are preparing to cross-examine.
    - Review their CV. Do not assume that just because the expert has been used frequently that he/she has been properly vetted.
    - Utilize disciplinary boards if available. If an expert lists a particular license or certification, see if that organization posts disciplinary information online.
    - Ask the expert about any certifications or professional qualifications attempted—has the expert taken any certification exams or other professional exams that he/she has not passed? This website can be used to check to see whether an MD is certified in a particular specialty.
    - Seek references on listserves, with the IDS Forensic Resource Counsel, NACDL Resource Center, American Academy of Forensic Sciences (AAFS), other lawyers, other experts and competitors, universities, and publicly-funded laboratories.
    - Search LexisNexis and/or Westlaw for cases in which the expert testified.
    - Additional information on how to research an expert online is available here.

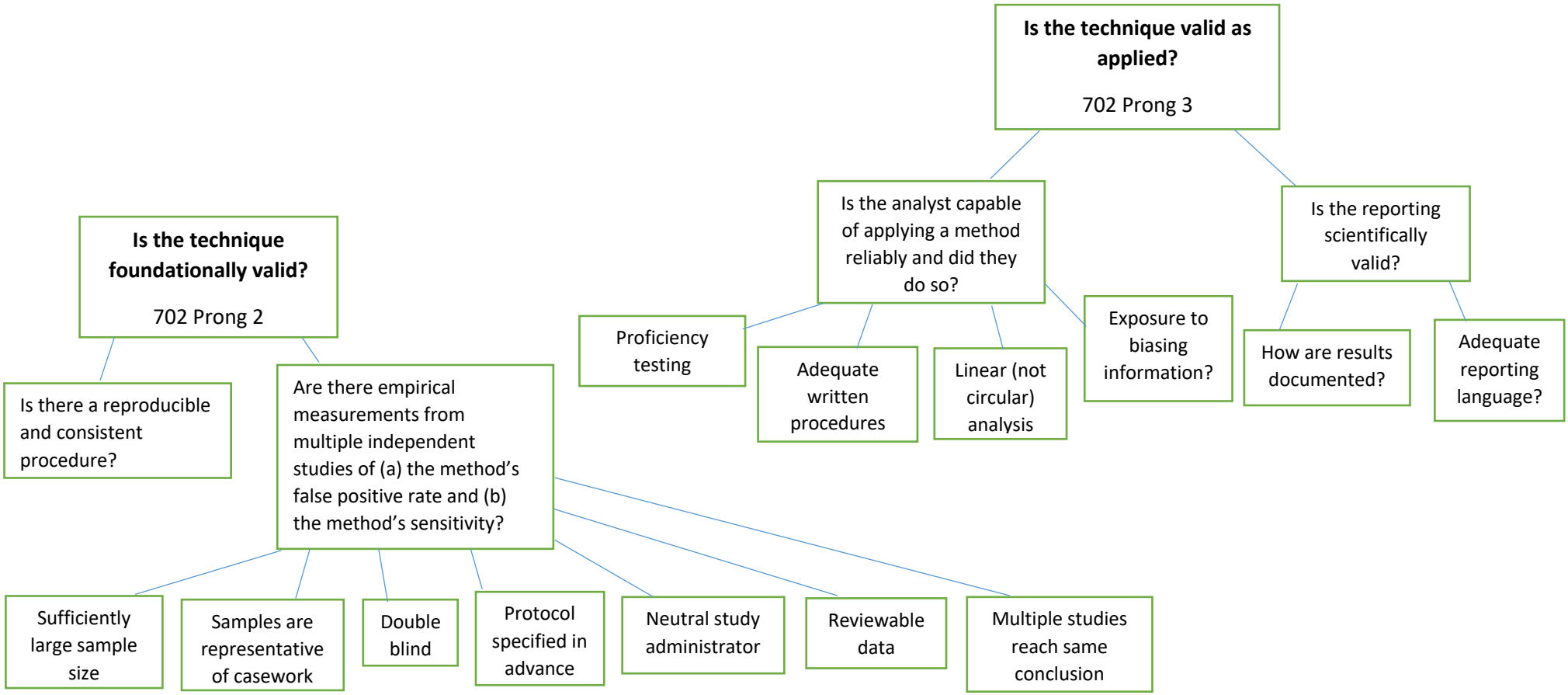
- **GUIDE TO YOUR FIRST CONVERSATION WITH EXPERT**

    - Be able to explain to the expert what work you need performed, including specific referral questions you would like addressed if working with a mental health expert. Never ask a mental health expert simply to "evaluate" your client without providing specific guidance. Do not assume that the expert already knows what constitutes a potential defense or mitigating factor. Sometimes an expert who has not received proper guidance will tell an attorney that his or her evaluation has turned up nothing useful, when in fact the expert simply does not have the legal expertise to know what is useful and what is not.
    - Get the expert to provide you with a copy of his/her CV.
    - Discuss with the expert anticipated hours of work needed, any re-testing needed, any travel required in order to prepare a request for adequate funding. Discuss AOC's rate schedule (see p. 2) and prepare justification if the expert requires a deviation from the rate schedule.
    - Discuss any potential conflicts with the expert due to co-defendants, scheduling, or any other professional or personal matter that would adversely affect the expert's work/testimony in the case.
    - Verify that your expert will be able to testify. Do not assume that testimony will not be needed or promise your expert that testimony will not be needed.
    - Your expert will need lab reports and the underlying data in order to analyze the evidence.
    - Communication

- Can they explain their conclusions clearly and understandably?
- Consider non-verbal communication: arrogance, bias, appearing defensive, organized, prepared, etc.

- Considerations to discuss with expert(s)
  - Position currently held.
  - Description of the subject matter of the expert's specialty.
  - Specializations within that field.
  - What academic degrees are held and from where and when obtained.
  - Specialized degrees and training.
  - Licensing in field, and in which state(s).
  - Length of time licensed.
  - Length of time practicing in this field.
  - Board certified as a specialist in this field.
  - Length of time certified as a specialist.
  - If certifications/proficiency tests/etc have been attempted, history of results.
  - Positions held since completion of formal education, and length of time in each position.
  - Duties and function of current position.
  - Length of time at current position.
  - Specific employment, duties, and experiences (optional).
  - Teaching or lecturing in the relevant field, dates and location of teaching.
  - Publications in this field and titles.
  - Membership in professional societies/associations/organizations, and special positions in them.
  - Requirements for membership and advancement within each of these organizations.
  - Honors, acknowledgments, and awards received by expert in the field.
  - Who is considered "the best" in the field?
  - Number of times testimony has been given in court as an expert witness in this field. (Case names and transcripts, if available.)
  - How has the expert's testimony been treated in the past? Did the expert appear balanced, knowledgeable, and credible? Has the expert ever not been qualified as an expert? Why?
  - Availability for consulting to any party, state agencies, law enforcement agencies, defense attorneys.

Roadmap for scientific validity under Rule 702 (prongs 2 and 3)/PCAST Report



Rule 702 – Testimony by Experts

(a) 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:

(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.

BY SARAH RACKLEY OLSON | OCTOBER 14, 2014 · 9:22 AM | EDIT

What is in a State Crime Laboratory Lab Report?

Many attorneys have asked me what should be included in a lab report from the State Crime Lab. Often in District Court DWI cases or through discovery, defense attorneys receive only a 1-2 page report called a Lab Report. For each case that is analyzed by the State Crime Laboratory, the lab produces a Case Record in Forensic Advantage (FA), the lab's electronic information management system. The Case Record contains many items, including the lab report, chain of custody information, analyst CV, and information about tests performed. Under N.C. Gen. Stat. 15A-903, the lab provides this Case Record to the prosecution for disclosure to the defendant through discovery. If attorneys do not receive complete lab reports, they should request the items described below through discovery. This information is also available on the IDS Forensic website.

How are reports accessed by the District Attorney's Office?

When the lab has completed its analysis and finalized its report, an email is automatically sent to the District Attorney's office and the law enforcement agency that requested the analysis, notifying them that the Case Record is available. These offices can access the Case Record using a web-based program called FA Web. There are legal assistants or victim-witness coordinators in each DA's office who are trained to use FA Web. They can access the Case Records using the emailed link (which remains active for seven days after the email is sent), or they can search for the report within FA Web even after the email link has expired. Some ADAs and DAs may also be trained in using FA Web, but typically it is a legal assistant who accesses the FA Web and downloads the Case Records.

Many defense attorneys are surprised to learn that a full Case Record is produced by the lab and sent to the DA's office for each case that is worked, including District Court cases. Depending on whether they have been trained in the use of FA Web, ADAs may or may not know that the lab provides complete Case Records for each case worked, but the legal assistant in their office who is trained to use FA Web can access these full reports.

How long has this system been in place?

FA was adopted by the lab in 2008 as the lab's electronic information management system. Since 2011, the lab has been providing Case Records to DA's offices through FA Web. Since June 2013, DA's offices have had the option to download and print partial "Ad Hoc" lab reports instead of printing the full Case Record.

What is included in a Case Record Full Packet?

The "Case Record Full Packet" may be downloaded as one zip file or portions of the Case Record may be

downloaded separately. **The Table of Contents is the most important page for a defense attorney to review in order to determine if the complete packet has been provided through discovery.** If items of evidence were analyzed in more than one section of the lab, each lab section will complete a separate Case Record for its analysis and Case Records will be numbered consecutively (for example, Record #1 may be from Trace Evidence, Record #2 may be from Forensic Biology and DNA, etc.) Some Case Records may not be needed once created, such as when an examination is redundant with another Case Record. These will be listed as "Terminated."

The main PDF in the zip file Case Record Full Packet contains the Table of Contents. The Table of Contents will specify if it is a Case Record (Full), Ad Hoc or Officer. If an attorney sees on the Table of Contents that the packet is an Ad Hoc or Officer packet, the attorney will know that there were additional items provided by the lab that have not been provided to the defense. If the DA's office downloads the Case Record Full Packet the entire packet will be paginated consecutively and state the total number of pages, such as Page 1 of 200. If only a partial Ad Hoc packet is downloaded, the portion that is downloaded will be paginated, such as Page 1 of 10.

The Case Record Full Packet will include the following items (though not necessarily in this order):

- **Table of Contents** – lists all items included in the main PDF file of the "Case Record Full Packet" as well as additional items that are sent as separate files. Every packet (including partial Ad Hoc packets) that is downloaded from FA Web will have a Table of Contents. This Table of Contents has been annotated to describe its various parts. These links show sample Table of Contents for Digital Evidence (Audio Video and Computer), Drug Chemistry, Firearms, Toolmarks, Forensic Biology (Blood, DNA, and Semen) Latent Evidence (Footwear-Tire and Latent), Toxicology, and Trace Evidence (Arson,Explosives, Fiber, Glass, GSR, Hair, Paint, and Trace). Beneath each item listed in the Table of Contents will be an indented description of this item. Often the "description" just repeats the name of the document. Attorneys should know that indented description is not a separate or duplicate item, but is intended to describe the item listed above. The lab plans to remove the descriptions when it upgrades the FA Web program as they are mainly duplicative of the document name.
- **Lab Report** – a 1-2 page document that states the analyst's conclusions. It will not identify what test was performed or how the analyst reached her conclusions. This is the notarized document that is found in the court file in District Court DWI cases. Many attorneys think this is the only report that the lab produces, but it is just one part of the entire Case Record that the lab produces for each case.
- **Case Report** – several pages that list the names of the analysts who performed the analysis and reviewed the case. If any problem is found when the case is reviewed by another analyst, the problem will be briefly described in this section in a written dialogue between the analysts.
- **Chain of Custody** – shows the chain of custody of the item of evidence within the lab.
- **Request for Examination of Physical Evidence** – a copy of the form that law enforcement submits to request that an item be analyzed by the lab.
- **Worksheets** – as the analyst works, she records which test is performed and her observations, measurements, and results using an electronic form on her computer. The Lab Worksheets are printouts of these electronic forms. The Lab Worksheets are one place to look to see what tests were performed.
- **Quality Control/Quality Assurance and sample preparation documentation** – this documentation will vary depending on the type of analysis completed, but many analyses will have documentation of calibration curves, positive and negative controls, instrument set-up, sample

preparation, instrument results, etc. Attorneys can consult with Sarah Olson, their own expert, or the lab analyst for an explanation of these case-specific items.

- **Communication Log** – includes details of case-related phone conversations, including communications from law enforcement, prosecutors, and defense attorneys, if any such communications occurred. If communication has occurred by e-mail or memo, the e-mail or memo will be provided as part of the main PDF file in the Case Record Full Packet.
- **CV of Analyst(s)**
- **Messages Report** – these are messages that can be sent from external users to the State Crime Lab via the FA system, such as rush requests or stop work orders. Analysts can also send messages to each other through the FA system that will be recorded here.
- **Publish History and Packet History** – if this is the first publication of the packet, it will be noted here. If this is a subsequent publication of the packet, any information on previous publications, including downloads by FA Web users, will be listed.

Several additional items also make up the Case Record Full Packet. These items are listed in the Table of Contents but are not paginated with the previous documents.

- **Prior Versions of Worksheets and Lab Reports** – various versions of one Worksheet may be saved during analysis as the analyst progresses through her work. If an analyst has to go back and amend something in a completed Worksheet, the previous and new versions will be saved. If an analyst changes something in a Lab Report, the previous and new versions will be saved. These worksheets and reports are paginated separately from the Case Record Full Packet.
- **Worksheet Resources** – a list of all instruments, equipment, chemicals, reagents, kits, and other standards used in the analysis. The document also contains the maintenance history for the equipment and instruments used. This document is paginated.
- **All other items that cannot be made into PDFs, including images and some data files** – images may be printed by the DA's office, but attorneys should request them on a disc for better image quality. Raw data files cannot be printed and require proprietary software to open. Currently raw data files are being provided only in cases where DNA analysis was performed. These files can be opened by an expert who has the appropriate software to read this data.

How do I know if I received all documents that the lab has produced?

There are a number of steps that defense attorneys can take to ensure that they are receiving compete discovery:

1. **Review the Table of Contents** – Attorneys should look for the Table of Contents in the Case Record Full Packet and check to ensure that the type of Case Record that the DA's office downloaded was Full (rather than Ad Hoc) and that all documents listed in the Table of Contents are provided.
2. **Check pagination** – The FA Web system paginates everything that is downloaded. If, for example, only pages 4 and 5 of 200 are provided, the defense attorney will know that she doesn't have a copy of everything that the DA's office downloaded. However, if the DA's office chooses to only download a portion of the packet (Ad Hoc packet) rather than the Case Record Full Packet, only those downloaded pages will be paginated. For example, if the Case Record Full Packet has 200 pages but the DA's office

only downloads the Lab Report which is 2 pages, those pages will be paginated, 1 and 2 of 2.

3. **Request Forensic Advantage notification emails from the DA's office** – Whenever the lab updates a Case Record that has already been sent to the DA's office, FA will send an email notifying the DA's office that there has been a change and specifying which portion of the record is changed. Defense attorneys should request these emails from the DA's office through discovery. The updated Case Record may appear to be a duplicate of the original Case Record that was provided (and may be hundreds of pages long). These emails can help identify which document was changed.
4. **Meet with the ADA** – Defense attorneys may request to meet with the ADA assigned to the case to view all of the documents available on FA Web to ensure that everything has been downloaded and shared through discovery.
5. **Consult with the lab** – After reviewing the discovery and checking that the DA's office has provided everything available in the FA Web program to the defense, defense attorneys may consider scheduling a pre-trial meeting with the lab analyst if questions remain about reports. State Crime Lab analysts are available to meet with defense attorneys prior to trial and will answer questions about the analysis that was performed and what reports/documents were produced in the case. Defense attorneys may contact Lab Legal Counsel Assistant Attorney General Joy Strickland if there are issues with lab discovery that cannot be resolved with the ADA.

