UNC SCHOOL OF GOVERNMENT

2023 Misdemeanor Defender Training

November 14-17, 2023 / Chapel Hill, NC

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

Tuesday, November 14

12:30-12:45 pm	Welcome and Introductory Remarks
12:45-2:00 pm	**Basics of Driving While Impaired:** **Elements, Sentencing, and Motions Practice** (75 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
2:00-2:15 pm	*Break*
2:15-3:15 pm	**Basics of Driving While Impaired**, cont'd**.** (60 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
3:15-3:30 pm	*Break*
3:30-4:15 pm	**Challenging Pleadings** (45 min.) Candace Washington, Ass't. Appellate Defender Jim Grant, Ass't. Appellate Defender North Carolina Office of the Appellate Defender, Durham, NC
4:15-5:00 pm	**Pretrial Release Advocacy** (45 min.) Emily Mistr, Supervising Attorney Blanchard Community Law Clinic, Campbell School of Law, Raleigh Raleigh, NC
5:00 pm	*Adjourn*

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Wednesday, November 15

9:15-10:15 am	**Client Interviewing and Rapport** (60 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
10:15-11:15am	**Crimmigration** (60 min.) Barbara Lagemann, Assistant Public Defender Office of the Public Defender, Durham, NC
11:15-12:15 pm	*Lunch*
12:15-1:45 pm	**Introduction to Structured Sentencing** (90 min.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair UNC School of Government, Chapel Hill, NC
1:45-2:00 pm	*Break*
2:00-3:00 pm	**Probation Violations** (60 min.) Jamie Markham, Thomas Willis Lambeth Distinguished Chair UNC School of Government, Chapel Hill, NC
3:00-3:15 pm	*Break*
3:15-4:15 pm	**Ethical Issues in District Court** (ETHICS) (60 min.) Whitney Fairbanks, Assistant Director & General Counsel North Carolina Office of Indigent Defense Services, Durham, NC
4:15 pm	*Adjourn*

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Thursday, November 16

9:15-10:00 am	**Negotiating Effectively** (45 min.) Derek Brown, Attorney The Derek K. Brown Law Firm, PC, Greenville, NC
10:00-10:15 am	*Break*
10:15-11:30 am	**Negotiation Workshops** (75 min.)
11:30-11:45 am	*Break*
11:45-1:00 pm	**Suppressing Evidence in District Court** (75 min.) Phil Dixon, Jr., Director of Public Defense Education UNC School of Government, Chapel Hill, NC
1:00-2:00 pm	*Lunch*
2:00-3:00 pm	**Driving Records and Getting Your Client Back on the Road** (60 min.) Matt Suczynski, Attorney Law Office of Matthew Charles Suczynski, Chapel Hill, NC
3:00-3:15 pm	*Break*
3:15-4:15 pm	**Introducing Evidence** (60 min.) John Donovan, Magistrate Judge Judicial District 14, Durham, NC
4:15-5:00 pm	**IDS Polices and Procedures** (45 min.) Becky Whitaker, Defender Policy and Planning Attorney Office of Indigent Defense Services, Durham, NC
5:00 pm	*Adjourn*

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Friday, November 17

9:00-9:45 am	**Theory of Defense/Emotional Themes** (45 min.) Tucker Charns, Regional Defender Office of Indigent Defense Services, Durham, NC
9:45-10:15 am	**Cross Examination** (30 min.) Phil Dixon, Jr., Director of Public Defense Education UNC School of Government, Chapel Hill, NC
10:15-10:30 am	*Break*
10:30-12:00 pm	**Cross Examination Workshops** (90 min.)
12:00-1:00 pm	*Lunch*
1:00-1:30 pm	**Direct Examination** (30 min.) Timothy Heinle, Assistant Teaching Professor UNC School of Government, Chapel Hill, NC
1:30-1:45 pm	Break
1:45-2:30 pm	**Closing Arguments** (45 min.) Kevin Boxberger, Regional Defender Office of Indigent Defense Services, Durham, NC
2:30-3:30 pm	**Rules of Evidence Refresher** (60 min.) Jonathan Broun, Senior Staff Attorney NC Prisoner Legal Services, Raleigh, NC
3:30 pm	*Final Wrap-Up and Adjourn*

CLE HOURS: 20.25

Includes 1 hour of ethics/professional responsibility

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PUBLIC DEFENSE EDUCATION INFORMATION & UPDATES

If your e-mail address is *not* included on an IDS listserv and you would like to receive information and updates about Public Defense Education trainings, manuals, and other resources, please visit the School of Government's Public Defense Education site at:

www.sog.unc.edu/resources/microsites/public-defense-education

(Click *Sign Up for Program Information and Updates*)

Your e-mail address will not be provided to entities outside of the School of Government.

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DWI: From Charge to Sentencing

Shea Denning

November 2023

1

Elements of DWI

G.S. 20-138.1

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

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Issue 1. The Charge

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I, the undersigned, find that there is probable cause to believe that on or about the date of the offense shown and in the county named above the defendant named above unlawfully and willfully did operate a motor vehicle on a street or highway while subject to an impairing substance. N.C.G.S. 20-138.1.

4

Is this pleading sufficient?

- Does it provide defendant enough notice to prepare a defense?
- Does it provide defendant enough notice to project against double jeopardy?
- G.S. 20-138.1(c): "In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance."

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Issue 2. The Stop and the Arrest

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The officer pulled behind the vehicle at a stoplight at 3 a.m. The registration was expired. The officer turned on his lights. The defendant turned into a parking lot. The officer smelled an odor of alcohol coming from the defendant and saw that the defendant's eyes were red and glassy. The defendant's left foot was in a surgical boot. The officer performed an HGN test, noting 4 of 6 indicators of impairment. The defendant said he drank two beers at 6 p.m.

7

Evidence of drinking

+

Indicators of impairment from field sobriety tests

or

Unexplained faulty driving consistent with impairment

=

Probable cause

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G.S. 20-38.6

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

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Summary Rulings

- State stipulation
- Failure to move pretrial

10

Preliminary Determination

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

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Issue 3. The Testing

12

This defendant was arrested and taken before a chemical analyst. The chemical analyst asked the defendant to submit to a breath test. He advised him orally and in writing of his implied consent rights. That advice of rights was given at 4:15 a.m. At 4:42 a.m., the chemical analyst requested that the defendant submit to testing. He did. The test results were a 0.08 and a 0.08.

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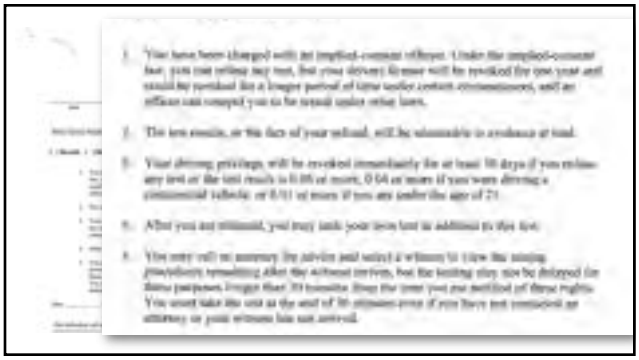

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Remedy for Violation of Statutory Implied Consent Rights

- *State v. Shadding*, 17 N.C. App. 279 (1973)
  - Failure to offer evidence that defendant was advised of implied consent rights renders breath test results inadmissible
  - Results of test admissible only if testing was delayed to give defendant opportunity to exercise rights
- *State v. Myers*, 118 N.C. App. 452 (1995); *State v. Hatley*, 190 N.C. App. 639 (2008); *State v. Buckheit*, 223 N.C. App. 269 (2012)
  - Denial of statutory right to have witness present during administration of breath test bars admission of results

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Implied Consent Testing

Advice of Rights

Test

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Issue 4. The Initial Appearance

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"I'm setting a $1,000 bond, and I am ordering you held. Anyone who drives while impaired is dangerous. You'll need to call a parent to pick you up. I'm not letting you leave with anyone else."

MAGISTRATE

18

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

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

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G.S. 20-38.4

AOC-CR-271

- Magistrate: I informed the defendant in writing of the access procedures.

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Issue 5. The State's Case

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"The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration."

G.S. 20-138.1(a)(2); G.S. 20-139.1(b)

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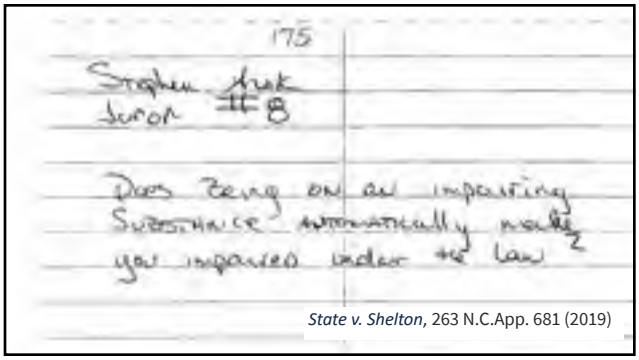
175
Stephen Juk
Juror #8
Does being on an impairing substance automatically make you impaired under the law?

State v. Shelton, 263 N.C.App. 681 (2019)

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Issue 6. Dismissal/Reduction of Charges.

24

G.S. 20-138.4

AOC-CR-339

- Must document dismissals and reductions

25

Issue 7. The Fourth Amendment

26

Withdrawal of blood from an unconscious defendant

SCENARIO

LEO responded to a single vehicle crash. The defendant was only person in his truck and was severely injured. He was unresponsive and smelled of alcohol. He was taken to the hospital.

The officer went to the hospital. There, she obtained a sample of the defendant's blood while the defendant remained unconscious. The officer did not seek or obtain a warrant authorizing the blood draw.

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"If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary." G.S. 20-16.2(b)

28

Mitchell v. Wisconsin, 588 U.S. ___, 139 S. Ct. 2525 (2019)

- When an officer has probable cause to believe a person has committed an impaired driving offense, and
- the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed,
- the State may "almost always" order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment.

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Issue 8. Confrontation Clause

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This defendant's blood sample was analyzed by a local crime lab. The ADA has sent you a copy of the lab report along with notice that she intends to introduce the report without calling the analyst. May you insist that the analyst be present?

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Sixth Amendment Right to Confront Witnesses

01

Sworn forensic reports prepared by lab analysts for purposes of prosecution are testimonial.

02

Their authors – the analysts – are witnesses for purposes of the Sixth Amendment.

03

A defendant has the right to be confronted with such a witness at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.

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

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Remote Testimony in District Court

G.S. 20-139.1(c6)

- Laboratory analyst may testimony remotely if:
  - State has provided copy of report to defendant; and
  - State has notified defendant at least 15 business days before the proceeding of intent to offer remote testimony.

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Issue 9. Sentencing

35

Duties of the Prosecutor

G.S. 20-179(a)(2)

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

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Issue 10. Pleading Aggravating Factors.

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Grossly Aggravating Factors

G.S. 20-179(c)

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

* Finding of this factor alone requires sentencing at Level One

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Notice of Aggravating Factors in Superior Court

G.S. 20-179(a1)(1)

- Notice must be provided no later than 10 days prior to trial
- AOC-CR-338

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Takeaways

1. Special (permissive) pleading rules
2. Pretrial motions required
3. Suppression is remedy for failure to advise/afford implied consent rights
4. Dismissal is remedy for violation of statutory right to pre-trial release that deprives defendant of access to witnesses
5. Chemical analysis results meet State's prima facie burden to show impairment

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Takeaways

6. Special rules govern the dismissal, reduction of charges
7. Fourth Amendment governs withdrawal of blood, which requires consent, a warrant, or exigent circumstances
8. A defendant may waive the right to confront a lab analyst by failing to object after receiving notice
9. Prosecutors have special duties to present evidence at sentencing
10. State must provide notice of GAFs and AFs in superior court

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Sentencing

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Sentencing under G.S. 20-179

01	02	03	04	05	06
Separate scheme from structured sentencing	No indefinite PJCs	Mandatory minimums	Good time credit	Parole eligible	Substance abuse assessment and education or treatment required as condition of probation

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G.S. 20-179: Covered Offenses

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

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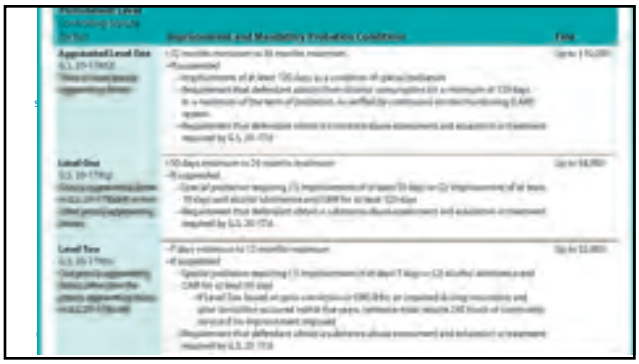

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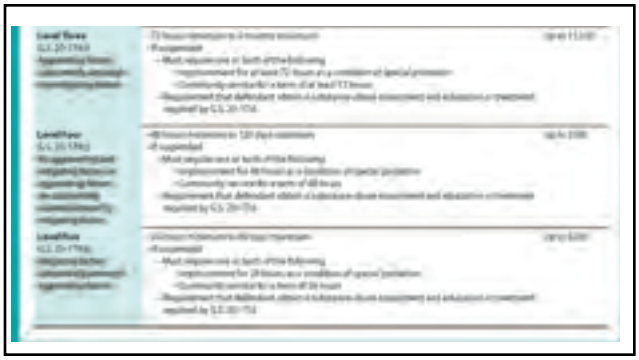

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Grossly Aggravating Factors

G.S. 20-179(c)

1. Prior conviction for offense involving impaired driving (within 7 years before instant offense; after instant offense and before/at sentencing)
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* Finding of this factor alone requires sentencing at Level One

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STATE OF NORTH CAROLINA

INJURED DRIVING

DETERMINATION OF SENTENCING FACTORS

49

Duties of the Prosecutor

G.S. 20-179(a)(2)

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

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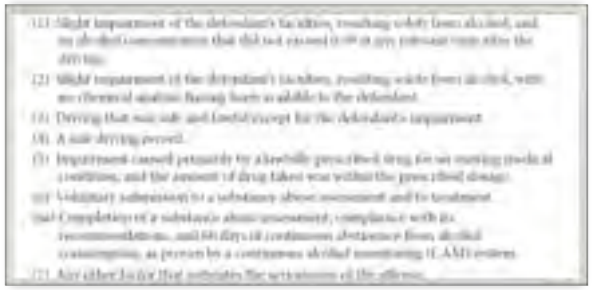
Mitigating Factors



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Special Rules

G.S. 20-179

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

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Special probation (split sentence) for DWI

↓

Local Jail

_____

Active sentence for DWI

↓

Statewide Misdemeanant Confinement Program

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Resentencing After Appeal

G.S. 20-38.7(c)

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

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AOC-CR-321B

SIDE 2

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Sentencing Scenario 1

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

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Suspended sentence?

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

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Sentencing Scenario 2

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

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Level One Sentencing Requirements

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

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Sentencing Scenario 3

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

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Aggravated Level One Sentencing Requirements

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

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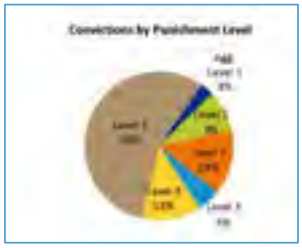
- SOURCE: NC Sentencing and Policy Advisory Commission, 2022 DWI Statistical Report



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- SOURCE: NC Sentencing and Policy Advisory Commission, 2022 DWI Statistical Report

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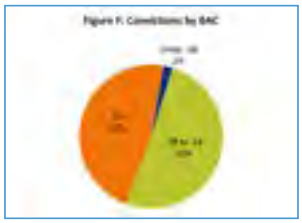
- SOURCE: NC Sentencing and Policy Advisory Commission, 2022 DWI Statistical Report



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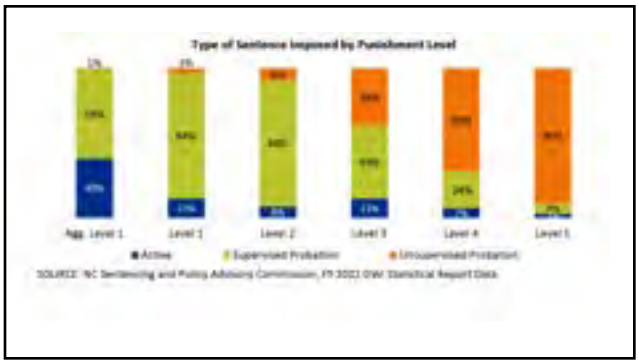
Type of Sentence Imposed by Punishment Level
Active
Supervised Probation
Unsupervised Probation

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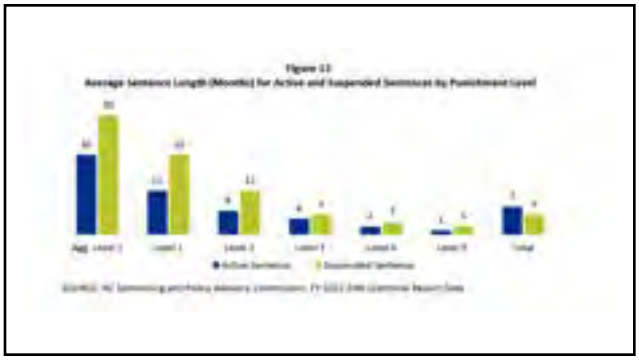
Figure 11

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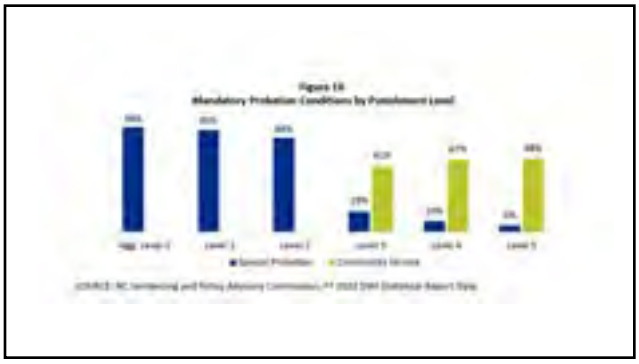
Figure 16

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Bonus Material: Defenses

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Involuntary Intoxication?

SCENARIO

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

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Automatism/Involuntary Intoxication

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

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What is Not Automatism/Involuntary Intoxication

01

State v. Clowers, 217 N.C. App. 520 (2011)

- No defense of automatism as no evidence demonstrated that the defendant's consumption of alcohol, resulting in an alcohol concentration of 0.25, was involuntary. Despite possible side effect of Alprazolam, the defendant testified that his ingestion of the anxiety drug also was voluntary.

02

State v. Highsmith, 173 N.C. App. 600 (2005)

- No involuntary intoxication where defendant drove after voluntarily consuming prescription medication that he knew or should have known could impair him.

03

State v. Rose, 312 N.C. 441 (1984)

- Statute defining impaired driving based on a specified alcohol concentration is not void for vagueness; while people may not know when their blood alcohol concentration reaches the per se level, they do "know the line exists" and "that drinking enough alcohol before or during driving may cause them to cross it."

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Necessity

SCENARIO

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

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

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

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

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

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Necessity is an available defense for driving while impaired.

Evidence must permit the jury to reasonably infer that the defendant

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

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

Shea Denning
School of Government
November 2023

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

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

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

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

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

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

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

3. **State the pleadings requirements for DWI.**

A pleading is sufficient if it "states the time and place of the alleged offenses in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance." G.S. 20-138.1(c). The State is not required to allege the specific hour and minute that the offense occurred. *State v. Friend*, 219 N.C. App. 338 (2012). Nor must the State allege the theory of impairment. *State v. Coker*, 312 N.C. 432 (1984).

If the State intends to prove one or more aggravating factors for misdemeanor DWI (or another offense sentenced under G.S. 20-179) that the defendant has appealed to superior court for trial de novo, the State must provide the defendant notice of its intent. G.S. 20-179(a1)(1). The notice must be provided no later than 10 days prior to trial and must contain a plain and concise factual statement indicating each factor the State plans to use. Notice may be provided on AOC-CR-338.

4. List statutory implied consent rights.

Implied consent testing. The following requirements apply to implied consent testing (G.S. 20-16.2):

1. Law enforcement officer must have probable cause to believe defendant committed an implied consent offense.
2. Defendant must be charged with implied consent offense.
3. Defendant must be taken before chemical analyst with permit from DHHS.
4. Chemical analyst designates type of test and requests that person submit to it.
5. Chemical analyst must advise person orally and in writing of implied consent rights.
   a. You've been charged with an implied consent offense. If you refuse to be tested, your driver's license will be revoked for one year.
   b. The test results will be admissible at trial.
   c. If the result is .08 or more (.04 if CMV or .01 if you are under 21) your license will be revoked for 30 days.
   d. After you are released, you may seek your own test.
   e. You may call an attorney for advice and select a witness to view test. But test will not be delayed longer than 30 minutes for this purpose.
6. The chemical analyst may ask the person to submit to more than one type of testing. Before a new type of testing is carried out, the person must be readvised of his or her implied consent rights. G.S. 20-139.1(b5); *State v. Williams*, 234 N.C. App. 445 (2014); *but see State v. Sisk*, 238 N.C. App. 553 (2014) (concluding that because defendant volunteered to take blood test his right to be readvised of implied consent rights was not triggered).

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

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

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

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

Admissibility. In any implied consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substances in the person's body as shown by a chemical analysis is admissible in evidence. G.S. 20-139.1(a).

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

Breath test results. A chemical analysis of the breath administered pursuant to the implied consent law is admissible if (1) it is performed in accordance with the rules of the Department of Health and Human Services; and (2) the person performing the analysis had, at the time of the analysis, a current permit issued by DHHS authorizing the person to perform a breath test using the type of instrument employed.

Rules for breath testing.

1. **Observation period.** Chemical analyst must observe the person to be tested to determine that the person has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. May the chemical analyst observe while setting up the machine? Yes. 10 A NCAC 41B .0101(6), .0322.
2. **Preventative maintenance.** Intoximeter EC/IR II must undergo preventative maintenance every 4 months. The ethanol gas canister must be changed before its expiration date. 10 NCAC 41B .0323. A court must take judicial notice of the preventative maintenance records of DHHS. Breath test results are not admissible if a defendant objects and demonstrates that preventative maintenance was not performed within the time limits prescribed. G.S. 20-139.1(b2).
3. **Consecutive breath samples.** Results are admissible if test results from any two consecutive breath samples do not differ by more than 0.02. G.S. 20-139.1(b3).
4. **Are both results admissible?** Yes. But only the lower may prove a particular alcohol concentration. G.S. 20-139.1(b3).
5. **What if person provides one breath sample and then refuses?** That makes the result of the first breath sample or the one providing the lowest alcohol concentration admissible.
6. **Affidavit of chemical analyst.** In district court, the State may introduce an affidavit of a chemical analyst "without further authentication and without the testimony of the analyst" to prove the following matters:
    a. the defendant's alcohol concentration or the presence or absence of an impairing substance of a person
    b. the time blood, breath or urine was collected
    c. the type of chemical analysis administered and the procedures followed
    d. the type and status of the analyst's DHHS permit
    e. the date the most recent preventative maintenance was performed on the breath testing machine

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

Rules for blood or urine testing.

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

3. **Chain of custody.** Similar notice and demand rules apply to statements regarding chain of custody. G.S. 20-139.1(c3). Note, however, that the State may establish a sufficient chain of custody to support the introduction of the laboratory report without introducing the chain of custody statement. If the State introduces sufficient evidence from which the trial court can conclude that the blood analyzed was the defendants' and it was not materially altered before testing, then the results of an analysis of the blood are admissible, even without testimony from every person who participated in the chain of custody.
    a. *See State v. Campbell*, 311 N.C. 386, 388–89 (1984) ((1) establishing two-pronged test for the admission of real evidence: (a) item must be identified as being the same object involved in the incident and (b) it must be shown that the object has undergone no material change; (2) stating that trial court has discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition; (3) requiring a detailed chain of custody only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered; and (4) stating that "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility").
    b. *See also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' . . . this does not mean that everyone who laid hands on the evidence must be called. . . .'[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody

are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."); *State v. Andrews*, 233 N.C. App. 239 (2014) (unpublished) (finding "ample testimony presented by the two most important links in the chain of custody for the trial court to conclude the blood sample was the same as that taken from defendant and had undergone no material change" and concluding, therefore, that the trial court did not abuse its discretion in admitting the blood test results).

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

    To use an affidavit in this way, the State must notify the defendant no later than 15 business days after receiving the affidavit and at least 15 business days before the proceeding at which the affidavit will be introduced that it intends to introduce the affidavit. The State must provide a copy of the affidavit to the defendant. The State may introduce the affidavit without further authentication and without testimony from the analyst if the defendant, after receiving notice of the State's intent and a copy of the affidavit, fails to file a written objection with the court, at least 5 days before the proceeding at which the affidavit will be used. If the case is continued, the notice and written objection (or lack thereof) remain effective at any subsequent calendaring of that proceeding. G.S. 20-139.1(e2).
5. **Continuance so that analyst may appear.** G.S. 20-139.1(e2), which sets forth the rules for providing notice and demand for a chemical analyst's affidavit in district court, requires that the case be continued until the analyst can be present. It also states that the criminal case "shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court."
6. **Remote testimony by lab analysts in district court.** G.S. 15A-1225.3 and G.S. 20-139.1 authorize remote testimony by analysts in district court criminal proceedings regardless of whether the defendant objects.

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

    Chemical analysts. G.S. 20-139.1(c6) permits a laboratory analyst to testify remotely in a district court proceeding regarding the results of a chemical analysis of blood or urine reported by the analyst if two conditions are met. First, the State has provided a copy of the analyst's report to the defendant's attorney of record or to the defendant if he or

she is unrepresented. Second, the State has notified the defendant's attorney or the unrepresented defendant at least 15 business days before the proceeding at which the evidence would be used of its intention to introduce remote testimony regarding the chemical analysis. If these procedures are followed, the testimony of each person in the associated chain of custody also may be provided remotely.

Both statutes require that the method used for remote testimony permit the trier of fact and all parties to observer the demeanor of the remote witness in a similar manner as if the witness were testifying in person. The court must ensure that the defendant's attorney or an unrepresented defendant has a full and fair opportunity to examine and cross-examine the witness. For discussion of potential constitutional challenges to these provisions, see Shea Denning, *Remote Testimony by Lab Analysts Authorized in District Court – Even Without Defendants' Consent*, North Carolina Criminal Law Blog (December 6, 2021), *available at* https://nccriminallaw.sog.unc.edu/remote-testimony-by-lab-analysts-authorized-in-district-court-prosecutions-even-without-defendants-consent/.

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

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

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

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

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

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

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

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

Is consent to a blood or urine test expressed after being advised of implied consent rights sufficient? Yes, it can be, depending on the totality of the circumstances. *See State v. Romano*, 369 N.C. 678, 692 (2017) (stating that "the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw" under the

totality of the circumstances; noting that the State has the burden of proving voluntary consent), *overruled on other grounds*, *Mitchell v. Wisconsin*, 588 U.S. ___, 135 S. Ct. 2525 (2019) (discussed below).

Can an unconscious person consent to testing? G.S. 20-16.2(b) permits a law enforcement officer to withdraw blood from an unconscious defendant without advising the person of his or her implied consent rights or asking for his or her consent. The North Carolina Supreme Court held in *State v. Romano*, 369 N.C. 678 (2017), that G.S. 20-16.2(b) was unconstitutional as applied to the defendant, who was unconscious when his blood was drawn and where the circumstances did not establish an exigency or voluntary consent. A plurality of the United States Supreme Court subsequently held in *Mitchell v. Wisconsin*, 588 U.S. ___, 135 S. Ct. 2525 (2019), that when an officer has probable cause to believe a person has committed an impaired driving offense and the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may "almost always" order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment, based on the exigency exception to the warrant requirement. The plurality did not rule out that in an "unusual case," a defendant could show that his or her blood would not have otherwise been withdrawn had the State not sought blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties. The North Carolina Court of Appeals held in *State v. Burris*, __ N.C. App. ___, 890 S.E.2d 539 (2023), that the State met its burden of establishing sufficient exigent circumstances pursuant to the test set forth in *Mitchell* to justify the warrantless withdrawal of the defendant's blood. The defendant was unconscious at the scene of the crash and was transported to the hospital for the treatment of serious injuries. The investigating officer spent an hour investigating the crash and securing the scene. The officer then went directly to the hospital, where the defendant had been sedated and remained unconscious. Given the severity of the defendant's injuries, the officer was concerned that the defendant might have to undergo surgery of an unknown duration. The officer also was unsure how long it would take to secure a warrant from a magistrate. The officer obtained a sample of Burris's blood while Burris remained unconscious. The officer did not seek or obtain a warrant authorizing the blood draw.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. State the duties of the prosecutor at sentencing.

Before a sentencing hearing for an offense sentenced under G.S. 20-179 in district court, the prosecutor must make all feasible efforts to obtain the defendant's full record of traffic convictions and must present this record to the judge for consideration at sentencing. G.S. 20-179(a)(2). Upon the defendant's request, the prosecutor must provide to the defendant or his or her attorney a copy of the defendant's record of traffic convictions at a reasonable time before introducing the record into evidence. *Id.* The

prosecutor must present all other appropriate grossly aggravating and aggravating factors of which the prosecutor is aware. *Id.* The prosecutor must present evidence of the resulting alcohol concentration from any valid chemical analysis of the defendant. *Id.*

13. Apply DWI sentencing laws.

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

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

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

c. What is the maximum length of probation?
Five years

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

a. At what level should the defendant be sentenced and why?
Level 1. The presence of the grossly aggravating factors in G.S. 20-179(c)(2) requires sentencing at Level 1.

b. What are the requirements for sentencing at this level?
30 days minimum to 24 months maximum
If suspended
Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days
And defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.6

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

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

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

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

30 days minimum to 24 months maximum

If suspended

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

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

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

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

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

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

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

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

12 months minimum to 36 months maximum.

If suspended

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

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

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

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

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

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

The minimum sentence for an Aggravated Level One DWI is 12 months. The defendant will be released after serving 8 months to serve 4 months of post-release supervision.

The defendant's sentence will not be reduced by good time credit as DAC does not apply those credits to Aggravated Level One sentences.

E. The defendant pleads guilty to two DWI offenses.

a. May the offenses be consolidated for sentencing?

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

b. May the sentences run concurrently?

Yes.

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

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

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

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

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

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

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

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

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

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

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

DWI Sentencing

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

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

1 Determine the Applicable Law

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

Offenses committed on or after October 1, 2013

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

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

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

2 Determine Whether Any Grossly Aggravating Factors Exist

There are four grossly aggravating factors:

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

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

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

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

4 Count the Grossly Aggravating Factors

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

5 Determine the Sentencing Level

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

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

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

6 Consider Aggravating and Mitigating Factors

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

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

7 Determine Aggravating Factors

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

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

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

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

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

8 Determine Mitigating Factors

Determine whether mitigating factors exist.

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

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

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

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

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

(4) A safe driving record.