Related

Draft Policy Recommendations by the National Commission on Forensic Science
In "Crime Labs"

Meeting with lab analysts and forensic pathologists prior to trial

Where's my lab report?

In "Crime Labs"

Pretrial Release Advocacy in Superior Court

Idrissa A. Smith

1

WHOSE CASE IS IT?

2

The case does not belong to you, the prosecutor, the victims, the Court, the county you are practicing in, or even the State of North Carolina

3

The case is your client's and theirs only!

4

The case is your client's and theirs only!

It is of the utmost importance to aggressively assert that that this is the defendant's case and that all proceedings, rulings, contemplations, or negotiations are for your client's benefit (or detriment) and theirs alone

5

The case is your client's and theirs only!

A hearing to determine pretrial release is not a chance for the State to show how bad your client or their case is, but rather an opportunity for you to assert your client's absolute right to their liberty interest as guaranteed by the Procedural Due Process Clause (XIV Amendment) of the United States Constitution.

6

The Law

1. Pretrial Integrity Act
   A. NCGS 7B-1906(b1) - Juveniles
   B. NCGS 15A-533 – Right to Pretrial Release in Capital and Non-Capital Cases
2. Procedure for Determining Conditions of Pretrial Release
   A. NCGS 15A-534

7

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. If a crime is committed during an escape or unauthorized absence from involuntary commitment in a mental health facility:
   A. The defendant shall be returned to the treatment facility which he was residing at the time of the crime
   B. A judicial official must determine that the defendant's commitment is still valid
      1) NCGS 15A-533(a)

8

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. Pretrial release is discretionary if defendant is charged with:
   A. 1st or 2nd Degree Murder (or attempt)
   B. 1st or 2nd Degree Forcible Rape
   C. Statutory Rape of a Child by an Adult
   D. 1st Degree Statutory Rape or 1st/2nd Stat Sex Off
   E. 1st or 2nd Degree Forcible Sexual Offense
   F. Statutory Sex Offense w/Child by Adult
   G. AWDWIKISI
   H. 1st or 2nd Degree Kidnapping

9

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. Pretrial release is discretionary if defendant is charged with (contd.):
   A. RWDW
   B. 1st Degree Arson
   C. 1st Burglary
   D. Human Trafficking
   E. Discharging Certain Barreled Weapons or Firearms into Occupied Property

10

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. If the judge determines that release is warranted for a defendant charged with the (above) listed crimes, the judge shall set conditions of pretrial release in accordance with NCGS 15A-534
2. Any other non-capital offense must have conditions of pretrial release determined in accordance with NCGS 15A-534
   A. NCGS 15A-533(b)

11

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. Capital Offenses
   A. Release before trial is at the judge's discretion
   B. If a judge determines that release for a capital offense is warranted, release conditions must be determined in accordance with NCGS 15A-534
      1) NCGS 15A-533(c)

12

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. Rebuttable presumption that no condition of release can reasonably assure the defendant's appearance or safety to the community if the judge finds: (NCGS 15A-533(d))
   - A. Defendant is charged with an offense involving drug trafficking; and
   - B. Defendant was already on pretrial release; and
   - C. Defendant has previously been convicted of a Class A-E Felony; and
     1) That offense involves drug trafficking; and was
     2) Within 5 years of conviction or release from prison

13

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. Rebuttable presumption that no condition of release can reasonably assure the defendant's appearance or safety to the community if the judge finds: (NCGS 15A-533(e))
   - A. Offense committed for benefit, direction or at direction of a criminal gang; and
   - B. Defendant was already on pretrial release; and
   - C. Defendant has previously been convicted of a gang activity offense; and
     1) Received an enhanced sentence; and was
     2) Within 5 years of conviction or release from prison

14

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. Rebuttable presumption that no condition of release can reasonably assure the defendant's appearance or safety to the community if the judge finds: (NCGS 15A-533(f))
   - A. Offense is a felony or a Class A1 misd. w/illegal use, possession or discharge of a firearm; and
   - B. Defendant was already on pretrial release for felony or Class A1 misd. w/illegal use, possession or discharge of a firearm; and
   - C. Defendant has previously been convicted of a felony or Class A1 misd. w/illegal use, possession or discharge of a firearm; and
     1) Within 5 years of conviction or release from prison

15

NCGS 15A-533: Right to Pretrial Release in Capital and Non-Capital Cases

1. When defendant is arrested for a new offense allegedly committed while on pretrial release:
   A. Release can only be determined by a judge;
   B. Court shall receive a criminal history and risk assessment (if available);
      1) If not addressed w/in 48 hours
         a. Pretrial release conditions can be addressed by a magistrate the clerk of superior court
   C. NCGS 15A-533(h)

16

NCGS 15A-534: Procedure of Determining Pretrial Release

1. Types (NCGS 15-534(a))
   A. Written promise to appear
   B. Unsecured bond
   C. Custody of a person or organization for supervision
   D. Secured bond
   E. House arrest with electronic monitoring
      1) Must be accompanied by a secured bond

17

NCGS 15A-534: Procedure of Determining Pretrial Release

1. A written promise to appear, unsecured bond or release to a person or custody must be imposed if release is granted, UNLESS (NCGS 15-534(b)):
   A. It will not reasonably assure the appearance of the defendant;
   B. Defendant poses a danger /injury to any person; or
   C. Is likely to:
      1) Result in the destruction of evidence;
      2) Subordination or perjury; or
      3) Intimidation of potential witnesses

18

NCGS 15A-534: Procedure of Determining Pretrial Release

1. What to consider (NCGS 15-534(c)):
   - A. The weight of the evidence against the defendant;
   - B. The defendant's family ties;
   - C. Employment;
   - D. Financial resources;
   - E. Character;
   - F. Mental condition;
   - G. Length or residence in community;
   - H. Records of convictions;
   - I. History of avoiding prosecution; and
   - J. Any other relevant evidence.

19

NCGS 15A-534: Procedure of Determining Pretrial Release

1. Conditions when defendant has failed to appear (NCGS 15-534(d1)):
   - A. Secured bond in double the amount; or
   - B. At least $1k if no bond was previously required;
   - C. Restrict travel, associations, conduct, or residence.

20

NCGS 15A-534: Procedure of Determining Pretrial Release

1. Conditions when defendant is charged with a felony and is on probation (NCGS 15-534(d2)):
   - A. Written determination that defendant does not pose a threat to the public;
     1) If determined that defendant poses a threat:
        a. Secured bond; or
        b. House arrest
   - B. If insufficient evidence that defendant does not pose a threat to the public
     1) Defendant shall be retained in custody until additional information is secured
        a. Period of 72/96 hours or earlier if information is secured.

21

NCGS 15A-534: Procedure of Determining Pretrial Release

1. Conditions when defendant is charged with an offense and is free on pretrial release (NCGS 15-534(d3)):
   A. Secured bond in double the amount of the most recent bond; or
   B. At least $1k if no bond was previously required.

22

NCGS 15A-534: Procedure of Determining Pretrial Release

1. Other considerations:
   A. Once a is in superior court, a superior court judge may modify any previous pretrial release orders (NCGS 15A-534(e).
   B. For good cause, at any time, a judge may revoke or set new conditions an order for pretrial release (NCGS 15A-534(f).
      1) Not bond by the rules of evidence (NCGS 15A-534(g).
      2) least $1k if no bond was previously required.

23

So now you are in front of a Superior Court Judge, now what?

1. MAKE SURE YOU SPEAK FIRST!:
   1. It is your motion (even if it is not) assert your right to address the court about your client before the prosecutor.

24

Clearly State

1. The charged offenses;
2. Current bond amount;
3. Presumptive bond amounts;
4. Amount of time your client has been in custody;
5. The procedural history of the case;
6. The actors;
7. A clear statement of the facts (good and bad);
8. The issues which make your client less culpable

25

Clearly State

1. Your client's family ties;
2. Your client's ties to the community;
3. Your client's social (work/educational) history;
4. A list of any mental health/medical history;
5. Your client's criminal history;
6. Your client's history of failures to appear.

26

1

Roadmap

- Make objections and arguments
- Establish facts in the record
- Appeal correctly

2

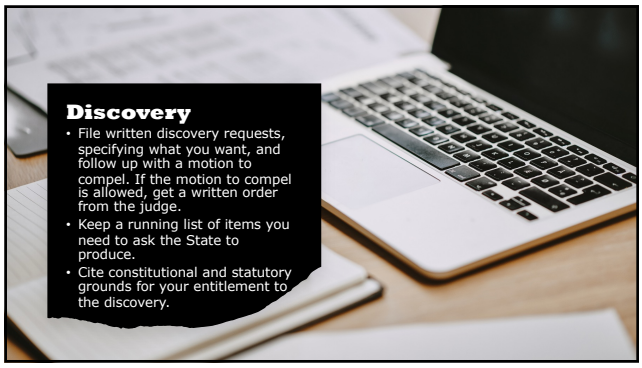
Getting started on the right foot:

- Make a motion for complete recordation. If you don't, the following won't be recorded:
  - Jury selection in noncapital cases;
  - Opening statements and closing arguments; and
  - Arguments of counsel on questions of law.
- You should win it every time!
  - Upon motion of any party or on the judge's own motion, proceedings excepted "*must* be recorded." N.C.G.S. § 15A-1241(b).

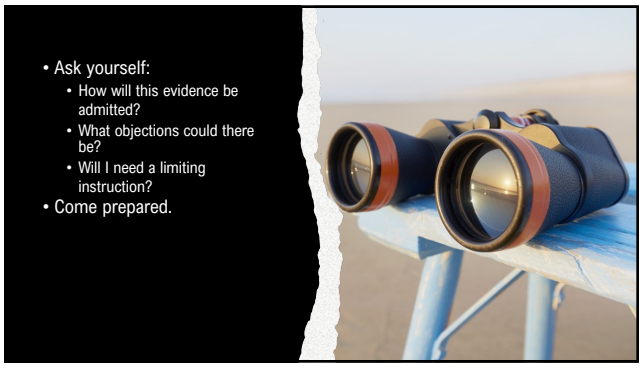
3


Packing your bags
(aka Pretrial Preparation)

4


Discovery
• File written discovery requests, specifying what you want, and follow up with a motion to compel. If the motion to compel is allowed, get a written order from the judge.
• Keep a running list of items you need to ask the State to produce.
• Cite constitutional and statutory grounds for your entitlement to the discovery.

5


• Ask yourself:
• How will this evidence be admitted?
• What objections could there be?
• Will I need a limiting instruction?
• Come prepared.

6

Indictments

- Jurisdictional defect vs. non-jurisdictional defect
- Jurisdictional = charging document "fails to wholly allege a crime." *State v. Singleton*, 386 N.C. 183 (2024).
- Now non-jurisdictional = mere failure to allege essential element or facts to support an essential element. *Singleton*, 386 N.C. 183 (2024).
  - Subject to waiver and an appellate prejudice test the Court has already said you will not be able to meet.
- Read more at **Did *State v. Singleton* Bring a Sea Change in the Law of Indictments** and **Indictment Technicalities: Gone Today and Here Tomorrow**.

7

Pre-trial motions

- Request and motion for discovery
- Motion for complete recordation
- Motion for a bill of particulars
- Motion to sever charges or defendants
- Motion to suppress
  - You **must** attach an affidavit, and you can sign the affidavit
  - If the motion is denied, you **must** object in front of the jury when the evidence is actually offered.

8

Motions *in Limine*

- A motion *in limine* (and pretrial ruling on it) regarding the admissibility of evidence is **not sufficient** to preserve an issue for appeal.
- Trial counsel **must** renew the motion or object to the evidence **at trial in the presence of the jury**.

9

Getting on the Road

- Joinder
- Jury Selection

10

Joinder of Charges

N.C.G.S. § 15A-926(a)

- Two or more offenses may be joined for trial when the offenses, whether felonies or misdemeanors or both, are:
  - based on the same act or transaction or on a series of acts or transactions connected together **or**
  - constituting parts of a single scheme or plan.

11

Joinder of Defendants

N.C.G.S. § 15A-926(b)

Charges against two or more defendants **may** be joined for trial:

- When each of the defendants is charged with accountability for each offense; **or**
- When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
  1. Were part of a common scheme or plan; or
  2. Were part of the same act or transaction; or
  3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

12

Motion to Sever Charges and Defendants

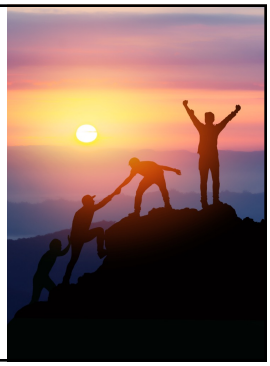
N.C.G.S. § 15A-927

- Objecting to the State's motion to join doesn't preserve joinder issues for appeal.
- A motion to sever must be made.
- The motion must be made pretrial
  - Unless, "based on grounds not previously known"
- Assert constitutional and statutory grounds.
  - 5th Amendment and state constitutional grounds
  - 15A-926 (same transaction, single plan)
  - 15A-927 ("necessary to achieve a fair determination of the defendant's guilt or innocence")
- Assert how the defendant will be prejudiced.
- Motion on the same grounds must be renewed before or at the close of all the evidence. Otherwise, any right to severance is waived by failure to renew the motion.

13

Jury Selection

- *Batson* (race) and *J.E.B.* (gender) discrimination claims
  - A complete recordation is imperative for preserving.
  - Preserve for federal litigation.
- Manner of juror selection, including fair cross-section of the community.
- Denied challenges for cause
  - Specific, technical requirements to preserve
  - Have a folder with voir dire materials including N.C.G.S. § 15A-1212 and § 15A-1214
  - Have a script to help you develop and preserve a challenge for cause.



14

Jury Selection: Challenges for Cause
(7-11-10)

Basis for Challenge for Cause. 15A-1212

(6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (You may NOT ask what the opinion is.)
(8) As a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of N.C.
(9) For any other cause, the juror is unable to render a fair and impartial verdict.

GOAL for Challenge for Cause: Have the juror agree that the juror:
1) has formed an opinion about guilt (or "expressed" an opinion),
2) would be unable to follow the law about _____, or
3) would be unable to be fair and impartial.

The STEPS to obtain a for cause challenge

1) Repeat the juror's bias or impaired position.
Use their EXACT words
"My son was a cocaine addict…I despise anyone ever remotely involved in it."

2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more…What happened…Why…?
NO leading at this point
"Tell us about your son's problem…How did he get into using cocaine…What happened…How is he today…?

3) Acknowledge the validity of the juror's position and compare it to other jurors
Ira calls it…"Normalize the impairment"
Do NOT argue or be judgmental…Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
"Thank you for your honesty and for sharing your personal experience about your son. It is understandable that you feel the way you do. Does anyone else feel the same way about people charged with selling drugs?"

4) Lock the juror's biased answer into a challenge for cause basis
Switch to LEADING questions from here on

15

Questions for the jury

Have case law to support your client's right to have you ask certain questions.

- A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. *State v Leonard*, 295 N.C. 58, 62-63 (1978).
- Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420 (1989).

JURY SELECTION QUESTIONS
(9-27-96)

I. GENERAL PURPOSE OF VOIR DIRE

"Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges**." Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (The N.C. Supreme Court explained that a **similar "dual purpose"** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges**. State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

"Where an adversary wishes to exclude a juror because of bias, ...it is the adversary seeking exclusion who must demonstrate, ***through questioning***, that the potential juror lacks impartiality." Wainwright v. Witt, 469 U.S. at 423 (1985).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v Thomas, 294 N.C. 105, 115 (1978).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to assure both...[parties]...that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

16

On the Road to Review (Trial Issues)

- Evidentiary Error
- Jury Instruction Issues
- Motions to Dismiss
- Improper Closing Arguments

17

18

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. "

Rule 10(a)

19

Objections must be:

1. Timely.

In front of the jury, even if made outside the presence of the jury.

2. Specific.

Cite the Rule or Statute

Include Constitutional Grounds

3. Ruled on.

On the record

May also need to include a motion to strike, a request for a limiting instruction, or a motion for a mistrial.

20

N.C. R. Evid. 103(a)

- "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."
- **Held unconstitutional in *State v. Oglesby*, 361 N.C. 550 (2007).**
- Even if a judge says an objection is preserved, that doesn't make it preserved.

21

Practice Tips:

- ✓Organize and label your questions to match up with the evidence rule that you are going to argue.
- ✓When you prepare for each witness's testimony, highlight/bold/circle the evidence and possible questions that you must object to.
  - ✓List the constitutional grounds and evidence rules
- ✓Don't rely on your memory in court. Write it down.

22

Motion to Suppress

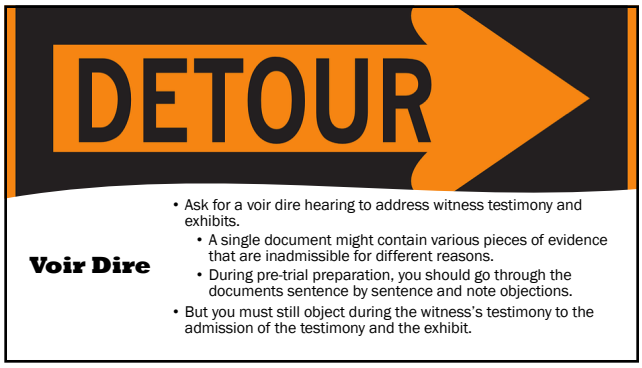
- Generally, must be made pretrial. N.C.G.S. § 15A-975
- "must state the grounds upon which it is made" N.C.G.S. § 15A-977(a)
- may be summarily denied if the motion "does not allege a legal basis for the motion[,]" or if the supporting affidavit "does not as a matter of law support the ground alleged" N.C.G.S. § 15A-977(c).
- Still **must** object at trial.

23

Motions to Suppress and Other Motions Made Before or During Trial

- Object at the moment the evidence is introduced in the presence of the jury, even if voir dire was held immediately before or earlier in case.
- Object if the evidence is mentioned by a later witness.
- Don't open the door if evidence is suppressed.

24



Voir Dire

- Ask for a voir dire hearing to address witness testimony and exhibits.
  - A single document might contain various pieces of evidence that are inadmissible for different reasons.
  - During pre-trial preparation, you should go through the documents sentence by sentence and note objections.
- But you must still object during the witness's testimony to the admission of the testimony and the exhibit.

25

State v. Lowery

278 N.C. App. 333 (2021)

- Pretrial motion to limit testimony filed challenging statements as hearsay and a violation of defendant's rights to due process and to confrontation.
- Trial court ruled statements were admissible under excited utterance exception to the hearsay rule and did not address consitutional grounds
- Defendant objected at trial. But "the objection was general and did not specifically raise any constitutional ground"
- Confrontation issue not preserved for appellate review

26

Jury Instruction Issues

- Counsel must have requested or objected to the jury instruction before the jury retired to deliberate.
- Requests for pattern jury instructions can be oral.
- Requests for special jury instructions, non-pattern instructions, and modifications to pattern instructions must be made in writing.

27

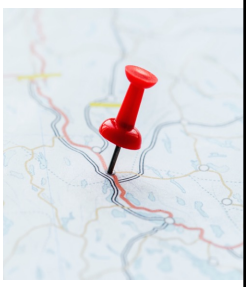
Constitutionalize Your Requests

- "Our courts have consistently held that 'due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction.'" *State v. Bennett*, 272 N.C. App. 577 (2020).
  - Cite the 14th Amendment and Article I, section 19
- "[T]he refusal to instruct the jury concerning an affirmative defense is a harsh sanction that implicates defendant's fundamental right to present a defense at trial." *State v. Foster*, 235 N.C. App. 365, 382, (2014).
  - Cite the 6th and 14th Amendments and Article I, sections 19 and 23

28

Practice Tips

- Print pattern instructions for all offenses.
- Review pattern instructions.
  - Read the footnotes and annotations.
  - Footnotes are **not** required unless requested.
  - Consider terms/phrases in brackets
- Limiting instructions are not required unless requested, so request it, and then remember to make sure it is actually given.
- Think outside the box and construct proposed instructions based on cases.
- Ask the judge for a written copy of instructions.



29

Motion to Dismiss – Sufficiency

- Trial counsel must have made a timely motion to dismiss at the end of **all** the evidence to preserve a sufficiency issue for appeal.
- "We hold that, under Rule 10(a)(3), and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 245 (2020).
- "Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of the evidence." *Id*. at 245-46.

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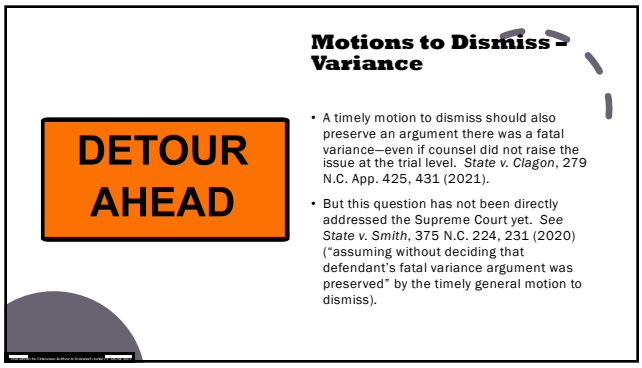

Motions to Dismiss – Variance

- A timely motion to dismiss should also preserve an argument there was a fatal variance—even if counsel did not raise the issue at the trial level. *State v. Clagon*, 279 N.C. App. 425, 431 (2021).
- But this question has not been directly addressed the Supreme Court yet. *See State v. Smith*, 375 N.C. 224, 231 (2020) ("assuming without deciding that defendant's fatal variance argument was preserved" by the timely general motion to dismiss).

31

Closing Arguments

- Improper arguments are not preserved without objection.
- Objections during argument are more important to protecting the defendant's rights on appeal than the attorney not appearing rude.

32

Objections – Closing Arguments

- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

33

State v. Anderson,
905 S.E.2d 297 (2024)

- "The best predictor of future behavior is past behavior. One of the things that tells you what—how somebody acts is some things that they've done in the past. Now, you don't convict somebody of something just because they've been in trouble in the past, but you look at the circumstances of what they've done in the past and see if they help you see a pattern, a common scheme, if they help you determine what somebody's intent is."
- "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so **grossly improper** that the trial court committed reversible error by failing to intervene ex mero motu."
- Error! But, trial court had instructed on use of 404(b) so on appeal defendant had to
  - Rebut the presumption that the jury followed the trial court's legal instructions, which Defendant didn't challenge AND
  - Show a reasonable possibility of a different outcome

34

State v. Anderson,
905 S.E.2d 297 (2024)

- Note: This is actually the wrong standard, and a more favorable one, and the defendant remains in prison.
- When there is no objection to the prosecutor's closing argument and the trial court fails to intervene, "the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179 (2017).

35

36

Making a Complete Record

- Move for a complete recordation
- State the basis for objection on the record
  - Even if stated at the bench or in chambers, put it on the record
- An oral proffer as to expected testimony is ineffective
  - The witness must testify
  - The exhibit/document must be given to the judge and be placed in the record

37

Commonly overlooked items

- PowerPoints – get in the record
  - Printed copy is not always adequate
  - Compare DA's PowerPoint slides to the actual exhibits – object to manipulation
- Ex parte materials – clearly labeled and sealed and not served on the State

38

Commonly overlooked items

- Digital evidence
  - Get in the record and keep copies.
  - Don't let the State try to admit disks with extraneous stuff, and don't let judges admit the stuff!
  - Make it clear what parts of video or audio files are played and what file is played.

39

What do you see?

- Courtroom conditions
- Law enforcement presence
- Victim's rights advocates
- Covid restrictions
- What can the jury see?
- Signs on the courtroom door restricting access
- How big is the screen that shows gruesome pictures and where is it located?

40

Making A Complete Record

- Submit a photograph of evidence and make sure it's in the court file.
  - Picture of client's tattoo
- Describe what happens in court.
  - "Three men came into the courtroom wearing shirts that said, 'Justice for Trey.'"
- Describe what a witness does.
  - "Mr. Jones, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

41

Making A Complete Record

- Defense wants to cross-examine State's witness about pending charges.
  - Ask to voir dire, and ask the questions.
  - Submit copies of indictments.
- Defendant wants to testify that he knows the alleged victim tried to kill someone five years ago. Judge won't let him.
  - Ask to voir dire, and ask the questions.
  - Make sure the answers are in the record.

42

If you don't object…

- On appeal, the issue is waived.
- Appellate attorney might be able to argue plain error for evidentiary or instructional issue. But prejudice showing is difficult.
  - "Plain error exists for **the rare cases** where the harshness of this preservation rule **vastly outweighs** its benefits." *State v. Reber*, 386 N.C. 153, 158 (2024).
- Appellate attorney might be able to argue Rule 2.
  - "To prevent **manifest injustice** to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"
- Appellate attorney might accuse you of being ineffective.

43

Plain Error – The Three Part Test

1. **Did a fundamental error occur? (reviewed under usual SOR for that topic/error)**
   - E.g.: In the first step, the trial court's legal conclusion that the challenged evidence is admissible under Rule 404(b) is reviewed de novo. *State v. Beckelheimer*, 366 N.C. 127, 130 (2012).
2. **Did the error have a "probable impact" on the outcome, meaning that "absent the error, the jury probably would have returned a different verdict"?**
   - Per the Court, this "requires a showing that the outcome is significantly more likely than not[, as i]n ordinary English usage, an event will 'probably' occur if it is 'almost certainly' the expected outcome." *Reber*, 386 N.C. at 159.
   - Plain error "probable impact" standard is more exacting than the "reasonable probability" required for the prejudice prong of an IAC claim. *Reber*, 386 N.C. at 159.
3. **Was that error an "exceptional case" that warrants plain error review?**
   - The *Reber* Court explained this can typically be shown where "the error seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Reber*, 386 N.C. at 158.

44

Ineffective Assistance of Counsel

"[T]he bar is set exceedingly high because whenever these [plain error] claims exist on direct appeal, **there will be a corresponding claim of ineffective assistance of counsel** that can be pursued in a motion for appropriate relief. There are several reasons why that ineffective assistance claim will often be a better vehicle to raise these issues.

First, as explained above and as the Court of Appeals dissent correctly observed, **the prejudice standard for ineffective assistance claims is lower**—the defendant need only show a 'reasonable probability' that absent the error the jury would have reached a different result. … This means a defendant might prevail on an ineffective assistance claim even when unable to prevail on plain error review.

Second, an ineffective assistance claim brought in a motion for appropriate relief avoids the gamesmanship concern we discussed above; it provides a forum where a fact-finder can determine whether the failure to object was indeed a reasonable strategic decision, or instead a deficiency on the part of counsel."

State v. Reber, 386 N.C. 153, 166 (2024) (citations omitted).

45

Properly Appealing

- Rules 3 and 4 of N.C. Rules of Appellate Procedure address notice of appeal.
- In criminal cases, notice of appeal can be oral or written.
- Satellite based monitoring and sex offender registry cases are "civil" cases and require written notice of appeal.
- Juvenile cases are governed by Rule 3 and N.C.G.S. § 7B-2602.

46

Rule 4

Oral Notice of Appeal

- Given "at trial."
- After judgment is entered.

Ms. [redacted]. Judge, yes.
Mr. [redacted] respectively gives notice of appeal.

Written Notice of Appeal

- Filed with the clerk and served on other parties within 14 days of entry of judgment or order
- Specify the party or parties taking the appeal
- Designate the judgment or order being appealed and the court to which appeal is taken
- Signed by counsel

47

Rule 4

Oral Notice of Appeal

- Given "at trial."
- After judgment is entered.

Ms. [redacted]. Judge, yes.
Mr. [redacted] respectively gives notice of appeal.

Written Notice of Appeal

STATE OF NORTH CAROLINA
XXXXX COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
*** CRS ***- (Include all file numbers)

STATE OF NORTH CAROLINA
v.
CLIENT NAME
Defendant-Appellant

MOTION FOR APPEAL
AND REQUEST FOR
APPOINTMENT
OF APPELLATE COUNSEL

CLIENT, by and through undersigned counsel, and pursuant to N.C.G.S. §§ 7A-270(b), 15A-1444, and N.C. App. R. 4, gives notice of appeal to the North Carolina Court of Appeals from the final judgment entered in the above-captioned case on DATE by the Superior Court of XXXXX County, the Honorable NAME OF JUDGE presiding.

CLIENT, by and through undersigned counsel, further asserts that he remains indigent and respectfully requests appointment of the Office of the Appellate Defender pursuant to N.C.G.S. § 7A-451 and IDS Rule 2.2.

This the ____ day of _____, 2024.

Attorney for Defendant
ADDRESS
PHONE NUMBER

48

Motion to Suppress

- If defense litigates a MTS and loses, and defendant the pleads guilty, defense must give prior notice to the court and prosecutor that defendant will appeal.
  - Put it in your motion to suppress.
  - Put it in the transcript and state it on the record.
  - Give notice of appeal from the judgment.

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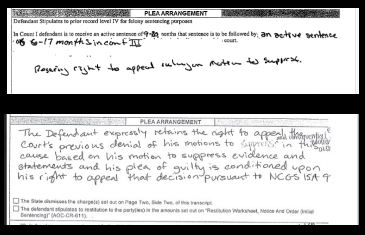
Motion to Suppress



PLEA ARRANGEMENT

Defendant Stipulates to prior record level IV for felony sentencing purposes.

In Count I defendant is to receive an active sentence of 9-20 months that sentence is to be followed by: an active sentence of 6-17 months in cont III

Reserving right to appeal ruling on motion to suppress.

PLEA ARRANGEMENT

The Defendant expressly retains the right to appeal the Court's previous denial of his motions to suppress in this cause based on his motion to suppress evidence and statements and his plea of guilty is conditioned upon his right to appeal that decision pursuant to NCGS 15A-9

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.
☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

50

Motion to Suppress

Notice is given that defendant reserves the right to appeal if this motion is denied and there is a subsequent plea of guilty.

51

Going the Extra Mile

- Make sure all court dates on are Appellate Entries.
- Ensure the Office of the Appellate Defender is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office

52

Unpacking

- Motions *in limine* will not preserve most evidentiary issues for appeal.
- Objections at trial must be timely and specific.
- A ruling must be made on all grounds in a motion or for an objection.
- Jury instructions must be requested before jury deliberations.
- Proper notice of appeal must be given.

53

Souvenirs
(aka Resources)

- IDS website
- SOG websites
  - Defender Manual
  - Pattern Jury Instructions
  - Criminal Law Blog
- OAD on-call attorneys and website

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Pleading Guilty in Superior Court

2025 FELONY DEFENDER TRAINING

February 7, 2025

Ray Griffis Jr.

Doby & Griffis, Attorneys at Law

PROCEDURE FOR ENTERING A PLEA

Before accepting a plea agreement, the court must be satisfied that the defendant understands his or her rights, and that his or her decision to plead guilty is knowing and voluntary.

PLEA TRANSCRIPT

(PAGE 1)

STATE OF NORTH CAROLINA

_____ County

File No.