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

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

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

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

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

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

9 Weigh Aggravating and Mitigating Factors

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

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

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

10 Select a Sentence of Imprisonment

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

Place of Confinement

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

11 Review Additional Issues, as Appropriate

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

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

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

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

Appendix G: Place of Confinement Chart

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

Notes

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

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

DRIVING WHILE IMPAIRED CONVICTIONS

STATISTICAL REPORT

FISCAL YEAR

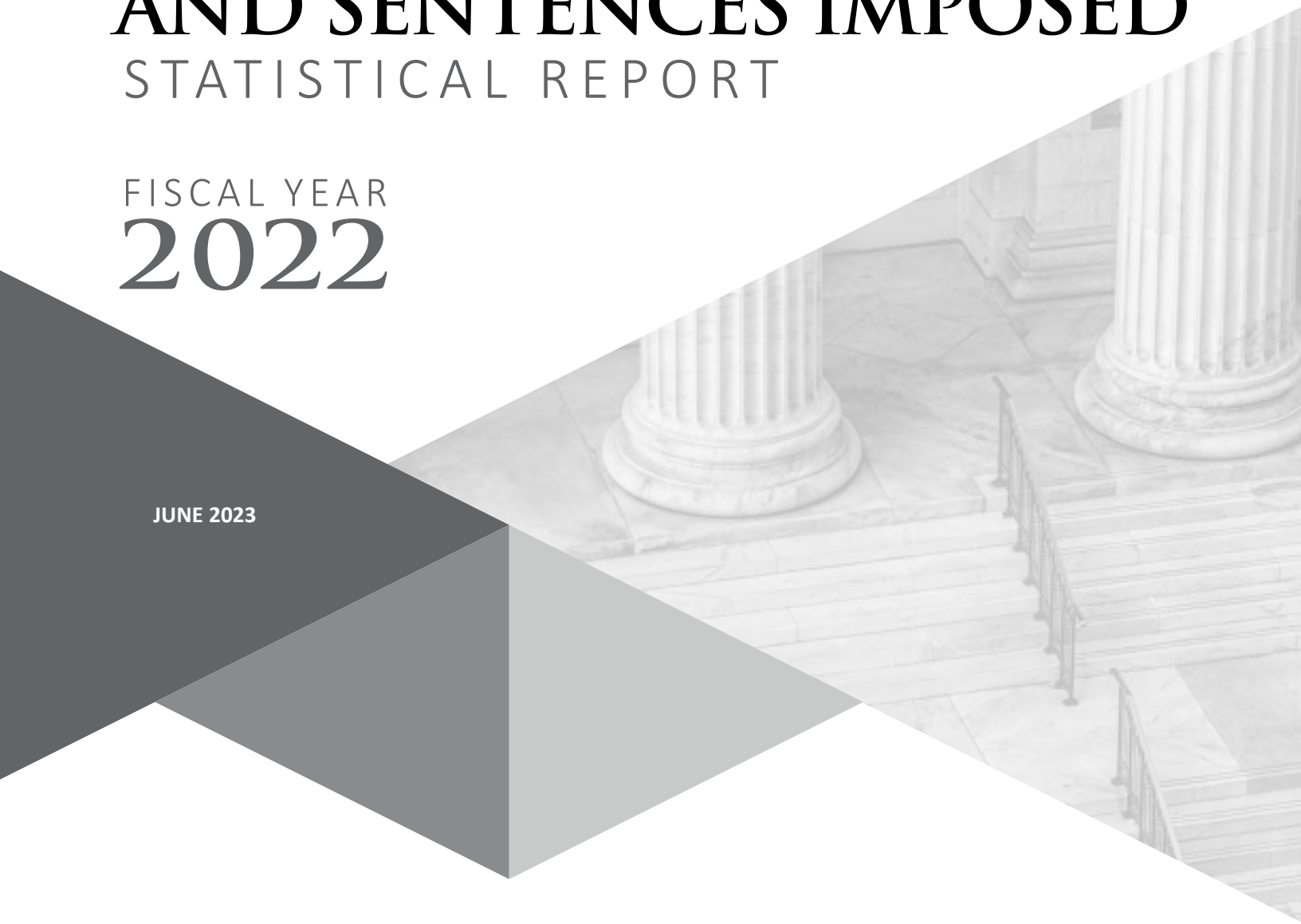
2022

NORTH CAROLINA
SENTENCING AND POLICY ADVISORY COMMISSION

DRIVING WHILE IMPAIRED CONVICTIONS AND SENTENCES IMPOSED

STATISTICAL REPORT

FISCAL YEAR
2022



JUNE 2023

THE HONORABLE CHARLIE BROWN
CHAIRMAN

MICHELLE HALL
EXECUTIVE DIRECTOR

NORTH CAROLINA
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TABLE OF CONTENTS

INTRODUCTION

This report provides detailed information about driving while impaired (DWI) convictions sentenced under North Carolina General Statute (hereinafter G.S.) 20-179 during Fiscal Year 2022 (July 1, 2021 through June 30, 2022). These data reflect the laws and practices that were in place during this time period.

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

The following impaired driving offenses are excluded from this report:

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

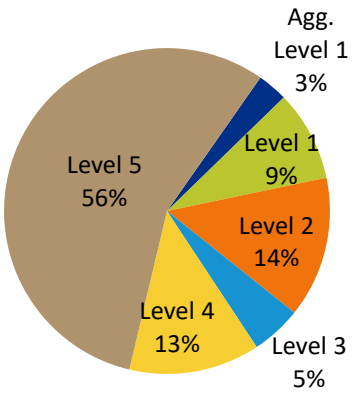
The report presents information on the number of DWI convictions, the distribution of DWI convictions across the six punishment levels, the types of sentences imposed, as well as data about several other issues. The Appendix includes data on DWI convictions by district and county, as well as additional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

While the COVID-19 pandemic had an impact on the criminal justice system and court operations, DWI convictions have returned to near pre-pandemic levels. However, time to sentencing has continued to be impacted with cases taking longer to process and thus increasing the average time to sentencing.

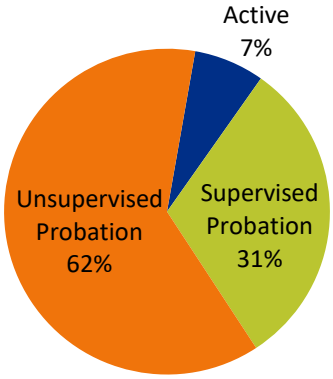
SUMMARY OF FINDINGS
FY 2022 DWI CONVICTIONS

During FY 2022, sentences for 26,333 DWI convictions were imposed. Under G.S. 20-179, offenders convicted of DWI are subject to punishment in one of six punishment levels (Aggravated Level 1, Level 1 through Level 5). As shown in the figures below, most DWI convictions were sentenced in Level 5 (56%) and a majority of offenders received unsupervised probation (62%).

Convictions by Punishment Level

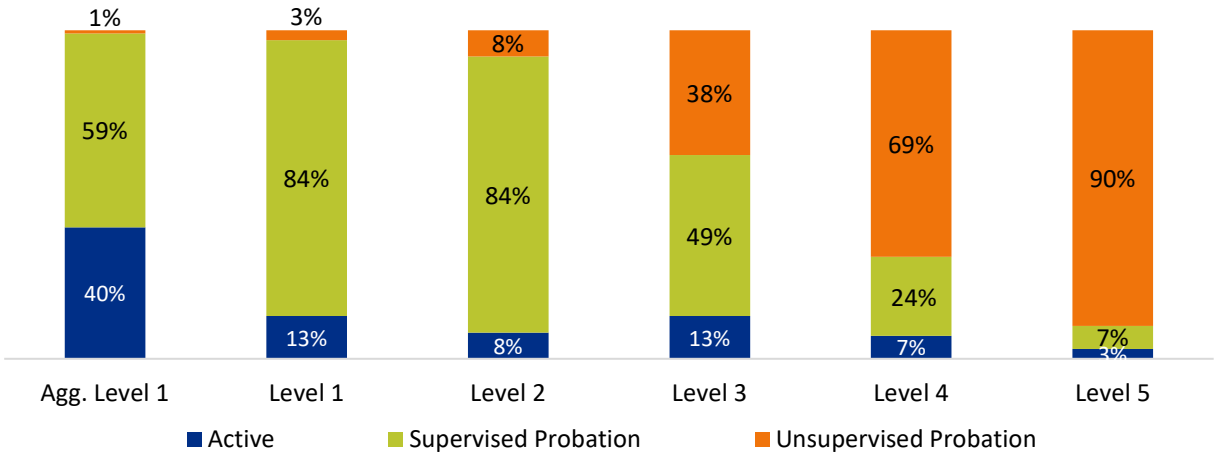


Convictions by Type of Sentence



The type of sentence imposed by punishment level is shown below. Overall, 7% of DWI convictions resulted in an active sentence; the highest percentage of active sentences was imposed for offenders with an Aggravated Level 1 punishment (40%). Supervised probation was the most frequently imposed among Aggravated Level 1 and Level 1 through Level 3 convictions – ranging from 49% for Level 3 to 84% each for Level 1 and Level 2. Unsupervised probation was most frequently imposed among Level 4 (69%) and Level 5 (90%) convictions.

Type of Sentence Imposed by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

DWI CONVICTIONS IN FY 2022

DWI CONVICTIONS

This report contains information on DWI convictions sentenced under G.S. 20-179[1] during Fiscal Year 2022 (July 1, 2021 through June 30, 2022) and reflects the laws and practices that were in place during this time period. Overall, sentences for 26,333 DWI convictions were imposed.[2] (This number excludes sentences imposed for aiding and abetting DWI, even though convictions for this offense are sentenced in Level 5 (G.S. 20-179(f1)). The offense of Habitual Impaired Driving is sentenced under Structured Sentencing as a Class F felony. Information on convictions for this offense is also excluded from this report.

Definition of the Unit of Analysis

The report is based on data entered into the Administrative Office of the Courts' (AOC's) management information system by the court clerk following the imposition of the sentence. The report covers all North Carolina counties. The unit of analysis is a *sentencing episode*, which includes cases disposed through conviction on a given day of court.[3] Within a sentencing episode, this report examines the most serious conviction. For the sake of simplicity, throughout the report the unit of analysis is referred to as "conviction."

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

While a sentencing episode involves one offender, in this reporting time frame an offender may be represented by more than one sentencing episode (meaning that within the fiscal year the number of offenders will be the same as or less than the number of sentencing episodes reported).

Data Limitations

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

Distribution of DWI Convictions by Punishment Level

Figure 1 shows the distribution of DWI convictions across punishment levels. The majority of convictions were in Level 5 (n=14,707 or 56%). The percentage of convictions increased from Aggravated Level 1 (3%) through Level 2 (14%), and then again from Level 3 (5%) through Level 5 (56%). Aggravated Level 1 through

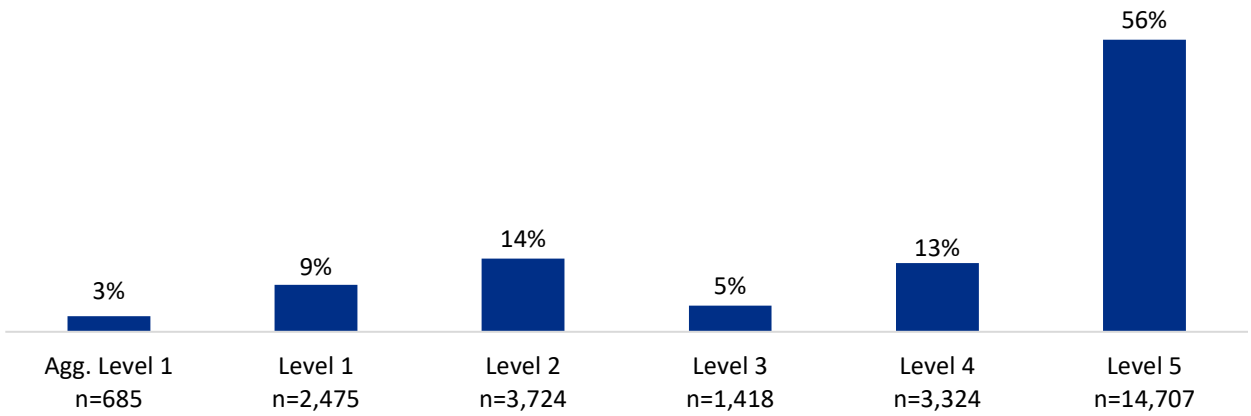
[1] In addition to convictions for impaired driving (G.S. 20-138.1), G.S. 20-179 also prescribes sentencing for impaired driving in a commercial vehicle (G.S. 20-138.2), a second or subsequent conviction for operating a commercial vehicle after consuming alcohol (G.S. 20-138.2A), and a second or subsequent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

[2] For many of the tables and figures in this report, 11 of the 26,333 DWI convictions were excluded because the type of sentence imposed could not be determined.

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

Level 2 punishments are based on the presence of grossly aggravating factors, while Level 3 through Level 5 punishments are based on the presence and weighing of aggravating and mitigating factors.[4]

Figure 1
Convictions by Punishment Level



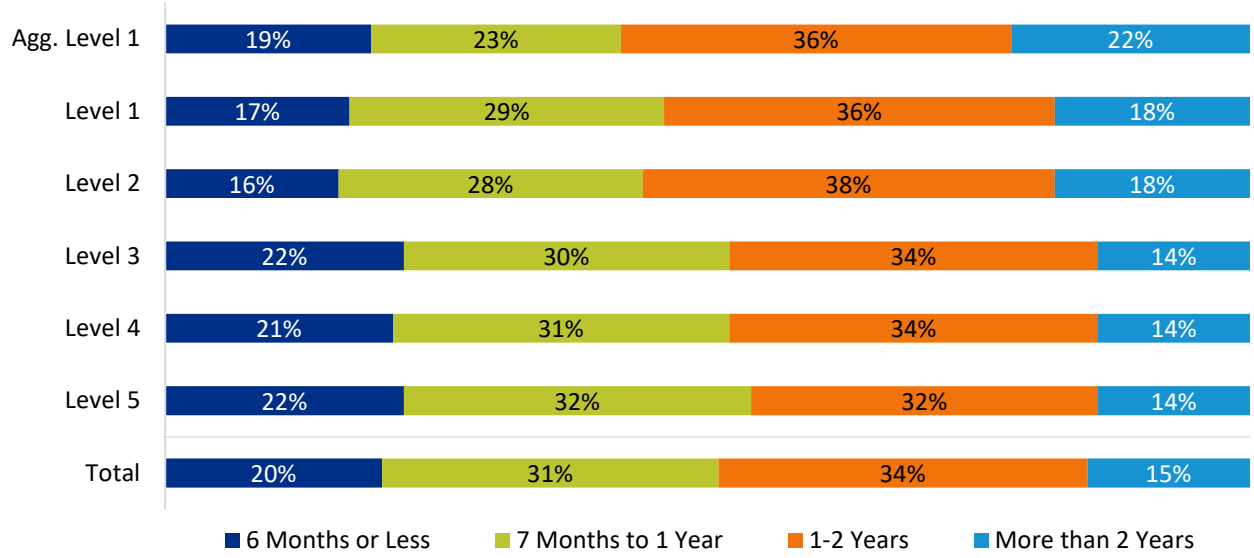
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Time to Sentencing

Time to sentencing refers to the amount of time between the date the offender was charged with DWI and the date the sentence was imposed. Figure 2 illustrates the distribution of time to sentencing for convictions by punishment level. Overall, 20% of convictions occurred within 6 months or less, 31% occurred within 7 months to 1 year, 34% occurred within 1 to 2 years, and 15% occurred in more than 2 years; Half (51%) of convictions were sentenced within 1 year or less. A smaller percentage of Aggravated Level 1 convictions were sentenced within 1 year compared to Level 1 through Level 5 convictions. Information on time to sentencing by method of disposition can be found in the Special Issues section.

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

Figure 2
Time to Sentencing by Punishment Level



Note: Of the 26,333 DWI convictions in FY 2022, 40 convictions with discrepant date values were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Month of Sentencing

Figure 3 shows the number of convictions by month of sentencing during FY 2022. Convictions generally decreased during the first half of the fiscal year and increased during the second half. Convictions were lowest in December 2021 and were highest in March 2022.

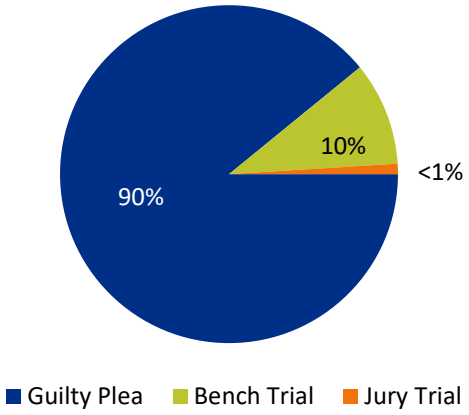
Figure 3
Convictions by Month of Sentencing

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Method of Disposition

Figure 4 shows that 90% of DWI convictions in FY 2022 resulted from guilty pleas and 10% from bench trials. Jury trials occurred for less than 1% of convictions (n=74). Across all punishment levels, Level 1 convictions had the highest percentage of guilty pleas (91%), conversely, Level 5 convictions had the highest percentage of bench trials (11%). Method of disposition was otherwise similar across the other punishment levels.

Figure 4
Convictions by Method of Disposition

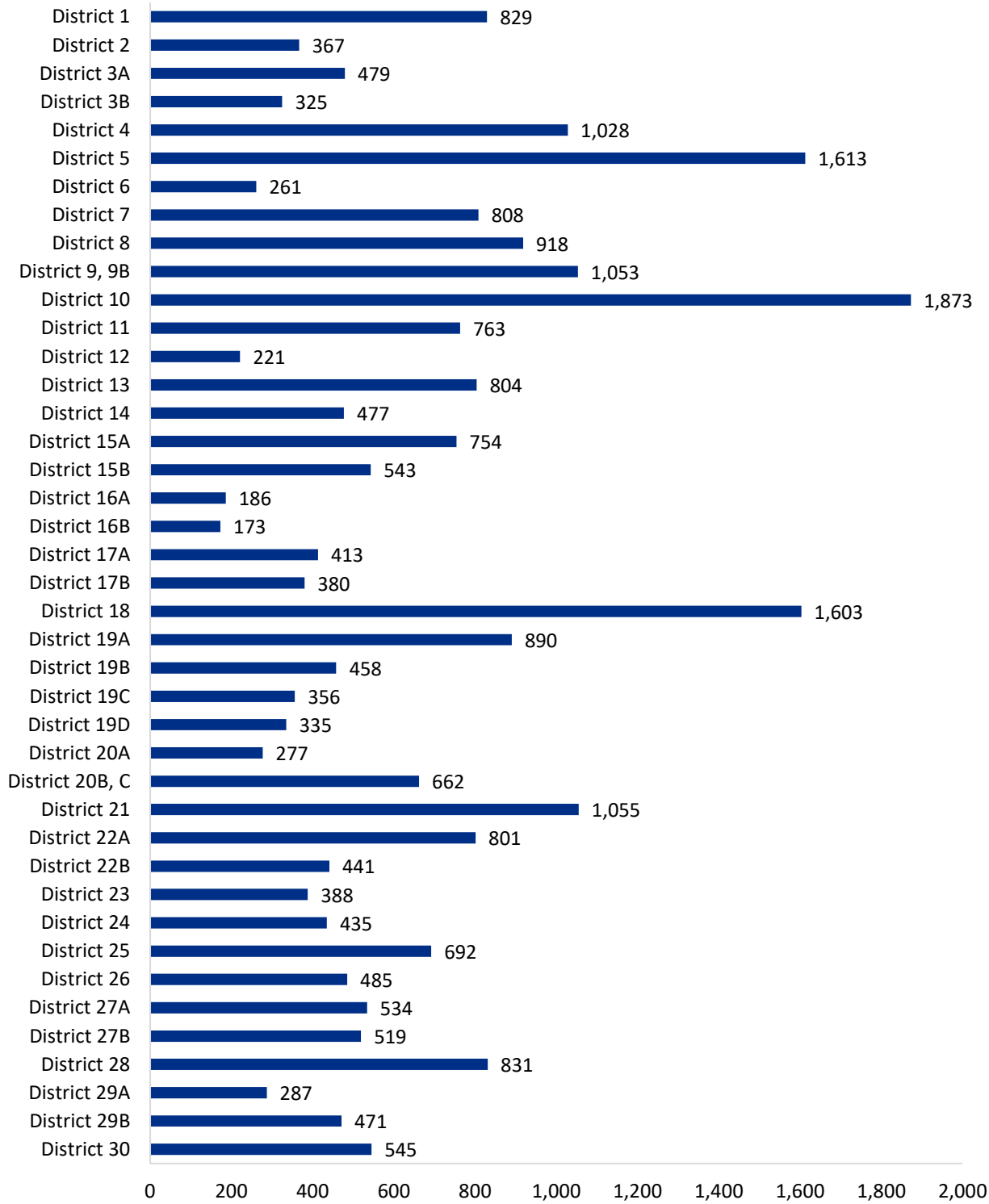


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Judicial District

Figure 5 shows the total number of convictions by judicial district (N=26,333). District 10 (Wake County, n=1,873), District 5 (New Hanover County and Pender County, n=1,613), and District 18 (Guilford County, n=1,603) had the most DWI convictions and accounted for a combined 19% of convictions in FY 2022. Additional information about DWI convictions by district and county can be found in Appendix C.

Figure 5
Convictions by Judicial District



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

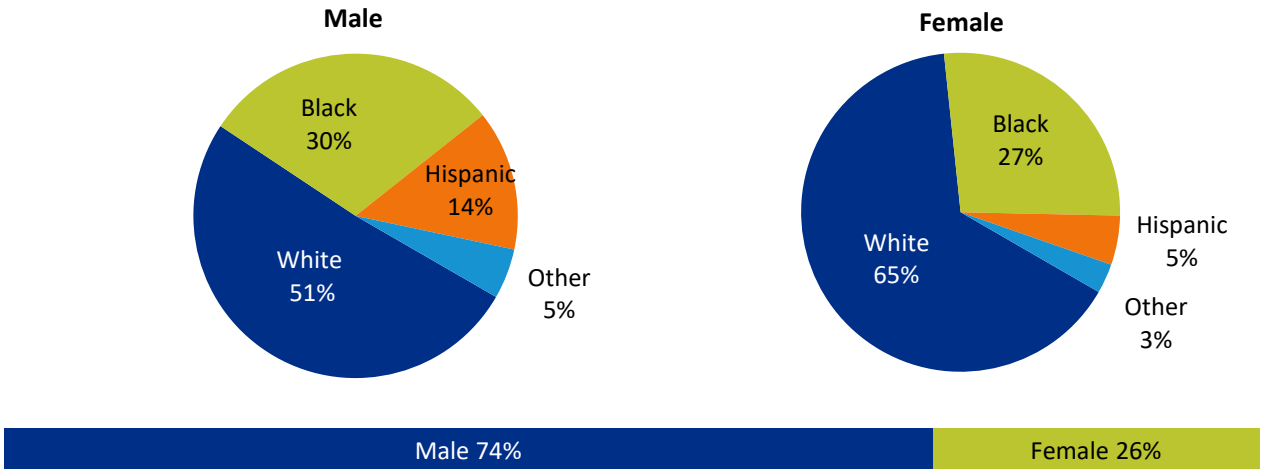
OFFENDER CHARACTERISTICS

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

Sex, Race, and Age at Offense

Of the 26,333 DWI convictions in FY 2022, 74% were for males (*see* Figure 6). Overall, the majority of DWI offenders were White (55%), followed by Black (29%), Hispanic (11%), and Other (5%). White females comprised a larger percentage of convictions for females (65%) compared to White males as a percentage of convictions for males (51%). While Black males and females comprised similar percentages by sex (30% and 27% respectively), the percentage of convictions for Hispanic males was larger (14%) compared to Hispanic females (5%).

Figure 6
Convictions by Sex and Race



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

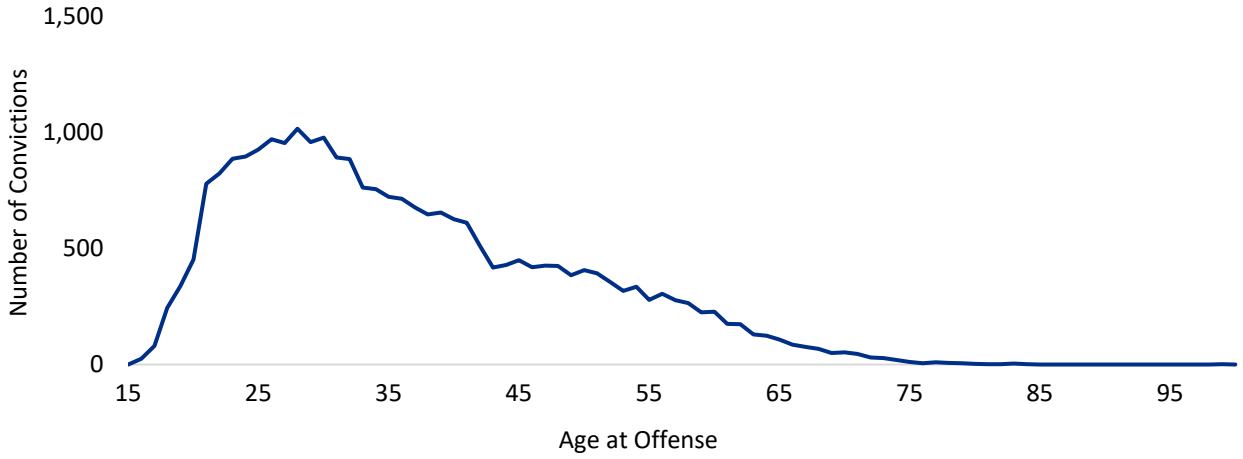
Table 1 shows convictions by age at offense and punishment level. Overall, the average age of DWI offenders was 37, with Level 5 offenders being slightly younger on average (35) than offenders sentenced in the other punishment levels. Most convictions were for offenders aged 21-40 at the time of offense, ranging from a low of 55% for Level 3 to a high of 65% for Level 1. Just under half (45%) of all Level 5 convictions were for offenders aged 30 and younger. As shown in Figure 7, the volume of offenders peaked at age 28, and then generally declined as age increased.

Table 1
Convictions by Age at Offense and Punishment Level

Punishment Level	#	Average Age	Age at Offense				
			<21	21-30	31-40	41-50	>50
			%	%	%	%	%
Agg. Level 1	685	38	1	28	34	23	14
Level 1	2,475	37	1	32	33	20	14
Level 2	3,724	38	2	30	31	19	18
Level 3	1,417	39	3	25	30	21	21
Level 4	3,320	38	4	30	29	19	18
Level 5	14,700	35	6	39	25	15	15
Total	**26,321**	**37**	**4**	**35**	**28**	**17**	**16**

Note: Of the 26,333 DWI convictions in FY 2022, 12 convictions with missing values for offender age were excluded from the table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Figure 7
Distribution of Convictions by Age at Offense

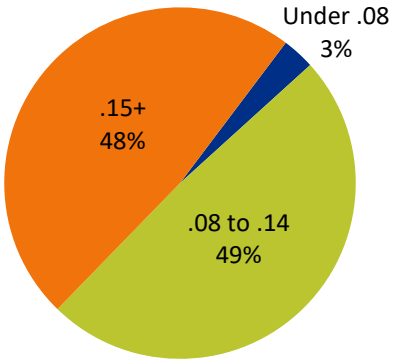


Note: Of the 26,321 DWI convictions in FY 2022, 12 convictions with missing values for offender age were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Blood Alcohol Concentration (BAC)

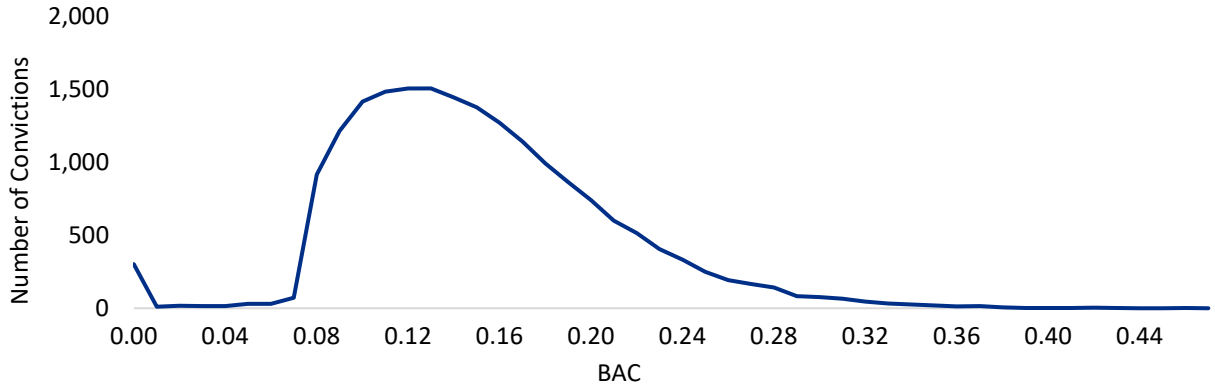
BAC levels were recorded for 73% of convictions.[5] Figure 8 shows the percentage of convictions by BAC category. The highest percentage of convictions were in the .08 to .14 category (49%), followed closely by the .15+ category (48%). Figure 9 illustrates the distribution of BAC for DWI offenders for each individual BAC recorded. A BAC of .13 or .12 were the most frequent (1,505 and 1,504 respectively), followed closely by.11 (n=1,482). These three BAC levels accounted for a combined total of 23%.

Figure 8
Convictions by BAC



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Figure 9
Distribution of BAC



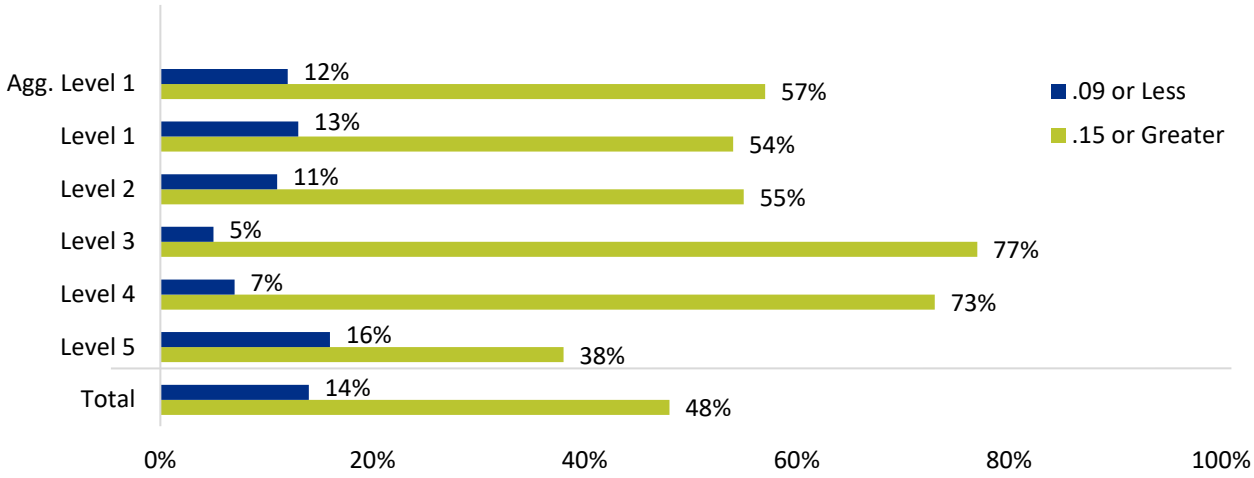
Note: Of the 26,333 DWI convictions in FY 2022, 6,987 convictions without BAC levels were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

[5] This section examines data contained in the AOC's BAC field at sentencing. The AOC's BAC data include information beyond numeric BAC values. Clerks use the same field to record refusals, blood tests, and whether the DWI charge stemmed from drugs or controlled substances other than alcohol. Data on these occurrences were incomplete, however, because clerks may overwrite initial data (e.g., blood test) with information that becomes available later (e.g., the BAC result of the blood test). The FY 2022 data showed refusals occurred in 11% of convictions, blood tests occurred in 5% of convictions, DWI under controlled substances other than alcohol occurred in 3% of convictions, and BAC was unknown in 8% of convictions. However, given the possibility of overwriting, the actual percentages of convictions involving refusals and blood tests were not known.