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

STATE VERSUS

Name Of Defendant

DOB | *Age* | *Highest Level Of Education Completed*

TRANSCRIPT OF PLEA

G.S. 15A-1022, 15A-1022.1

NOTE: *Use this section **ONLY** when the Court is rejecting the plea arrangement.*
☐ The plea arrangement set forth within this transcript is hereby rejected and the clerk shall place this form in the case file. *(Applies to plea arrangements disclosed on or after December 1, 2009.)*

Date | *Name Of Presiding Judge (type or print)* | *Signature Of Presiding Judge*

The undersigned judge, having addressed the defendant personally in open court, finds that the defendant (1) was duly sworn or affirmed, (2) entered a plea of ☐ guilty ☐ guilty pursuant to *Alford* decision ☐ no contest, and (3) offered the following answers to the questions set out below:

Answers

1. Are you able to hear and understand me? (1) _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? (2) _____
3. At what grade level can you read and write? (3) _____
4. (a) Are you now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances? (4a) _____
   (b) When was the last time you used or consumed any such substance? (4b) _____
   (c) How long have you been using or consuming this medication or substance? (4c) _____
   (d) Do you believe your mind is clear, and do you understand what you are doing in this hearing? (4d) _____
5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge? (5) _____
6. (a) Have you and your lawyer discussed the possible defenses, if any, to the charges? (6a) _____
   (b) Are you satisfied with your lawyer's legal services? (6b) _____
7. (a) Do you understand that you have the right to plead not guilty and be tried by a jury? (7a) _____
   (b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you? (7b) _____
   (c) Do you understand that by your plea(s) you give up these and other important constitutional rights to a jury trial? (7c) _____
8. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law? (8) _____
☐ 9. Do you understand that upon conviction of a felony you may forfeit any State licensing privileges you have in the event that your probation is revoked? (9) _____
10. Do you understand that following a plea of guilty or no contest there are limitations on your right to appeal? (10) _____
11. Do you understand that your plea of guilty may impact how long biological evidence related to your case (for example, blood, hair, skin tissue) will be preserved? (11) _____

(Over)

AOC-CR-300, Rev. 5/18

PLEA TRANSCRIPT

(PAGE 2)

12. Do you understand that you are pleading ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges shown below? *(Describe charges, total maximum punishments, and applicable mandatory minimums for those charges.)* (12) _____

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense OR Date Range Of Offense	G.S. No.	F/M	CL.	‡Pun. CL.	Maximum Punishment

☐ See attached AOC-CR-300A, for additional charges.

*G = Guilty GA = *Alford* plea NC = No Contest

TOTAL MAXIMUM PUNISHMENT

MANDATORY MINIMUM FINES & SENTENCES *(if any)*

✓ **NOTE TO CLERK:** *If this column is checked this is an added offense or reduced charge.*

‡ **NOTE:** *Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

13. Do you now personally plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest to the charges I just described? (13) _____

14. ☐ (a) Are you in fact guilty? (14a) _____

☐ (b) *(no contest plea)* Do you understand that, upon your plea of no contest, you will be treated as being guilty whether or not you admit that you are in fact guilty? (14b) _____

☐ (c) (Alford *guilty plea)*

(1) Do you now consider it to be in your best interest to plead guilty to the charges I just described? (14c1) _____

(2) Do you understand that, upon your "*Alford* guilty plea," you will be treated as being guilty whether or not you admit that you are in fact guilty? (14c2) _____

☐ 15. *(Use if aggravating factors are listed below)* Have you admitted the existence of the following aggravating factors: (15) _____

_____

_____

_____,

have you agreed that there is evidence to support these factors beyond a reasonable doubt, have you agreed that the Court may accept your admission to these factors, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these aggravating factors ☐ agree that the State has provided you with appropriate notice about these aggravating factors?

☐ 16. *(Use if sentencing points are selected below)* Have you admitted the existence of the following sentencing points not related to prior convictions: ☐ offense committed while on supervised or unsupervised probation, parole, or post-release supervision ☐ offense committed while serving a sentence of imprisonment ☐ offense committed while on escape from a correctional institution, have you agreed that there is evidence to support these points beyond a reasonable doubt, have you agreed that the Court may accept your admission to these points, and do you ☐ understand that you are waiving any notice requirement that the State may have with regard to these sentencing points ☐ agree that the State has provided you with the appropriate notice about these sentencing points? (16) _____

☐ 17. *(Use if No. 15 or 16 selected above)* Do you understand that at a jury trial you have the right to have a jury determine the existence of any aggravating factors and any additional sentencing points not related to prior convictions that may apply to your case beyond a reasonable doubt, and that by your plea(s) you give up this constitutional right to a jury determination? (17) _____

18. Do you understand that you also have the right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case? (18) _____

19. Do you understand that the courts have approved the practice of plea arrangements and you can discuss your plea arrangement with me without fearing my disapproval? (19) _____

PLEA TRANSCRIPT

(PAGE 3)

STATE VERSUS | *File No.*

Name Of Defendant

20. Have you agreed to plead ☐ guilty ☐ guilty pursuant to *Alford* ☐ no contest as part of a plea arrangement? *(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)* (20) _____

21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:

PLEA ARRANGEMENT

☐ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.

☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).

22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as being your full plea arrangement? (22) _____

23. Do you now personally accept this arrangement? (23) _____

24. *(Other than the plea arrangement between you and the prosecutor)* has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes? (24) _____

25. Do you enter this plea of your own free will, and do you fully understand what you are doing? (25) _____

26. Do you agree that there are facts to support your plea ☐ and admission to aggravating factors ☐ and sentencing points not related to prior convictions, and do you consent to the Court hearing a summary of the evidence? (26) _____

27. Do you have any questions about what has just been said to you or about anything else connected to your case? (27) _____

ACKNOWLEDGEMENT BY DEFENDANT

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. No one has told me to give false answers in order to have the Court accept my plea in this case. The terms and conditions of the plea as stated within this transcript, if any, are accurate.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		*Date*
Date	*Signature*	*Signature Of Defendant*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*		*Name Of Defendant (type or print)*

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that the terms and conditions stated within this transcript, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charges to which the defendant is pleading, and the aggravating and mitigating factors and prior record points for sentencing, if any.

Date	*Name Of Lawyer For Defendant (type or print)*	*Signature Of Lawyer For Defendant*

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated within this transcript, if any, are the terms and conditions agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charges in this case.

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

(Over)

PLEA TRANSCRIPT

(PAGE 4)

PLEA ADJUDICATION

Upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statements of the lawyer for the defendant, and statements of the prosecutor, the undersigned finds that:

1. There is a factual basis for the entry of the plea *(and for the admission as to aggravating factors and/or sentencing points)*;
2. The defendant is satisfied with his/her lawyer's legal services;
3. The defendant is competent to stand trial;
4. ☐ The State has provided the defendant with appropriate notice as to the aggravating factors and/or points; ☐ The defendant has waived notice as to the aggravating factors and/or points; and
5. The plea *(and admission)* is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea *(and admission)* is hereby accepted by the Court and is ordered recorded.

Date	*Name Of Presiding Judge (type or print)*	*Signature Of Presiding Judge*

SUPERIOR COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

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

DISTRICT COURT DISMISSALS PURSUANT TO PLEA ARRANGEMENT

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

CERTIFICATION BY PROSECUTOR

The undersigned prosecutor enters a dismissal to the above charges pursuant to a plea arrangement shown on this Transcript Of Plea.

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

AOC-CR-300, Page Two, Side Two, Rev. 5/18

OPEN PLEA AGREEMENT

DEFENDANT AGREES TO PLEAD GUILTY TO A CHARGE WITHOUT NEGOTIATING A SENTENCE WITH THE PROSECUTOR. THE SENTENCE IS LEFT IN THE DESCRETION OF THE PRESIDNG SUPERIOR COURT JUDGE.

WHAT CLASS FELONY IS YOUR CLIENT PLEADING TO?

WHAT IS YOUR CLIENT'S RECORD LEVEL?

***** Effective for Offenses Committed on or after 10/1/13 *****

FELONY PUNISHMENT CHART

PRIOR RECORD LEVEL

OFFENSE CLASS	I 0-1 Pt	II 2-5 Pts	III 6-9 Pts	IV 10-13 Pts	V 14-17 Pts	VI 18+ Pts	DISPOSITION
A	Death or Life Without Parole Defendant Under 18 at Time of Offense: Life With or Without Parole						
B1	A *240 - 300* **192 - 240** *144 - 192*	A *276 - 345* **221 - 276** *166 - 221*	A *317 -397* **254 - 317** *190 - 254*	A *365 - 456* **292 - 365** *219 - 292*	A *Life Without Parole* **336 - 420** *252 - 336*	A *Life Without Parole* **386 - 483** *290 - 386*	*Aggravated Range* **PRESUMPTIVE RANGE** *Mitigated Range*
B2	A *157 - 196* **125 - 157** *94 - 125*	A *180 - 225* **144 - 180** *108 - 144*	A *207 - 258* **165 - 207** *124 - 165*	A *238 - 297* **190 - 238** *143 - 190*	A *273 - 342* **219 - 273** *164 - 219*	A *314 - 393* **251 - 314** *189 - 251*	
C	A *73 – 92* **58 - 73** *44 - 58*	A *83 - 104* **67 - 83** *50 - 67*	A *96 - 120* **77 - 96** *58 - 77*	A *110 - 138* **88 - 110** *66 - 88*	A *127 - 159* **101 - 127** *76 - 101*	A *146 - 182* **117 - 146** *87 - 117*	
D	A *64 - 80* **51 - 64** *38 - 51*	A *73 - 92* **59 - 73** *44 - 59*	A *84 - 105* **67 - 84** *51 - 67*	A *97 - 121* **78 - 97** *58 - 78*	A *111 - 139* **89 - 111** *67 - 89*	A *128 - 160* **103 - 128** *77 - 103*	
E	I/A *25 - 31* **20 - 25** *15 - 20*	I/A *29 - 36* **23 - 29** *17 - 23*	A *33 - 41* **26 - 33** *20 - 26*	A *38 - 48* **30 - 38** *23 - 30*	A *44 - 55* **35 - 44** *26 - 35*	A *50 - 63* **40 - 50** *30 - 40*	
F	I/A *16 - 20* **13 - 16** *10 - 13*	I/A *19 - 23* **15 - 19** *11 - 15*	I/A *21 - 27* **17 - 21** *13 - 17*	A *25 - 31* **20 - 25** *15 - 20*	A *28 - 36* **23 - 28** *17 - 23*	A *33 - 41* **26 - 33** *20 - 26*	
G	I/A *13 - 16* **10 - 13** *8 - 10*	I/A *14 - 18* **12 - 14** *9 - 12*	I/A *17 - 21* **13 - 17** *10 - 13*	I/A *19 - 24* **15 - 19** *11 - 15*	A *22 - 27* **17 - 22** *13 - 17*	A *25 - 31* **20 - 25** *15 - 20*	
H	C/I/A *6 - 8* **5 - 6** *4 - 5*	I/A *8 - 10* **6 - 8** *4 - 6*	I/A *10 - 12* **8 - 10** *6 - 8*	I/A *11 - 14* **9 - 11** *7 - 9*	I/A *15 - 19* **12 - 15** *9 - 12*	A *20 - 25* **16 - 20** *12 - 16*	
I	C *6 - 8* **4 - 6** *3 - 4*	C/I *6 - 8* **4 - 6** *3 - 4*	I *6 - 8* **5 - 6** *4 - 5*	I/A *8 - 10* **6 - 8** *4 - 6*	I/A *9 - 11* **7 - 9** *5 - 7*	I/A *10 - 12* **8 - 10** *6 - 8*	

A – Active Punishment I – Intermediate Punishment C – Community Punishment
Numbers shown are in months and represent the range of minimum sentences

Revised: 09-09-13

AGGRAVATING FACTORS

Appendix C: Aggravating Factors (G.S. 15A-1340.16(d))

1. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

2. The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

2a. The offense was committed for the benefit of, or at the direction of, any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy.

3. The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

4. The defendant was hired or paid to commit the offense.

5. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

6. The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Division of Adult Correction and Juvenile Justice (DACJJ) of the Department of Public Safety, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

6a. The offense was committed against or proximately caused serious harm as defined in G.S. 14-163.1 or death to a law enforcement agency animal, an assistance animal, or a search and rescue animal as defined in G.S. 14-163.1, while engaged in the performance of the animal's official duties. [*Offenses committed on/after 12/1/2009.*]

7. The offense was especially heinous, atrocious, or cruel.

8. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

9. The defendant held public elected or appointed office or public employment at the time of the offense and the offense directly related to the conduct of the office or employment.

9a. The defendant is a firefighter or rescue squad worker, and the offense is directly related to service as a firefighter or rescue squad worker. [*Offenses committed on/after 12/1/2013.*]

10. The defendant was armed with or used a deadly weapon at the time of the crime.

11. The victim was very young, or very old, or mentally or physically infirm, or handicapped.

12. The defendant committed the offense while on pretrial release on another charge.

12a. The defendant has, during the ten-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration. [*Offenses committed on/after 12/1/2008.*]

13. The defendant involved a person under the age of 16 in the commission of the crime.

13a. The defendant committed an offense and knew or reasonably should have known that a person under the age of 18 who was not involved in the commission of the offense was in a position to see or hear the offense. [*Offenses committed on/after 12/1/2015.*]

14. The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

15. The defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.

16. The offense involved the sale or delivery of a controlled substance to a minor.

16a. The offense is the manufacture of methamphetamine and was committed where a person under the age of 18 lives, was present, or was otherwise endangered by exposure to the drug, its ingredients, its by-products, or its waste.

16b. The offense is the manufacture of methamphetamine and was committed in a dwelling that is one of four or more contiguous dwellings.

17. The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

18. The defendant does not support the defendant's family.

18a. The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

19. The serious injury inflicted upon the victim is permanent and debilitating.

19a. The offense is a violation of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude) and involved multiple victims. [*Offenses committed on/after 10/1/2013.*]

19b. The offense is a violation of G.S. 14-43.11 (human trafficking), G.S. 14-43.12 (involuntary servitude), or G.S. 14-43.13 (sexual servitude), and the victim suffered serious injury as a result of the offense. [*Offenses committed on/after 10/1/2013.*]

20. Any other aggravating factor reasonably related to the purposes of sentencing.

MITIGATING FACTORS

Appendix D: Mitigating Factors (G.S. 15A-1340.16(e))

1. The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
2. The defendant was a passive participant or played a minor role in the commission of the offense.
3. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
4. The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
5. The defendant has made substantial or full restitution to the victim.
6. The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
7. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
8. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
9. The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
10. The defendant reasonably believed that the defendant's conduct was legal.
11. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
12. The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
13. The defendant is a minor and has reliable supervision available.
14. The defendant has been honorably discharged from the Armed Forces of the United States.
15. The defendant has accepted responsibility for the defendant's criminal conduct.
16. The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.
17. The defendant supports the defendant's family.
18. The defendant has a support system in the community.
19. The defendant has a positive employment history or is gainfully employed.
20. The defendant has a good treatment prognosis, and a workable treatment plan is available.
21. Any other mitigating factor reasonably related to the purposes of sentences.

THINGS TO CONSIDER BEFORE DOING AN OPEN PLEA?

DOES YOUR CLIENT UNDERSTAND THE PROS AND CONS TO DOING AN OPEN PLEA?

IF THE PROSECUTOR HAS OFFERED A PLEA OFFER WITH A STRUCTURED SENTENCE, WHAT IS THE LIKELIHOOD OF GETTING A BETTER SENTENCE FOR YOUR CLIENT VIA OPEN PLEA?

WHO IS YOUR CLIENT?

- EMPLOYMENT HISTORY
- FAMILY HISTORY
- FAMILY SUPPORT
- COMMUNITY SUPPORT
- MENTAL HEALTH HISTORY
- MENTAL HEALTH TREAMENT
- SUBSTANCE ABUSE HISTORY
- SUBSTANCE ABUSE TREATMENT
- AGE OF YOUR CLIENT
- CRIMINAL RECORD HISTORY
- CHARACTER WITNESSES

ANY QUESTIONS?

CONTACT INFORMATION

Doby & Griffis, Attorneys at Law

Graham, North Carolina

www.dobygriffislaw.com

ray@dobygriffislaw.com

336-221-8900

Motion practice to advance your theory of the case

Jonathan E. Broun
Senior Staff Attorney
North Carolina Prisoner Legal Services
Raleigh, NC

1

The best defense is a good offense

2

Defensive Motions

- There is stuff that makes my client look guilty.
- KEEP IT OUT!!!

3

MOTIONS IN LIMINE

- 1) File Before Trial
- 2) Cite both evidentiary rules and constitutional principles
- 3) Got to renew motion at trial (and in front of the jury)

4

Discovery Motions

- Statutory motions (15A-903)
- Constitution:
- Exculpatory Evidence(Brady)
- Right to Present a Defense
- *State v. Canady*, 355 N.C. 242 (2002)

5

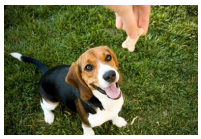
Litigation Control Motions

- Complete Recordation
- Sequestration
- Batson related motions
- Removing racist portraits and statues

6

Offensive motions

- We Got Good Stuff
- Reward Us



7

Offensive motions can promote a theme

- My guy is innocent because…
- And that's why we should win this motion

8

Offensive motions rely on "good facts"

- The State's witnesses are scum
- Our guy is a saint
- The cops blew it

9

Don’t we want to hide our good facts and theories before trial

10

The theory behind open file discovery

11

What offensive motions can do

- Let prosecutors know the problems with the case
- Judges might be better if you they think your case is just
- Judges might actually give you what you ask for

12

Why they help on appeal as well

13

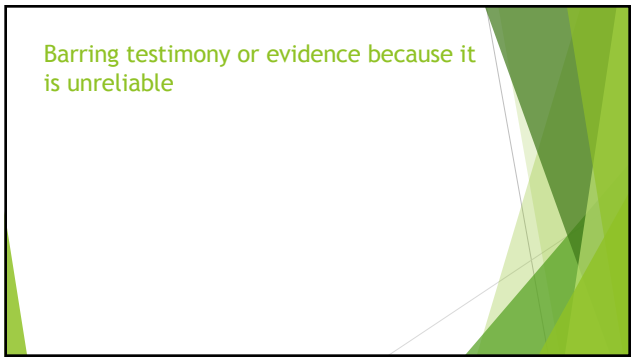
Offensive Discovery Motions

- Brady Motions
- Ritchie Motions
- Depositions

14

Judicial notice or jury instructions

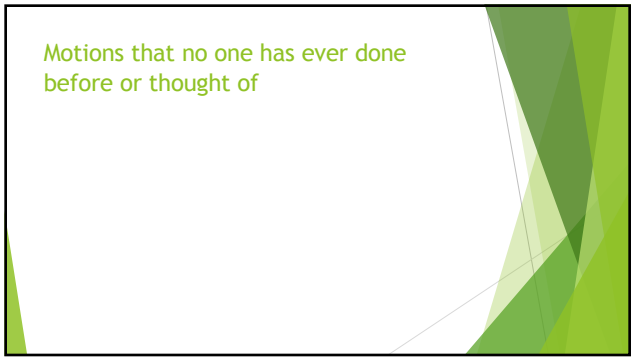
15


Barring testimony or evidence because it is unreliable

16


Admit good evidence

17


Motions that no one has ever done before or thought of

18

Developing the offensive motion

- Let the facts not the law dictate the motion
- Constitutionalize the motion

19

Telling a story

20

Examples of Offensive Motions

Jonathan E Broun

Senior Staff Attorney

Prisoner Legal Services

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 15 CRS 219491, 219539-40, 219654-55

STATE OF NORTH CAROLINA

v.

IAN POWELL,
Defendant.

****

MOTION TO BAR THE STATE FROM SEEKING THE DEATH PENALTY AGAINST A MAN WITH SEVERE MENTAL ILLNESS

****

Ian Powell is a young man with severe mental illness. Ian Powell suffered from psychosis before these offenses, during these offenses, and since his arrest. He was hospitalized for mental illness no fewer than twenty times in the year before these offenses occurred. Since his arrest, doctors at Central Regional Hospital have evaluated Ian numerous times and have consistently found him to suffer from severe mental illness. The office of the Wake County District Attorney wants to put this young man with severe mental illness to death. While it may have once been permissible to execute people who suffered from severe mental illness, our nation, state, and community's standards of decency have evolved. Sentencing people with mental illness to death in 2020 constitutes cruel and unusual punishment. Therefore, the State should be prohibited from seeking the death penalty in this case pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 19 and 27 of the North Carolina Constitution.

Factual Background

On December 11, 2014, Ian went to the emergency room at Duke Raleigh Hospital seeking psychiatric support because voices were telling him to harm himself. On December 25, 2014, Ian was admitted to Holly Hill Hospital; it was the third time he was admitted for psychiatric reasons that month. This would be the first of eight in-patient admissions to Holly Hill Hospital over the next eight months leading up to August 31, 2015, the day Ian was charged with committing murder, rape, robbery, and felonious assault. From December 2014 through July 2015, Ian was admitted to inpatient hospitalizations for mental illness twenty times -- at Wake Med, UNC Wake Brook, Duke University Hospital, Old Vineyard Behavioral Services, and other psychiatric facilities. At his initial Holly Hill hospitalization on Christmas Day 2014, Ian was diagnosed with schizoaffective disorder. This condition combines the psychosis of schizophrenia with the mania found in bipolar disorder. Throughout his twenty hospitalizations in the months before these offenses, Ian was diagnosed with various psychoses. He was diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, and major depression with psychotic features. Regardless of the specific diagnosis, psychiatrists consistently found that Ian was not malingering and was in fact suffering from severe mental illness and psychosis. *Exhibit 1, Affidavit of Katelin Rey.*

In the months before these offenses, Ian was consistently prescribed antipsychotic medication upon his discharge from in-patient psychiatric care. However, when Ian left the supervision of mental health providers, he did not take his medication. Ian's last hospitalization prior to the offense was at Duke Raleigh Hospital on July 8, 2015. *See Exhibit 2, Excerpts of Records from Ian's July 8, 2015 Duke Raleigh Hospital Report.* Ian admitted himself because he was hearing voices, and contemplating suicide. Ian told emergency room staff that he had a gun

at home, was going to retrieve it and kill himself. In response, doctors reviewed his medical record and history, noting diagnoses of major depression with psychotic features and schizophrenia. Based on this information, the hospital sought and received an order from the Wake County District Court involuntarily committing Ian. *Id.*

After the district court involuntarily committed Ian, the staff at Duke Raleigh Hospital began looking for a psychiatric unit where Ian could be admitted and treated in-patient. Apparently, no psychiatric beds were available at Duke Raleigh. Duke Raleigh called several other local hospitals but no beds were available for Ian. It could not be determined whether Duke Regional had any beds available because their fax machine was broken. *Id.* After Duke Raleigh staff exhausted local options for psychiatric support for Ian, and concluded no beds were available for him anywhere, records show the staff changed their medical opinion about Ian. The Duke Raleigh doctor now decided that, despite the fact that Ian was hearing voices, threatening suicide, and had a well-documented history of psychosis, on this day, Ian presented in the emergency room with nothing more than marijuana intoxication. The Duke doctor noted that Ian had no history of violence or antisocial behavior, and the hospital asked the district court to rescind its order involuntarily committing Ian. The court complied with this request, and Ian was released. Id. This was the last admission Ian prior to his arrest on the underlying charges. Upon information and belief, Ian did not take any antipsychotic medication after Duke Raleigh released him when they could not find a bed.

On August 1, 2015, within three weeks of Duke Raleigh's discharge of Ian because there was no available bed space, Ian was arrested for a number of nonviolent offenses on August 1, 2015. As a result of this arrest, Ian spent the next three weeks in jail before pleading to a probationary sentence. Records from the Wake County Detention Center show Ian did not

receive antipsychotic medication while in the custody of Wake County during August 2015. *Exhibit 1*. Further, there is no indication of mental health issues or history in Detention Center documentation for this period of confinement, nor in the corresponding court file.

Ian was arrested in New York on September 1, 2015, the day after the alleged capital offenses. An evaluation in the New York jail, confirmed Ian's noncompliance with prescribed antipsychotic medication. The medical staff at New York's Rikers Island Jail diagnosed Ian with schizophrenia. They prescribed him antipsychotic medication. *Exhibit* 1.

After Ian's extradition to North Carolina, defense counsel requested an evaluation for capacity to proceed to trial. On December 15, 2017, doctors at Central Regional Hospital (CRH) opined that Ian was incapable of proceeding to trial because of his severe mental illness. *Exhibit 3, 2017 Central Regional Report.* The Honorable Paul Ridgeway entered an Order finding the same on February 6, 2018. Ian was then admitted to CRH for competency restoration. It took approximately two months of hospitalization and treatment for CRH medical staff to restore Ian's capacity. A subsequent report from CRH June 19, 2018 concluded that Ian did not have a mental health defense in his case. That report, however, still acknowledges that Ian is severely mentally ill.

On December 16, 2019, both the defense and the prosecution filed motions asking that Ian be reevaluated for capacity to proceed. On January 29, 2020, doctors at CRH concluded that Ian was once again, too mentally ill to stand trial. Ian was acutely psychotic. According to the report, "Mr. Powell has presented with many serious psychiatric symptoms throughout his life including psychosis (a disconnect from reality) depression with reported suicide attempts and mania (excessive energy, euphoria and/or irritability)." *Exhibit 4, January 2020 Central Regional Report.* CRH opined that Ian had been incapable of standing trial since August of

2019, when documentation from the detention center reflects compliance with medication ceased.

The prosecutors assigned this case moved to have Ian forcibly medicated with antipsychotic drugs on February 19, 2020. The State argued that Ian would continue to be too mentally ill to meet the minimum requirements to stand trial, unless forcibly medicated. The State's motion to forcibly medicate him was heard on March 5, 2020. On behalf of the State, Nicole Wolfe, Md. and Brandon Harsch, Md. testified. Both psychiatrists reported that Ian was psychotic, and would not be restored and capable of proceeding to trial without antipsychotic medication.

Without requiring forcible medication, the Honorable Thomas Lock ordered Ian's transfer to Central Regional Hospital for competency restoration. Ian has complied with his antipsychotic medication since his second admission to CRH. Two months after his readmission to CRH, Ian remained actively psychotic, and was not yet returned to competency. On June 6, 2020, Ian was committed for an additional two months to CRH as a result of his severe mental illness.

After Ian had been in CRH for approximately five months, Dr. Harsch concluded he had finally been restored to competency. Dr. Harsch, however, continues to maintain Ian suffers from a psychotic disorder. His report dated September 4, 2020 concludes that when Ian is not taking antipsychotic medication, he decompensates and becomes too psychotic to proceed to trial. *Exhibit 5, September 2020 Central Regional Hospital Report.*

Psychiatrist Dr. Moria Artigues, MD, evaluated Ian for the defense. She has concluded that at the time of his offense, Ian had a severe mental disorder or disability. She found Ian suffers from Schizoaffective Disorder Bipolar type. She notes, "By its very nature,

Schizoaffective Disorder, Bipolar Type causes severe impairments in behavioral controls, reality testing, and judgment. Mr. Powell was suffering under such impairments at the time of his criminal behavior." *Exhibit 6, Affidavit of Dr. Moria Artigues, MD.*

Legal Argument

The humanity we all share is more important than the mental illnesses we may not — *Elyn R. Saks*

We should not execute children, the intellectually disabled, or people with severe mental illness. Our society, although far from perfect, is too moral, too decent and too evolved, to tolerate the execution of such vulnerable people. It is true that in our lifetime the execution of these groups was not considered to be a violation of the Eighth Amendment to the United States Constitution. But the Eighth Amendment's ban on cruel and unusual is not stagnant. "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

A. THE EXECUTION OF PEOPLE WITH SEVERE MENTAL ILLNESS SHOULD BE BARRED FOR THE SAME REASONS THE DEATH PENALTY IS PROHIBITED FOR PEOPLE WITH INTELLECTUAL DISABILITY AND JUVENILES

On June 26, 1989, the United States Supreme Court announced in two separate decisions that the Eighth Amendment did not bar the execution of children who were as young as sixteen years old or the execution of intellectually disabled persons. See *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Eighth Amendment does not bar the execution of children who were sixteen at the time of their offense); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not bar the execution of intellectually disabled offenders). Since the dawn of the twenty first century, the United States Supreme Court has reversed course and concluded that our evolving standards of decency now bar the execution of both children under the age of eighteen and intellectually

disabled offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005) (barring the execution of children under eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the execution of intellectually disabled defendants)[1].

The reasoning of *Roper* and *Atkins* also explains why the execution of people with severe mental illness like Ian Powell is morally wrong, does not pass constitutional muster, and is prohibited. The Court said that the chief justifications for the death penalty are retribution and deterrence. *Atkins*, 536 U.S. at 318-19; *Roper*, 543 U.S. at 571. In *Atkins,* the Court said that retribution did not apply to intellectually disabled offenders because the death penalty was reserved for the most depraved of murderers.

> If the culpability of the average murderer is insufficient to justify the most extreme sentence available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

536 U.S. at 319.

Three years later, the Court used a similar rationale in prohibiting the execution of children under the age of eighteen. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished." *Roper*, 543 at 571. The same applies to a person with severe mental illness. A person with a psychotic

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[1] In *Atkins*, the United States Supreme Court used the term "mental retardation" However, in *Hall v. Florida*, 572 U.S. 701, 704 (2014), the Court noted the more appropriate terminology was now intellectual disability. North Carolina has also replaced the term "mental retardation" with intellectual disability in N.C. Gen. Stat. §15A-2005. Therefore, even in discussing prior court decisions that used the phrase "mental retardation" we will use the phrase "intellectual disability."

condition, like Ian, simply does not have the same culpability as a murderer who does not suffer from severe mental illness.

In both *Atkins* and *Roper* the Court discussed deterrence as a justification for the death penalty, and the Court said that neither intellectually disabled nor children would be deterred from committing murder by the death penalty. *Atkins* at 320; *Roper* at 571-72. The Court explained in *Atkins* why deterrence did not justify the execution of intellectually disabled persons.

> With respect to deterrence—the interest in preventing capital crimes by prospective offenders—it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. Exempting the mentally retarded from that punishment will not affect the cold calculus that precedes the decision of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

Atkins at 320-21. This exact logic applies to people with severe mental illness. A person with schizophrenia, like Ian, suffers from delusional behavior and disorganized thinking. The death penalty is not going to deter such a person from committing murder any more than the threat of a long prison sentence.

In *Atkins*, the Court expressed concern that intellectually disabled capital defendants would be placed at a greater risk of the death penalty because of their "lesser ability... to make a persuasive showing of mitigation." *Id.* at 320. The Court noted that people with intellectual disabilities "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. These factors all apply to Ian and other people who suffer with severe mental illness.