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

Figure 10 shows the percentage of convictions by punishment level with a BAC of .09 or less and those with a BAC of .15 or more. Level 3 and Level 4 convictions had the highest percentage of convictions with BAC levels greater than .15 (77% and 73% respectively). Correspondingly, these same punishment levels also had the lowest percentage of convictions with BAC levels of .09 or less (5% and 7% respectively). Level 5 convictions had the highest percentage of convictions with BAC levels of .09 or less (16%).

Figure 10
Convictions by Mitigating and Aggravating BAC Levels and Punishment Level



Note: Of the 26,333 DWI convictions in FY 2022, 6,987 convictions without BAC levels were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

SENTENCES IMPOSED AND METHOD OF DISPOSITION

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

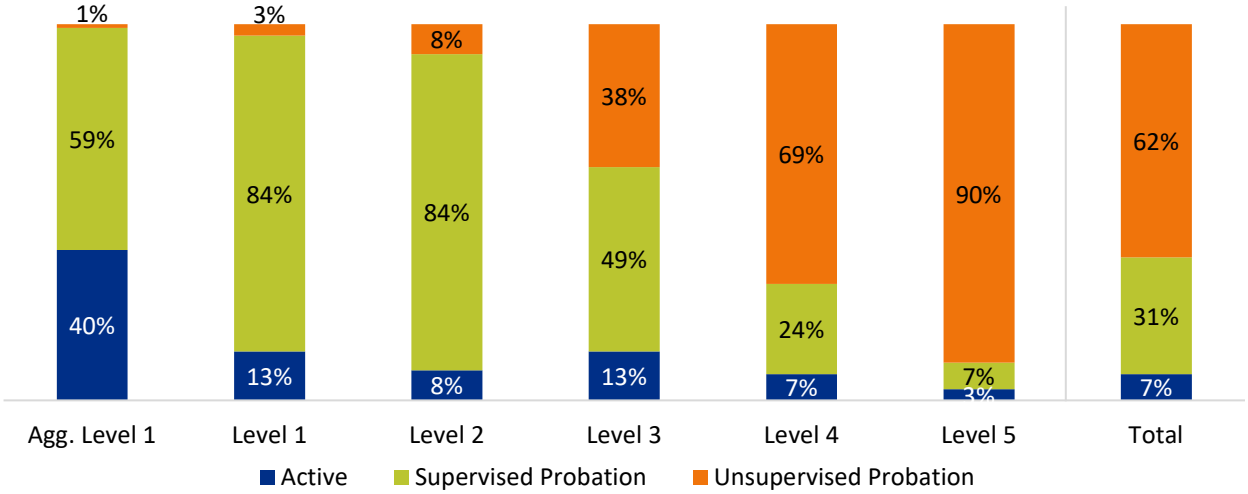
Type of Sentence Imposed and Punishment Level

Figure 11 and Table 2 show that 7% of DWI convictions in FY 2022 resulted in an active sentence, 31% resulted in supervised probation, and 62% resulted in unsupervised probation. The highest percentage of active sentences was imposed for offenders with an Aggravated Level 1 punishment (40%). Supervised

[6] G.S. 20-179(f)(1)-(3)
[7] G.S. 20-179(c)
[8] This section excludes 11 of the 26,333 DWI convictions in FY 2022 for which the type of sentence imposed could not be determined.

probation was most frequently imposed among Aggravated Level 1 and Level 1 through Level 3 convictions – ranging from 49% for Level 3 to 84% each for Level 1 and Level 2. Unsupervised probation was most frequently imposed among Level 4 (69%) and Level 5 (90%) convictions. Despite being a lower punishment level, the percentage of convictions that resulted in an active sentence for Level 3 punishments (13%) was higher than for Level 2 punishments (8%). As noted previously, Aggravated Level 1 through Level 2 punishments are based on the presence of grossly aggravating factors while Level 3 through Level 5 are not.

Figure 11
Convictions by Type of Sentence Imposed and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

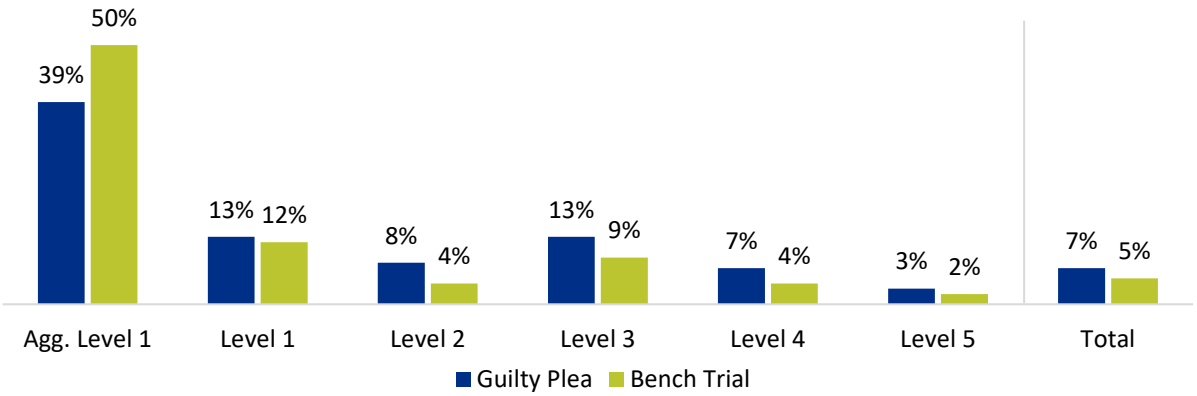
Table 2
Convictions by Type of Sentence Imposed and Punishment Level

Punishment Level	Type of Sentence Imposed						Total
	Active		Supervised Probation		Unsupervised Probation		
	#	%	#	%	#	%	
Agg. Level 1	277	40	404	59	4	1	685
Level 1	310	13	2,081	84	82	3	2,473
Level 2	297	8	3,119	84	307	8	3,723
Level 3	184	13	693	49	541	38	1,418
Level 4	230	7	798	24	2,295	69	3,323
Level 5	452	3	1,079	7	13,169	90	14,700
Total	**1,750**	**7**	**8,174**	**31**	**16,398**	**62**	**26,322**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Figure 12 shows the percentage of convictions that resulted in an active sentence for each punishment level by method of disposition. In FY 2022, 7% of all convictions obtained by guilty plea resulted in an active sentence compared to 5% of all convictions resulting from bench trials. Higher rates of active sentences for guilty plea convictions than for bench trials were found across all punishment levels except Aggravated Level 1.

Figure 12
Rate of Active Sentences by Method of Disposition and Punishment Level



Note: The overall rate of active sentences for jury trials was 14% (n=10). Jury trials were excluded from the figure due to the limited number of observations (n=74).
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Sentence Length Imposed

Under G.S. 15A-1351(b), judges must impose a maximum term of imprisonment and may impose a minimum term. For the purpose of this analysis, sentence length refers to the maximum term imposed.[9] Table 3 examines active sentences only and shows the average active sentence within the context of the statutory minimum and statutory maximum possible sentences. When an active sentence was imposed (n=1,750), the average length was 7 months. Among convictions in Level 1 through Level 5, the average active sentence length was about half of the statutory maximum.

[9] For more information on the use of minimum and maximum terms, *see* Figure 19.

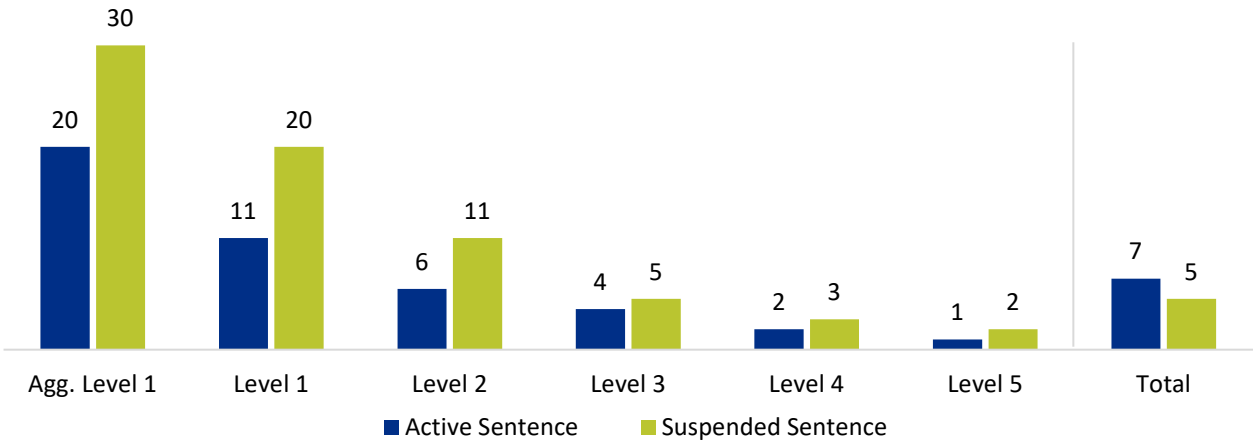
Table 3
Average Length of Active Sentences (Months) by Punishment Level

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

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Figure 13 provides a comparison of the average sentence imposed for active sentences and suspended sentences. As punishment level decreased, the average sentence length decreased. Aggravated Level 1 DWI convictions had the longest average active and suspended sentences imposed. For each punishment level, the average sentence for offenders who received a suspended sentence was longer than the average sentence for those who received an active sentence. However, the overall average sentence for active sentences was longer than the average sentence imposed for suspended sentences due to the large volume of Level 5 suspended sentences (n=14,248).

Figure 13
Average Sentence Length (Months) for Active and Suspended Sentences by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

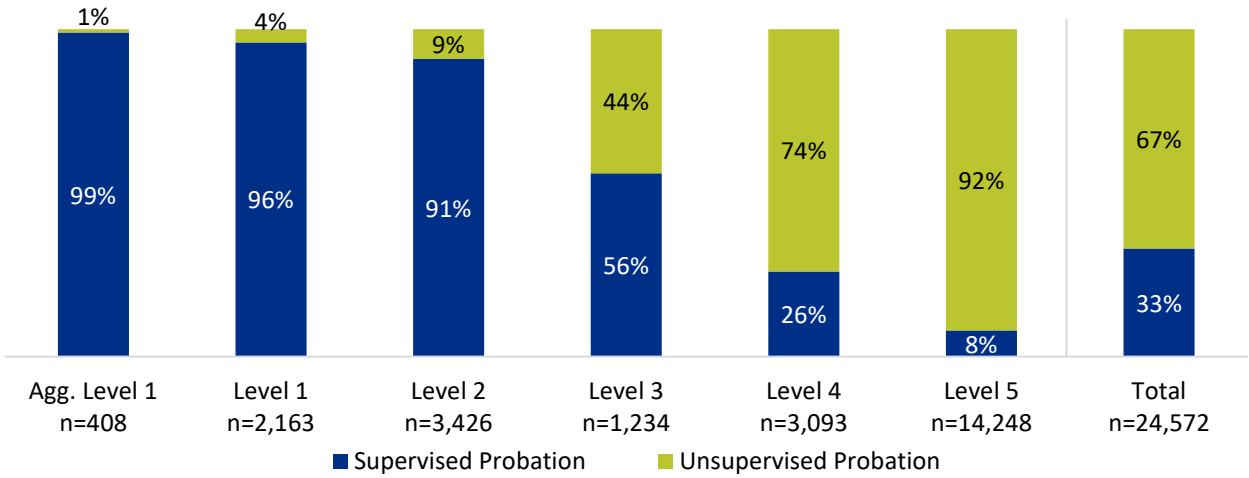
Suspended Sentences with Probation

This section summarizes information about suspended (i.e., probationary) sentences. Pursuant to G.S. 20-179, a suspended sentence may be imposed in each of the six levels of DWI punishment if the sentence contains certain conditions of probation (e.g., special probation). For all punishment levels receiving a suspended sentence, the defendant must obtain a substance abuse assessment and complete any recommended treatment or education. Unless a judge determines that supervised probation is necessary,

an offender who receives a suspended sentence for DWI and meets certain conditions[10] must be placed on unsupervised probation. The precise length of a probation term for a DWI conviction is not prescribed by statute. The court may place a convicted offender on probation for a period not to exceed five years.[11]

Probation was imposed for all 24,572 DWI convictions in FY 2022 with a suspended sentence. Figure 14 summarizes the type of probation – supervised or unsupervised – for suspended sentences. Overall, two-thirds (67%) of offenders received unsupervised probation. Nearly all Aggravated Level 1 and Level 1 offenders with a suspended sentence received supervised probation (99% and 96% respectively). Level 5 offenders accounted for almost 60% of all suspended sentences with probation (i.e., 14,248 of 24,572 offenders). As punishment level decreased, a greater percentage of offenders received unsupervised probation.[12]

Figure 14
Suspended Sentences by Type of Probation and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Figure 15 provides the average length of probation by punishment level and type of probation. The average length of probation was 18 months for supervised and 13 months for unsupervised probation. Offenders with supervised probation received longer probation terms than offenders with unsupervised probation. Generally, as punishment level decreased, the average length of probation supervision decreased.

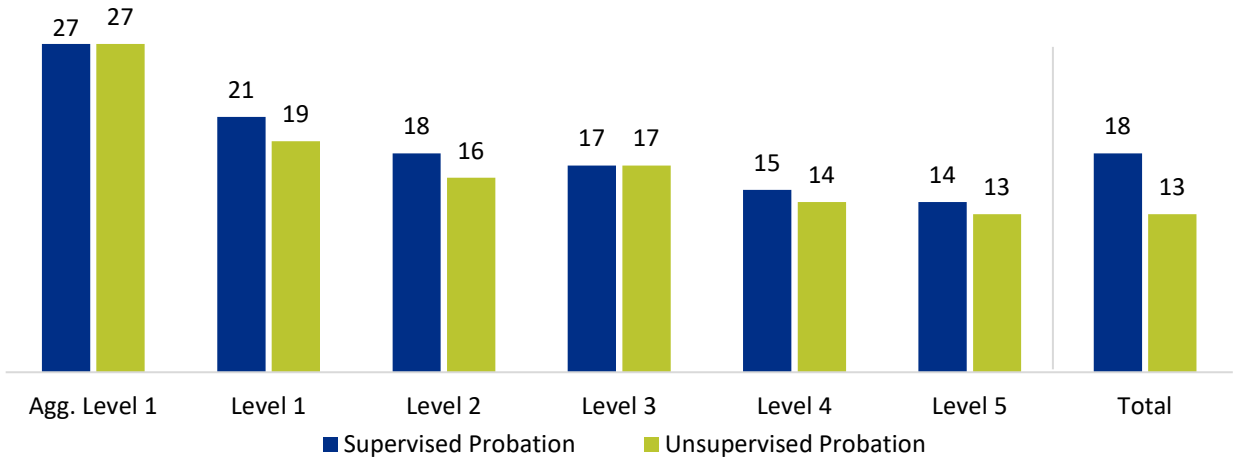
Table 4 explores the most frequently imposed probation length (mode) for each punishment level by type of probation. Except for Aggravated Level 1 convictions, among offenders who received unsupervised probation, 12 months was the most frequently imposed probation length. More variation in probation length occurred among offenders who received supervised probation ranging from 12 to 24 months.

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

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

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

Figure 15
Average Length of Probation (Months) by Type of Probation and Punishment Level



Note: The average length of probation for unsupervised probation in Aggravated Level 1 was based on fewer than 5 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

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

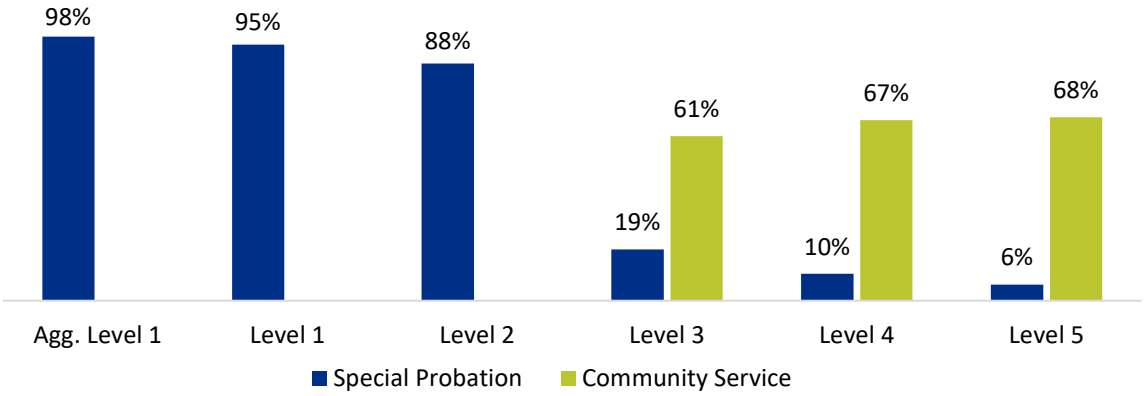
Punishment Level	Total	Type of Probation					
		Supervised Probation			Unsupervised Probation		
		#	Months (Mode)	%	#	Months (Mode)	%
Agg. Level 1	408	404	24	41	4	36	50
Level 1	2,163	2,081	24	45	82	12	41
Level 2	3,426	3,119	18	40	307	12	48
Level 3	1,234	693	18	43	541	12	56
Level 4	3,093	798	12	61	2,295	12	77
Level 5	14,248	1,079	12	75	13,169	12	87
Total	**24,572**	**8,174**	**12**	**38**	**16,398**	**12**	**84**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Special probation is required for Aggravated Level 1 through Level 2 offenders who receive probation,[13] while either special probation or community service is required for Level 3 through Level 5 offenders who receive probation.[14] Mandatory probation conditions by punishment level are shown in Figure 16.

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

Figure 16
Mandatory Probation Conditions by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Table 5 shows the number, percent, and average days of special probation ordered within the context of statutory requirements. Of all suspended sentences with probation, 28% (n=6,938) had special probation ordered (*see* Table 5). The average number of special probation days was highest for Aggravated Level 1 DWI offenders and decreased as punishment level decreased.

Table 5
Suspended Sentences with Special Probation by Punishment Level

Punishment Level	Suspended Sentences #	Special Probation Ordered %	Average Special Probation Days	Statutory Length Days
Agg. Level 1	398	98	129	At least 120
Level 1	2,060	95	31	At least 30 or at least 10 (if CAM)
Level 2	3,015	88	9	At least 7
Level 3	239	19	7	At least 3
Level 4	313	10	5	2
Level 5	913	6	2	1
Total	**6,938**	**28**	**21**	**N/A**

Note: All suspended sentences with special probation ordered are shown regardless of whether the lengths of special probation are consistent with the terms in G.S. 20-179(f3), (g)-(k). CAM stands for continuous alcohol monitoring.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Table 6 provides information on fines imposed for suspended sentences with probation by punishment level. Fines were imposed for the majority of DWI convictions (85%), ranging from a low of 70% for Aggravated Level 1 offenders to a high of 87% for Level 4 offenders. For each punishment level, the average fine amounts were much lower than the statutory maximum. Nearly all fines imposed (96%) were $500 or less. The average fine amount decreased as punishment level decreased.

Table 6
Suspended Sentences with a Fine Imposed by Punishment Level

Punishment Level	#	Fine Imposed %	Statutory Maximum	Average	Most Frequent Amount
Agg. Level 1	284	70	$10,000	$775	$500
Level 1	1,764	82	$4,000	$476	$500
Level 2	2,856	83	$2,000	$366	$300
Level 3	1,047	85	$1,000	$269	$200
Level 4	2,704	87	$500	$176	$100
Level 5	12,190	86	$200	$108	$100
Total	**20,845**	**85**	**N/A**	**$201**	**$100**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

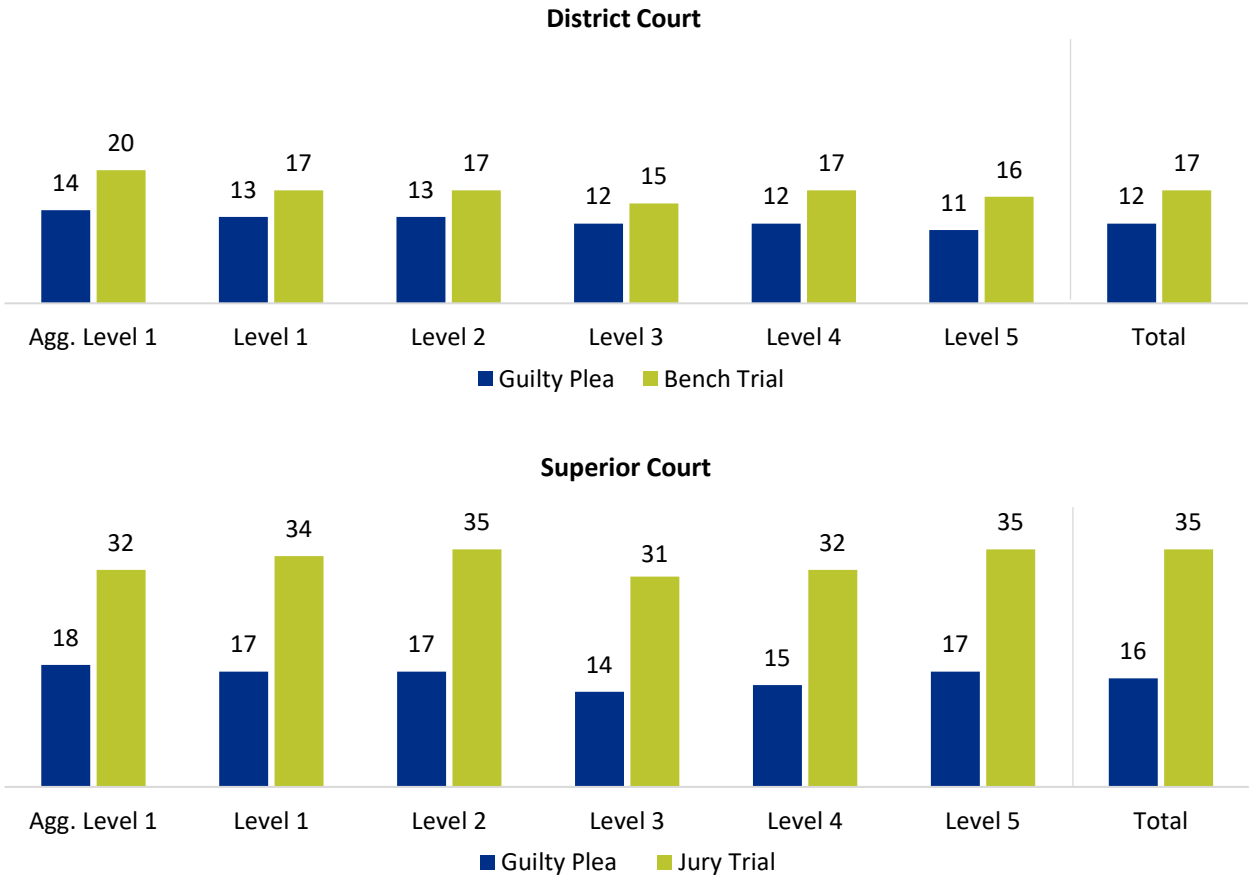
SPECIAL ISSUES

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

Time to Sentencing by Punishment Level and Method of Disposition

Figure 17 examines the median time to sentencing by punishment level and method of disposition for District Court and Superior Court. The median time to sentencing for DWI convictions sentenced in District Court was 12 months. District Court bench trials took 5 months longer to complete than District Court guilty pleas (17 months compared to 12 months). The median time to sentencing for DWI convictions sentenced in Superior Court was 17 months. Superior Court jury trials took over twice as long to complete than guilty pleas entered in Superior Court (35 months and 16 months). Time to sentencing was remarkably similar across punishment levels regardless of method of disposition.

Figure 17
Median Time to Sentencing (Months) by Punishment Level and Method of Disposition for District Court and Superior Court



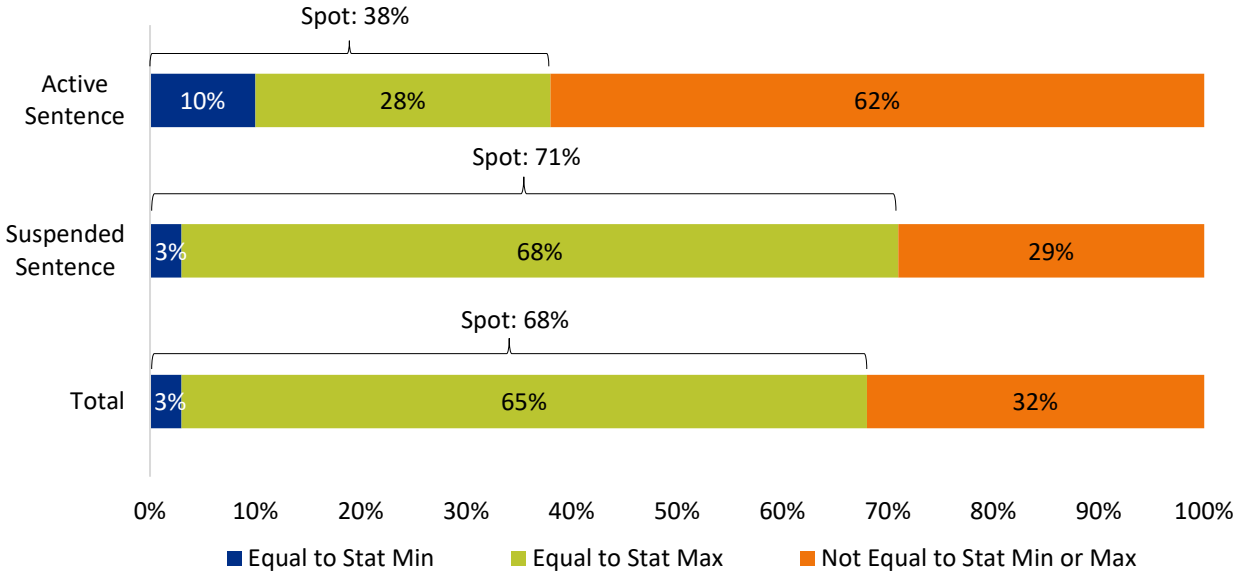
Note: Of the 26,333 DWI convictions in FY 2022, 9 Superior Court bench trials were excluded from the figure, as well as 40 convictions with discrepant date values.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Sentence Length Relative to the Statutory Minimum and Maximum Sentences

Figure 18 examines how often the minimum sentence imposed is equal to the statutory minimum or statutory maximum sentence length. Overall, the majority of minimum sentences imposed were equal to the statutory maximum (65%) and only 3% were equal to the statutory minimum – for a total of 68% on one of these two "spots." However, active sentences were only imposed on a spot 38% of the time compared to 71% of suspended sentences. The statutory minimum sentence was imposed very infrequently regardless of whether the sentence was active or suspended (with the exception of Aggravated Level 1 convictions).[15]

[15] Overall, 21% of Aggravated Level 1 offenders were sentenced to the statutory minimum (12 months), 43% were sentenced to the statutory maximum (36 months), and 36% were sentenced to a different amount of time, for a total of 64% sentenced on either the statutory minimum or statutory maximum.

Figure 18
Sentence Length Relative to the Statutory Minimum and Maximum Sentences



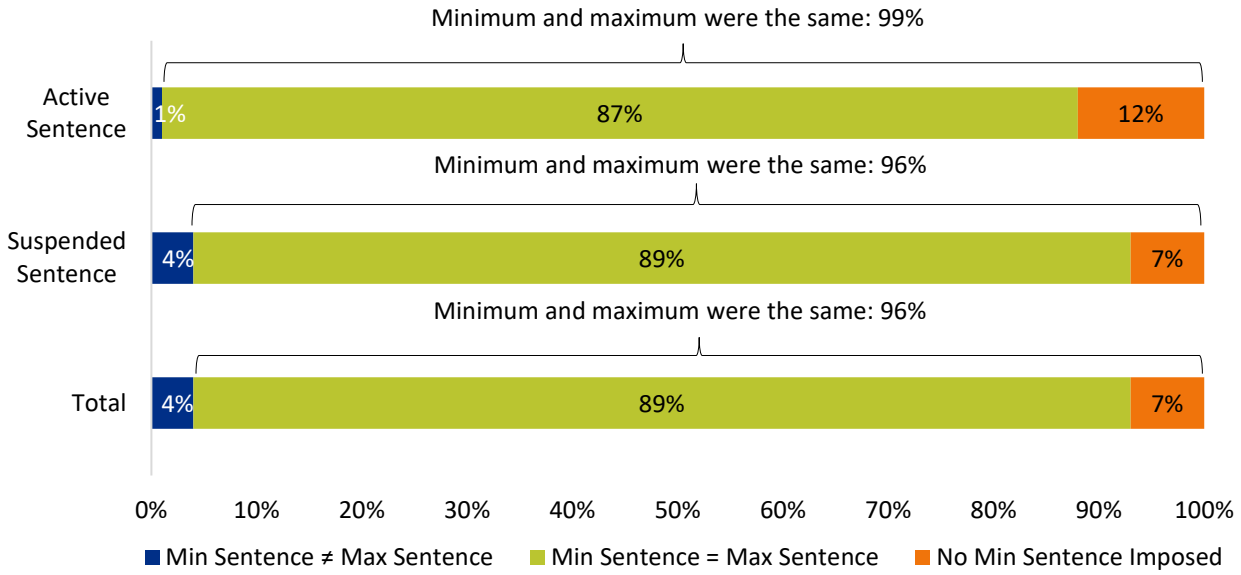
Note: Of the 26,333 DWI convictions in FY 2022, 11 convictions with missing values for type of sentence imposed were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Use of Minimum and Maximum Sentences

Judges must impose a maximum term of imprisonment and may impose a minimum term.[16] Figure 19 examines whether a minimum term was imposed and whether the minimum term equaled the maximum term. Overall, 89% of sentences imposed included a minimum term that was equal to the maximum term (e.g., 12 months minimum and 12 months maximum). In an additional 7% of sentences, no minimum term was indicated and only a maximum term was imposed. In the remaining 4% of sentences imposed, the minimum and maximum terms differed, indicating a range of months (e.g., 12 months minimum and 36 months maximum). The use of a sentencing range occurred infrequently regardless of whether an active or a suspended sentence was imposed.