Since his arrest, Ian has been found to be incapable of proceeding to trial twice because his severe mental illness rendered him incapable of assisting his attorneys. For the vast majority of our representation, Ian has been unable to effectively assist us in representing him. Even if Ian is restored to competency, his defense team will never be able to get back those many months, if not years, of work on the case while Ian was incompetent. It is highly doubtful that even if Ian's capacity to proceed is restored, his ability to assist counsel will be the same as a capital defendant without severe mental illness. *Exhibit 7, Affidavit of Deonte' Thomas.*

In order to properly defend against the death penalty, a capital defendant needs to assist his counsel by being able to tell him or her what happened during the offense, explain his background from childhood to the present and identify potential mitigation witnesses. As a result of Ian's psychosis, we have not been able to engage him in meaningful discussions about whether he should testify, what his strategy should be at trial and whether he should accept a plea to avoid a capital trial. *Id.*

Like a defendant with an intellectual disability, people with severe mental illness are unlikely to make good witnesses on their behalf. Ian's mental illness will certainly affect his demeanor in the courtroom. In the hearings we have had, Ian's mental illness causes him to have

outbursts in court, laugh aloud for no reason, to appear aloof and to appear otherwise inappropriate. *Id.* Our state supreme court has said that a defendant's demeanor in court can and will be used against him in a capital proceeding. *State v. Brown*, 320 N.C. 179, 199 (1987).

In prohibiting the execution of children under eighteen and the intellectually disabled, the Supreme Court expressed concern that without a ban on such executions, the defendants' youth or disability could enhance a defendant's likelihood of receiving death. *Roper* at 573; *Atkins* at 321. In *Simmons,* the Court noted that the prosecution at trial argued that the defendant's youth should be considered aggravating and not mitigating. *Roper* at 573. The Court also noted that reliance on intellectual disability as a mitigating factor "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins* at 321.

There is a similar fear that a defendant's severe mental illness may prove aggravating instead of mitigating. North Carolina does not have a "future dangerousness" aggravating circumstance. The prosecution, however, may argue a client's future dangerousness in prison as a reason why the jury should sentence a person to death. *State v. Ward*, 338 64, 119 (1994). Courts recognize evidence of mental illness "is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions." *Wright v. Angelone*, 151 F.3d 151, 162 (4th Cir. 1998); *see also Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005) (jurors' potential concern about the aggravating effect of mental illness justifies counsel's decision not to present such evidence at a capital sentencing hearing.) Academics who have studied the issue have also found empirical evidence that evidence of mental illness, instead of mitigating punishment, actually increases the likelihood that a defendant will be sentenced to death. *See* Slobogin, Christopher, "Mental Illness and the Death Penalty", CALIFORNIA CRIMINAL LAW REVIEW, 2000.

(Noting studies that show that mental illness often contributes to defendants receiving the death penalty, including studies showing that a failed insanity defense is one of the most accurate predictors of who will get the death sentence).

Defendants with severe mentally illness may also be in more serious danger of receiving the death penalty because of the treatment they receive for their mental illness. Ian, like most defendants suffering from psychosis, is taking antipsychotic medication. Such medication has side effects, and those side effects make him more vulnerable to receiving the death penalty.

> By administering medication, the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive.... That such effects may be subtle does not make them any less real or potentially influential. As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

Riggins v. Nevada, (KENNEDY Concurring) 504 U.S. 127, 143–44 (1992).

Another reason why there needs to be more protection for defendants with severe mental illness facing the death penalty is that effects of racism, discrimination and implicit bias means that jurors may not give as much credence to a mental illness mitigating circumstance for an African American defendant as it would for other severely mentally ill defendants. In order to establish such a mitigating circumstance, it is essential that the defense produce the defendant's mental health history. A compelling mental health mitigating circumstance is supported by a history of mental problems that is well documented. But racial bias means that African

American defendants might not have as accurate and compelling documented history of mental health problems. "Implicit bias pervades the mental health system." Merino, Yesenia, Adams, Leslie; Hall, William J., "Implicit Bias and Mental Health Professionals: Priorities and Direction for Research" PSYCHIATRIC SERVICES (2018), P. 725. "These biases affect every aspect of the mental health care continuum, from screening to treatment." *Id.* Merino, Adams and Hall's research follows other articles which noted that in the mental field there are "disparities in access, treatment, and quality of mental health care," but before research had been done about whether those disparities were the result of bias. Snowden, Lonnie, "Bias in Mental Health Assessment and Intervention Theory and Evidence", AMERICAN JOURNAL OF PUBLIC HEALTH 93:239-43 (2003). Studies indicate that racial and ethnic disparities in mental health care remain large and persistent today. Cook, B.L.; Zuvekas, S.H.; Carson, N; Wayne, G.F.; Vesper, A & McGuire, T. "Assessing Racial/Ethnic Disparities in Treatment Across Episodes in Mental of Mental Health Care", https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3844061/, HEALTH SERVICES RESEARCH, (49:1) 206-229 (2014).). "Blacks and Latinos access mental health care at half the rate of non-Latino whites, even after accounting for mental health status, with higher rates of attrition following initiation of care." *Id.* (internal citations omitted). Blacks and Latinos were also significantly less likely than whites to have minimally adequate mental health care., and more likely to have some of this health care depend on emergency room treatments rather than full psychiatric care. *Id.* The treatment Ian received before his arrest is an example of how African Americans often do not receive necessary mental health treatment. The manner in which Duke Raleigh treated Ian in his July 8, 2015 is probably starkly different than any hospital would treat a similarly situated white patient. Ian came to the hospital reporting hearing voices commanding him to commit suicide and having an established history of suicide attempts and

psychosis. Doctors there originally concluded his condition was so serous he needed to be involuntarily committed. But just because the hospital could not find a bed for him, they changed his diagnosis to marijuana intoxication and discharged him. Sadly, it appears this is how our mental health institutions treat poor African Americans and other minorities.

The implicit bias and discrimination that causes disparate treatment in mental health officials is not limited to psychiatrists, psychologists and other mental health workers. It appears that society in general may be more likely to view white people with potential mental illness more sympathetically than similarly situated African Americans. *See* Bouie, Jamelle "Racial Blindness" SLATE, March 23, 2018 https://slate.com/news-and-politics/2018/03/in-texas-and-maryland-white-killers-receive-more-sympathy-than-black-victims.html; Herbert, Bob "Empathy for a Killer", NEW YORK TIMES, July 5, 2001. While jurors might be willing to be give weight to mental health mitigation for white defendants or other people they might relate to, implicit bias and other problems means they are less likely to give as great a weight to such a mitigating circumstance, even if they are convinced the defendant was mentally ill.

B. THE EVOLVING STANDARDS OF DECENCY IN THIS COMMUNITY, STATE, NATION AND WORLD REQUIRES THAT WE DO NOT SENTENCE TO DEATH AND EXECUTE PEOPLE WITH SEVERE MENTAL ILLNESS

There is a growing national consensus in the United States against executing people with severe mental illness. Mental health organization, such as the American Psychological Association, the American Psychiatric Association, the National Alliance on Mental Illness, and Mental Health America have all called for prohibiting the death penalty for people with severe mental illness.

> Regardless of whether the defendant is able to show causation required by the insanity defense, no one should be threatened or put to death while experiencing serious mental illness. It is

> irrational to use the death penalty where there is no evidence that it enhances deterrence and rehabilitation is possible.

MENTAL HEALTH AMERICA, "Position Statement 54: Death Penalty and People With Mental Illness."

The American Bar Association, which has no position on the death penalty generally, adopted a resolution in 2006 calling for a prohibition on executing severely mentally ill people. The resolution says

> A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

See Exhibit 8, ABA 2006 Resolution. Psychiatrist Dr. Moria Artigues, MD, has diagnosed Ian with suffering from Schizoaffective Disorder Bipolar type at the time of the offenses in this case. She has found that Ian meets the ABA's proposed criteria for exemption from the death penalty.

A national poll conducted by Public Policy Polling in 2014 found that 58% of Americans opposed the death penalty for people with mental illness while only 28% favored such executions. A Public Policy Polling survey of Wake County residents in 2017 found that 74% believed that a prosecutor should not seek the death penalty against a person with severe mental illness. *Exhibit 9, 2017 Public Policy Polling Results of Wake County*

In evaluating whether executing people with severe mental illness constitutes cruel and unusual punishment, it is appropriate for a court to consider the practices and positions of the

international community. In *Roper*, the Court said, while not controlling, the views of other counties are important in Eighth Amendment jurisprudence.

> Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102–103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins, supra,* at 317, n. 21, 122 S.Ct. 2242 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson [v. Oklahoma,* 487 U.S. 815, 830–831, and n. 31 (1987)] (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo–American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Enmund v. [Florida*, 458 U.S. 782,796–797, n. 22 (1982)] (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker [v. Georgia*, 433 U.S. 584, 596, n. 10 (1977)] (plurality opinion) ("It is ... not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").

Roper, 543 U.S. at 575–76.

The Wake County District Attorney's attempt to execute this young man who suffer from severe mentally illness man goes against the standards upheld by most of the rest of the world. The death penalty itself has either been abolished in practice or by law in 135 countries. *See* "Abolitionist and Retentionist Countries", DEATH PENALTY INFORMATION CENTER https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries. Only 63 countries carry out the death penalty. *Id.* It has been abolished in every European country except for Belarus. *Id.* Canada, Mexico, Australia and South Africa have all abolished the death penalty.

Many of the countries that do allow the death penalty, however, do not allow for it to be applied to individuals like Ian, who suffer from severe mental illness. Countries that continue to uphold the death penalty but exclude the practice for people with severe mental illness include India, St. Lucia, Syria, Thailand, and Trinidad and Tobago. *Id.* The defense acknowledges, however, some countries like Iran and Iraq have similar sentiments to the Wake County District Attorney's office and pursue the execution of people with severe mental illness.

Executing or sentencing to death a person with severe mental illness like Ian violates the international community's standards of humanity. The United Nations Human Rights Committee made that clear in a 2018 report. "States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psycho-social and intellectual disabilities impeded their effective defense, and on persons that have limited moral culpability. "General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life." UNITED NATIONS HUMAN RIGHTS COMMITTEE, paragraph 49.

C. THE NORTH CAROLINA CONSTITUTION PROHIBITS THE EXECUTION OF PEOPLE WITH SEVERE MENTAL ILLNESS

The death penalty against persons with severe mental illness is also prohibited by the North Carolina constitution. Article I, § 27 of the North Carolina Constitution prohibits a defendant from being subjected to "cruel *or* unusual punishment." The drafters of this provision intentionally made it broader than the Eighth Amendment to the United States Constitution. For the reasons stated above, Article I, § 27 means the State is not permitted to seek Ian's execution. Therefore, Section 27 forbids the execution of persons with severe mental illness even assuming *arguendo* that the United States Supreme Court would not agree that the Eighth Amendment imposes such a bar. The United States Supreme Court has ruled that a State may "adopt in its

own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980). Our State Supreme Court has established that our state constitution does provide individual rights more expansive than the federal constitution. *See State v. Robinson,* 846 S.E.2d 711, 720 (2020) (finding that North Carolina Constitution's Law of the Land Clause has more expansive definition of Double Jeopardy than the Fifth Amendment of the United States Constitution); *State v. Ramseur*, 374 N.C. 658, 670, fn. 4 (2020) (finding that the *ex post facto* clause of the North Carolina Constitution is more expansive than the United States Constitution). In evaluating whether sentencing to death people with severe mental illness violates Section 19, it is appropriate to look at the United States Supreme Court decisions in *Roper*, *Atkins* and other Eighth Amendment United States Supreme Court cases. The North Carolina Supreme Court says that rulings from the United States Supreme Court on similar provisions of the United States and North Carolina Supreme Court are "highly persuasive." *Robinson* at 720. But in the end, the proper and application of the North Carolina Constitution is the responsibility of the North Carolina courts alone. *Id.* Regardless of whether the United States Supreme Court might rule about the constitutionality of executing persons with severe mental illness, for the reasons stated above, executing such persons is cruel or unusual punishment under Section 27 for the reasons stated in the rest of this motion.

That Ian Powell suffers from severe mental illness is not seriously disputed. We have now reached the point in this world, this country, this state and this county that the death penalty is not appropriate for someone with severe mental illness. This Court should prohibit the Wake Count District's County office from seeking the death penalty.

Respectfully submitted, this the _____ day of December, 2020.

Jonathan E. Broun
Attorney for Defendant
North Carolina Prisoner Legal Services
PO Box 25397
1110 Wake Forest Road
Raleigh, NC 27611

Deonte Thomas
Public Defender

Alexis Strombonte
Assistant Public Defender
Office of the Public Defender
300 S. Salisbury St., 5th Floor
Raleigh, N.C. 27601

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

Matt Lively and Sherita Walton
Assistant District Attorneys
Office of the District Attorney
10th Prosecutorial District
P.O. Box 31
Raleigh, NC 27602

This the ___ day of December, 2020.

Jonathan E. Broun

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 17 CRS 202280

STATE OF NORTH CAROLINA	)
V.	)
ANTWAN CARTER	)

****

MOTION FOR DEPOSITION OF KEY WITNESS WHO HAS KNOWLEDGE OF MATERIAL THAT SHOULD HAVE BEEN DISCLOSED PURSUANT TO BRADY V. MARYLAND

****

NOW COMES Defendant, by and through counsel, and respectfully requests that this Court permit the taking of a deposition by the parties of Demetria Houston. Houston has knowledge of materially exculpatory and impeaching material. While the defense has attempted to interview Houston, she has stymied those attempts. Therefore, the only way for counsel to obtain exculpatory information it is entitled to is for counsel to use compulsory power of a subpoena that would be available if a deposition was ordered in the case. Houston's deposition is necessary to preserve Defendant's rights to due process, and to effective assistance of counsel, and also is necessary in the general interest of justice, and therefore should be granted pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 18, 19, and 23 of the North Carolina Constitution, *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Buckner*, 351 N.C. 401, 527 S.E.2d 307 (2000) and as part of the Court's inherent authority.

Houston is the key witness in this case. She claims Defendant confessed to her. Presently, she is the only person who connects Defendant to the murder of Kareem Jones. Her credibility is everything.

In its original discovery package, the State provided a copy of Houston's record. That record, however, only consisted of misdemeanor and traffic charges from the early 1990s. Undersigned counsel on his own learned that Houston has twice gone to federal prison for drug trafficking offenses. Counsel informed the State of Houston's true criminal record as part a motion he filed on November 16, 2018. Four months later, on February 22, 2018, the State provided the defense with a new copy of Houston's record. This newly disclosed record consists only of the convictions the defense had previously informed the State about.

On January 22, 2018 undersigned counsel filed multiple motions in this case. Two of those motions dealt with requests for any deals that Houston received in this case. Specifically, counsel pointed out that Houston had received credit for substantial assistance in her most recent federal conviction and the defense wanted to know if she was receiving credit for this case. The State said they were unaware of any deals or benefits Houston had received for this case, and that this case was too old for them to be able to find out if the federal system had given her credit for providing information against Antwan Carter.

On February 22, 2018, undersigned counsel learned that the federal government did in fact give Houston credit for her assistance in helping the Raleigh Police Department with two unrelated homicides. Based on the timing of this information, it is clear that one of the cases she was receiving credit for was this case. Undersigned counsel provided this newly discovered evidence to the prosecutor handling the case, Howard Cummings, the same day that counsel discovered it. This new information shows that Houston pled guilty to Distribution of Crack in the Eastern District of North Carolina and was facing a minimum mandatory sentence of ten years in prison. She was facing a maximum sentence of life imprisonment. The crime happened a year before she made her statements to police. The plea happened after she implicated Carter.

After she pled, the United States Attorney for the Eastern District of North Carolina filed a motion saying she provided the Raleigh Police Department with information about two homicides. Instead of receiving a life sentence, or even ten years in prison, Houston received two years in prison. She had also received five years in prison for violating her previous supervised release conditions, but it is unclear if those sentences ran concurrent or consecutive to each other.