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

Figure 19
Use of Minimum and Maximum Sentences



Note: Of the 26,333 DWI convictions in FY 2022, 11 convictions with missing values for type of sentence imposed were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Credit for Time Served

Credit for time served refers to the amount of time an offender has spent committed to or confined in a State or local correctional, mental, or other institution prior to sentencing. Eighteen percent (18%) of all DWI offenders received credit for time served (*see* Table 7). Fifty-seven percent (57%) of offenders who received active sentences received credit for time served compared to only 15% of those who received suspended sentences. Offenders who received an active sentence averaged a greater amount of credit for time served than those who received a suspended sentence (58 and 16 days respectively).

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

Punishment Level	Sentence Type	#	Convictions with Credit for Time Served		
			%	Average Days	Median Days
Agg. Level 1	Active	277	49	57	30
	Suspended	408	43	54	30
	Subtotal	**685**	**45**	**55**	**30**
Level 1	Active	310	49	65	37
	Suspended	2,163	32	26	17
	Subtotal	**2,473**	**34**	**33**	**21**
Level 2	Active	297	54	75	40
	Suspended	3,426	27	15	7
	Subtotal	**3,723**	**29**	**24**	**7**
Level 3	Active	184	55	84	36
	Suspended	1,234	20	20	4
	Subtotal	**1,418**	**25**	**39**	**10**
Level 4	Active	230	63	59	48
	Suspended	3,093	15	9	2
	Subtotal	**3,323**	**18**	**21**	**4**
Level 5	Active	452	67	37	30
	Suspended	14,248	9	6	1
	Subtotal	**14,700**	**10**	**12**	**2**
Total	**Active**	**1,750**	**57**	**58**	**35**
	Suspended	**24,572**	**15**	**16**	**3**
	Total	**26,322**	**18**	**25**	**7**

Note: Of the 26,333 DWI convictions in FY 2022, 11 convictions with missing values for type of sentence imposed were excluded from the table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

TRENDS FOR DWI CONVICTIONS

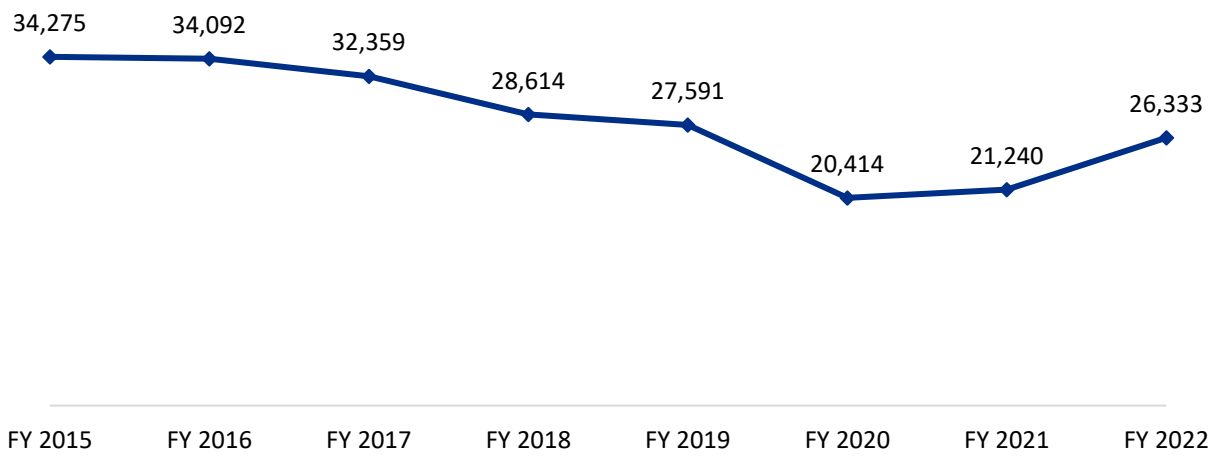
TRENDS FOR DWI CONVICTIONS

The previous sections focused on a single fiscal year of data (FY 2022); Trends for DWI Convictions examines DWI convictions from FY 2015[17] to FY 2022, with a focus on the past five years (FY 2018 through FY 2022). Trend data allow for the examination of changes over time, including (but not limited to) the composition of offenders and changes in sentencing practices.

Volume of DWI Convictions

The number of DWI convictions has been declining since FY 2015 (*see* Figure 20). The sharpest decline occurred following the onset of the COVID-19 pandemic in March 2020, with a 26% decrease from FY 2019 to FY 2020. DWI convictions increased 24% from FY 2021 to FY 2022. With that increase, DWI convictions in FY 2022 were just below pre-pandemic levels, although they are still lower than in FY 2015.

Figure 20
DWI Convictions



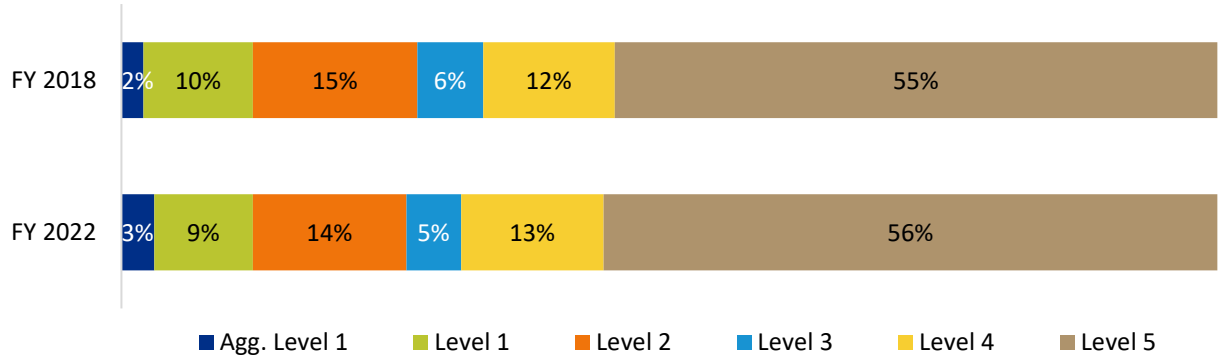
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2015 – FY 2022 DWI Statistical Report Data

Punishment Level

The distribution of DWI convictions by punishment level has remained stable (*see* Figure 21). Most convictions were in Level 5, while a small percentage were in Aggravated Level 1.

[17] FY 2015 is the first year the NC Sentencing and Policy Advisory Commission published data on DWI convictions.

Figure 21
Convictions by Punishment Level

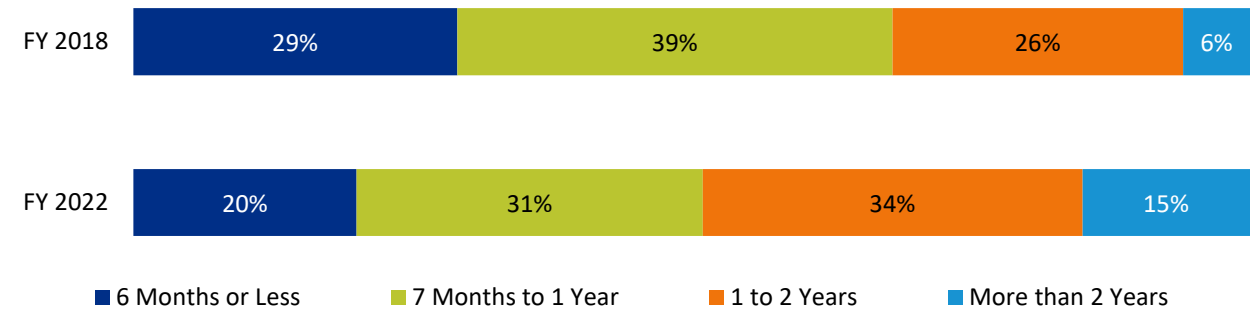


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Time to Sentencing

The COVID-19 pandemic has had a considerable impact on sentencing for DWI convictions (*see* Figure 22). A smaller percentage of DWI convictions have been sentenced in one year or less; correspondingly, the percentage of convictions sentenced in more than two years has drastically increased.

Figure 22
Time to Sentencing

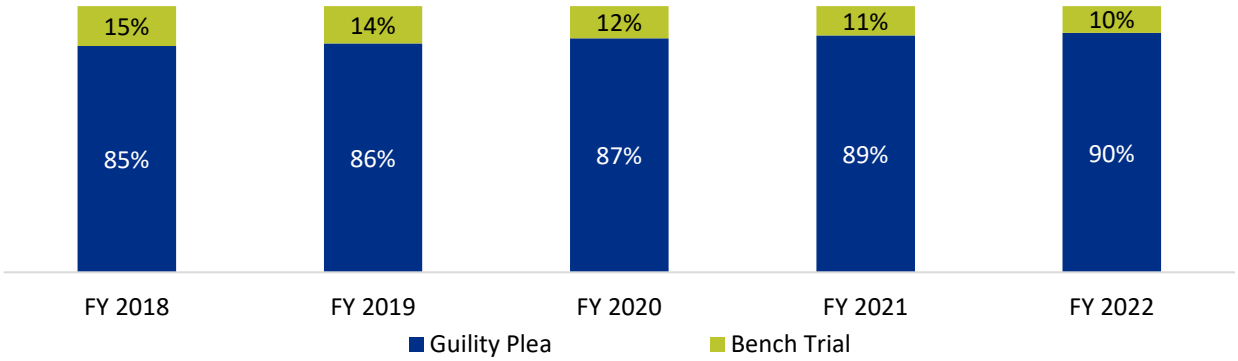


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Method of Disposition

The majority of DWI convictions resulted from guilty pleas (*see* Figure 23), increasing from 85% in FY 2018 to 90% in FY 2022. The percentage of DWI convictions that resulted from bench trials has declined. The percentage of convictions resulting from jury trials has remained stable at 1% or less.

Figure 23
Convictions by Method of Disposition

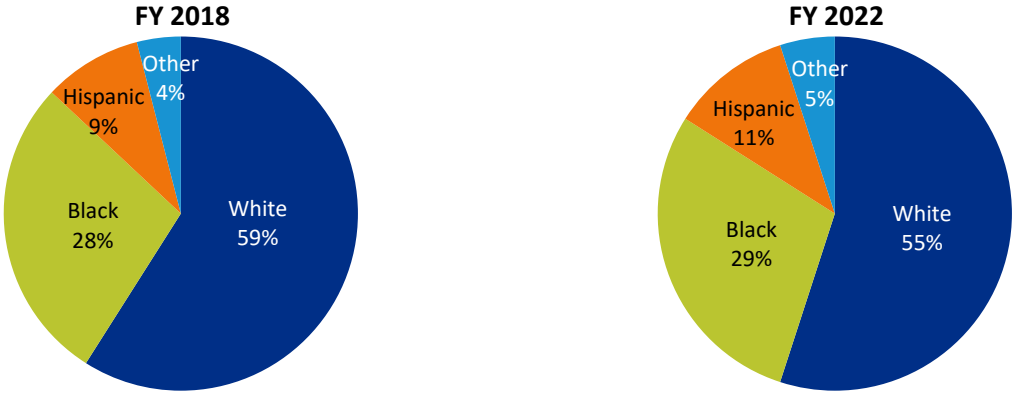


Note: Jury trials were excluded from the figure due to the limited number of observations. One percent (1%) or less of convictions resulted from jury trials in each of these fiscal years.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Offender Characterisitics

The distribution of offenders by sex has remained consistent over time, with males accounting for around 75% of convictions. Figure 24 shows DWI convictions by race. White offenders comprised the majority of DWI convictions in both years shown; however, the percentage decreased since FY 2018.

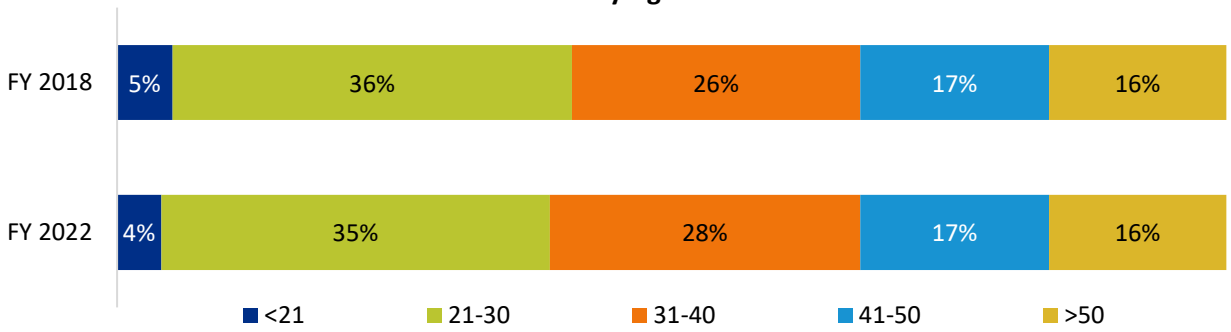
Figure 24
Convictions by Race



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

As shown in Figure 25, the age distribution for DWI convictions has remained similar with over 60% of offenders between age 21 and 40 at offense. The average age at offense was also similar in FY 2018 (36) and in FY 2022 (37).

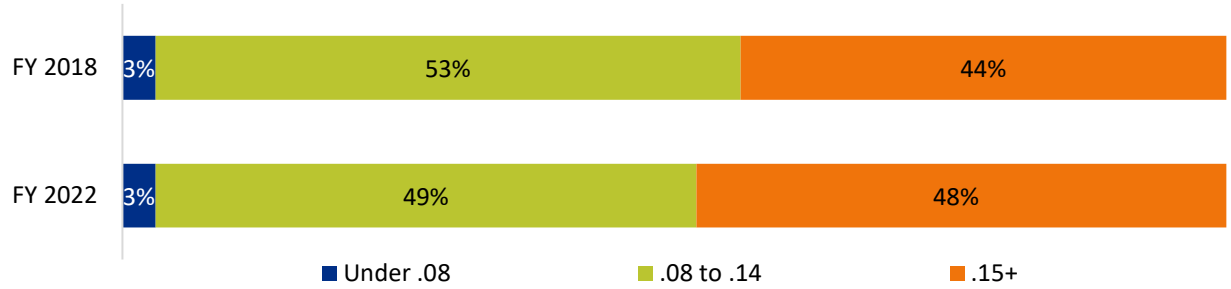
Figure 25
Convictions by Age at Offense



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

BAC levels were recorded for about three-fourths of convictions. As shown in Figure 26, the BAC distribution has shifted slightly, with a lower percentage of offenders having a BAC in the .08 to .14 range and a higher percentage having a BAC in the .15+ range in FY 2022.

Figure 26
Convictions by BAC



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Sentences Imposed and Method of Disposition

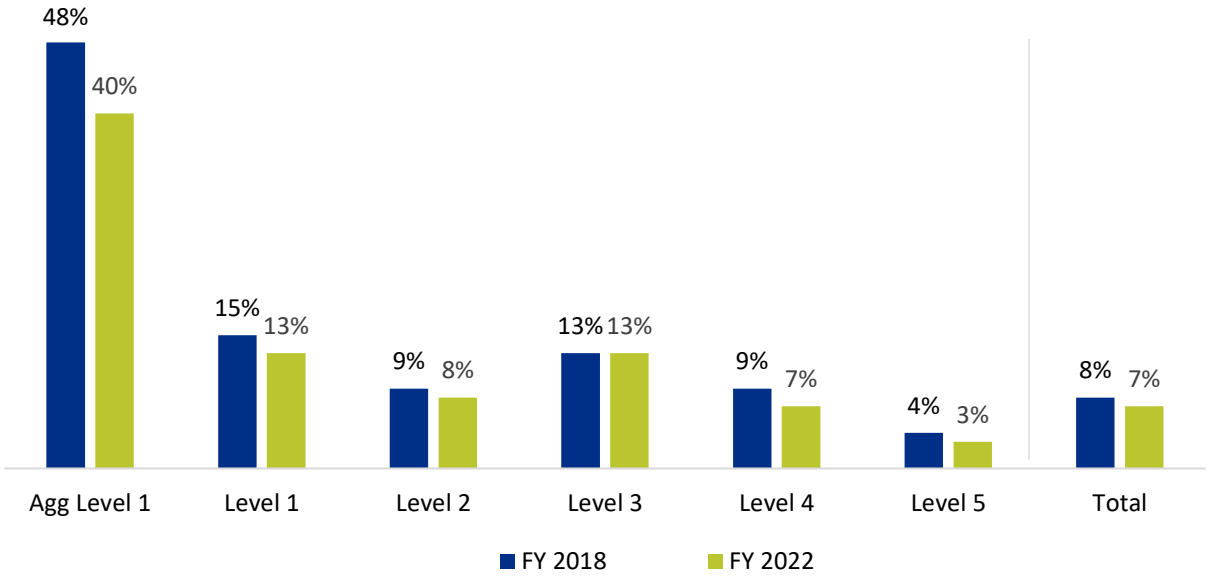
Figure 27 shows convictions by type of sentence imposed. The distribution of DWI convictions by type of sentence imposed was similar in FY 2018 and FY 2022, although the percentage of offenders receiving unsupervised probation has increased.

Figure 27
Convictions by Type of Sentence Imposed

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

The rate of active sentences by method of disposition has remained consistent. For convictions resulting from a bench trial, the percentage with an active sentence has remained between 3 and 4% since FY 2018. The percentage of active sentences as a result of a guilty plea has decreased slightly since FY 2018 (9% in FY 2018 compared to 7% in FY 2022). Figure 28 shows the percentage of active sentences imposed (i.e., active rate) by punishment level. With the exception of Aggravated Level 1, active rates for each of the other punishment levels were similar in FY 2018 and FY 2022.

Figure 28
Active Rate by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Table 8 shows the average sentence length in months for active and suspended sentences by punishment level. Among both active and suspended sentences, the average length of sentences was remarkably consistent, with most sentence lengths either the same or within one month difference.

Table 8
Average Sentence Length for Active and Suspended Sentences by Punishment Level

Punishment Level	Active				Suspended			
	2018		2022		2018		2022	
	#	Months	#	Months	#	Months	#	Months
Agg. Level 1	349	21	277	20	377	30	408	30
Level 1	410	13	310	12	2,325	21	2,163	20
Level 2	392	6	297	6	3,805	11	3,426	11
Level 3	240	4	184	4	1,563	5	1,234	5
Level 4	326	2	230	2	3,162	3	3,093	3
Level 5	613	1	452	1	15,040	2	14,248	2
Total	2,330	7	1,750	7	26,272	6	24,572	5

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

When a suspended sentence was imposed, most DWI offenders received unsupervised probation (*see* Figure 29). The use of unsupervised probation for suspended sentences has increased since FY 2018.

Figure 29
Suspended Sentences by Type of Probation

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Table 9 shows the average length of probation in months by type of probation. As with average sentence length, the average length of supervised and unsupervised probation by punishment level were very similar for FY 2018 and FY 2022.

Table 9
Average Length of Probation by Type of Probation

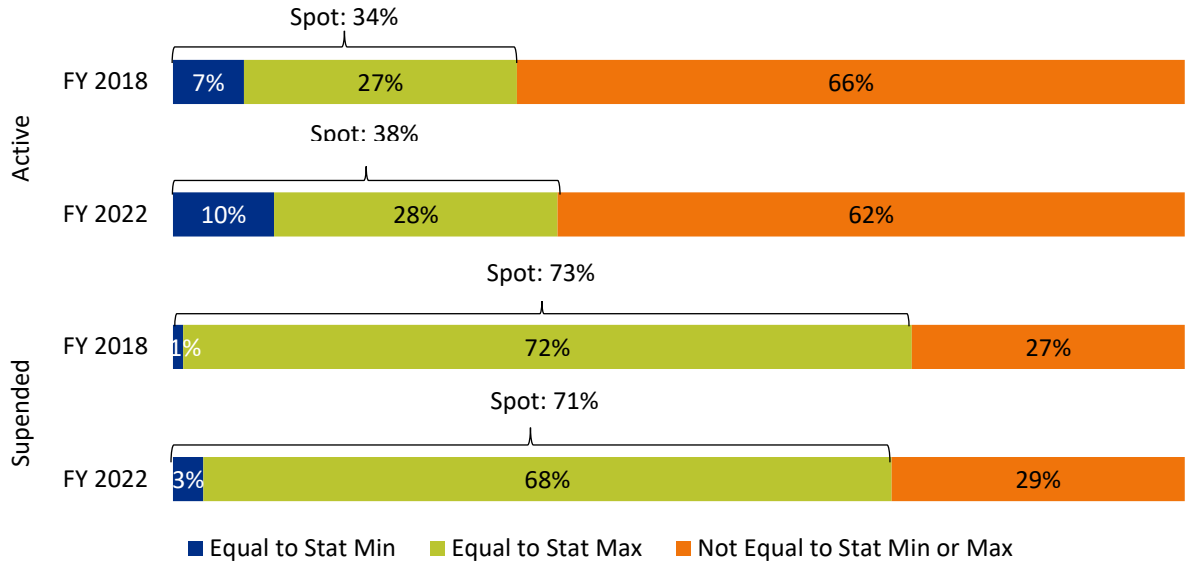
Punishment Level	Supervised Probation				Unsupervised Probation			
	2018		2022		2018		2022	
	#	Months	#	Months	#	Months	#	Months
Agg. Level 1	372	30	404	27	5	18	4	27
Level 1	2,247	22	2,081	21	78	19	82	19
Level 2	3,428	19	3,119	18	377	16	307	16
Level 3	930	18	693	17	633	17	541	17
Level 4	963	15	798	15	2,199	14	2,295	14
Level 5	1,676	14	1,079	14	13,364	13	13,169	13
Total	9,616	19	8,174	18	16,656	14	16,398	13

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

Sentence Length Relative to the Statutory Minimum and Maximum Sentences

Figure 30 examines how often the minimum sentence imposed is equal to the statutory minimum or statutory maximum sentence length. For both years, the majority of active sentences were not equal to the statutory minimum or statutory maximum sentence, while the majority of suspended sentences were equal to the statutory maximum sentence. For both active sentences and suspended sentences, the percentage of sentences equal to the statutory minimum has increased.

Figure 30
Sentence Length Relative to the Statutory Minimum and Maximum Sentence

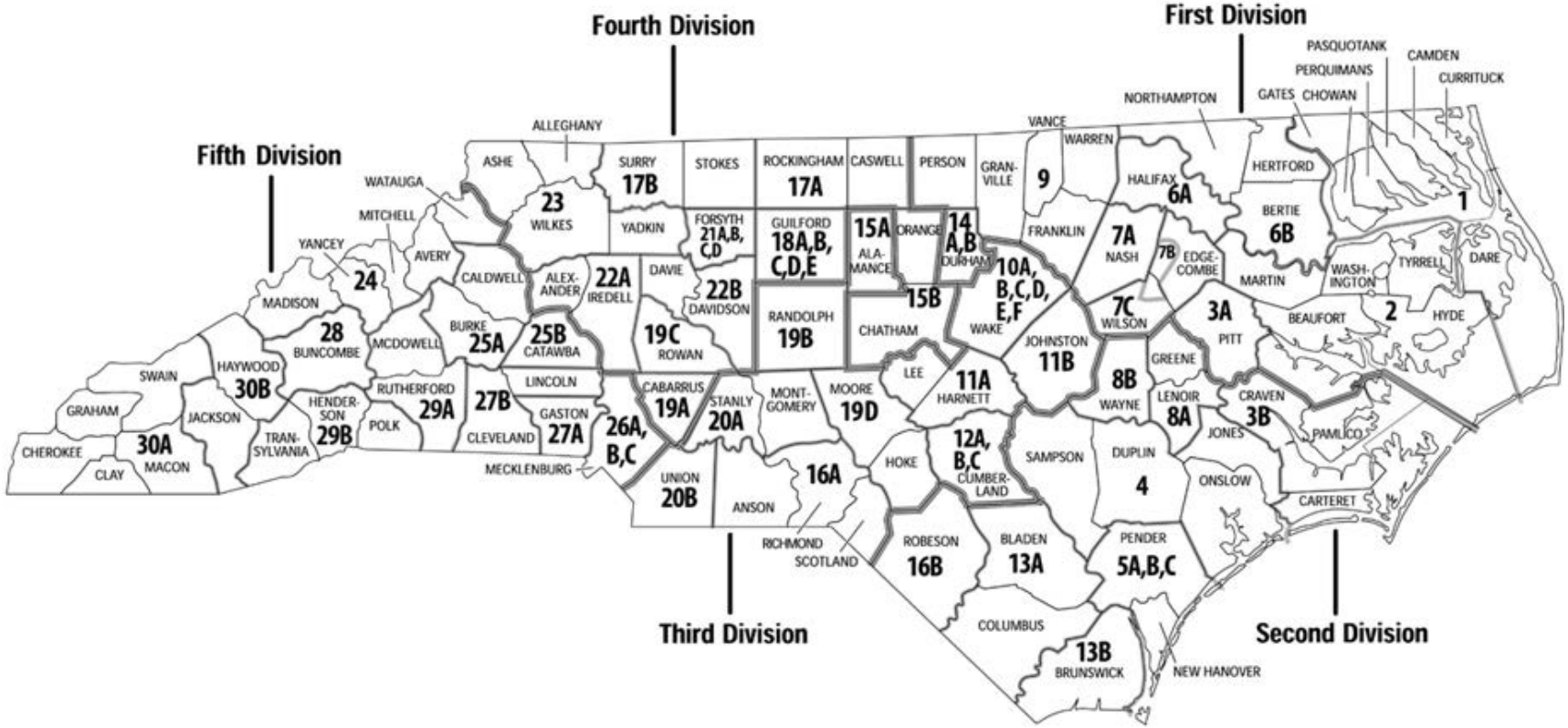


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2018 – FY 2022 DWI Statistical Report Data

APPENDIX A
MAPS OF JUDICIAL DIVISIONS AND DISTRICTS

North Carolina Superior Court Districts

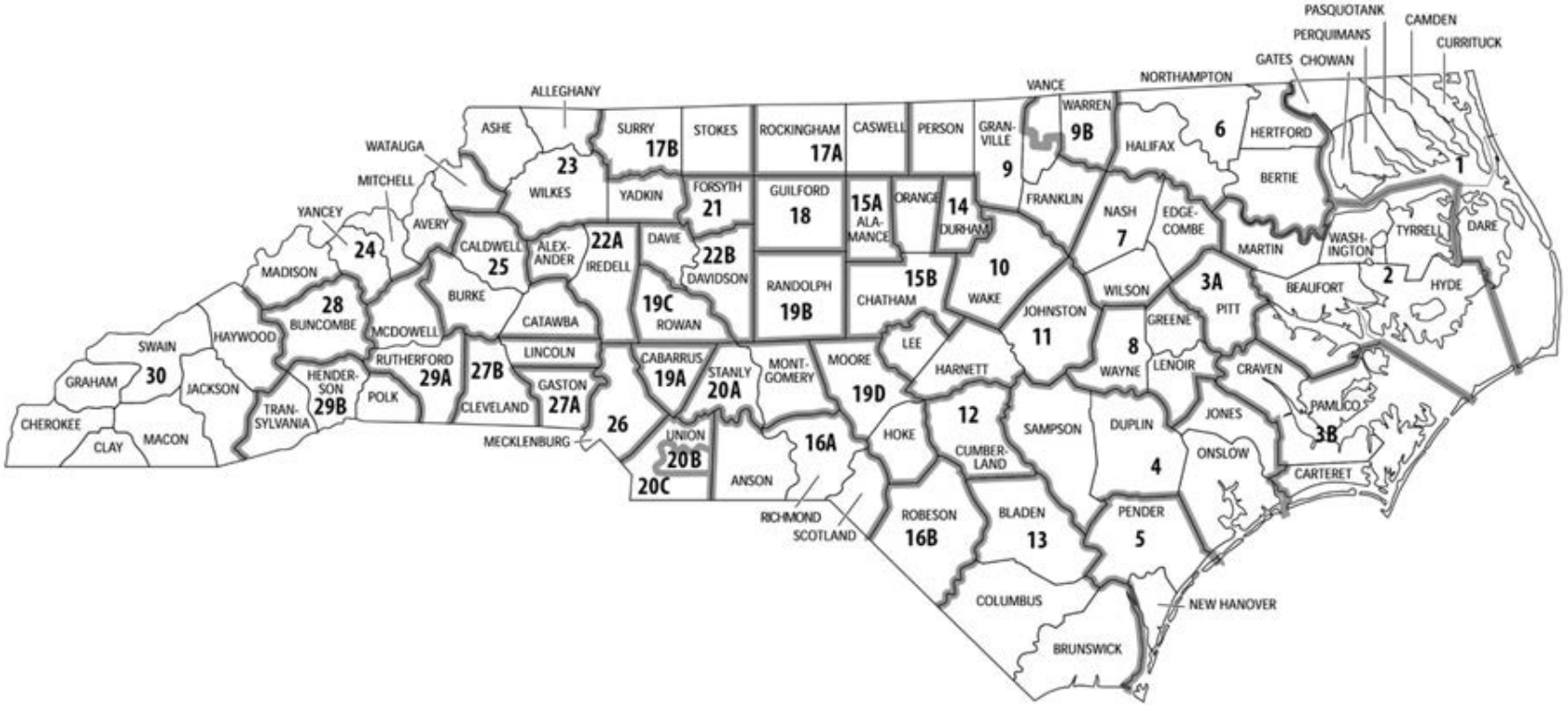
Effective January 1, 2019



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

North Carolina District Court Districts

Effective January 1, 2019



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

APPENDIX B
DWI PUNISHMENT TABLE

Table B.1
Sentencing for Impaired Driving Offenses

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

Offenses

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

Sentence

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

Place of confinement for active sentences

For convictions on or after January 1, 2015:

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

APPENDIX C
ADDITIONAL CONVICTION DATA BY JUDICIAL DISTRICT AND COUNTY

Table C.1
Convictions by Judicial District and County

Judicial District and County		DWI Convictions	Convictions per 1,000 Adults (16+)
District 1	Camden	37	4
	Chowan	40	4
	Currituck	160	6
	Dare	385	12
	Gates	28	3
	Pasquotank	97	3
	Perquimans	82	7
	Total	**829**	**6**
District 2	Beaufort	216	6
	Hyde	27	7
	Martin	64	4
	Tyrrell	31	12
	Washington	29	3
	Total	**367**	**5**
District 3A	Pitt	479	3
	Total	**479**	**3**
District 3B	Carteret	173	3
	Craven	141	2
	Pamlico	11	1
	Total	**325**	**2**
District 4	Duplin	198	5
	Jones	39	5
	Onslow	502	3
	Sampson	289	6
	Total	**1,028**	**4**
District 5	New Hanover	1,305	7
	Pender	308	6
	Total	**1,613**	**6**
District 6	Bertie	30	2
	Halifax	154	4
	Hertford	51	3
	Northampton	26	2
	Total	**261**	**3**
District 7	Edgecombe	170	4
	Nash	351	4
	Wilson	287	5
	Total	**808**	**5**
District 8	Greene	103	6
	Lenoir	128	3
	Wayne	687	7
	Total	**918**	**6**
District 9,9B	Franklin	316	5
	Granville	250	5
	Person	169	5
	Vance	235	7
	Warren	83	5
	Total	**1,053**	**5**
District 10	Wake	1,873	2
	Total	**1,873**	**2**
District 11	Harnett	121	1
	Johnston	568	3
	Lee	74	1
	Total	**763**	**2**
District 12	Cumberland	221	1
	Total	**221**	**1**
District 13	Bladen	127	5
	Brunswick	513	4
	Columbus	164	4
	Total	**804**	**4**
District 14	Durham	477	2
	Total	**477**	**2**
District 15A	Alamance	754	5
	Total	754	**5**
District 15B	Chatham	131	2
	Orange	412	3
	Total	**543**	**3**
District 16A	Anson	55	3
	Richmond	53	2
	Scotland	78	3
	Total	**186**	**2**
District 16B	Robeson	173	2
	Total	**173**	**2**
District 17A	Caswell	66	4
	Rockingham	347	5
	Total	**413**	**4**
District 17B	Stokes	143	4
	Surry	237	4
	Total	**380**	**4**
District 18	Guilford	1,603	4
	Total	**1,603**	**4**
District 19A	Cabarrus	890	5
	Total	**890**	**5**

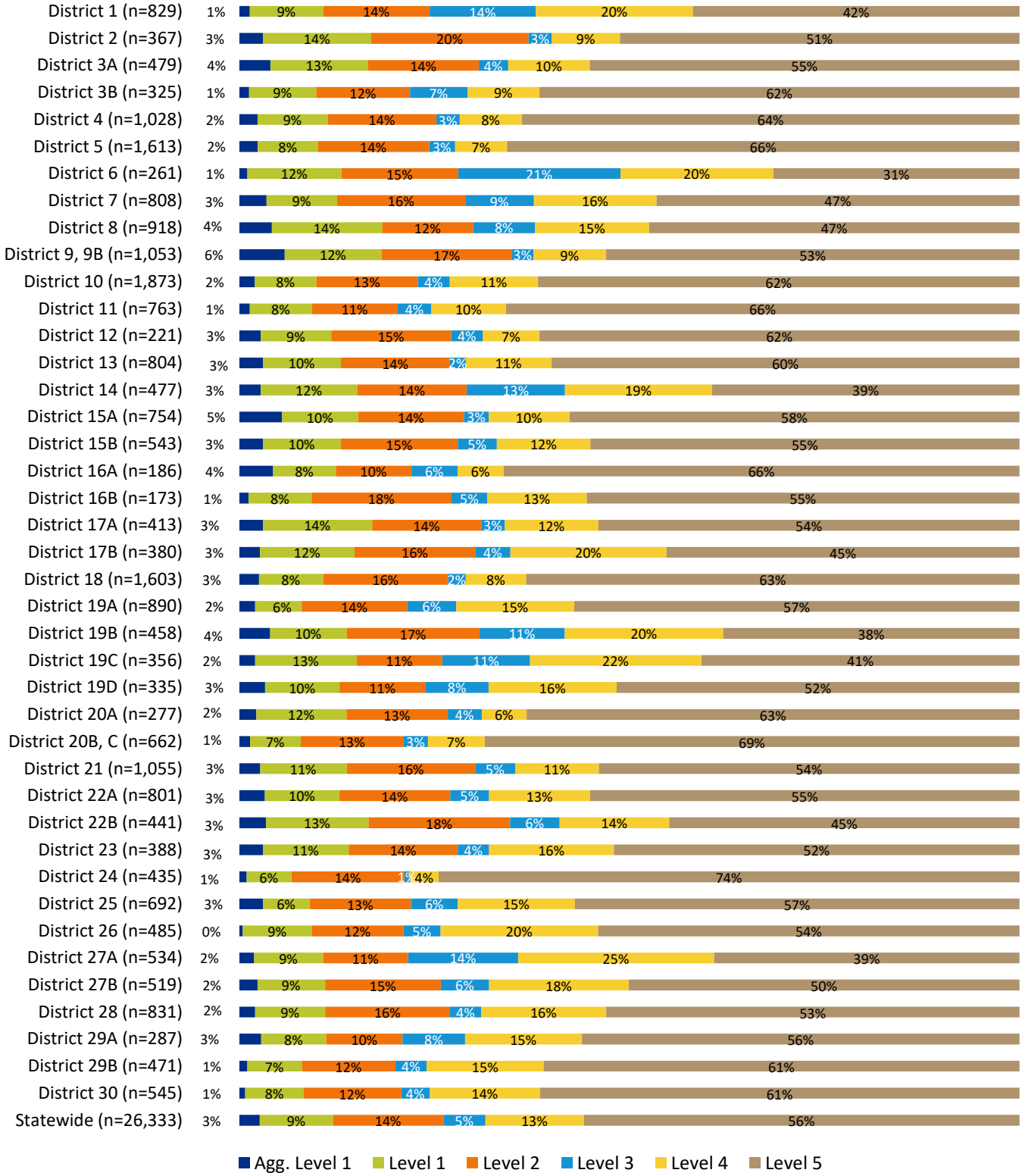
continued

Table C.1
Convictions by Judicial District and County

Judicial District and County		DWI Convictions	Convictions per 1,000 Adults (16+)
District 19B	Randolph	458	4
	Total	**458**	**4**
District 19C	Rowan	356	3
	Total	**356**	**3**
District 19D	Hoke	88	2
	Moore	247	3
	Total	**335**	**3**
District 20A	Montgomery	87	4
	Stanly	190	4
	Total	**277**	**4**
District 20B,C	Union	662	3
	Total	**662**	**3**
District 21	Forsyth	1,055	3
	Total	**1,055**	**3**
District 22A	Alexander	113	4
	Iredell	688	4
	Total	**801**	**4**
District 22B	Davidson	325	2
	Davie	116	3
	Total	**441**	**2**
District 23	Alleghany	12	1
	Ashe	60	3
	Wilkes	176	3
	Yadkin	140	5
	Total	**388**	**3**
District 24	Avery	63	4
	Madison	63	3
	Mitchell	68	5
	Watauga	174	4
	Yancey	67	4
	Total	**435**	**4**
District 25	Burke	159	2
	Caldwell	130	2
	Catawba	403	3
	Total	**692**	**3**
District 26	Mecklenburg	485	1
	Total	**485**	**1**
District 27A	Gaston	534	3
	Total	**534**	**3**
District 27B	Cleveland	292	4
	Lincoln	227	3
	Total	**519**	**3**
District 28	Buncombe	831	4
	Total	**831**	**4**
District 29A	McDowell	114	3
	Rutherford	173	3
	Total	**287**	**3**
District 29B	Henderson	285	3
	Polk	82	5
	Transylvania	104	4
	Total	**471**	**3**
District 30	Cherokee	50	2
	Clay	47	5
	Graham	12	2
	Haywood	161	3
	Jackson	102	3
	Macon	127	4
	Swain	46	4
	Total	**545**	**3**
	State Total	***26,333***	***3***

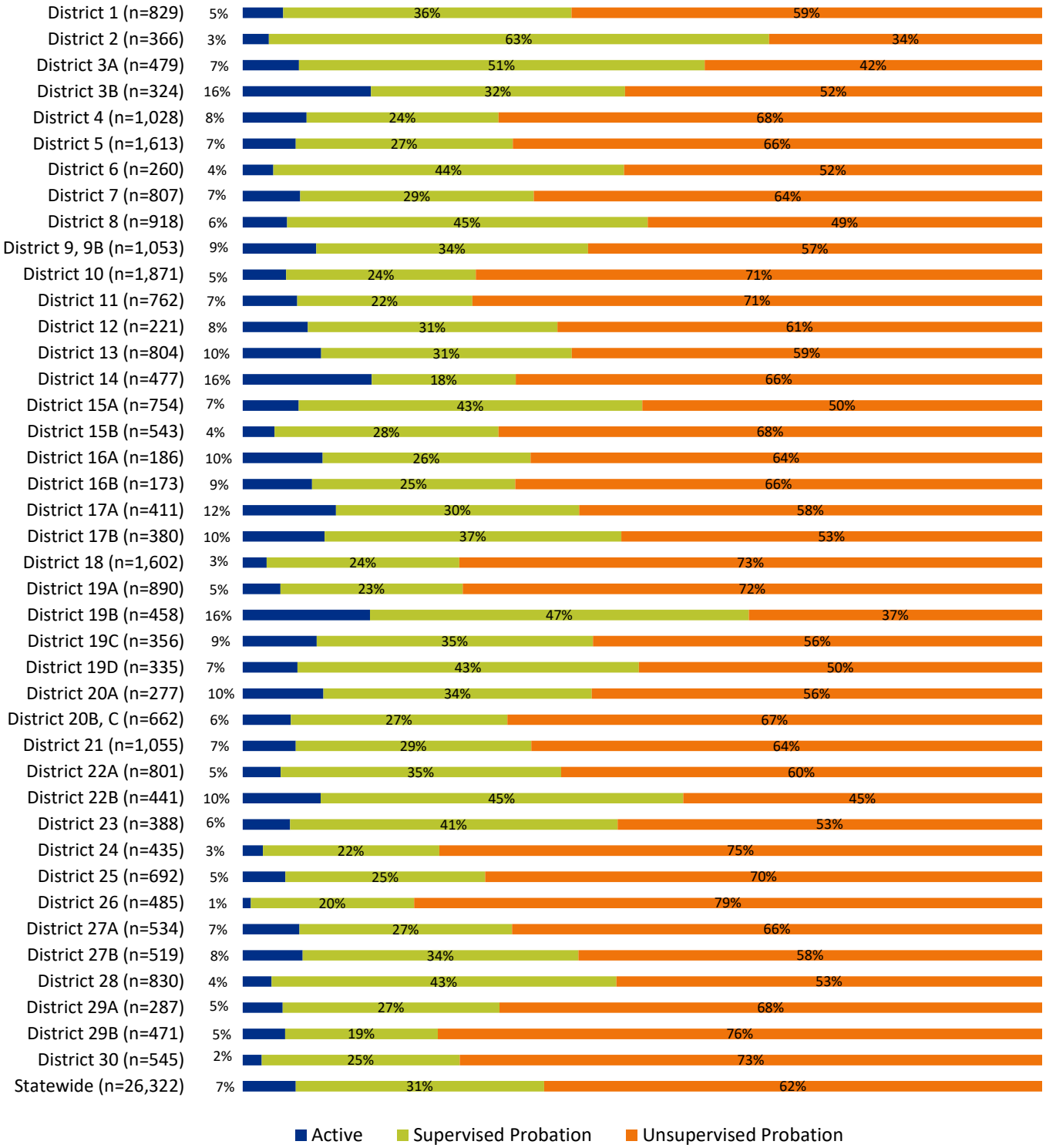
SOURCES: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data and NC Office of State Management and Budget, 2022 Population Estimates from https://demography.osbm.nc.gov/explore/ (*see* Population Projections).

Figure C.1
Convictions by Judicial District and Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Figure C.2
Convictions by Judicial District and Type of Punishment



Note: Of the 26,333 DWI convictions in FY 2022, 11 convictions with missing values for type of sentence imposed were excluded from the figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

APPENDIX D
ADDITIONAL CONVICTION DATA BY PUNISHMENT LEVEL

Table D.1:
Offender Characteristics and Punishment Imposed by Punishment Level
N=26,333

		Agg. Level 1 n=685	Level 1 n=2,475	Level 2 n=3,724	Level 3 n=1,418	Level 4 n=3,324	Level 5 n=14,707
Offender Characteristics							
Gender							
Male	%	80	74	78	82	78	72
Female	%	20	26	22	18	22	28
Race/Ethnicity							
White	%	44	46	56	48	53	57
Black	%	45	40	31	37	29	25
Hispanic	%	7	10	9	11	14	12
Other	%	4	4	4	4	4	6
Age at Offense							
Less than 21 Years	%	1	1	2	3	4	6
21-30 Years	%	28	32	30	25	30	39
31-40 Years	%	34	33	31	30	29	25
41-50 Years	%	23	20	19	21	19	15
Over 50 Years	%	14	14	18	21	18	15
Average Age		38	37	38	39	38	35
Median Age		36	35	36	38	36	32
Blood Alcohol Concentration							
Less than .08	%	4	3	3	2	3	3
.08 to .14	%	39	44	42	20	24	59
.15 or More	%	57	53	55	78	73	38
Punishment Imposed							
Method of Disposition							
Guilty Plea	%	90	91	90	91	90	89
Bench Trial	%	10	9	10	9	10	11
Jury Trial	%	<1	<1	<1	<1	<1	<1
Sentence Type							
Active Sentence	%	40	13	8	13	7	3
Supervised Probation	%	59	84	84	49	24	7
Unsupervised Probation	%	1	3	8	38	69	90
Sentence Length/Location							
Active							
Average Length (Months)		20	12	6	4	2	1
Sentenced at Stat. Minimum	%	13	3	2	1	2	3
Sentenced at Stat. Maximum	%	64	64	78	62	57	69
Sent. Other than Stat. Min/Max	%	23	33	20	37	41	28
Suspended							
Average Length (Months)		30	20	11	5	3	2
Sentenced at Stat. Minimum	%	33	11	9	2	1	3
Sentenced at Stat. Maximum	%	13	17	32	37	29	37
Sent. Other than Stat. Min/Max	%	54	72	59	61	70	60

Note: Convictions with missing data were excluded from the table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Table D.2
Conditions of Probation for Suspended Sentences by Punishment Level
n=24,572

		Agg. Level 1 n=408	Level 1 n=2,163	Level 2 n=3,426	Level 3 n=1,234	Level 4 n=3,093	Level 5 n=14,248
Supervised Probation	%	99	96	91	56	26	8
Length							
1 Year or Less	%	4	20	35	38	62	76
13-18 Months	%	17	26	41	44	27	17
19-24 Months	%	41	45	21	16	10	6
More than 2 Years	%	38	9	3	2	1	1
Average Length (Months)		27	21	18	17	15	14
Unsupervised Probation	%	1	4	9	44	74	92
Length							
1 Year or Less	%	25	41	49	57	77	90
13-18 Months	%	0	26	37	31	17	7
19-24 Months	%	25	24	12	8	5	2
More than 2 Years	%	50	9	2	4	1	1
Average Length (Months)		27	19	16	17	14	13
Mandatory Conditions							
Special Probation	%	97	95	88	19	10	6
Community Service	%	3	5	9	61	67	68
Both	%	3	5	6	1	<1	<1
Fines							
Conv. with Fine Imposed	%	70	82	83	85	87	86
Fine Amount							
Less than $100	%	2	3	4	4	8	11
$100 to $199	%	8	12	16	25	48	81
$200 to $299	%	14	18	23	33	32	7
$300 to $499	%	14	26	32	20	10	1
$500 or More	%	62	41	25	18	2	<1
Average Fine Imposed		$775	$476	$366	$269	$176	$108
Median Fine Imposed		$500	$400	$300	$200	$150	$100

Note: Convictions with missing data were excluded from the table. The average length of probation for unsupervised probation in Aggravated Level 1 was based on fewer than 10 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2022 DWI Statistical Report Data

Disclaimer for AOC Data

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

DWI CHEAT SHEET

Levels: (§20-179(a-k)) **AOC-CR-311**
Agg 1= 3 or more Grossly Aggravating Factors
1= 2 Grossly Aggravating Factors, **OR factor involving age/disability**
2= 1 Grossly Aggravating Factor (other than factor involving age/disability)

3=Aggravating outweighs Mitigating	A>M
4=No Aggravating or Mitigating	@
Or Aggravating=Mitigating	A=M
5=Mitigating outweighs Aggravating	M>A

Sentencing: (§20-179(f1)-(k)) **AOC-CR-310 & 342**

Level	Minimum	Maximum	Mandatory split IF suspended
Agg 1	12 months	36 months/$10,000	**120 days**

If suspended, **MUST** require a term of imprisonment of at least **120 days**, abstain from alcohol for period of 120 days up to the full term of probation and require abuse assmt and treatment (§20-179 (f3))

Level	Minimum	Maximum	Mandatory split IF suspended
1	30 days & $4,000	24 months	**30 days MAY reduce to 10 days** if CAM for 120 (may apply up to 60 pretrial days) (g)
2	7 days & $2,000	12 months	**7 days MAY eliminate split** if CAM for 90 (may apply up to 60 pretrial days) **AND** if prior w/in 5 years or DWLR, **MUST** perform 240 hours of CS (h)

MAY require abstain from alcohol as verified by CAMS (§20-179 (h1) & (k2))

Level	Minimum	Maximum	MAY be suspended with these Probation Conditions	
3	72 hrs	6 months $1,000	72 hours jail 72 hours C.S. Or any combination	(i)
4	48 hrs	120 days $500	48 hours jail 48 hours C.S. Or any combination	(j)
5	24 hrs	60 days $200	24 hours jail 24 hours C.S.	(k)

SECOND or subsequent offense requires interlock on all vehicles owned or operated
SECOND or subsequent offense requires at least 30 days of CS **OR** 5 days in jail
THIRD or subsequent offense requires at least 60 days of CS **OR** 10 days in jail
IF suspended, MUST require substance abuse assmt and treatment (§20-179(k3))
MAY require abstain from alcohol as verified by CAMS (§20-179 (k2))
No Jail Credit for First 24 Hours (§20-179 (p)(1))
Hour for Hour service/Weekends/Report in Sober Condition (§20-179(s))
Credit for Inpatient Treatment (§20-179 (k1))
Can't consolidate multiple DWIs. Can consolidate w/ higher charge (§20-179(f2))
Aiding and Abetting conviction is always **LEVEL 5** (§20-179 (f1)).
MUST serve active sentence in local jail unless second DWI (§20-176(c1))

Limited Driving Privilege Eligibility: (§20-179.3) AOC-CR-312

Valid license or license that had been expired for less than 1 year
No prior impaired driving convictions w/in 7 years of offense date
Level Three, Four, or Five was imposed and **Not a refusal**
After offense, not been convicted of or have unresolved DWI charge
Obtained and filed with the court a **substance abuse assessment NEED**

- **Letter on letterhead** for nonstandard working hours (STD hours 6:00 A.M. to 8:00 P.M. Mon through Fri)
- DL-123 or DL-123A from Ins. Co. (Only good for 30 days)
- **$100** filing fee

Allows maintenance of household only during standard hours
Allows for work, edu & *religious worship* during standard and listed times
CS, assmt and treatment as directed. Medical anytime

Refusal Privilege: (§20-16.2 (a3) & §20-179.3) AOC-CR-313

Same as above but also: **No prior refusals** w/in 7 years
No death or critical injury
Final disps AND Revoked at least **6 months AND no unresolved DWI charges**
Complied with at least one **condition of suspended sentence**
Completed training or treatment per assessment
Allows work, edu & *religious worship* same. If < 15 medical anytime, maint shl & CS as directed. If ≥ 15 not allowed for medical, maint or CS

Interlock: (§20-179.3 (g5)) required when 0.15 or more AOC-CR-340

§20-179.3 (c1) requires 45 day waiting period for **LDP**
Does not allow maint, medical or CS / allows work, edu. & trn at listed times

THIS BELONGS TO AN EXCELLENT ASSISTANT PUBLIC DEFENDER IN 2015
Effective for LDP on or after October 1, 2013

Interlock info: www.monitechinc.com 800-521-4246
Interlock info: www.smartstartinc.com 800-880-3394
DWI Regs: 10A N.C.A.C. 41B .0101 - 41B .0503
Preventive Maintenance and Permits (§20-139.1 (b2), (b6))
www.ncpublichealth.com/chronicdiseaseandinjury/fha/history.htm
Pre-Trial Motion Practice (§20-38.6)
Checking Stations and Roadblocks (§20-16.3A)
Blood Test Chain of Custody (§20-139.1 (c3))
Expert Testimony Fee under §20-139.1 $600 (§7A-314(a)(11) & (12))
(fees assessed on or after 8-1-13)
BLAKELY CURE in District Court (§20-179(a)(1) & (2), (c))
State must prove Grossly Aggravating or Aggravating Factors beyond a reasonable doubt at sentencing hearing **or** may use evidence from trial
BLAKELY CURE in Superior Court (§20-179(a1), (a2) & (c))
For notice, see **AOC-CR-338**
10 year look back period on Habitual DWI (§20-138.5 (a)) (on or after 12-1-06)
MELENDEZ-DIAZ CURE (20-139.1(c1), (c3), (e1) & (e2))
(on or after 10-1-09) **AOC-CR-344**
Appeals and Withdrawal/Remand (§20-38.7) (appeals on or after 12-1-15)

GROSSLY AGGRAVATING FACTORS (§20-179 (c))

- A conviction for an offense involving impaired driving within seven years of the date of this offense (See §20-179 (e) re: rebutting prior)
- Each prior conviction is a separate grossly aggravating factor
- District court conviction that is appealed and either withdrawn or remanded BUT not yet resentenced
- The defendant's driver's license was revoked for an impaired driving offense at the time of this offense
- Serious injury to another person caused by the defendant's impaired driving at the time of this offense
- **A child under the age of 18, mental development of a child under 18, or physical disability preventing unaided exit was in the vehicle at the time of this offense (Super Aggravating Factor that bumps to Level 1)**

AGGRAVATING FACTORS (§20-179 (d))

- Gross impairment of 0.15 or more
- Especially reckless or dangerous driving
- Negligent driving that led to a reportable accident
- Driving by the defendant while his driver's license was revoked under §20-28(a1) for an impaired driving revocation under §20-28.2(a)
- Two or more prior convictions of a motor vehicle offense for which at least three points are assigned occurring within five years of the date of this offense **OR** one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of this offense
- Conviction of speeding while fleeing or attempting to elude apprehension
- Conviction of speeding by the defendant by at least 30 miles per hour over the legal limit
- Passing a stopped school bus
- Any other factor that aggravates the seriousness of the offense

MITIGATING FACTORS (§20-179 (e))

- Slight impairment solely from alcohol and the alcohol concentration did not exceed 0.09
- Slight impairment resulting solely from alcohol, with no chemical analysis having been available to the defendant
- Driving at the time of the offense that was safe and lawful except for the impairment
- A safe driving record, having no convictions for any motor vehicle offense for which at least four points are assigned within five years of the date of this offense
- Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage
- **Voluntary submission to a mental health facility for assessment after being charged with the impaired driving offense and, if recommended by the facility, voluntary participation in the recommended treatment**
- **Assessment, compliance with recommendations and maintaining 60 days of continuous abstinence, as proven by DOC approved device**
- Any other factor that mitigates the seriousness of the offense

Effective for offenses on or after 12-1-15

Class A1

Assault by Pointing Gun (14-34)
Assault Inflicting Serious Injury (14-33(c)(1))
Assault on a Child Under 12 (14-33(c)(3))
Assault on a Female (14-33(c)(2))
Assault on Gov' Off. (14-33(c)(4)) F
*Assault on Handicapped Person (14-32.1)
Assault on School Pers (14-33(c)(6)) F
Assault with a Deadly Weapon (14-33(c)(1))
Assault and pers rel in presence of minor (14-33 (d))
Child Abuse (14-318.2) F
Death by Vehicle (20-141.4)
E- Liquid Container Violations (14-401.18A)
Food Stamp Fraud $100-$500 (108A-53.1)
Hit & Run Without Permission (14-202.4) F
Interfering with Emergency Comm (14-286.2)
Patient Abuse (14-32.2) F
F Patronizing a Prostitute (14-205.2) F
@ Secret Peeping w/ photo device (14-202) F
[illegible] (14-27.7A) F
@ F *Sexual Battery (14-27.5A)
*Stalking (14-277.3A) [illegible]
Trespass 1st Degree at [illegible] Facility (14-159.12)(c)) F
Trespass 1st Degree at Agricultural Center (14-159.12(c)) F
Unfair Trade of Cigarettes (14-401.18)
Unmanned Aircraft Image Dissemination (14-401.28) F
Violation of [illegible] (Ch[illegible] 4.1) F

Class 1

Alcohol offense, not otherwise specified (18B-102(b))
Alcohol Premier Offenses (18B-102(a)(1))
Altering Serial Number (14-160.1)
Breaking or Entering (14-54) F
B&E Coin Operated Machine (14-56.1) F
Communicating Threats (14-277.1)
Concealed Weapon Prohibited or Alcohol (14-415.21)
Contrib to Delinq of Juvenile (14-316.1)
Criminal Domestic Trespass (14-134.3) F
Damaging Computers < $100 (14-455) F
Death by Vehicle (20-141.4) F Prior to 12-1-06
Disorderly Conduct #2 (14-288.4) F
DWLR ONLY if Impaired Driving revocation (20-28)
Escape by Misdemeanor (148-45) F
ESC Violation (96-18)

HIV testing if DAC, effective 7-1-13
P= May order testing for Sexually Transmitted Disease, effective 10-1-13 (14-205.4)
M =possible misd. enhancement (review statute)
F =possible felony enhancement (review statute)
* Subject to DNA sample (15A-266.4)
@ Potential Sex Offender Registry (14-208.7)
DV / knowing female is pregnant is 1 class higher. If A1, becomes class I felony (14-18.2)
Hab Misd Assault Class H Felony (14-33.2)
14-33 & physical inj or 14-34, & 2 or > assault conv
Assault by strangulation Class H felony (14-32.4)
Committed because of **race, color, religion, nationality or country of origin**
Class 2 or 3 becomes Class 1, Class A1 or 1 becomes Class H Felony (14-3)

Ethnic Intimidation (14-401.14) F (See 14-3)
Failure to Stop for School Bus (20-217)
Failure to Yield Emerg Veh w/Damage (20-156, 57) F
False Imprisonment (Common Law)
Food Stamp Fraud < $100 (108A-53) F
Forgery (Common Law)
Fracking Violations (113-391)
Going Armed to the Terror (Common Law)
Graffiti Vandalism (14-127.1) Min $500 & CS if suspended sentence F
Hit and Run Property Damage (20-166) F
Inciting a Riot (14-288.2) F
Injury to Personal Property >$200 (14-160(b))
Injury to Real Property (14-127)
Injury to Trees, Crops, Lands (14-128)
Interfering with Meter Lines (14-151) F
Larceny (14-72) F Habitual Misd Lar F (14-7.30(b))
P Maintaining Place of Prostitution (14-204)
Metal Theft (14-159.4) F
Metal Sales Regulation Violation (66-424) F
Misuse of 911 (14-111.4) all types of Misuse of 911
Move Over Law >$500 damage or injury (20-157(f)) F
Obstruction of Justice (Common Law)
Passing Stopped School Bus (20-217) min $500 fine F
Picketing Courthouse (14-225.1)
Possession Weapon on School Grounds (14-269.2) F
Possession of Drug Paraphernalia (90-113.22) **(90-96) Except MJ [BUT SEE** PDP w/ [illegible] immunity for [illegible]]
Possession of MJ > ½ oz (90-95) **(90-96 discharge)** F
Possession Stolen Goods (14-72) F
Prearranged Racing (20-141.3)
P Prostitution (14-204) Conditional Discharge 1st Off
Receiving Stolen Goods (14-72) F
Secret Peeping (14-202) F
Shoplifting #3 w/in 3 Yrs (14-72.1) F
Speeding to Elude (20-141.5) F
P Soliciting for Prostitution (14-205.1) F
Toxic Fumes Violations (90-113.10-.13)
Unauthorized Use of Motor Vehicle (14-72.2) F
Unlawful Assembly (Common Law)
Unmanned Aircraft Fishing or Hunting (14-401.25)
Welfare Fraud (108A-39) F
Worthless Check $2000 or Less 4th Conv (14-107) F
Worthless Check/Closed Account (14-107(d)(4)) F

Class 2

Adult Establishment Viol #2 (14-202.11-.12)
Carrying Concealed Weapon (14-269 & 14-415.21) F
Concealed Weapon Permit Most Violations (14-415.21) M
Cyberbullying School Employee (14-458.2)
Cyberstalking (14-196.3)
Defacing Public Property (14-132)
Defrauding Innkeeper (14-110)
Disorderly Conduct (14-288.4) F
Driving After Consuming <21 (20-138.3)
Driving w/ Open Cont Alcoh in System #2 (20-138.7)
Failure to Disperse (14-288.5)
Failure to Work after Being Paid (14-104)
Failure to Yield/Stop Emerg Veh (20-156, 57) F
Filing False Police Report (14-225)
Financial Card Fraud <500 w/in 6 mos (14-113.13) F
Fornication / Adultery (14-184)
Furnishing False Information (20-29)
Gambling (14-291-292)
Harassing Phone Calls (14-196)

Hit and Run Failure to Notify (20-166.1) M F
Indecent Exposure (14-190.9) F
Injury to Personal Property $200 or Less M (14-160(a))
Lottery Viol (14-289-291)
Misuse Registration and Plate Violation (20-111)
Motor Vehicle Law, not otherwise specified (20-35 & 20-176)
Move Over Law (20-157(a)) F
Open Container 2nd or > Off (20-138.7(e))
Possession of Handgun by Minor (14-269.7)
Reckless Driving (20-140)
Resisting/Obstructing Officer (14-223)
Sciencing (14-344)
Setting Fire to Woods (14-137)
Shoplifting #2 w/in 3 Yrs (14-72.1) F
Simple Assault/Battery/Affray (14-33) M
Soliciting for C/A/H (Common Law)
Tampering with M/V (20-107)
Trespass, 1st Degree (14-159.12) M
Willful Racing (20-141)

Class 3

Offenses on or after 12-1-13, unless otherwise specified if less than 4 prior convictions, fine ONLY (max $200)
Adult Establishment Viol (14-202.11-.12) M
Concealed Weapon w/out Permit or disclosure (14-415.21) M
Conversion by Bailee $400 or Less (14-168.1) F
Driving Commercial Vehicle after Cons (20-138.2A)
Driving w/ Open Cont Alcohol in System (20-138.7)
DWLR IF NOT Impaired Driving Revocation (20-28) M
Expired License (20-7(f) & 20-35(a)(2))
Failure to Notify DMV of Address Change (20-7.1)
Failure to Possess License (20-7(a) & 20-35(a)(1))
Failure to Return Rental Property (14-167) F
Failure to Return Rental Property Purchase Option (14-168.4)
Fishing Without License (113-271)
Hunting Without License (113-270.2)
Intoxicated and Disruptive (14-444)
Littering (14-399(c)) M F
NOL (20-7(a) & 20-35)
Obtaining Property by W/C (14-106)
Open Container 1st Offense (20-138.7(a)) M
Permitting Bitch at Large (67-2)
Possession of MJ Drug Paraphernalia (90-113.22A)
Possession of MJ ≤ ½ oz (90-95) **(90-96)** M F
Shoplifting (14-72.1) M F
Speeding >15 MPH over OR >80 MPH (20-141(j1))
Trespass, 2nd Degree (14-159.13) M
Unsealed Wine/Liquor in Passenger Area (18B-401(a))
Using Profane Language on Roadway (14-197)
Violation of City or County Ord (14-4)
Window tinting violation (20-127(d))
Worthless Check $2000 or Less (14-107) M F

Infraction

Concealed Weapon w/out Permit or Disclosure (14-415.21) M
Cell Phone <18 (20-137.3)
Littering (14-399(c1)) M F
MV Law, Parts 9, 10, 10A & 11, if not otherwise specified (20-176)
Move Over Law (20-157(g)) M F
Open Container Passenger (20-138.7(a1)) M
Seatbelt Violations (20-135.2A(e)) fine & cost limits
Speedometer Violations (20-123.2)
Violation of Ord. re: operation of vehicles (14-4(b))

Multiple Prior Convictions §15A-1340.21(d) [I]f an offender is convicted of more than one offense in a **single session of district court, or in a single week of superior court** of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.
Multiple Convictions §15A-1340.22(a) If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Cl A1, Class 1, or Class 2, **the cumulative length of the sentences of imprisonment shall not exceed twice the maximum** sentence authorized for the class and prior conviction le of the most serious offense. **Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.**
Concurrent and Consecutive Terms §15A-1354(a) Unless specified or required by statute to run consecutively, sentences shall run **concurrently**.
Prior Record Level for Felony Sentencing §15A-1340.14(b)(5) Prior Record Level for Felony Sentencing –For each prior misdemeanor conviction as defined in subsection, 1 point. For purposes of this subsection, misdemeanor **is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving** (G.S. 20-138 impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), **but not any other misdemeanor traffic offense under Chapte of the General Statutes**
Sentences of Imprisonment §15A-1351(a) Split sentence may not exceed **one fourth the maximum sentence of imprisonment imposed** for the offense. "[T]he judge credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation."
Restitution Statutes §15A-1340.34 - .38 Basis, Determination, Defendant's Ability to Pay, Partial Restitution and Enforcement
Standard Probation Lengths §15A-1343.2 Community Punishment 6-18 months / Intermediate Punishment 12-24 months
Probation Hearing/Probable Cause Hearing §15A-1345(c) must be **held within seven working days** of an arrest. Otherwise, must be **released**
"[P]rovided that probation may not be revoked solely for conviction of a **Class 3 misdemeanor.** §15A-1344(d)
Conspiracy & Attempt (§14-2.5) = 1 lower **Solicitation** (§14-2.6) = class 3 misdemeanor (unless specified) **Aid and Abet & Acting in Concert** = same punish

Class	PRIOR CONVICTION LEVELS			
	Ø Priors	1 to 4 Priors		5 or > Priors
	I	II		III
A1	1-60 days C/I/A	1-75 days C/I/A		1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A		1-120 days C/I/A
2	1-30 days C	1-45 days C/I		1-60 days C/I/A
3	1-10 days C Fine ONLY*	1-15 days		1-20 days C/I/A
		1 to 3 Priors	4 Priors	
		C Fine ONLY*	C/I	

COMMUNITY
§15A-1340.11(2)
Does NOT include ACTIVE
OR Drug Ct
OR Special Prob / Split under §15A-1351(a)
MAY be unsupervised or supervised
MAY include 1 or > under §15A-1343(a1)
House Arrest with EM
Community Service
Confinement of 2/3 days (<6 days per month) during 3 separate months
Substance Abuse Assmt, Monitoring or Tmt/Edu or Vocational Skills Development Program
Satellite-based Monitoring (if covered under §14-208.40(a)(2))
Daily fee and $90 install

INTERMEDIATE
§15A-1340.11(6)
Must be Supervised Probation
MAY include
Drug Treatment Court
Special Prob / Split §15A-1351(a)
CP conditions under §15A-1343(a1)

ACTIVE §15A-1340.11(1)
Any time within the range. Also see §15A-1340.20 (c1) for time served when active not otherwise authorized

FINES §15A-1340.23(b)
Unless specified by offense
Class A1 = discretion of court
Class 1 = discretion of court
Class 2 = $1,000
Class 3 = $200
MV Infraction = $100 §20-176(b)
Local Ordinance $500/$50 §14-4

DELEGATION TO PROBATION
UNLESS SPECIFIC FINDING TO INAPPROPRIATE §15A-1343.2(e)
Probation may require
20/50 hours of Community Service
Report to Probation more frequent
Substance Abuse Assmt, Monitoring
House Arrest with Electronic Monit
Confinement of 2/3 days (<6 days month) during 3 separate months
Curfew with Electronic Monitoring
Edu or Vocational Skills Develop Program

REQUIRES
Admin Review and Approval by Cl
MAY FILE MOTION to revie
UNLESS signed a WAIVER

* Fine ONLY, unless otherwise provided, effective on or after 12-1-13 per §15A-1340.23(d)
THIS BELONGS TO AN EXCELLENT ASSISTANT PUBLIC DEFENDER IN 2015
Effective for offenses on or after 12-1-15 Effective for offenses on or after 6-19-15 7-1-15

PLEADINGS IN DISTRICT COURT

Candace Washington
Jim Grant
Office of the Appellate Defender

1

Roadmap

- Types of Pleadings in Dist. Ct.
- Pleading Issues
  - Facial Defects
  - Variances
- Practice Points
  - Motions
  - Amendments
  - Appeals to Superior Court
  - Trouble on the Horizon?
- Questions

2

What are they?