Undersigned counsel also learned that following her sentence the United States Attorney office filed a motion asking Houston's sentence to be further reduced pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The Federal Government asked that the motion be held in abeyance. The motion noted that Houston was assisting both the Raleigh Police Department and federal agents in a narcotics investigation, and they expected that she would be providing valuable information and testimony. There does not appear to have ever been a ruling on the Rule 35 motion. It is certainly possible that her information and testimony did not actually prove to be valuable or trustworthy.

The State of North Carolina had and has an absolute duty to disclose all of the above information to the defense. In *Giglio v. United States*, 405 U.S. 150 (1972) the United States Supreme Court said that the prosecution has a duty to disclose deals that were made with testifying witnesses. The Court vacated the defendant's conviction even though the prosecutor handling the trial was unaware of the deal with the witness. In *United States v. Bagley*, 473 U.S. 667 (1985).the Court emphasized that *Brady* applied to material evidence which could be used to impeach a prosecutor's witness.

The defense recognizes that Assistant District Attorney Cummings was completely unaware of this impeaching information until we provided him with it. We know from working

with Mr. Cummings on this case and other cases, and from his reputation in the community, that he understands and appreciates his *Brady* obligations, that he strives to fulfill them, that he timely discloses information within his possession and does not hide evidence. But Mr. Cummings personal knowledge about exculpatory and impeaching material is irrelevant under *Brady*. As the United States Supreme Court has noted

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether that is, a failure to disclose is in good faith or bad faith) the prosecution's responsibility for disclose known favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). The Raleigh Police Department was involved in helping secure a very good deal for Houston in exchange for her information about this case and another homicide.

The reason that the State has not lived up to its *Brady* obligations is that this case is too old. That in no way excuses the State for failing to provide this information. Nor has the State's obligations under *Brady* ceased because the defense has unearthed some significant impeachment materials in this case. What has been found by the defense is simply the tip of the iceberg. What the defense has found presents more questions than answers. The defense entitled to know 1) exactly what the Raleigh Police Department told Houston before and after their interview with her about her pending charges, 2) what Houston knew about her pending charges when she spoke to the police; 3) what the Raleigh Police Department told members of the U.S. Attorney's office about Houston's involvement in this case; 4) whether the Raleigh Police Department approached the U.S. Attorney's on their own, or were asked to do so by Houston or her attorney; 5) the extent of Houston's cooperation with other Raleigh Police Department

investigations, and 6) whether this information proved accurate. These are just some of the information that must be disclosed under *Brady*. It is type of information that would ordinarily be disclosed by Mr. Cummings. It is information that we now know the State is incapable of finding because of the age of the case.

The defense has attempted to talk with Houston numerous times. Defense investigator Steve Hale and undersigned counsel have been to Houston's home several times, but we have never been able to speak to her. Mr. Hale has also approached the house without me. We have left business cards and phone numbers with her family members and asked that she call us. She has the right not to talk with us absent a compulsory court appearance, and she is taking advantage of it. But we cannot learn important impeaching material that should have been disclosed to us under *Brady* by simply trying to talk to her.

Since Houston is unwilling to talk with the defense team, the defense suggests that this Court permit depositions to be taken in the case. This is the only way to even remotely assure that the defense receives *Brady* information before trial. The defense recognizes that depositions are very unusual in criminal cases in North Carolina. In this case, however, the defense may never be able to ascertain critical information unless depositions are ordered. This Court has within its inherent authority the ability to order depositions. In *State v. Buckner*, 351 N.C. 401, 412-413, 527 S.E.2d 307, 314 (2000), the North Carolina Supreme Court said that a superior court judge had the authority to order depositions in order to collect information that was essential in a capital post-conviction case. In *Buckner*, the defendant had challenged both his convictions and death sentences on the basis of ineffective assistance of counsel. The prosecution attempted to talk with the defendant's trial counsel, but they refused to speak to the State. The trial court ordered the attorneys to talk to the State *ex parte*, and Buckner appealed.

The North Carolina Supreme Court found that the trial court erred in ordering an *ex parte* communication between the State and trial counsel, but said that the trial court had the inherent authority to order trial counsel to provide all relevant information to the state. The Court then specifically ruled that the trial court had the authority to order depositions of trial counsel. *Id.*

Although *Buckner* involved a post conviction case, its holding should apply to trial cases as well. *Buckner* relied on *State v. Taylor*, 327 N.C. 147, 393 S.E.2d. 801 (1990). In *Taylor*, the North Carolina Supreme Court said that superior court's have the inherent authority to order disclosure of relevant facts "where it is in the interest of justice to do so." *Id.* at 153-54, 393 S.E.2d at 801. The superior court has the same inherent authority to order such discovery at both trial and post conviction. *Id.*

This Court should order that Houston be deposed a week before Defendant's March 12, 2018 trial. After that deposition it may be determined what further steps need to be taken to assist the State in fulfilling its *Brady* obligations. Or to determine whether it is simply impossible for the State to fulfill its obligations and to recognize that Antwan Carter cannot receive a fair trial.

This the ___ day of _____, 2018.

_____

Jonathan E. Broun
Senior Staff Attorney
North Carolina Prisoner Legal Services
N.C. State Bar No. 18108
1110 Wake Forest Road
Raleigh, NC 27611
919-856-2200

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

Howard Cummings
Assistant District Attorney
Office of the District Attorney
10th Prosecutorial District
P.O. Box 31
Raleigh, NC 27602

This the ___ day of _____, 2018.

_____
Jonathan E. Broun

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 15 CRS 52177

STATE OF NORTH CAROLINA)
)
v.)
)
BRICE BERRY,)
Defendant.)

****

MOTION TO DISCLOSE PRISON AND MENTAL HEALTH RECORDS OF THE STATE'S KEY WITNESS MARCUS HICKS

****

NOW COMES Defendant, Brice Berry, by and through counsel, and respectfully moves this Court for an order releasing to the defense, the prison records and psychiatric records of the State's key witness Marcus Vander Hicks (DOB: 03/05/1985). Defendant requests that the Court order records in the possession of persons or institutions in North Carolina be provided directly to the defense. Defendant requests that, in the case of records being held in other jurisdictions, a local court there order a release of records to the defense. Defendant is entitled to such information pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 23, and 27 of the North Carolina Constitution, as well as *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995); *Chavis v. North Carolina*, 637 F.2d. 213 (4th Cir. 1980); and *State v. Hunt*, 64 N.C. App. 81 (1983).

Factual Background

Brice Berry ("Brice") is charged with two counts of first degree murder for the January 8th 2012 deaths of Timothy McGhee and Paul Noel. There were no arrests made in the case until

April of 2015 when Brice was arrested for the murders. Based on a review of the discovery provided by the State, it appears Brice was arrested after Detective S.M. Pate took over the investigation approximately three years after Mr. McGhee and Mr. Noel died. Detective Pate sought an arrest warrant after listening to a recording of an interview with Marcus Hicks ("Hicks"), an inmate in South Carolina, conducted by the former detective assigned to the case. Detective Pate's report indicates that, in the interview, Hicks says that Brice Berry told him about the murders and a motive for the killings. Detective Pate also asserts that a gun found in Brice's car was linked to the homicides through ballistics. *Exhibit 1, Excerpt of Detective Pate's Report.*

Marcus Hicks's credibility is paramount to this case. Without him, the State has no case. It is important that Defendant receive the information requested herein, in order to be able to properly prepare a cross examination of Hicks, should this case proceed to trial. It is, however, essential that Defendant receive the requested information now: after spending three months in jail, Defendant continues to be confined based on the statements of a person, who, as we shall demonstrate, has little credibility. The requested records may play a vital role in ensuring that Defendant receives a reasonable bond in this case. It is also Defendant's hope that upon reviewing the information provided in this Motion, the State will realize the charges against Brice Berry must be dismissed.

In his report, Detective Pate mischaracterized what is contained in Hicks's interview.

On July 2, 2015, the defense was furnished with a taped copy of Hicks's statement. Upon review of the interview, counsel discovered that Detective Pate was greatly mistaken in his account of Hicks's statements. According to Pate, Hicks claimed that Brice told him about the double homicide in Durham. Instead, the recording reveals that Brice's brother, Terrance Berry

("Terrance"), was actually the person who described the Durham homicides to Hicks. Hicks claims to have known Terrance since he was a child growing up in South Carolina, and that he saw Terrance one or two days after the shootings. According to Hicks, Terrance, not Brice, disclosed a detailed account of how the murders happened. Hicks alleges that Terrance said he was mad at one of the victims for shooting him, Terrance, a year beforehand. During the time he was in jail, Terrence ordered a hit on this victim, and the second victim was simply a "casualty of war."

Hicks's taped statement is inadmissible hearsay and contradictory to established facts.

Hicks's information is problematic as it clearly constitutes inadmissible hearsay. *See State v. Canady*, 355 N.C. 242 (2002) (prejudicial error to allow Sheriff's deputy to testify that one inmate told him that another inmate told him that defendant confessed to the murders, even when the information was offered for non-hearsay purpose). In addition to being hearsay, Hicks's statement is inconsistent with known facts. Hicks claims that Terrance told him about the Durham murders while both men were in South Carolina one or two days after the Durham shootings. However, upon information and belief, Terrance was confined at the Durham County Jail in North Carolina, when he allegedly made the statement in person to Hicks in South Carolina. Court and confinement records demonstrate that Terrance was arrested in Durham, North Carolina, on January 6, 2012, and released on bond on January 19, 2012. *Exhibit 2, Record of Confinement from Durham County Jail.*

During the course of his interview, Hicks denies ever spending time in Durham except for the one time his semi-pro football team played in the city. Hicks emphatically denies being near the crime scene the night of the offense or ever in his life. Yet, Hicks offers incredibly specific details concerning the events of that night, including the layout of the property

surrounding the scene, as well as the reactions of people both in the house and in the street while the crime was occurring. Hicks's statement is simply inconsistent with someone who was given a third-hand account of events nearly three years ago. Hicks's claim that he has never been to Durham except for the single instance related to his football team is contradicted by discovery that shows the Durham Police Department registered Hicks as a gang member in 2012. Further, Hicks also inconsistently claims to have been dating a woman who lived in Durham.

Marcus Hicks has a history of lying about others in an effort to implicate them in crimes for which he has been charged.

At the time he disclosed information concerning the Durham homicides, Marcus Hicks was an inmate at a local detention center in Horry County, South Carolina. Following a guilty verdict at trial, Hicks was convicted of second degree burglary and sentenced to a thirteen year prison term. Hicks was originally charged with 37 counts of burglary as well as additional felonies, including perjury. See *Exhibit 3, Arraignment Statement* and *Exhibit 4, Perjury Indictment.* The day after Hicks made his statements to the Durham police, Hicks's lawyer filed a motion requesting a sentence reduction for his client. Hicks's lawyer argued that Hicks's codefendants received lesser sentences. In its response, The State of South Carolina made it clear that Hicks had lied about another person's criminal involvement as a means of self-gain. In rejecting Hicks's motion, the South Carolina prosecutor wrote:

> This Court did not consider the sentences received by the co-Defendants in sentencing the Defendant, and properly so. The sentence of the co-Defendant were not relevant to the consideration of the Defendant's sentence for burglary of November 21, 2013, as neither co-Defendant pled guilty participation in that crime. In fact, the State presented evidence during the course of the trial that the co-Defendants were arrested solely on evidence provided by the Defendant, and that evidence proved unreliable. ***Some of the charges for which the Defendant accused co-Defendant Henry, for instance, actually occurred while Henry was incarcerated in Horry County jail. Since the information provided by the***

Defendant proved unreliable, Henry pled only to an unrelated Shoplifting charge, and co-Defendant Brandenburg pled only to an Accessory charge which was based on her admission of helping the Defendant dispose of stolen televisions.

See *Exhibit 5, Response to Defendant's Motion* (emphasis added).

Hicks has an extensive criminal record from multiple jurisdictions.

In responding to Hicks's motion, the State of South Carolina further stipulated that Hicks's sentence was the result of his extensive criminal history. "[T]he sentence of 13 years was based on the Defendant's extensive and appalling prior criminal record of criminal convictions, including crimes against the public order, crimes falsehood, crimes against property, and crimes of violence against persons. These crimes were all committed within the last 15 years and in at least 4 separate states." See *Exhibit 5*. According to the State, Hicks's prior convictions are:

South Carolina

2004	Driving Without a License
2004	Public Disorderly Conduct
2011	Simple Possession of Marijuana
2012	Possession of Marijuana with Intent to Distribute
2012	Shoplifting

Virginia

2012	Possession of Marijuana 1st
2013	Identity Theft

New York

2002	Assault 3rd Degree
2002	Menacing 2nd Degree with a Weapon
2005	Possession of Marijuana 5th Degree

North Carolina

2005	Common Law Robbery
2005	Conspiracy to Commit Robbery with a Deadly Weapon
2008	Assault on a Female

The judge in South Carolina denied the defense's motion to reduce Hicks's sentence. Undersigned counsel is unsure whether other legal mechanisms now exist to reduce Hicks's sentence in South Carolina.

Without Marcus Hicks, the State does not have enough to prosecute Brice Berry for any role in this case.

Without Marcus Hicks's statement, the only other evidence against Brice is the weapon he was found with, that ballistics maintains is connected to the murder. Discovery received in this case does not provide the circumstances surrounding the police stop that uncovered the weapon. However, per the Lakeview South Carolina police department, undersigned counsel has obtained a copy of the police report for the stop when Brice was in the car where the gun was found. *Exhibit 6, Lakeview Police Department Report.*

According to the police department of Lakeview, Brice Berry was pulled over on October 20, 2012; this date is over nine months after the Durham homicides. Also according to the report, Brice was not alone in the car. The second individual, a passenger, fled the scene and

was never apprehended. A search of the vehicle uncovered a gun under the passenger's seat, in addition to other weapons found in the trunk of the car. The fact that Defendant drove a car where the murder weapon was located more than nine months after the trial, and where Defendant was not the sole person in the car, is not sufficient by itself to warrant a trial of Defendant.

Claim for Relief

Defendant is incarcerated and facing a possible sentence of life without parole based on the statement of Marcus Hicks. As this Motion demonstrates, Hicks is an unreliable witness and his statement, problematic. Nevertheless, the State, in its case against Brice Berry, relies on it. Therefore, Defendant has a constitutional obligation to seek out additional information to impeach Hicks. While Hicks was facing charges for perjury and 37 counts of burglary, his lawyer in South Carolina requested a competency evaluation. See *Exhibit 7, Motion for Competency Evaluation*. The results of that competency evaluation may offer the evidence needed to verify Hicks's lack of credibility. In considering Mr. Hicks has been incarcerated in four different states, it is very possible mental health records or other impeaching materials exist in the files of those correctional institutions.

Provided this and the information in this Motion, Defendant requests the following relief:

1. That this Court issue an order requiring North Carolina Department of Corrections to release to Defendant, all records it has relating to Marcus Hicks, including, but not limited to, disciplinary records, medical records, and mental health records;
2. That this Court issue a request to a court in South Carolina to provide the results of any and all competency evaluations or other mental health evaluations conducted on

Marcus Hicks during the pendency of his most recent South Carolina case, which included charges of perjury, burglary, and other felonies;

3. That this Court issue a request to courts in South Carolina, Virginia, and New York to provide copies of the prison files of Marcus Hicks held by those Department of Corrections to the defense.

Respectfully submitted, this the _____ day of July, 2015.

_____

Jonathan E. Broun
Assistant Capital Defender
N.C. State Bar No. 18108
123 W. Main Street, Suite 601
Durham, NC 27701

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina same by first class mail or hand delivery to:

Kelley L. Gauger
Office of the District Attorney
Durham County Courthouse
510 S. Dillard Street
Durham, NC 27701

This the _____ day of July, 2015.