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

3

Facial Defects

- The pleading fails *on its face*
  - "A criminal pleading . . . is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty."

State v. Ellis, 368 N.C. 342, 345 (2015).

4

What makes a pleading facially defective?

- Two sets of requirements
  - Statute: N.C.G.S. 15- 924(a)(5)
  - Offense Specific: Caselaw (see SOG Bulletin)

5

Statutory Requirements

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

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

- "A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation."
- What does that mean? The State must, at minimum, allege ALL of the elements of the offense.

7

Real Case

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

(1) intentionally;

(2) caused a public disturbance;

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

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

8

Real Case

The warrant alleged that client "unlawfully and willfully":

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

9

Result?

Conviction vacated, no jurisdiction:

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

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

10

Caselaw Requirements

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

Examples….

11

Defect in RDO Pleading

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

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

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Defect in RDO Pleading

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

13

Find the Defect

Find the Defect

14

A Note on Juvenile Cases

N.C.G.S. 7B-1802 - same rules?

...pretty much, at least for now.

...more on that later.....

15

Examples of Defects in Juvenile Petitions

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

16

Exception to the Rules: Citations

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

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Variance

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

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Defect….or variance?

- Seems

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In Practice

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

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Motion to Dismiss

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

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Amendments and MSOCs

- Amendments to Pleading
  - N.C.G.S. 15A-922(f) – Pleadings may be amended "when the amendment does not change the nature of the offense charged."
  - Elements
  - Time/Date and "Substantial Alteration"
- Misdemeanor Statement of Charges – 15A-922(d)
  - Provides avenue for amendment prior to arraignment.
  - When the State finds a fatal defect. Entitles you to at least 3 working days notice from when it is filed or when you are notified (whichever is later)
  - Becomes the State's pleading - Effect on other charges

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Appeals for Trial *De Novo*

- Can the State fix a pleading after you appeal it to Superior Court?
  - No. Superior Court jurisdiction is "derivative of" the charge that is pled and convicted in District Court. N.C.G.S. 7A-271(b)
  - Response – Motion to Dismiss in Superior Court for lack of jurisdiction.
  - One other Superior Court wrinkle – *State v. Armstrong*, 248 N.C. App. 65 (2016)

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Trouble on the Horizon?

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

Or at least relax the rules.

24

Trouble on the Horizon?

Recent opinion: *In re J.U.*, 384 N.C. 618 (2023):

"We address here the jurisdictional sufficiency of allegations in a juvenile delinquency petition. Just as 'it is not the function of an indictment to bind the hands of the State with technical rules of pleading, the plain language of N.C.G.S. § 7B-1802 does not require the State in a juvenile petition to aver the elements of an offense with hyper-technical particularity to satisfy jurisdictional concerns. Because the juvenile petition sufficiently pled the offense . . . and provided adequate notice to the juvenile, the pleading requirements of N.C.G.S. § 7B-1802 were satisfied."

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Useful Materials

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

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Questions?

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CRIMINAL PLEADINGS IN DISTRICT COURT

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

EXAMPLES:

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

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

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

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

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

PROBLEMS WITH PLEADING:

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

WHEN TO MOVE TO DISMISS:

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

SPECIFIC OFFENSES:

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

AMENDMENT:

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

PRACTICE TIPS:

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

UNC SCHOOL OF GOVERNMENT

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

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Contents

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I. Introduction

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

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

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

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

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

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

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

3. G.S. 15-153.

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

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

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

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

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

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

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

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

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

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

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

II. General Matters

A. Date or Time of Offense

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

1. Homicide

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

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

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

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

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

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

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

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

2. Burglary

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

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

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

3. Sexual Assault

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Failure to Register as a Sex Offender

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

5. Larceny

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

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

6. False Pretenses

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

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

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

7. Possession of a Firearm by a Felon

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

8. Impaired Driving

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

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

9. Conspiracy

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

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

10. Habitual and Violent Habitual Felon

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

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

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

11. Sexual Exploitation of a Minor

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

B. Victim's Name

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Defendant's Name

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

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

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

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

D. Address or County

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Use of the Word "Feloniously"

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

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

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

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

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

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

F. Statutory Citation

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

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

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

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

G. Case Number

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

H. Completion By Grand Jury Foreperson

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

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

I. Prior Convictions

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

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

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

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

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

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

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

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

J. "Sentencing Factors"

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

III. Offense Specific Issues

A. Homicide[58]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Arson

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

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

C. Kidnapping and Related Offenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Burglary, Breaking or Entering, and Related Crimes

1. Burglary and Breaking or Entering

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

96. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Breaking into Coin- or Currency-Operated Machine

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

E. Robbery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Assaults

1. Generally

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

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

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

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

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

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

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

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

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

2. Injury Assaults

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

3. Deadly Weapon Assaults

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

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

The cases applying this rule are summarized below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Assault on a Government Official

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

5. Habitual Misdemeanor Assault

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

6. Malicious Conduct by Prisoner

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

G. Stalking

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

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

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

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

H. Resist, Delay, and Obstruct Officer

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

I. Disorderly Conduct

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

J. Child Abuse

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

K. Sexual Assault

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

126. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

L. Indecent Liberties

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

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

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

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

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

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

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

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

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

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

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

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

State v. Downing, 313 N.C. 164, 166-68 (1985) (fatal variance between felony larceny indictment alleging that items were the personal property of a mother who owned the building and evidence showing that items were owned by the daughter's business, which was located in the building).

State v. Eppley, 282 N.C. 249, 259-60 (1972) (fatal variance between larceny indictment alleging that property belonged to James Ernest Carriker and evidence showing that although the property was taken from Carriker's home, it was owned by his father).

State v. Cathey, 162 N.C. App. 350 (2004) (error to allow amendment regarding owner of property).

State v. Craycraft, 152 N.C. App. 211, 213-14 (2002) (fatal variance between felony larceny indictment alleging that stolen property belonged to one Montague and evidence showing that items belonged to defendant's father; Montague, the landlord, did not have a special possessory interest in the items, although he was maintaining them for his former tenant).

State v. Salters, 137 N.C. App. 553, 555-57 (2000) (fatal variance between felony larceny indictment charging defendant with stealing property owned by Frances Justice and evidence showing that the property belonged to Kedrick (Justice's eight-year old grandson); noting that had Justice been acting *in loco parentis*, "there would be no doubt" that Justice would have been in lawful possession or had a special custodial interest in the item).

State v. Johnson, 77 N.C. App. 583, 585 (1985) (indictment charging defendant with breaking or entering a building occupied by Watauga Opportunities, Inc. and stealing certain articles of personal property was fatally defective because it was silent as to ownership, possession, or right to possess the stolen property; fatal variance existed between second indictment charging defendant with breaking or entering a building occupied by St. Elizabeth Catholic Church and stealing two letter openers, the personal property of St. Elizabeth Catholic Church, and evidence that did not show that the church either owned or had any special property interest in the letter openers but rather established that the articles belonged to Father Connolly).

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

State v. Green, 305 N.C. 463, 474 (1982) (no fatal variance between larceny indictment alleging that the stolen item was "the personal property of Robert Allen in the custody and possession of Margaret Osborne" and the evidence; rejecting defendant's argument that the evidence conclusively showed that Terry Allen was the owner and concluding that even if there was no evidence that Robert Allen owned the item, there would be no fatal variance because the evidence showed it was in Osborn's possession; the allegation of ownership in the indictment therefore was mere surplusage).

State v. Liddell, 39 N.C. App. 373, 374-75 (1979) (no fatal variance between indictments charging defendant with stealing "the property of Lees-McRae College under the custody of Steve Cummings" and evidence showing that property belonged to Mackey Vending Company and ARA Food Services; Lees-McRae College was in lawful possession of the items as well as having custody of them as a bailee).

When a variance between the indictment's allegation regarding the owner or individual or entity with a possessory interest and the evidence can be characterized as minor or as falling within the rule of *idem sonans*,[142] it has been overlooked.[143]

Larceny and embezzlement indictments must allege ownership of the property in a natural person or a legal entity capable of owning property. When the property owner is a business, the words "corporation," "incorporated," "limited," and "company," as well as abbreviations for those terms such as "Inc." and "Ltd." sufficiently designate an entity capable of owning property.[144] The following cases illustrate this rule.

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

State v. Thornton, 251 N.C. 658, 660-62 (1960) (embezzlement indictment charging embezzlement from "The Chuck Wagon" was defective because it contained no allegation that the victim was a legal entity capable of owning property; although the victim's name was given, there was no allegation that it was a corporation and the name itself did not indicate that it was such an entity).

State v. Brown, __ N.C. App. __, 646 S.E.2d 590 (2007) (larceny indictment stating that stolen items were the personal property of "Smoker Friendly Store, Dunn, North Carolina" was defective because it did not state that the store was a legal entity capable of owning property; rejecting the State's argument that when count one and two were read together the indictment alleged a legal entity capable of owning property; although count two referenced a corporation as the owner, that language was not incorporated into count one and each count of an indictment must be complete in itself).

State v. Price, 170 N.C. App. 672, 673 (2005) (indictment for larceny was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that this entity was a legal entity capable of owning property).

State v. Phillips, 162 N.C. App. 719 (2004) (larceny indictments were fatally defective because they failed to give sufficient indication of the legal ownership of the stolen items; indictment alleged that items were the personal property of "Parker's Marine"; Parker's Marine was not an individual and the indictment failed to allege that it was a legal entity capable of ownership; defective count cannot be read together with

142. *See supra* pp. 10–11.

143. State v. Weaver, 123 N.C. App. 276, 291 (1996) (no fatal variance between attempted larceny indictment alleging that the stolen items were "the personal property of Finch-Wood Chevrolet-Geo Inc." and evidence; evidence showed that Finch-Wood Chevrolet had custody and control of the car but did not show that entity was incorporated or that it also was known as Finch-Wood Chevrolet-Geo); State v. Cameron, 73 N.C. App 89, 92 (1985) (no fatal variance between indictment alleging that stolen items belonged to "Mrs. Narest Phillips" and evidence showing that the owner was "Mrs. Ernest Phillips"; names are sufficiently similar to fall within the doctrine of idem sonans, and the variance was immaterial); State v. McCall, 12 N.C. App. 85, 87-88 (1971) (no fatal variance between indictment and proof; indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc."); *see also* State v. Smith, 43 N.C. App. 376, 378 (1979) (no fatal variance between warrant charging defendant with stealing the property of "K-Mart Stores, Inc., Lenoir, N.C." and testimony at trial that the name of the store was "K-Mart, Inc.," "K-Mart Corporation," or "K-Mart Corporation").

144. State v. Cave, 174 N.C. App. 580, 583 (2005).

non-defective count when defective count does not incorporate by reference required language).

State v. Norman, 149 N.C. App. 588, 593 (2002) (felony larceny indictment alleging that defendant took the property of "Quail Run Homes Ross Dotson, Agent" was fatally defective because it lacked any indication of the legal ownership status of the victim (such as identifying the victim as a natural person or a corporation); "Any crime that occurs when a defendant offends the ownership rights of another, such as conversion, larceny, or embezzlement, requires proof that someone other than a defendant owned the relevant property. Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property.")

State v. Linney, 138 N.C. App. 169, 172-73 (2000) (fatal variance existed in embezzlement indictment alleging that rental proceeds belonged to an estate when in fact they belonged to the decedent's son; also, an estate is not a legal entity capable of holding property).

State v. Woody, 132 N.C. App. 788, 790 (1999) (indictment for conversion by bailee alleging that the converted property belonged to "P&R unlimited" was defective because it lacked any indication of the legal ownership status of the victim; while the abbreviation "ltd" or the word "limited" is a proper corporate identifier, "unlimited" is not).

State v. Hughes, 118 N.C. App. 573, 575-76 (1995) (embezzlement indictments alleged that gasoline belonged to "Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation"; evidence showed that gasoline was actually owned by Petroleum World, Incorporated, a corporation; trial judge improperly allowed the State to amend the indictments to delete the words Mike Frost, President; because an indictment for embezzlement must allege ownership of the property in a person, corporation or other legal entity able to own property, the amendment was a substantial alteration).

State v. Strange, 58 N.C. App. 756, 757-58 (1982) (arresting judgment *ex mero moto* where the defendant was charged and found guilty of the larceny of a barbeque cooker "the personal property of Granville County Law Enforcement Association" because indictment failed to charge the defendant with the larceny of the cooker from a legal entity capable of owning property).

State v. Perkins, 57 N.C. App. 516, 518 (1982) (larceny indictment was defective because it failed to allege that "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was a corporation or other legal entity capable of owning property and name did not indicate that it was a corporation or natural person).

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

State v. Cave, 174 N.C. App. 580, 582 (2005) (larceny indictment was not defective; the indictment named the owner as "N.C. FYE, Inc."; the indictment was sufficient because the abbreviation "Inc." imports the entity's ability to own property).

State v. Day, 45 N.C. App. 316, 317-18 (1980) (no fatal variance between the indictment alleging that items were the property of "J. Riggings, Inc., a corporation" and evidence; witnesses testified that items were owned by "J. Riggings, a man's retailing establishment," "J. Riggins Store," and "J. Riggings" but no one testified that J. Riggings was a corporation).

One case that appears to be an exception to the general rule that the owner must be identified as one capable of legal ownership is *State v. Wooten*.[145] That case upheld a shoplifting indictment that named the victim simply as "Kings Dept. Store." Noting that indictments for larceny and embezzlement must allege ownership in either a natural person or legal entity capable of owning property, the *Wooten* court distinguished shoplifting because it only can be committed against a store. At least one case has declined to extend *Wooten* beyond the shoplifting context.[146]

A larceny indictment must describe the property taken. The cases annotated below explore the level of detail required in the description. When the larceny is of any money, United States treasury note, or bank note, G.S. 15-149 provides that it is sufficient to describe the item "simply as money, without specifying any particular coin [or note]." G.S. 15-150 provides a similar rule for embezzlement of money.

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

State v. Ingram, 271 N.C. 538, 541-44 (1967) (larceny indictment that described stolen property as "merchandise, chattels, money, valuable securities and other personal property" was insufficient).

State v. Nugent, 243 N.C. 100, 102-03 (1955) ("meat" was an insufficient description in larceny and receiving indictment of the goods stolen).

State v. Simmons, 57 N.C. App. 548, 551-52 (1982) (fatal variance between larceny indictment and the proof at trial as to what item or items were taken; property was alleged as "eight (8) Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., a corporation"; however, the property seized was a 21 cubic foot freezer, serial number "W210TSSC-030-138").

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

State v. Hartley, 39 N.C. App. 70, 71-72 (1978) (larceny indictments alleging property taken as "a quantity of used automobile tires, the personal property of Jerry Phillips and Tom Phillips, and d/b/a the Avery County Recapping Service, Newland, N.C." was sufficient; indictments named property (tires), described them as to type (automobile), condition (used), ownership, and location).

State v. Monk, 36 N.C. App. 337, 340-41 (1978) (indictment alleging "assorted items of clothing, having a value of $504.99 the property of Payne's, Inc." was sufficient).

State v. Boomer, 33 N.C. App. 324, 330 (1977) ("When describing an animal, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. The general term 'hogs' in the indictment sufficiently describes the animals taken so as to identify them with reasonable certainty.") (citation omitted).

State v. Coleman, 24 N.C. App. 530, 532 (1975) (no fatal variance between indictment describing property as "a 1970 Plymouth" with a specific serial number, owned by

145. 18 N.C. App. 652 (1973).

146. *See* State v. Woody, 132 N.C. App. 788, 791 (1999).

George Edison Biggs and evidence which showed a taking of a 1970 Plymouth owned by George Edison Biggs but was silent as to the serial number).

State v. Foster, 10 N.C. App. 141, 142-43 (1970) (larceny indictment alleging "automobile parts of the value of $300.00 . . . of one Furches Motor Company" was sufficient).

State v. Mobley, 9 N.C. App. 717, 718 (1970) (indictment alleging "an undetermined amount of beer, food and money of the value of $25.00 . . . of the said Evening Star Grill" was sufficient).

State v. Chandler[147] held that when the charge is attempted larceny, it is not necessary to specify the particular goods and chattels the defendant intended to steal. The court reasoned that the offense of attempted larceny is complete "when there is a general intent to steal and an act in furtherance thereof." Thus, it concluded, an allegation as to the specific articles intended to be taken is not essential to the crime.[148]

A larceny indictment need not describe the manner of the taking, even if the larceny was by trick.[149] Nor is it necessary for a larceny indictment to expressly allege that the defendant intended to convert the property to his or her own use, that the taking was without consent, or that the defendant had an intent to permanently deprive the owner of the property of its use.[150]

In order to properly charge felony larceny, the indictment must specifically allege one of the factors that elevate a misdemeanor larceny to a felony.[151] Thus, if the factor elevating the offense to a felony is that the value of the items taken exceeds $1,000, this fact must be alleged in the indictment. However, a variance as to this figure will not be fatal, provided that the evidence establishes that the value of the items is $1,000 or more.[152] An indictment alleging that the larceny was committed "pursuant to a violation of G.S. 14-51" is sufficient to charge felony larceny committed pursuant to a burglary.[153] Also, a defendant properly may be convicted of felony larceny pursuant

147. 342 N.C. 742, 753 (1996).

148. *See id.*

149. *See* State v. Barbour, 153 N.C. App. 500, 503 (2002) ("It is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words 'by trick' need not be found in an indictment charging larceny."); State v. Harris, 35 N.C. App. 401, 402 (1978).

150. *See* State v. Osborne, 149 N.C. App. 235, 244-45 (indictment properly charged larceny even though it did not allege that item was taken without consent or that defendant intended to permanently deprive the owner; charge that defendant "unlawfully, willfully and feloniously did "[s]teal, take, and carry away" was sufficient), *aff'd*, 356 N.C. 424 (2002); State v. Miller, 42 N.C. App. 342, 346 (1979) (rejecting defendant's argument that the indictment was fatally defective because it failed to state a felonious intent to appropriate the goods taken to the defendant's own use; allegation that defendant "unlawfully and willfully did feloniously steal, take, and carry away" the item was sufficient); *see also* State v. Wesson, 16 N.C. App. 683, 685-88 (1972) (warrant's use of the term "steal" in charging larceny sufficiently charged the required felonious intent).

151. *See* G.S. 14-72 (delineating elements that support a felony charge); State v. Wilson, 315 N.C. 157, 164-65 (1985) (agreeing with defendant's contention that the indictment failed to allege felonious larceny because it did not specifically state that the larceny was pursuant to or incidental to a breaking or entering and the amount of money alleged to have been stolen was below the statutory amount necessary to constitute a felony).

152. *See* State v. McCall, 12 N.C. App. 85, 88 (1971) (indictment alleged larceny of $1948 and evidence showed larceny of $1748).

153. *See* State v. Mandina, 91 N.C. App. 686, 690-91 (1988).

to a breaking and entering when the indictment charged felony larceny pursuant to a burglary,[154] because breaking or entering is a lesser included offense of burglary.[155]

N. Receiving or Possession of Stolen Property

Unlike larceny, indictments charging receiving or possession of stolen property need not allege ownership of the property.[156] The explanation for this distinction is that the name of the person from whom the goods were stolen is not an essential element of these offenses.[157]

O. Injury to Personal Property

An indictment for injury to personal property must allege the owner or person in lawful possession of the injured property.[158] If the entity named in the indictment is not a natural person, the indictment must allege that the victim was a legal entity capable of owning property.[159] These rules follow those for larceny, discussed above.[160]

P. False Pretenses and Forgery

1. False Pretenses

One issue in false pretenses cases is how the false representation element should be alleged in the indictment. In *State v. Perkins*,[161] the court of appeals held that an allegation that the defendant used a credit and check card issued in the name of another person, wrongfully obtained and without authorization, sufficiently apprised the defendant that she was accused of falsely representing herself as an authorized user of the cards.[162] In *State v. Parker*,[163] the court of appeals upheld the

154. *See* State v. McCoy, 79 N.C. App. 273, 277 (1986); State v. Eldgridge, 83 N.C. App. 312, 316 (1986).

155. *See McCoy*, 79 N.C. App. at 277.

156. *See* State v. Jones, 151 N.C. App. 317, 327 (2002) (variance between ownership of property alleged in indictment and evidence of ownership introduced at trial is not fatal to charge of felonious possession of stolen goods); State v. Medlin, 86 N.C. App. 114, 123-24 (1987) ("In cases of receiving stolen goods, it has never been necessary to allege the names of persons from whom the goods were stolen, nor has a variance between an allegation of ownership in the receiving indictment and proof of ownership been held to be fatal. We now hold that the name of the person from whom the goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictments' allegations of ownership of property and the proof of ownership fatal.") (citations omitted).

157. *See Jones*, 151 N.C. App at 327.

158. *See* State v. Price, 170 N.C. App. 672, 673-74 (2005).

159. *See id.* at 674 (indictment for injury to personal property was defective when it named the property owner as "City of Asheville Transit and Parking Services," which was not a natural person; the indictment did not allege that it was a legal entity capable of owning property).

160. *See supra* pp. 34–36.

161. 181 N.C. App. 209, 215 (2007).

162. *Id.* (the indictment alleged that the defendant "unlawfully, willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, attempted to obtain BEER AND CIGARETTES from FOOD LION by means of a false pretense which was calculated to deceive. The false pretense consisted of the following: THIS PROPERTY WAS OBTAINED BY MEANS OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM").

163. 146 N.C. App. 715 (2001).

trial court's decision to allow the State to amend a false pretenses indictment by changing the items that the defendant represented as his own from "two (2) cameras and photography equipment" to a "Magnavox VCR."[164] The court held that the amendment was not a substantial alteration because the description of the item or items that the defendant falsely represented as his own was irrelevant to proving the essential elements of the crime charged. Those essential elements were simply that the defendant falsely represented a subsisting fact, which was calculated and intended to deceive, which did in fact deceive, and by which defendant obtained something of value from another.

In false pretenses cases, the thing obtained must be described with reasonable certainty.[165] This standard was satisfied in *State v. Walston*,[166] where the court held that there was no fatal variance between a false pretenses indictment alleging that the defendant obtained $10,000 in U.S. currency and the evidence that showed that the defendant deposited a $10,000 check into a bank account. The court reasoned that "whether defendant received $10,000.00 in cash or deposited $10,000.00 in a bank account, he obtained something of monetary value which is the crux of the offense."[167] Although early cases indicate that a false pretenses indictment should describe money obtained by giving the amount in dollars and cents,[168] more modern cases have been flexible on this rule. Thus, an indictment alleging that the defendant falsely represented to a store clerk that he had purchased a watch band in order to obtain "United States currency" was held to be sufficient, even though a dollar amount was not stated.[169] The court distinguished the earlier cases noting that in the case before it, the indictment alleged the item – the watch band – which the defendant used to obtain the money.[170]

G.S. 15-151 provides that in any case in which an intent to defraud is required for forgery or any other offense, it is sufficient to allege an intent to defraud, without naming the person or entity intended to be defrauded. That provision states that at trial, it is sufficient and not a variance if there is an intent to defraud a government, corporate body, public officer in his or her official capacity, or any particular person. Without citing this provision, at least one case has held that a false pretenses indictment need not specify the alleged victim.[171]

2. Identity Theft

Identity theft[172] is a relatively new crime and few cases have dealt with indictment issues regarding this offense. One case that has is *State v. Dammons,*[173] in which the indictment alleged that the defendant had fraudulently represented himself as William Artis Smith "for the purpose of making financial or credit transactions and for the purpose of avoiding legal consequences in the name of Michael Anthony Dammons." The State's evidence at trial indicated that the defendant assumed Smith's identity without consent in order to avoid legal consequences in the form of

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164. *See id*. at 719.

165. *See* State v. Walston, 140 N.C. App. 327, 334 (2000) (quotation omitted).

166. 140 N.C. App. 327 (2000).

167. *Id.* at 334-36

168. *See* State v. Smith, 219 N.C. 400, 401 (1941); State v. Reese, 83 N.C. 638 (1880).

169. State v. Ledwell, 171 N.C. App. 314, 317-18 (2005).

170. *See id.* at 318.

171. State v. McBride, __ N.C. App. __, 653 S.E.2d 218 (2007) (the court concluded that the statute proscribing the offense, G.S. 14-100, does not require that the State prove an intent to defraud any particular person).

172. G.S. 14-113.20.

173. 159 N.C. App. 284 (2003).

felony charges. The appellate court rejected the defendant's argument of fatal variance, concluding that the charging language about the financial transaction was unnecessary and was properly regarded as surplusage.[174]

3. Forgery

In North Carolina, there are common law and statutory offenses for forgery.[175] For offenses charged under G.S. 14-119 (forgery of notes, checks, and other securities; counterfeiting instruments), the indictment need not state the manner in which the instrument was forged.[176]

Q. Perjury and Related Offenses

G.S. 15-145 provides the form for a bill of perjury. G.S. 15-146 does the same for a bill of subornation of perjury. G.S. 14-217(b) specifies the contents of an indictment for bribery of officials.

R. Habitual and Violent Habitual Felon

In North Carolina, being a habitual felon or a violent habitual felon is not a crime but a status, the attaining of which subjects a defendant thereafter convicted of a crime to an increased punishment.[177] The status itself, standing alone, will not support a criminal conviction.[178] Put another way, an indictment for habitual or violent habitual felon must be "attached" to an indictment charging a substantive offense.[179] Focusing on the distinction between a status and a crime, the

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174. *Id.* at 293.

175. *See* Jessica Smith, North Carolina Crimes: A Guidebook on the Elements of Crime pp. 334-39 (6th ed. 2007).

176. State v. King, 178 N.C. App. 122 (2006) (indictment alleged that "on or about the 19th day of March, 2004, in Wayne County Louretha Mae King unlawfully, willfully, feloniously and with the intent to injure and defraud, did forge, falsely make, and counterfeit a Wachovia withdrawal form, which was apparently capable of effecting a fraud, and which is as appears on the copy attached hereto as Exhibit "A" and which is hereby incorporated by reference in this indictment as if the same were fully set forth"; rejecting the defendant's argument that the indictment was defective because it failed to allege how the defendant committed the forgery; concluding that the indictment clearly set forth all of the elements of the offense and that furthermore a copy of the withdrawal slip was attached to the indictment as an exhibit showing the date and time of day, amount of money withdrawn, account number, and particular bank branch from which the funds were withdrawn).

177. *See, e.g.,* State v. Allen, 292 N.C. 431, 433-35 (1977) ("Properly construed the [habitual felon] act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive felony. The act does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon.").

178. *See, e.g., id.* at 435.

179. *Compare id.* at 436 (holding that habitual felon indictment was invalid because there was no pending felony prosecution to which the habitual felon proceeding could attach) *and* State v. Davis, 123 N.C. App. 240, 243-44 (1996) (trial court erred by sentencing defendant as an habitual felon after arresting judgment in all the underlying felonies for which defendant was convicted) *with* State v. Oakes, 113 N.C. App. 332, 339 (1994) (until judgment was entered upon defendant's conviction of the substantive felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could

North Carolina Court of Appeals has stated that because being a habitual felon is not a substantive offense, the requirement in G.S. 15A-924(a)(5) that each element of the crime be pleaded does not apply.[180] It went on to indicate that as a status, "the only pleading requirement is that defendant be given notice that he is being prosecuted for some substantive felony as a recidivist."[181]

The relevant statutes provide that the indictment charging habitual felon or violent habitual felon status shall be separate from the indictment charging the substantive felony.[182] Although it has not ruled on the issue, in *State v. Patton*, the North Carolina Supreme Court has indicated that this language requires separate indictments.[183] In *State v. Young*,[184] the North Carolina Court of Appeals upheld an indictment that charged the underlying felony and habitual felon in separate counts of the same indictment. *Young* held that G.S. 14-7.3 does not require that a habitual felon indictment be contained in a separate bill of indictment; rather it held that the statute requires merely that the indictment charging habitual felon status "be distinct, or set apart, from the charge of the underlying felony." However, *Young* was decided before *Patton* and it is not clear that its rationale survives that later case.