_____
Jonathan E. Broun

Evidence Blocking*

Jonathan Rapping**

* The term "evidence blocking" and the ideas set forth in this paper come from my colleague and mentor at the D.C. Public Defender Service, Jonathan Stern. Mr. Stern honed the practice of evidence blocking to an art. There is not a concept in this paper that I did not steal from Mr. Stern, including examples presented. He deserves full credit for this paper.

** Jonathan Rapping is the Executive Director of the Southern Public Defender Training Center and is on the faculty of Atlanta's John Marshall law School.

I. Facts of the World v. Facts of the Case

If a tree falls in the woods and no one is there to hear it, does it make a sound? We may confidently answer, "yes." However, we cannot, with certainty, know what exactly it sounded like. Scientists might estimate what the sound would have been based on whatever factors scientists use, but that will be an approximation. They may disagree on the density of other vegetation in the area that would affect the sound, or the moisture in the soil that may be a factor. Perhaps the guess will be close to the actual sound. Perhaps not. We can never know for sure. A trial is the same way. It is a recreation, in a courtroom, of a series of events that previously took place. There are disagreements over factors that impact the picture that is created for the jury. The picture painted for the jury is affected by biases of the witnesses, the quality and quantity of evidence that is admitted, and the jury's own viewpoint. In the end, the picture the jury sees may be close to what actually occurred or may be vastly different.

Understanding that the picture that is painted for the jury is the one that matters is central to the trial lawyer's ability to be an effective advocate. It is helpful to think of facts in two categories: facts of the world and facts of the case. The first category, facts of the world, are the facts that actually occurred surrounding the event in question in our case. We will never know with certainty what the facts of the world are. The second category, facts of the case, are the facts that are presented at trial. It is from these facts that the fact-finder will attempt to approximate as closely as possible the facts of the world. The fact-finder will never be able to perfectly recreate a picture of what happened during the incident in question. How close the fact-finder can get will be a function of the reliability and completeness of the facts that are presented at trial.

II. The Difference Between Prosecutors and Defense Attorneys

By understanding that the outcome of the trial is a function of the facts of the case, we have a huge advantage over the prosecution. The prosecutor tends to believe he knows the "truth." He thinks the facts of the world are perfectly reflected by his view of the evidence known to him. When the facts of the case point to a conclusion that is different from the one he believes he knows to be true, the prosecutor is unable to adjust. He can't move from the picture he has concluded in his mind to be "true." Therefore, he renders himself unable to see the same picture that is painted before the jury at trial. The good defense attorney understands she is incapable of knowing the "truth." She focuses on the facts of the case. She remains flexible to adjust to facts that are presented, or excluded, that she did not anticipate. In that sense she is better equipped to see

the picture the jury sees and to effectively argue that picture as one of innocence, or that at least raises a reasonable doubt.

The ability to think outside the box is one of the main advantages defense attorneys have over prosecutors. It is a talent honed out of necessity. We necessarily have to reject the version of events that are sponsored by the prosecution. They are a version that points to our client's guilt. We must remain open to any alternative theory, and proceed with that open mind throughout our trial preparation.

Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete they have usually settled on a suspect, a motive, and other critical details of the offense. In the prosecutor's mind, this version of events is synonymous with what actually happened. In other words, the prosecutor assumes he knows the "truth." The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of being open minded about evidence learned, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory but, to an objective observer, has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution theory ultimately is right or wrong, this mid-set taints the ability to critically think about the case.

Good defense attorneys don't do this!!! We understand that the "truth" is something we will almost certainly never know and that, more importantly, will not be accurately represented by the evidence that makes it into the trial. We understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. We know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the degree to which, and manner in which, it is presented. In short, as defense attorneys, we understand that a trial is not about what "really happened." Rather, it is about the conclusions to which the fact-finder is led by the facts that are presented at trial. This may closely resemble what actually occurred or be far from it. We will never know. As defense attorneys we deal with the facts that will be available to our fact-finder. To do otherwise would be to do a disservice to our client.

For example, imagine a case that hinges on one issue, whether the traffic light was red or green. The prosecutor has interviewed ten nuns, all of whom

claim to have witnessed the incident in question. Each of the ten nuns insists that the light was green. The defense has one lone witness. This witness says the light was red. At trial, not a single nun shows up to court. The only witness to testify to the color of the light is the lone defense witness, who says it was red. The prosecutor sees this case as a green light case in which one witness was wrong. The jury, on the other hand, sees only a red light case. It knows nothing of the nuns. The only evidence is that the light was red. As defense attorneys we must also see the case as a red light case. These are the only facts of the case. Even assuming the ten nuns were correct, that the light was green, those facts are irrelevant to this case and the jury that will decide it.

III. The Art of Evidence Blocking

The defense attorney's job is to shape the facts of the case in a manner most favorable to her client. She must be able to identify as many ways as possible to keep facts that hurt her client from becoming facts of the case. Likewise, she must be thoughtful about how to argue the admissibility of facts that are helpful to her client's case. This requires a keen understanding of the facts that are potentially part of the case and a mastery of the law that will determine which of these facts become facts of the case.

As a starting proposition, the defense attorney should consider every conceivable way to exclude every piece of evidence in the case. Under the American system of justice, the prosecution has the burden of building a case against the defendant. The prosecution must build that case beyond a reasonable doubt. The facts available to the prosecution are the bricks with which the prosecutor will attempt to build that case. At the extreme, if we can successfully exclude all of the facts, there will be no evidence for the jury. It follows that the more facts we can successfully keep out of the case, the less bricks available to the prosecution from which to build the case against our client.

A wise advocacy principle is to never underestimate your opponent. Along this line it would behoove you to assume that if the prosecutor wants a piece of evidence in a case, it is because it is helpful to his plan to win a conviction against your client. Assume he is competent. Assume he knows what he is doing. Assume that fact is good for his case, and therefore bad for your client. Therefore, you do not want that fact in the case. Resist the temptation to take a fact the prosecution will use, and make it a part of your defense before you have considered whether you can have that fact excluded from the trial and how the case will look without it. Far too often defense attorneys learn facts in a case and begin thinking of how those facts will fit into a defense theory without considering whether the fact can be excluded from the trial. This puts the cart

before the horse. We must train ourselves to view every fact critically. We must consider whether that fact is necessarily going to be a part of the case before we decide to embrace it[1].

The prosecutor obviously knows his case, and how he plans to build it, much better than you do. If you accept the premise prosecutors tend to do things for a reason, i.e. to help convict your client, then it follows that any fact the prosecution wishes to use to build its case against your client is one we should try to keep out of evidence. Even if you are unwilling to give the prosecutor that much credit, limiting the facts at his disposal to use against your client can only be beneficial. This defines a method of practice coined by Jonathan Stern as "evidence blocking." Put plainly, evidence blocking is the practice of working to keep assertions about facts of the world out of the case. This exercise is one that forces us to consider the many ways facts can be kept out of evidence, and therefore made to be irrelevant to the facts of the case, and the derivative benefits of litigating these issues.

It is helpful to think of evidence blocking in four stages: 1) suppression/discovery violations; 2) witness problems; 3) evidence problems; and presentation problems.

A. Suppression / Discovery and Other Statutory Violations

The first stage we must think about when seeking to block evidence includes violations by the prosecution team of the Constitution, statutory authority, or court rule. We must think creatively about how evidence gathered by the State may be the fruit of a Constitutional violation. Generally, in this regard, we consider violations of the Fourth, Fifth, and Sixth Amendments. We look to any physical evidence seized by the government, statements allegedly made by your client, and identifications that arguably resulted from a government-sponsored identification procedure. We consider theories under which this evidence was obtained illegally and we move to suppress that evidence. We also must look to any violations of a statute or rule that might arguably warrant exclusion of evidence as a sanction. A prime example of this is a motion to exclude evidence based on a violation of the law of discovery. How we litigate these issues will define how much of the evidence at issue is admitted

[1] Of course, after going through this exercise, there will be facts that you have concluded are going to be part of the "facts of the case." These are "facts beyond control." At that point it is wise to consider how your case theory might embrace these facts beyond control, thereby neutralizing their damaging impact. However, this paper is meant to serve as a caution to the defense attorney to not engage in the exercise of developing a case theory around seemingly bad facts until she has thoroughly considered whether she can exclude those facts from the case.

at trial and how it can be used. We must use our litigation strategy to define how these issues are discussed.

B. Witness Problems

A second stage of evidence blocking involves identifying problems with government witnesses. This includes considering the witness' basis of knowledge. A witness may not testify regarding facts about which she does not have personal knowledge. It also includes thinking about any privileges the witness may have. Be thoughtful about whether a witness has a Fifth Amendment privilege. Consider marital privilege, attorney/client privilege, and any other privilege that could present an obstacle to the government's ability to introduce testimony it desires in its case. Another example of a witness problem is incompetency. We should always be on the lookout for information that arguable renders a witness incompetent to testify and move to have that witness excluded from testifying at trial. These are some examples of witness problems.

C. Evidence Problems

While witness problems relate to problems with the witness herself, we must also consider a third stage of evidence blocking: problems with the evidence itself. Even with a witness who has no problems such as those described above, there may be problems with the evidence the government wishes for them wish to present. Perhaps the information the witness has is barred because it is hearsay. Consider whether the evidence is arguably irrelevant. Think about whether the evidence is substantially more prejudicial than probative. These are all examples of problems with the evidence.

D. Presentation Problems

A final stage of evidence blocking involves a problem with the method of presentation of the evidence. Maybe the government is unable to complete the necessary chain of custody. The prosecutor may be missing a witness who is critical to completing the chain of custody. Maybe the prosecutor has never been challenged with respect to chain of custody and is unaware of who he needs to get the evidence admitted. By being on your feet you may successfully exclude the evidence the prosecutor needs to make its case against your client. Another example of a presentation problem is where the prosecutor is unable to lay a proper foundation for admission of some evidence. A third example is a prosecutor who is unable to ask a proper question (for example, leading on

direct). These are all examples of problems the prosecutor could have in getting evidence before the jury if you are paying attention and making the appropriate objections.

IV. How Do You Raise An Issue

Once you have decided that there is evidence that should not be admitted at your trial you must consider the best method for bringing the issue to the Court's attention. You essentially have three options: 1) file a pretrial written Motion in Limine, 2) raise the issue orally as a preliminary matter, or 3) lodge a contemporaneous objection. There are pros and cons to each of these methods.

Some motions must be filed in writing prior to trial, such as motions to suppress. Each jurisdiction is different on the requirement regarding what must be filed pre-trial and the timing of the filing[2]. For any motions that must be filed pretrial, you should always file pretrial motions whenever possible, for reasons stated below. However, many evidentiary issues may be raised without filing a motion. Objections to evidence on grounds that it is hearsay, irrelevant, substantially more prejudicial than probative, or any number of evidentiary grounds, are routinely made contemporaneously during trial. Certainly, should you anticipate an evidentiary issue in advance of trial you may raise it with the court. This may be done orally as a preliminary matter or in writing as a motion in limine.

What are the pros and cons of the different methods of raising an objection? Let's first consider a written, pretrial motion in limine. There are several advantages to filing a pretrial motion in limine to exclude evidence on evidentiary grounds. One is that it gives you a chance to educate the judge on the issue. Judges, like all of us, often do not know all of the law governing a particular issue off the top of their heads. If forced to rule on an issue without giving it careful thought, most judges rely on instinct. It is the rare judge whose instinct it is to help the criminal defendant. If the judge is going to rely on one of the parties to guide her, it is more often than not the prosecutor[3]. Therefore, you are often better often having had the chance to educate the judge than to rely on her ruling in your favor on a contemporaneous objection when the answer is not obvious.

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[2] In Georgia, pursuant to O.C.G.A. 17-7-110, all pretrial motions, demurrers, and special pleas must be filed within ten days of the date of arraignment unless the trial court grants additional time pursuant to a motion.

[3] To the extent that you have previous experience with that judge and you have developed a reputation for being thorough, smart, and honest, you may be the person upon whom the judge relies. If that is the case with the judge before whom you will be in trial, that may factor into your decision about whether to object contemporaneously.

A second reason for filing a written motion pretrial is that you are entitled to a response from the prosecutor. This benefits you in several ways. First, every time you force the prosecution to commit something to writing, you learn a little more about their case. Filing motions are a great way to get additional discovery by receiving a response. Second, whenever the prosecutor commits something to writing, he is locking himself into some version of the facts. If he characterizes a witnesses testimony in a particular way and that witness ends up testifying differently, you have an issue to litigate. Presumably, the prosecutor accurately stated in his response to your motion what the witness told him or his agent. You now are entitled to call the prosecutor, or his agent, to impeach the witness. Maybe the response is an admission of the party opponent that can be introduced at trial. The bottom line is that there is now an issue where there would not have been one had you not forced the response to your motion[4].

A third reason for filing a written motion is that there is always the chance that the prosecutor will fail to respond, despite being required to by law or ordered to by the court. Whenever the prosecutor fails to respond to a written motion you are in a position to ask for sanctions. Sanctions may be for the court to treat your motion as conceded. They might be exclusion of some evidence. Perhaps you may get an instruction in some circumstances. Be creative in the sanctions you request.

A fourth reason is that when you file a motion, you get a hearing. Pretrial hearings are great things. They give us a further preview of the prosecutions case, commit the prosecution to the evidence presented at the hearing, and may result in sanctions.

A fifth reason for filing motions whenever you can is that it increases the size of your client's court file. A thick court file can be beneficial to your client in several ways. The shear size of a large court file is intimidating to judges and prosecutors. Judges like to move their dockets. Thick case files tend to be trials that take a long time to complete. Judges will be less likely to force you to trial in a case with a thick case jacket. Similarly, prosecutors often have to make choices about which cases to offer better pleas in or to dismiss outright. The more of a hassle it is to deal with a case, the greater the chance the prosecutor will offer a good plea to your client or dismiss the case outright.

A sixth reason is that by taking the time to research and write the motion, you are better preparing yourself to deal with the issue and to consider how it impacts your trial strategy.

[4] One of Jonathan Stern's cardinal rules that I have taken to heart is that you always want to be litigating something other than guilt or innocence.

A final reason for filing pretrial motions even when not required is that you appear to be honest and concerned with everyone getting the result right. By appearing to be on the up and up you can gain points with the court that will spill over to other aspects of the trial.

What are the downsides to filing a motion in advance of trial. One is certainly that you give the prosecution a heads up to an issue you seek to raise. To the extent that you identify a problem with the government's case, they may be able to fix it with advance notice. Certainly this is an important consideration that must be factored into your decision about whether to raise an evidentiary issue in writing, pretrial. A second issue, which concerns me much less, is that it allows the prosecutor to do the research he needs to do to address the legal issue you raise. Certainly by filing a pretrial motion you allow everyone to be more prepared. However, if the issue is an important one, and the judge's ruling depends on the prosecutor having a chance to do some research, most judges will give the prosecutor time to research the question before ruling whenever you raise it. To the extent this holds up the trial, there is always the risk the judge will fault you for not raising the issue earlier.

The third option, raising the issue orally as a preliminary matter, is a compromise between the other two alternatives. Obviously, it has some of the pros and cons of the other alternatives. How you handle any given issue must be the product of careful thought and analysis.

V. Conclusion

In conclusion, as defense attorneys we must take advantage of any tools at our disposal to alter the landscape of the trial in our client's favor. In order to do this we must understand and appreciate the difference between facts in the world and facts in the case. By undergoing a rigorous analysis of the facts that are potentially part of the case against our client, we may be able to keep some of those facts out of evidence. This exercise has the benefit of keeping from the prosecutor some of the blocks he hoped to use to build the case against you client. It alters the facts of the case in a way the prosecutor may be unable to deal with. And by litigating these issues we stand to derive residual benefits that will shape the outcome of the trial.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C, in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