The indictment for the substantive felony need not charge or refer to the habitual felon status.[185] Nor must the habitual felon indictment allege the substantive felony.[186] If the substantive felony is alleged in the habitual felon indictment and an error is made with regard to that allegation, the allegation will be treated as surplusage and ignored.[187] Finally a separate habitual felon indictment is not required for each substantive felony indictment.[188]

A number of issues have arisen regarding the timing of habitual and violent habitual felon indictments. The basic rule is that an indictment for habitual felon or violent habitual felon must be obtained before the defendant enters a plea at trial to the substantive offense.[189] The reason for this rule is "so that defendant has notice that he [or she] will be charged as a recidivist before pleading to the substantive felony, thereby eliminating the possibility that he [or she] will enter a

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attach) *and* State v. Mewborn, 131 N.C. App. 495, 501 (1998) (after the original violent habitual felon indictment was quashed, prayer for judgment continued was entered on the substantive felony, a new indictment was issued, and defendant stood trial under that indictment as a violent habitual felon; because defendant had not yet been sentenced for the substantive felony and because the original indictment placed him on notice that he was being tried as a violent habitual felon, the subsequent indictment attached to the ongoing felony proceeding and defendant was properly tried as a violent habitual felon).

180. *See* State v. Roberts, 135 N.C. App. 690, 698 (1999).

181. *Id.* at 698 (quotation omitted and emphasis deleted).

182. *See* G.S. 14-7.3 (habitual felon); 14-7.9 (violent habitual felon).

183. *See* State v. Patton, 342 N.C. 633, 635 (1996); State v. Allen, 292 N.C. 431, 433 (1977).

184. 120 N.C. App. 456, 459-61 (1995).

185. *See* State v. Todd, 313 N.C. 110, 120 (1985); State v. Peoples, 167 N.C. App. 63, 71 (2004); State v. Mason, 126 N.C. App. 318, 322 (1997); State v. Hodge, 112 N.C. App, 462, 466-67 (1993); State v. Sanders, 95 N.C. App. 494, 504 (1989); State v. Keyes, 56 N.C. App. 75, 78 (1982).

186. *See* State v. Cheek, 339 N.C. 725, 727 (1995); State v. Smith, 160 N.C. App. 107, 124 (2003); State v. Bowens, 140 N.C. App. 217, 224 (2000); State v. Roberts, 135 N.C. App. 690, 698 (1999); *Mason,* 126 N.C. App. at 322.

187. *See, e.g., Bowens*, 140 N.C. App. at 224-25.

188. *See* State v. Patton, 342 N.C. 633, 635 (1996) (rejecting the notion that a one-to-one correspondence was required); State v. Taylor, 156 N.C. App. 172, 174 (2003).

189. *See* State v. Allen, 292 N.C. 431, 436 (1977); State v. Little, 126 N.C. App. 262, 269 (1997).

The court of appeals has rejected the argument that the "cut off" is when a defendant enters a plea at an arraignment. State v. Cogdell, 165 N.C. App. 368 (2004). The court concluded that "the critical event . . . is the plea entered before the actual trial." Id. at 373.

guilty plea without a full understanding of the possible consequences of conviction."[190] A habitual or violent habitual indictment may be obtained before an indictment on the substantive charge is obtained, provided there is compliance with the statutes' notice and procedural requirements.[191] Once a guilty plea has been adjudicated on a habitual felon indictment or information, that particular pleading has been "used up" and cannot support sentencing the defendant as a habitual felon on another felony; this rule applies even if the sentencing on the original pleading has been continued.[192]

The most common challenges to habitual felon and violent habitual felon indictments are to the prior felonies alleged. G.S. 14-7.3 (charge of habitual felon), provides that indictments "must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." G.S. 14-7.9 (charge of violent habitual felon) contains similar although not identical language. The prior convictions are treated as elements; thus, it is error to allow the State to amend an indictment to replace an alleged prior conviction.[193] Similarly, an indictment will be deemed defective if one of the alleged priors is a misdemeanor, not a felony, even if defense counsel stipulates that the prior convictions were felonies.[194] By contrast, the courts are lenient with regard to the statutory requirement that the indictment identify the state or other sovereign against whom the prior felonies were committed.[195]

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190. State v. Oakes, 113 N.C. App. 332, 338 (1994). The court of appeals has deviated from the basic timing rule in two cases. However, in both cases, (1) the habitual felon indictment was obtained before the defendant entered a plea at trial and was later replaced with either a new or superseding indictment; thus there was some notice as to the charge; and (2) both cases described the defects in the initial indictment as "technical"; thus, both probably could have been corrected by amendment. *See Oakes,* 113 N.C. App. 332; *Mewborn*, 131 N.C. App. 495.

191. *See* State v. Blakney, 156 N.C. App. 671, 675 (2003); *see also* State v. Murray, 154 N.C. App. 631, 638 (2002).

192. State v. Bradley, 175 N.C. App. 234 (2005) (when the defendant pleaded guilty to two crimes and having attained habitual felon status as to each but sentencing was continued, the original habitual felon informations could not be used to support habitual felon sentencing for a subsequent felony charge).

193. *State v. Little*, 126 N.C. App. 262, 269-70 (1997) (the State should not have been allowed to obtain a superseding indictment which changed one of the three felony convictions listed as priors; the court concluded that a change in the prior convictions was substantive and altered an allegation pertaining to an element of the offense).

194. State v. Moncree, __ N.C. App. __, 655 S.E.2d 464 (2008) (habitual felon indictment was defective where one of the prior crimes was classified as a misdemeanor in the state where it was committed; defense counsel's stipulations that all of the priors were felonies did not foreclose relief on appeal).

195. State v. Montford, 137 N.C. App. 495, 500-01 (2000) (trial court did not err in allowing the State to amend the habitual felon indictment; original indictment listed three previous felonies, but did not state that they had been committed against the State of North Carolina, instead listing that they had occurred in Carteret County; State amended the indictment by inserting "in North Carolina" after each listed felony; "we need not even address the amendment issue, as we conclude that the original indictment itself was not flawed"; although the statute requires the indictment to allege the name of the state or sovereign, we have not required rigid adherence to this rule; "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed"; the original indictment sufficiently indicated the state against whom the prior felonies were committed because "State of North Carolina" explicitly appears at the top of the indictment, followed by "Carteret County," thus, Carteret County is clearly linked with the state name); State v. Mason, 126 N.C. App. 318, 323 (1997) (indictment stated the prior assault with a deadly weapon inflicting serious injury occurred in "Wake County, North Carolina" and

Cases dealing with date issues regarding prior convictions in these indictments are summarized above, see *supra* pp. 8–9. The summaries below explore other challenges that have been asserted against the prior felony allegations in habitual felon and violent habitual felon indictments.

> *State v. McIlwaine,* 169 N.C. App. 397, 399-499 (2005) (habitual felon indictment alleged that the defendant had been previously convicted of three felonies, including "the felony of possession with intent to manufacture, sell or deliver [S]chedule I controlled substance, in violation of N.C.G.S. 90-95"; the indictment was sufficient to charge habitual felon even though it did not allege the specific name of the controlled substance).
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> *State v. Briggs*, 137 N.C. App. 125, 130-31 (2000) (habitual felon indictment listing conviction for "felony of breaking and entering buildings in violation of N.C.G.S. 14-54" and containing the date the felony was committed, the court in which defendant was convicted, the number assigned to the case, and the date of conviction was sufficient).
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> *State v. Hicks*, 125 N.C. App. 158, 160 (1997) (no error by allowing State to amend habitual felon indictment; original indictment alleged that all of the previous felony convictions were committed after the defendant reached the age of eighteen; the State amended to allege that all but one of the previous felony convictions were committed after the defendant reached the age of eighteen; the three underlying felonies remained the same).

S. Drug Offenses

1. Sale or Delivery

Indictments charging sale or delivery of a controlled substance in violation of G.S. 90-95(a)(1) must allege a controlled substance that is included in the schedules of controlled substances.[196] Such indictments also must allege the name of the person to whom the sale or delivery was made, when that person's name is known, or allege that the person's name was unknown.[197] One exception

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that judgment was entered in Wake County Superior Court and listed voluntary manslaughter as occurring in "Wake County" and that judgment was entered in Wake County Superior Court, but did not list a state; indictment was sufficient "because the description of the assault conviction indicates Wake County is within North Carolina, and the indictment states both judgments were entered in Wake County Superior Court, we believe this, along with the dates of the offenses and convictions, is sufficient to give defendant the required notice"); State v. Young, 120 N.C. App. 456, 462 (1995) (rejecting defendant's argument that habitual felon indictment inadequately alleged the name of the state or other sovereign against whom the prior felonies were committed); State v. Hodge, 112 N.C. App. 462, 467 (1993) (upholding indictment that alleged that the felony of common law robbery was committed in "Wake County, North Carolina," and that the other priors were committed in "Wake County," descriptions which were in the same sentence; the use of "Wake County" to describe the sovereignty against which the felonies were committed was clearly a reference to Wake County, North Carolina); State v. Williams, 99 N.C. App. 333, 334-35 (1990) (habitual felon indictment setting forth each of the prior felonies of which defendant was charged and convicted as being in violation of an enumerated "North Carolina General Statutes" contained a sufficient statement of the state or sovereign against whom the felonies were committed).

196. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 785-86 (2006); *see infra* pp. 47-48 (discussing allegations regarding drug name).

197. *See* State v. Bennett, 280 N.C. 167, 168-69 (1971) (an indictment for sale of a controlled substance must state the name of the person to whom the sale was made or that his or her name was unknown) (decided under prior law); State v. Calvino, 179 N.C. App. 219, 221-222 (2006) (the indictment alleged that defendant sold cocaine to "a confidential source of information" and it was undisputed that the State knew the name

to this rule has been recognized by the court of appeals in cases involving middlemen. *State v. Cotton*[198] is illustrative. In *Cotton,* the sale and delivery indictment charged that the defendant sold the controlled substance to Todd, an undercover officer. The evidence at trial showed a direct sale to Morrow, who was acting as a middleman for Todd. Defendant unsuccessfully moved to dismiss on grounds of fatal variance. The court of appeals noted that the State could overcome the motion by producing substantial evidence that the defendant knew the cocaine was being sold to a third party, and that the third party was named in the indictment. Turning to the facts before it, the court noted that the evidence showed that Todd accompanied Morrow to the defendant's house and was allowed to stay in the house while Morrow and defendant had a discussion. Todd was brought upstairs with them and waited in the bedroom when they went into the bathroom. Morrow then came out and told Todd to give him the money because the defendant was paranoid, went back into the bathroom, and came out with the cocaine. The court concluded that there was substantial evidence that the defendant knew that Morrow was acting as a middleman, and that the cocaine was actually being sold to Todd, the person named in the indictment, and thus that there was no fatal variance.[199] When there is insufficient evidence showing that the defendant knew that the intermediary was buying or taking delivery for the purchaser named in the indictment, a fatal variance results.[200]

If the charge is conspiracy to sell or deliver, the person with whom the defendant conspired to sell and deliver need not be named.[201]

2. Possession and Possession With Intent to Manufacture, Sell or Deliver

An indictment for possession of a controlled substance must identify the controlled substance allegedly possessed.[202] However, time and place are not essential elements of the offense of

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of the individual to whom defendant allegedly sold the cocaine in question; the indictment was fatally defective); State v. Smith, 155 N.C. App. 500, 512-13 (2002) (fatal variance in indictment alleging that defendant sold marijuana to Berger; facts were that Berger and Chadwell went to defendant's bar to purchase marijuana; Berger waited in the car while Chadwell went into the building and purchased marijuana on their behalf; there was no substantial evidence that defendant knew he was selling marijuana to Berger); State v. Wall, 96 N.C. App. 45, 49-50 (1989); (fatal variance between indictment charging sale and delivery of cocaine to McPhatter, an undercover officer, and evidence showing that McPhatter gave Riley money to purchase cocaine, which she did; there was no substantial evidence that defendant knew Riley was acting on McPhatter's behalf); State v. Pulliman, 78 N.C. App. 129, 131-33 (1985) (no fatal variance between indictment charging sale and delivery to Walker, an undercover officer, and evidence; evidence showed that although the sale was made to Cobb, defendant knew Cobb was buying the drugs for Walker); State v. Sealey, 41 N.C. App. 175, 176 (1979) (fatal variance between indictment charging defendant with selling dilaudid to Mills and evidence showing that defendant made the sale to Atkins); State v. Ingram, 20 N.C. App. 464, 465-66 (1974) (fatal variance between indictment charging that defendant sold to Gooche and evidence showing that the purchaser was Hairston); State v. Martindate, 15 N.C. App. 216, 217-18 (1972) (indictment that did not name the person to whom a sale was allegedly made and did not allege that the purchaser's name was unknown was fatally defective); State v. Long, 14 N.C. App. 508, 510 (1972) (same).

198. 102 N.C. App. 93 (1991).

199. *See also Pulliman*, 78 N.C. App. at 131-33.

200. *See Wall,* 96 N.C. App. at 49-50; *Smith,* 155 N.C. App. at 512-13.

201. *See, e.g.,* State v. Lorenzo, 147 N.C. App. 728, 734-35 (2001) (indictment charging conspiracy to traffic in marijuana by delivery was not defective for failing to name the person to whom defendant allegedly conspired to sell or deliver the marijuana).

202. *See* State v. Ledwell, 171 N.C. App. 328, 331 (2005).

unlawful possession.[203] Indictments charging possession with intent to sell or deliver need not allege the person to whom the defendant intended to distribute the controlled substance.[204]

For case law pertaining to drug quantity, see *infra* pp. 46–47. For case law pertaining to the name of the controlled substance, see *infra* pp. 47–48.

3. Trafficking

An indictment charging conspiracy to traffic in controlled substances by sale or delivery is sufficient even if it does not identify the person with whom the defendant conspired to sell or deliver the controlled substance.[205]

For case law pertaining to drug quantity in trafficking cases, see *infra* pp. 46–47.

4. Maintaining a Dwelling

The specific address of the dwelling need not be alleged in an indictment charging the defendant with maintaining a dwelling.[206]

5. Drug Paraphernalia

In *State v. Moore*,[207] an indictment charging possession of drug paraphernalia alleged that the defendant possessed "drug paraphernalia, to wit: a can designed as a smoking device." However, none of the evidence at trial related to a can; rather, it described crack cocaine in a folded brown paper bag with a rubber band around it. After denying the defendant's motion to dismiss, the trial court granted the State's motion to amend the indictment striking "a can designed as a smoking device" and replacing it with "drug paraphernalia, to wit: a brown paper container." The court of appeals held that because this change constituted a substantial alteration of the indictment, it was impermissible and the motion to dismiss should have been granted. It reasoned: "As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, in order to mount a defense to the charge of possession of drug paraphernalia, a defendant must be apprised of the item or substance the State categorizes as drug paraphernalia." Without citing *Moore,* a later case held that no plain error occurred when the indictment charged the defendant with possessing "drug paraphernalia, SCALES FOR PACKAGING A CONTROLLED SUBSTANCE," but the trial court instructed the jury that it could find the defendant guilty if it concluded that he knowingly possessed drug paraphernalia, without mentioning scales or packaging.[208]

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203. *See Bennett*, 280 N.C. at 169.

204. *See* State v. Campbell, 18 N.C. App. 586, 589 (1973) (decided under prior law).

205. *See Lorenzo*, 147 N.C. App. at 734.

206. *See* State v. Grady, 136 N.C. App. 394, 396-98 (2000) (no error in allowing amendment of dwelling's address in indictment for maintaining dwelling for use of controlled substance; address changed from "919 Dollard Town Road" to "929 Dollard Town Road"; because the specific designation of the dwelling's address need not be alleged in an indictment for this offense, the amendment did not "substantially alter the charge set forth in the indictment"; also, defendant could not have been misled or surprised because another count in the same indictment contained the correct address).

207. 162 N.C. App. 268 (2004).

208. State v. Shearin, 170 N.C. App. 222, 232-33 (2005).

6. Obtaining Controlled Substance by Fraud or Forgery

Cases involving challenges to indictments charging obtaining a controlled substance by forgery are annotated below.

State v. Brady, 147 N.C. App. 755, 758 (2001) (no error in allowing amendment to change the controlled substance named from "Xanax" to "Percocet" in an indictment for obtaining a controlled substance by forgery; the name of the controlled substance is not necessary in an indictment charging this offense).

State v. Baynard, 79 N.C. App. 559, 561-62 (1986) (indictments charging crime of obtaining controlled substance by fraud and forgery under G.S. 90-108(a)(10) were adequate to support conviction, even though they did not specifically state that defendant presented forged prescriptions knowing they were forged; indictments alleged that the offense was done "intentionally" and contained the words "misrepresentation, fraud, deception and subterfuge," all of which implied specific intent to misrepresent).

State v. Fleming, 52 N.C. App. 563, 565-66 (1981) (indictment properly charged offense under G.S. 90-108(a)(10); the illegal means employed was alleged with sufficient particularity).

State v. Booze, 29 N.C. App. 397, 398-400 (1976) (indictment alleging the time and place and the persons from whom defendant attempted to acquire the controlled substance, identifying the controlled substance, and stating the illegal means with particularity, "by using a forged prescription and presenting it to" the named pharmacists, was sufficient; "it was not necessary to make further factual allegations as to the nature of the forged prescriptions or to incorporate the forged prescriptions in the bills").

7. Amount of Controlled Substance

When the amount of the controlled substance is an essential element of the offense, it must be properly alleged in the indictment. Amount is an essential element with felonious possession

of marijuana,[209] felonious possession of hashish,[210] and trafficking in controlled substances.[211] Quantity is not an element of an offense under 90-95(a)(1).[212]

8. Drug Name

When the identity of the controlled substance is an element of the offense,[213] the indictment must allege a substance that is included in the schedules of controlled substances.[214] Thus, when an indictment alleged that the defendant possessed "Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I," and no such controlled substance by that name is listed in Schedule I, the indictment was defective.[215] Similarly, an indictment that identified the controlled substance allegedly possessed, sold, and delivered as "methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act" was defective because although 3, 4-Methylenedioxymethamphetamine was listed in

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209. *See* State v. Partridge, 157 N.C. App. 568, 570-71 (2003) (indictment charging felonious possession of marijuana was defective because it did not state drug quantity; the weight of the marijuana is an essential element of this offense); State v. Perry, 84 N.C. App. 309, 311 (1987) (the elements of felony possession were set out with sufficient clarity in indictment that specifically mentioned drug quantity).

210. *See* State v. Peoples, 65 N.C. App. 168, 168 (1983) (indictment that failed to allege the amount of hashish possessed could not support a felony conviction).

211. *See* State v. Outlaw, 159 N.C. App. 423 (trafficking indictment that failed to allege weight of cocaine was invalid) (citing State v. Epps, 95 N.C. App. 173 (1989)); State v. Trejo, 163 N.C. App. 512 (2004) (rejecting defendant's argument that the indictments charging him with trafficking in marijuana by possession and trafficking in marijuana by transportation were fatally defective because each failed to correctly specify the quantity of marijuana necessary for conviction; indictment charging trafficking in marijuana by possession alleged that defendant "possess[ed] 10 pounds or more but less than 50 pounds" of marijuana; the indictment charging defendant with trafficking in marijuana by transportation alleged that defendant "transport[ed] 10 pounds or more but less than 50 pounds" of marijuana; indictments, although overbroad, did allege the required amount of marijuana; fact that challenged indictments were drafted to include the possibility that defendant possessed and transported exactly ten pounds of marijuana (which does not constitute trafficking in marijuana) does not invalidate the indictments); *Epps*, 95 N.C. App. at 175-76 (quashing conspiracy to traffic in cocaine indictment for failure to refer to amount of cocaine); State v. Keyes, 87 N.C. App. 349, 358-59 (1987) (although statute makes it a trafficking felony to possess "four grams or more, but less than 14 grams" of heroin, the indictment charged possession of "more than four but less than fourteen grams of heroin"; distinguishing *Goforth*, discussed below, and holding that variance was not fatal; the indictment excludes from criminal prosecution the possession of exactly four grams, whereas the statute includes the possession of exactly four grams; the indictment, while limiting the scope of defendant's liability, is clearly within the confines of the statute); State v. Goforth, 65 N.C. App. 302, 305 (1983) (applying prior law that criminalized trafficking in marijuana at weights of in excess of 50 pounds and holding that indictment charging conspiracy to traffic "in at least 50 pounds" of marijuana was defective). *But see Epps*, 95 N.C. App. at 176-77 (affirming trafficking by sale conviction even though relevant count in indictment did not allege a drug quantity; defendant was charged in a two-count indictment, count one charged trafficking by possession of a specified amount of cocaine and count two charged trafficking by sale but did not state an amount; the two counts, when read together, informed defendant that he was being charged with trafficking by sale).

212. *See* State v. Hyatt, 98 N.C. App. 214, 216 (1990) ("while the quantity of drugs seized is evidence of the intent to sell, 'it is not an element of the offense'"); *Peoples*, 65 N.C. App. at 169 (same).

213. *See, e.g., supra* pp. 43, 44.

214. State v. Ahmadi-Turshizi, 175 N.C. App. 783, 784-85 (2006); State v. Ledwell, 171 N.C. App. 328 (2005).

215. *Ledwell*, 171 N.C. App. at 331-33.

Schedule I, methylenedioxymethamphetamine was not.[216] Notwithstanding this, cases have held that controlled substance indictments will not be found defective for minor errors in identifying the relevant controlled substance, such as "cocoa" instead of cocaine,[217] cocaine instead of a mixture containing cocaine,[218] and the use of a trade name instead of a chemical name.[219]

T. Weapons Offenses and Firearm Enhancement

Several cases addressing indictment issues with regard to weapons offenses and the firearm enhancement in G.S. 15A-1340.16A are annotated below.

1. Shooting into Occupied Property

State v. Pickens, 346 N.C. 628, 645-46 (1997) (no fatal variance between indictment alleging that defendant fired into an occupied dwelling with a shotgun and evidence establishing that the shot came from a handgun; the essential element of the offense is "to discharge ... [a] firearm"; indictment alleging that defendant discharged "a shotgun, a firearm" alleged that element and the averment to the shotgun was not necessary, making it mere surplusage in the indictment).

State v. Cockerham, 155 N.C. App. 729, 735-36 (2003) (indictment charging shooting into occupied property was not defective for failing to allege that defendant fired into a "building, structure or enclosure"; indictment alleged defendant shot into an "apartment" and as such was sufficient; an indictment which avers facts constituting every element of the offense need not be couched in the language of the statute).

State v. Bland, 34 N.C. App. 384, 385 (1977) (no fatal variance between indictment alleging that defendant shot into an occupied building and evidence showing that he shot into an occupied trailer; indictment specifically noted that the occupied building was located at 5313 Park Avenue, the address of the trailer).

State v. Walker, 34 N.C. App. 271, 272-74 (1977) (indictment not defective for failing to allege that the defendant knew or should have known that the trailer was occupied by one or more persons).

2. Possession of Firearm by Felon

G.S. 14-415.1 makes it a crime for a felon to possess a firearm or weapon of mass destruction. G.S. 14-415.1(c) provides that an indictment charging a defendant with this crime "shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section." It further provides that the indictment

> must set forth the date that the prior offense was committed, the type of offense and the penalty therefore, and the date that the defendant was convicted or plead guilty to such

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216. *Ahmadi-Turshizi*, 175 N.C. App. at 785-86.

217. *See* State v. Thrift, 78 N.C. App. 199, 201-02 (1985).

218. State v. Tyndall, 55 N.C. App. 57, 61-62 (1981) (although the indictment alleged that defendant sold cocaine rather than a mixture containing cocaine, this was not a fatal variance).

219. State v. Newton, 21 N.C. App. 384, 385-86 (1974) (no fatal variance between indictment charging that defendant possessed Desoxyn and evidence that showed defendant possessed methamphetamine; Desoxyn is a trade name for methamphetamine hydrochloride).

> offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein.

The court of appeals has held that the statutory requirement that the indictment state the conviction date for the prior offense is directory and not mandatory.[220] Thus, it concluded that failure to allege the date of the prior conviction did not render an indictment defective.[221] Also, *State v. Boston,*[222] rejected a defendant's claim that an indictment for this offense was fatally defective because it failed to state the statutory penalty for the prior felony conviction. The court held that "the provision . . . that requires the indictment to state the penalty for the prior offense is not material and does not affect a substantial right," that the defendant was apprised of the relevant conduct, and "[t]o hold otherwise would permit form to prevail over substance." Other relevant cases are summarized below.

> ***Cases Finding a Fatal Defect or Variance/Error With Respect to an Amendment***
>
> *State v. Langley*, 173 N.C. App. 194, 196-99 (2005) (in conviction under a prior version of G.S. 14-415.1, the court held that there was a fatal variance where the indictment charged that the defendant was in possession of a handgun and the State's evidence at trial tended to show that defendant possessed a firearm with barrel length less than 18 inches and overall length less than 26 inches, a sawed-off shotgun).[223]
>
> ***Finding No Fatal Defect or Variance/No Error With Respect to an Amendment***
>
> *State v. Coltrane*, __ N.C. App. __, 656 S.E.2d 322 (2008) (the trial court did not err by allowing the State to amend the allegation that the defendant's underlying felony conviction occurred in Montgomery County Superior Court to state that it occurred in Guilford County Superior Court; the indictment correctly identified all of the other allegations required by G.S. 14-415.1(c).
>
> *State v. Bishop*, 119 N.C. App. 695, 698-99 (1995) (indictment was not invalid for failing to allege (1) that possession of the firearm was away from defendant's home or business; (2) that defendant's prior Florida felony was "substantially similar" to a particular North Carolina crime; and (3) to which North Carolina statute the Florida conviction was similar; omission of the situs of the offense was not an error because situs is an exception to the offense, not an essential element; omission of a statement that the Florida felony was "substantially similar" to a particular North Carolina crime was not an error because the indictment gave sufficient notice of the offense charged; the indictment clearly described the felony committed in Florida, satisfying the requirements of G.S. 14-415.1(b)(3) and properly charging defendant with possession of firearms by a felon).
>
> *State v. Riggs*, 79 N.C. App. 398, 402 (1986) (indictment charging that defendant possessed "a Charter Arms .38 caliber pistol, which is a handgun" was not invalid for failing to allege the length of the pistol).

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220. State v. Inman, 174 N.C. App. 567 (2005).

221. *Id.* at 571.

222. 165 N.C. App. 214 (2004).

223. At the time, the prior version of the statute made it a crime for a felon to possess "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass destruction as defined by G.S. 14-288.8(c)." G.S. 14-415.1(a) (2003).

3. Possession of Weapon of Mass Destruction

State v. Blackwell, 163 N.C. App. 12 (2004) (no fatal variance between indictment charging possession of weapon of mass destruction that alleged possession of "a Stevens 12 gauge single-shot shotgun" and evidence at trial that shotgun was manufactured by Jay Stevens Arms; even if there was no evidence that the shotgun was a "Stevens" shotgun, there would be no fatal variance because "any person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim).

4. Firearm Enhancement

G.S. 15A-1340.16A provides for an enhanced sentence if the defendant is convicted of a felony falling within one of the specified classes and the defendant used, displayed, or threatened to use or display a firearm during commission of the felony. The statute provides that an indictment is sufficient if it alleges that "the defendant committed the felony by using, displaying, or threatening the use or display of a firearm and the defendant actually possessed the firearm about the defendant's person."[224]

U. Motor Vehicle Offenses

1. Impaired Driving

G.S. 20-138.1(c) and 20-138.2(c) allow short-form pleadings for impaired driving and impaired driving in a commercial vehicle respectively. For a discussion of the implications of *Blakely v. Washington,*[225] on these offenses, see *supra* p. 16. A case dealing with an allegation regarding the location of an impaired driving offense is summarized below.

State v. Snyder, 343 N.C. 61, 65-68 (1996) (indictment alleged that offense occurred on a street or highway; trial judge properly permitted the State to amend the indictment to read "on a highway or public vehicular area"; although the *situs* of the impaired driving offense is an essential element, the indictment simply needs to contain an allegation of *a situs* covered by the statute and no greater specificity is required; change in this case merely a refinement in the description of the type of *situs* on which the defendant was driving rather than a change in an essential element of the offense).

2. Habitual Impaired Driving

Under the current version of the habitual impaired driving statute,[226] this offense is committed when a person drives while impaired and has three or more convictions involving impaired driving within the last ten years. Under an earlier version of the statute, the "look-back period" for prior convictions was only seven years. At least one case has held, in connection with a prosecution under the prior version of the statute, that it was error to allow the State to amend a habitual impaired driving indictment to correct the date of a prior conviction and thereby bring it within the seven-year look-back period.[227] Indictments charging habitual impaired driving must conform to G.S. 15A-928. Cases on point are summarized below.

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224. G.S. 15A-1340.16A(d).
225. 542 U.S. 296 (2004).
226. G.S. 20-138.5.
227. State v. Winslow, 360 N.C. 161 (2005).

State v. Mark, 154 N.C. App. 341, 344-45 (2002) (rejecting defendant's argument that indictment violated G.S. 15A-928 because count three was entitled "Habitual Impaired Driving"), *aff'd,* 357 N.C. 242 (2003).

State v. Lobohe, 143 N.C. App. 555, 557-59 (2001) (indictment which alleged in one count the elements of impaired driving and in a second count the previous convictions elevating the offense to habitual impaired driving properly alleged habitual impaired driving) (citing G.S. 15A-928(b)).

State v. Baldwin, 117 N.C. App. 713, 715-16 (1995) (indictment alleged the essential elements of habitual impaired driving; contrary to defendant's claim, it alleged that defendant had been previously convicted of three impaired driving offenses).

3. Speeding to Elude Arrest

G.S. 20-141.5 makes it a misdemeanor to operate a motor vehicle while fleeing or attempted to elude a law enforcement officer who is in lawful performance of his or her duties. The crime is elevated to a felony if two or more specified aggravating factors are present, or if the violation is the proximate cause of death.

An indictment for this crime need not allege the lawful duties the officer was performing.[228] When the charge is felony speeding to elude arrest based on the presence of aggravating factors, the indictment is sufficient if it charges those aggravating factors by tracking the statutory language.[229] Thus, when the aggravating factor is "reckless driving proscribed by G.S. 20-140,"[230] the indictment need not allege all of the elements of reckless driving.[231] However, when the aggravating factor felony version of this offense is charged, the aggravating factors are essential elements of the crime and it is error to allow the State to amend the indictment to add an aggravating factor.[232]

4. Driving While License Revoked

In *State v. Scott,*[233] the court rejected the defendant's argument that an indictment for driving while license revoked was defective because it failed to list the element of notice of suspension. Acknowledging that proof of actual or constructive notice is required for a conviction, the court held that "it is not necessary to charge on knowledge of revocation when unchallenged evidence shows that the State has complied with the provisions for giving notice of revocation.[234]

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228. State v. Teel, 180 N.C. App. 446, 448-49 (2006).

229. State v. Stokes, 174 N.C. App. 447, 451-52 (2005) (indictment properly charged this crime when it alleged that the defendant unlawfully, willfully and feloniously did operate a motor vehicle on a highway, Interstate 40, while attempting to elude a law enforcement officer, T.D. Dell of the Greensboro Police Department, in the lawful performance of the officer's duties, stopping the defendant's vehicle for various motor vehicle offenses, and that at the time of the violation: (1) the defendant was speeding in excess of 15 miles per hour over the legal speed limit; (2) the defendant was driving recklessly in violation of G.S. 20-140; and (3) there was gross impairment of the defendant's faculties while driving due to consumption of an impairing substance); *see also* State v. Scott, 167 N.C. App. 783, 787-88 (2005) (indictment charging driving while license revoked as an aggravating factor without spelling out all elements of that offense was not defective).

230. G.S. 20-141.5(b)(3).

231. *Stokes,* 174 N.C. App. at 451-52.

232. State v. Moses, 154 N.C. App. 332, 337-38 (2002) (error to allow the State to amend misdemeanor speeding to allude arrest indictment by adding an aggravating factor that would make the offense a felony).

233. 167 N.C. App. 783 (2005).

234. *Id.* at 787.

V. General Crimes

1. Attempt

An indictment charging a completed offense is sufficient to support a conviction for an attempt to commit the offense.[235] This is true even though the completed crime and the attempt are not in the same statute.[236] G.S. 15-144, the statute authorizing use of short-form indictment for homicide, authorizes the use of the short-form indictment to charge attempted first-degree murder.[237]

2. Solicitation

In solicitation indictments, "it is not necessary to allege with technical precision the nature of the solicitation."[238]

3. Conspiracy

For the law regarding conspiracy to sell or deliver controlled substances indictments, see *supra* p. 44. For cases pertaining to allegations regarding the date of a conspiracy offense, see *supra* p. 8.

Conspiracy indictments "need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime."[239] Thus, the court of appeals has upheld a conspiracy indictment that alleged an agreement between two or more persons to do an unlawful act and contained allegations regarding their purpose, in that case to "feloniously forge, falsely make and counterfeit a check."[240] The court rejected the defendant's argument that the indictment should have been quashed for failure to specifically allege the forgery of an identified instrument.[241]

4. Accessory After the Fact to Felony

Accessory after the fact to a felony is not a lesser included offense of the principal felony.[242] This suggests that an indictment charging only the principal felony will be insufficient to convict for accessory after the fact.[243]

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235. *See* G.S. 15-170; State v. Gray, 58 N.C. App. 102, 106 (1982); State v. Slade, 81 N.C. App. 303, 306 (1986)

236. *See Slade*, 81 N.C. App. at 306 (1987) (discussing State v. Arnold, 285 N.C. 751, 755 (1974), and describing it as a case in which the defendant was indicted for the common law felony of arson but was convicted of the statutory felony of arson).

237. State v. Jones, 359 N.C. 832, 834-38 (2005) (noting that it is sufficient for the State to insert the words "attempt to" into the short form language); State v. Reid, 175 N.C. App. 613, 617-18 (2006) (following *Jones*).

238. State v. Furr, 292 N.C. 711, 722 (1977) (holding "indictment alleging defendant solicited another to murder is sufficient to take the case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object").

239. State v. Nicholson, 78 N.C. App. 398, 401 (1985) (rejecting defendant's argument that conspiracy to commit forgery indictment was fatally defective because it "failed to allege specifically the forgery of an identified instrument").

240. *Id.*

241. *See id.*

242. *See* State v. Jones, 254 N.C. 450, 452 (1961).

243. *Compare infra* n. 246 & accompanying text (discussing accessory before the fact). For a case allowing amendment of an accessory after the fact indictment, see *State v. Carrington*, 35 N.C. App. 53, 56-58 (1978) (indictments charged defendant with being an accessory after the fact to Arthur Parrish and an

W. Participants in Crime

An indictment charging a substantive offense need not allege the theory of acting in concert,[244] aiding or abetting,[245] or accessory before the fact.[246] Thus, the short-form murder indictment is sufficient to convict under a theory of aiding and abetting.[247] Because allegations regarding these theories are treated as "irrelevant and surplusage,"[248] the fact that an indictment alleges one such theory does not preclude the trial judge from instructing the jury that it may convict on another such theory not alleged,[249] or as a principal.[250]

unknown black male in the murder and armed robbery of a named victim; trial court did not err by allowing amendment of the indictments to remove mention of Parrish, who had earlier been acquitted).

244. *See* State v. Westbrook, 345 N.C. 43, 57-58 (1996).

245. *See* State v. Ainsworth, 109 N.C. App. 136, 143 (1993) (rejecting defendant's argument that first degree rape indictment was insufficient because it failed to charge her explicitly with aiding and abetting); State v. Ferree, 54 N.C. App. 183, 184 (1981) ("[A] person who aids or abets another in the commission of armed robbery is guilty … and it is not necessary that the indictment charge the defendant with aiding and abetting."); State v. Lancaster, 37 N.C. App. 528, 532-33 (1978).

246. *See* G.S. 14-5.2 ("All distinctions between accessories before the fact and principals … are abolished."); *Westbrook*, 345 N.C. at 58 (1996) (indictment charging murder need not allege accessory before the fact); State v. Gallagher, 313 N.C. 132, 141 (1985) (indictment charging the principal felony will support trial and conviction as an accessory before the fact).

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

248. State v. Estes, __ N.C. App. __, 651 S.E.2d 598 (2007).

249. *Estes*, __ N.C. App. __, 651 S.E.2d 598 (trial judge could charge the jury on the theory of aiding and abetting even though indictment charged acting in concert).

250. State v. Fuller, 179 N.C. App. 61, 66-67 (2006) (where superseding indictment charged the defendant only with aiding and abetting indecent liberties, the trial judge did not err in charging the jury that it could convict if the defendant was an aider or abettor or a principal).

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GETTING YOUR CLIENT OUT OF JAIL

EMILY E. MISTR
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FORMER ASSISTANT PUBLIC DEFENDER, WAKE COUNTY, 2006-2020

1

HOW DOES A PERSON END UP IN CUSTODY?

- Arrest v. Magistrate Summons v. Citation
- Initial appearance vs. first appearance
- First appearance – felony vs. misdemeanor

Types of pretrial release (NCGS 15A-534)

- Written promise to appear
- Unsecured bond
- Custody release
- Secured bond
- House arrest with electronic monitoring

2

WHO IS ENTITLED TO PRETRIAL RELEASE?

- Prior to 10/1/23: 15A-533(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with 15A-534.
- Post 10/1/23: Pretrial Integrity Act
- First appearance vs. regular court date

3

OFFENSE SPECIFIC CONSIDERATIONS

- For certain types of crimes –
  - 15A-534.1: Crimes of domestic violence
    - 48-hour hold
  - 15A-534.2: Detention of impaired drivers
  - 15A-534.3: Detention for communicable diseases
  - 15A-534.4: Sex offenses and crimes of violence against child victims
  - 15A-534.5: Detention to protect public health

4

ADDITIONAL CONSIDERATIONS

- 15A-534(d1): Failure to Appear
- 15A-534(d3): New Charge While on Pretrial Release for Another Charge
  - Pretrial Integrity Act – expansion of 48-hour hold

5

IMPORTANCE OF RELEASE

To your client and family
- ❑ Psychological
- ❑ Financial
- ❑ Assistance with defense
- ❑ Physical health

To the community
- ❑ Financial
- ❑ Long term harm

6

REQUIREMENT OF NON-MONETARY BOND

According to NCGS 15A-534(b), "The judicial official in granting pretrial release **must impose** condition (1) [written promise], (2) [unsecured bond], or (3) [custody release] . . . unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses."
(*emphasis added*)

7

Based on that, jails should mostly hold people charged with violent felonies, right?

WRONG.

8

GETTING YOUR CLIENT OUT OF JAIL

START LOCAL: Pursuant to NCGS 15A-535(a) the senior resident superior court judge in each jurisdiction must establish local policies, including bond guidelines.

NCGS 15A-534(c) lists factors the court is *supposed* to consider when determining pretrial release conditions.

- Details from officer – Specifics about charged conduct (use with caution)
- Details from client

Record	Family Situation
Work or school	Ties to community
Living situation	Character and mental condition
Financial situation	Probation (use with caution)

KNOW YOUR AUDIENCE – Know your judge and your ADA

9

OTHER CONSIDERATIONS

- Other pending cases (including other counties)
  - Jail credit issue if bond out on one
- Probation status
  - PV about to be filed?
- Immigration Detainers
- Child support charges
- DV civil issues
- Possible additional charges

10

DEALING WITH RISK FACTORS *(REALISTICALLY, YOU'LL HAVE TO)*

- Prior record – explain, if needed/possible
- Failures to Appear
- If MH/SA issues, address treatment plan
- Supervision
  - Family
  - Pretrial Services
  - Probation
  - GPS/SCRAM

11

CRIME VICTIM'S RIGHTS ACT (MARSY'S LAW)

- In 2018, NC voters approved constitutional amendments related to victim's rights.
- In 2019 the CVRA was enacted to codify the enumerated rights.
- For misdemeanors, it applies to crimes against a person ONLY.

Defendant's Rights  Victim's Rights

WHO WINS?

12

PRETRIAL DETENTION REFORM

- Approximately 69% of the people in jails are being held PRETRIAL, and many are there because they can't afford their bail. The majority of them are people of color.
- Voluntary Reform: Judicial District 30B bail reform pilot project
- Forced reform: Groups file federal lawsuit challenging unjust cash bail system in Alamance County, NC.

13

CRIMINAL JUSTICE INNOVATION LAB

- Areas of study: Pretrial, Overcriminalization, Policing & Responding, Re-Entry & Second Chances, Case Management
- 82% of NC criminal charges are for non-violent misdemeanors
- #1 reason for jail admission in examined NC counties: FTA on a misdemeanor
- Less than 1% of incidents pick up new violent pretrial felony charges
- Measuring Justice Dashboard

14

Crimmigration

2023 Misdemeanor Defender Training
UNC School of Government
November 15, 2023

1

What is the purpose of this presentation?

To help you develop a strategy to effectively advise all immigrant defendants of the immigration consequences for their criminal prosecution (when the consequences are known)

2

Padilla v. Kentucky, 559 U.S. 356 (2010)

- HELD: When immigration consequences are CLEAR, the criminal defense attorney has a DUTY to give correct advice regarding those consequences.
- Failure to do so is INEFFECTIVE ASSISTANCE OF COUNSEL to be analyzed under Strickland v. Washington, 466 U.S. 668 (1984).
- Silence is not an option.
- Wishy washy advice is not an option.
- Telling client "you should consult with an immigration attorney" is not an option.

3

Lee v. United States, 137 S.Ct. 1958 (2017)

- Question for the court was essentially whether an immigrant can demonstrate prejudice under Strickland v. Washington analysis when the case against them is very strong. (Answer: YES)
- HELD: "but for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that 'almost' could make all the difference."

4

State v. Nkiam, 369 N.C. 61 (2016)

- NC first case applying Padilla
- HELD: when the consequence of deportation is clear, counsel is required by Padilla to give **correct advice** and not just advise defendant that his pending criminal charges *may carry a risk* of adverse immigration consequences
- *The judge cannot "cure" the failure to advise. The duty is that of defense counsel alone.*

5

State v. Marzoug, 836 S.E.2d 893 (2019)

- NC Case
- Question: can a criminal defendant who was ineffectively advised by counsel demonstrate prejudice under Strickland v. Washington when they already had **criminal** grounds for removal at the time of entry of the plea in question?
- Answer: NO.

6

Juvenile Clients

- UNLESS A CASE IS REMOVED TO SUPERIOR COURT (or is going to be), Juvenile Defenders do not need to advise under Padilla
- Padilla does not apply because adjudications in juvenile court are NOT convictions
- **Special Immigrant Juvenile Status (SIJS)** : an immigration classification that applies to children present in the US w/o status, in need of humanitarian protection b/c they have been abused, abandoned, or neglected by a parent

7

Important Definitions:

a. Admission: lawful entry into US after inspection and authorization by an immigration officer

b. Inadmissibility: cannot lawfully enter US and/or gain lawful status. *I.E. an inadmissible LPR cannot (w/o relief) become a USC and will be turned away at the border if travels abroad and seeks to return to US.*

c. Removable: able to be removed from US according to US code

d. Deportation: the act of removing someone who was previously lawfully admitted to the US

8

Our Process

- APD meets with client→ "Where were you born?"
- APD completely fills out Non-Citizen Defendant Worksheet (included in written materials)
- APD gives me the form
- I analyze (see next slide)
  - Including contacting immigration attorneys when needed
- I email APD w/ information and advice (example included in written materials)
  - APD accounts for my time in their client file
- I keep form w/ advice email, notes, correspondence attached
- APD informs me when/how the case is resolved
- I return the original form and all advice emails to APD for closed file

9

Tips for Success during your client interview

- Find a way to ask… (i.e. social security number does not equal citizen)
- Tip: A work permit IS NOT a status…it is a BENEFIT OF lawful status
- Tip: There are MANY types of visas…find out what kind…copy the card!
- Tip: If client has/had help of an immigration attorney, get a release to talk to the attorney if they or you are unclear about their status

10

My analysis, Part I

- What are the goals of the immigrant, based on his/her status?
  - Undocumented, permanent residency, asylum, refugee, TPS, DACA, U Visa, T Visa
- What position do I believe the immigrant to be in based on prior record? *(including prior convictions and dismissals)*
  - i.e. is client removable? Inadmissible? Are there forms of relief for which s/he is ineligible?
- What are the consequences of the current charges for the immigrant?
- What suggestions can I make regarding case outcome?
- What local agencies can I refer the immigrant to for referrals to immigration attorneys?

11

My analysis, Part II

- When I am looking at the charges pending against an immigrant, I need to know whether they carry any of the following potential **criminal grounds for removal or inadmissibility:**
  - Aggravated Felony
  - Crime of Moral Turpitude
  - Substance Abuse Grounds
  - Firearm/Destructive Device Grounds
  - DV Grounds
  - Stalking Grounds
  - Child Abuse/Neglect/Abandonment Grounds
  - Violation of a Protective Order Grounds
  - Prostitution
  - Human Trafficking
  - Money Laundering
  - Gambling

12

Resources I Use

- **Immigration Consequences of a Criminal Conviction in North Carolina by Sejal Zota and John Rubin (2017) FREE on School of Government Website**
- IDS Expert: www.ncids.org/immigration-consultations/
- Local friendly immigration attorneys

- Kurzban's Immigration Law Sourcebook by Ira J. Kurzban
- Immigration Consequences of Criminal Activity by Mary E. Kramer

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Additional Online Resources

- NAPD: National Association of Public Defenders
  - My Gideon, archived in "Sentencing and Collateral Consequences" section
  - FREE "Padilla in Perspective" Webinars by Jessica Stern
- ILRC: Immigrant Legal Resource Center www.ilrc.org
- National Immigration Project of the National Lawyers Guild www.nipnlg.org
- Immigrant Defense Project www.immigrantdefenseproject.org

14

Hi,

Thanks for the immigration referral. Please see my information and advice below.

If you have questions please let me know. Also, please let me know when/how the case is disposed so that I can update the database and return your form to you for your closed file.

Please account for 15 minutes in your file for my time.

1. Your client is removable simply for being in the US w/o permission. Any conviction hurts if/when s/he comes into contact with ICE.
    a. Your client's priorities will be: 1) to avoid inadmissibility; and 2) to avoid criminal grounds for removal (even though s/he is already removable)
2. Commonly used phrases/information:
    a. Admission: lawful entry into US after inspection and authorization by an immigration officer.
    b. Inadmissibility: cannot lawfully enter US and/or gain lawful status. I.E. an inadmissible LPR cannot (w/o relief) become a USC and will be turned away at the border if travels abroad and seeks to return to US.
    c. Aggravated Felony (AF) Consequences:
        i. Worst of the worst classification of criminal convictions for immigrants in removal proceedings
        ii. Will be removed
        iii. Will be barred from almost all forms of relief from removal
        iv. Permanently inadmissible and permanently barred from returning to US
        v. Held without bond during removal proceedings
        vi. Can face up to 20 years in prison for federal crime of illegal reentry.
    d. Crime of Moral Turpitude (CMT) Consequences:
        i. Deportable if convicted of one CMT committed w/in five years of lawful admission to US and punishable by at least one year active.
        ii. Deportable if convicted of two or more CMTs any time after lawful admission regardless of sentence.
        iii. Inadmissible if convicted of one CMT w/o relief.
3. **PRIOR RECORD**
    a. *DWI/NOL:*
        i. *Not AFs*
        ii. *Not CMTs*
        iii. *No other criminal grounds for removal/inadmissibility*
4. **CURRENT CHARGES/CONSEQUENCES (AND POSSIBLE ALTERNATIVES)**
    a. *DWI/NOL/DWLR IR/failure to give name & address*
        i. *Are not AFs*
        ii. *Are not CMTs*
        iii. *No other **criminal** grounds for removal/inadmissibility*
        iv. *However, a second DWI conviction could be problematic for your client if/when she ends up in ICE custody/removal proceedings. See below information from my expert cut/pasted from another email*

1. There is another ground of **inadmiss** of:
    a. 212(a)(1)(A)(i) [1182(a)(1)(A)(i)] who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance;
    b. DOS routinely applies this to recent or multiple DWIs. I'd imagine ICE would too in the context of **removal proceedings** if the posture of his case is that he needs to demonstrate admissibility

v. *Also, it looks to me like this DOO is within 7 years of her prior conviction. Keep in mind that any active sentence she serves will be served in the "misdemeanor confinement program" and could result in her transfer to another county jail. That jail may or may not cooperate with ICE holds.*

5. Defenses to Removal
    a. Undocumented Client
        i. Cancellation of Removal: barred by AF conviction
            1. Must have lived in US 10 years prior to commission of offense (there is an exception for honorably discharged veterans)
            2. Must establish that removal would result in extreme hardship to USC or LPR spouse, parent, or child
6. Common Outcomes
    a. Technical Definition of *conviction* for immigration purposes: a formal judgment of guilt by a court (OR if adjudication of guilt has been withheld) where
        i. Person found or pled guilty OR admitted sufficient facts to warrant finding of guilt
        ii. AND punishment, penalty, restraint on liberty imposed.
    b. Informal deferred/earned VD: not a conviction
    c. Conditional Discharge: IS A CONVICTION, regardless of whether the charges are later discharged as dismissed by the Court.
    d. Deferred Prosecution: sometimes safe, sometimes not
        i. District: not a conviction
        ii. Superior: not safe b/c of recordation and factual basis required
    e. PJC: not a conviction so long as the only condition in the record to have the PJC is the cost of court.
    f. Unsupervised Probation: safe outcome.
    g. Supervised Probation: try to avoid for immigrants without lawful status b/c DPS is required to cooperate with ICE if called upon to do so.
    h. Jail: Durham County Jail is safe under current Sheriff.
    i. DAC: Once an immigrant finishes his/her sentence in DAC if ICE wants him/her, s/he will be turned over to ICE.
7. The agencies listed below can assist your client with referrals to immigration attorneys.

El Centro Hispano	Durham	(919) 687-4635
Alerta Migratoria	Durham	(984) 377-2622
D.E.A.R. Foundation	Raleigh	(919) 803-0559
NC Justice Center	Raleigh	(919) 856-2570

Non Citizen Defendant Worksheet

Client Name: _____

Attorney: _____ Next Court Date: _____

Immigration Status:

- ☐ LPR – Lawful Permanent Resident (greencard)
  - Since: _____
  - Renewal Date: _____
  - **COPY CARD, please**
- ☐ Refugee or granted asylum status (circle one)
  - Since: _____
- ☐ Undocumented (entered illegally)
  - Since: _____
- ☐ Previously Deported
  - By ICE or Saw Immigration Judge
- ☐ Other: _____

DOB: _____ Age today: _____

POB: _____

ICE Detainer: ☐ Yes ☐ No

Defendant is in Custody: ☐ Yes ☐ No

Family Ties

Spouse: ☐ USC ☐ LPR ☐ Undocumented
Partner: ☐ USC ☐ LPR ☐ Undocumented
Children: Number: _____ Ages: _____
USC: _____ LPR: _____ Undocumented: _____
Mother: ☐ USC ☐ LPR ☐ Undocumented
Father: ☐ USC ☐ LPR ☐ Undocumented
US Citizen Grandparents: ☐ Yes ☐ No

Client's Goals re: Immigration Consequences

- ☐ Avoid conviction that triggers deportation
- ☐ Preserve Eligibility to obtain future immigration benefits (e.g. LPR status or citizenship)
- ☐ Preserve ability to ask immigration judge to get/keep lawful status & stay in US
- ☐ DACA/DAPA (President Obama's Executive Orders for children/parents)
- ☐ Get out of jail ASAP
- ☐ Immigration consequences, including deportation, are not a priority

Complete Criminal History

(Include offense, file number for offense, date of conviction, and sentence [including suspended time], and arrests, deferred prosecutions, juvenile history, or other resolutions, **include dismissals**)

Current charge(s) (w/ statute #, if obscure):

_____

_____

File Number(s): _____

Related to DV? ☐ Yes ☐ No
Relationship to victim? V is D's: _____

Plea Offer(s):

_____

_____

Padilla v. Kentucky

Supreme Court of the United States

October 13, 2009, Argued; March 31, 2010, Decided

No. 08-651

Reporter
559 U.S. 356 *; 130 S. Ct. 1473 **; 176 L. Ed. 2d 284 ***; 2010 U.S. LEXIS 2928 ****; 78 U.S.L.W. 4235; 22 Fla. L. Weekly Fed. S 211

JOSE PADILLA, Petitioner v. KENTUCKY

Subsequent History: On remand at, Remanded by *Padilla v. Commonwealth, 381 S.W.3d 322, 2012 Ky. App. LEXIS 193 (Ky. Ct. App., 2012)*

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.

Commonwealth v. Padilla, 253 S.W.3d 482, 2008 Ky. LEXIS 3 (Ky., 2008)

Disposition: Reversed and remanded.

Case Summary

Procedural Posture
Defendant, who pleaded guilty to drug charges, sought postconviction relief based on ineffective assistance of counsel. The Supreme Court of Kentucky denied relief. The United States Supreme Court granted certiorari.

Overview

Defendant was a lawful permanent resident who pleaded guilty to transporting marijuana. His crime was a removable offense under *8 U.S.C.S. § 1227(a)(2)(B)(i)*. He claimed that his counsel incorrectly told him prior to entry of his plea that he did not have to worry about immigration status because he had been in the United States for so long. The state court held that the *Sixth Amendment* did not protect defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. The Supreme Court held that the distinction between collateral and direct consequences was ill-suited to the deportation context, so advice regarding deportation was not categorically removed from the ambit of the *Sixth Amendment*. Counsel's alleged failure to correctly advise defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient assistance under prevailing professional norms, as the consequences could easily have been determined from reading the removal statute. Whether defendant was entitled to relief depended on whether he could demonstrate prejudice, a matter for the state courts to consider in the first instance.

Outcome
The state court's judgment was reversed, and the matter was remanded for further proceedings. 7-2 decision; one concurrence in the judgment, one dissent.

Syllabus

[*356] [1475] [***288]** Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he

claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived **[**1476]** in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the *Sixth Amendment's* effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. *Pp. 360-375, 176 L. Ed. 2d, at 290-299*.

(a) Changes to immigration law have dramatically raised **[****2]** the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. *Pp. 360-364, 176 L. Ed. 2d, at 290-293*.

(b) *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763*. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and **[****3]** collateral consequences in defining the scope of constitutionally "reasonable professional assistance" **[*357]** required under *Strickland, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. *Pp. 364-366, 176 L. Ed. 2d, at 293-294*.

(c) To satisfy *Strickland's* two-prong inquiry, counsel's representation **[***289]** must fall "below an objective standard of reasonableness," *id., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The weight of prevailing professional norms supports **[****4]** the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of " '[p]reserving the . . . right to remain in the United States' " and "preserving the possibility of" discretionary relief from deportation. *INS v. St. Cyr, 533 U.S. 289, 322, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347*. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined **[**1477]** from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland's* first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. **[****5]** *Pp. 366-369, 176 L. Ed. 2d, at 294-296*.

(d) The Solicitor General's proposed rule--that *Strickland* should be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice--is unpersuasive. And though this Court must be careful about recognizing

new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not **[*358]** open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203*. *Pp. 369-374, 176 L. Ed. 2d, at 296-299*.

253 S. W. 3d 482, reversed and remanded.

Counsel: Stephen B. Kinnaird argued the cause for petitioner.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

Wm. Robert Long, Jr., argued the cause for respondent.

Judges: Stevens, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Roberts, C. J., joined, *post*, p. 375. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, *post*, p. 388.

Opinion by: STEVENS

Opinion

[*359] Justice **Stevens** delivered **[****6]** the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served **[***290]** this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.[1]

[1478]** In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he " 'did not have to worry about immigration status since he had been in the country so long.' " *253 S. W. 3d 482, 483 (Ky. 2008)*. Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky **[****7]** denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the *Sixth Amendment's* guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence **[*360]** of his conviction. *Id., at 485*. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, *555 U.S. 1169, 129 S. Ct. 1317, 173 L. Ed. 2d 582 (2009)*, to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have

[1] Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under *8 U.S.C. § 1227(a)(2)(B)(i)*.

advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority **[****8]** to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948)*, is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.2a, p. 5 (1959). An early effort to empower the President to order the deportation of those immigrants he "judge[d] dangerous to the peace and safety of the United States," Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon § 1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, *18 Stat. 477*. Gordon § 1.2b, at 6. In 1891, Congress added to the list of excludable persons those "who have been **[***291]** convicted of a felony or other infamous **[*361]** crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, *26 Stat. 1084*.[2]

The Immigration Act of 1917 (1917 Act) brought "radical changes" **[**1479]** to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., 54-55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . ." 39 Stat. 889. And § 19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term "moral turpitude."

While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing **[****10]** or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." *Id.*, at 890.[3] This procedure, known as a judicial recommendation **[*362]** against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier v. United States, 793 F.2d 449, 452 (CA2 1986)*. Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

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[2] In 1907, Congress expanded the class **[****9]** of excluded persons to include individuals who "admit" to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 899.

[3] As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days **[****11]** thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889-890.

This provision was codified in *8 U.S.C. § 1251(b) (1994 ed.)* (transferred to *§ 1227* (2006 ed.)). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States, 793 F.2d 449, 452 (CA2 1986)*.

Although narcotics offenses--such as the offense at issue in this case--provided a distinct basis for deportation as early as 1922,[4] the JRAD procedure was generally available **[***292]** to avoid deportation in narcotics convictions. See *United States v. O'Rourke, 213 F.2d 759, 762 (CA8 1954)*. Except for "technical, inadvertent and insignificant violations of the laws relating to narcotics," *ibid.*, it appears that courts treated narcotics offenses as crimes involving **[**1480]** moral turpitude for purposes of the 1917 Act's broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics **[*363]** case "was effective to prevent deportation" (citing *Dang Nam v. Bryan, 74 F.2d 379, 380-381 (CA9 1934)*)).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, the Second Circuit held that the *Sixth Amendment* right to effective **[****13]** assistance of counsel applies to a JRAD request or lack thereof, see *Janvier, 793 F.2d 449*. See also *United States v. Castro, 26 F.3d 557 (CA5 1994)*. In its view, seeking a JRAD was "part of the sentencing" process, *Janvier, 793 F.2d, at 452*, even if deportation itself is a civil action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process--not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),[5] and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, *110 Stat. 3009-596*, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS v. St. Cyr, 533 U.S. 289, 296, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)*. Under contemporary law, [1] if a noncitizen has committed a removable offense after the 1996 effective **[****14]** date of these amendments, **[*364]** his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.[6] See *8 U.S.C. § 1229b*. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See *§ 1101(a)(43)(B)*; *§ 1228*.

These **[****15]** changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of **[***293]** crimes has never been more important. These changes confirm our view that, [2] as a matter of federal law, deportation is an integral part--

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[4] Congress **[****12]** first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, *42 Stat. 596*. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat, 8 F.2d 488, 489 (CA9 1925)* (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special," *Chung Que Fong v. Nagle, 15 F.2d 789, 790 (CA9 1926)*; thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi v. Ebey, 12 F.2d 922, 923 (CA7 1926)*; *Todaro v. Munster, 62 F.2d 963, 964 (CA10 1933)*.

[5] The INA separately codified the moral turpitude offense provision and the narcotics offense provision within *8 U.S.C. § 1251(a) (1994 ed.)* under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204, 206. The JRAD procedure, codified in *8 U.S.C. § 1251(b) (1994 ed.)*, applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States v. O'Rourke, 213 F.2d 759, 762 (CA8 1954)* (recognizing that, under the 1952 INA, narcotics offenses were no longer eligible for JRADs).

[6] The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term "removal" rather than "deportation." See *Calcano-Martinez v. INS, 533 U.S. 348, 350, n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001)*.

indeed, sometimes the most important part[7] --of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

[3] Before deciding whether to plead guilty, a defendant is entitled to "the effective **[**1481]** assistance of competent counsel." *McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*; *Strickland, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.[8] *253 S. W. 3d, [*365] at 483-484* (citing *Commonwealth v. Fuartado, 170 S. W. 3d 384 (2005)*). In its view, "collateral consequences are outside the scope of representation required by the *Sixth Amendment*," **[****16]** and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." *253 S. W. 3d, at 483*. The Kentucky high court is far from alone in this view.[9]

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that [4] deportation is a particularly severe "penalty," *Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893)*; but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984)*, deportation **[****18]** is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and **[*366]** the penalty of deportation **[***294]** for nearly a century, see Part I, *supra, at 360-364, 176 L. Ed. 2d, at 290-293*. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States v. Russell, 686 F.2d 35, 38, 222 U.S. App. D.C. 313 (CADC 1982)*. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347* ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the **[**1482]** immigration consequences of their convictions").

[5] Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude

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[7] See Brief for Asian American Justice Center et al. as *Amici Curiae* 12-27 (providing real-world examples).

[8] There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, *95 Iowa L. Rev. 119, 124, n. 15 (2009)*. The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen "defendant that a criminal conviction may have adverse immigration consequences," *post, at 375, 176 L. Ed. 2d, at 299* (opinion concurring in judgment). See also *post, at 387, 176 L. Ed. 2d, at 307* ("I do not mean to suggest that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation"). In his concurring opinion, Justice Alito has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post, at 375-376, 176 L. Ed. 2d, at 300*.

[9] See, *e.g.*, **[****17]** *United States v. Gonzalez, 202 F.3d 20 (CA1 2000)*; *United States v. Del Rosario, 902 F.2d 55, 284 U.S. App. D.C. 90 (CADC 1990)*; *United States v. Yearwood, 863 F.2d 6 (CA4 1988)*; *Santos-Sanchez v. United States, 548 F.3d 327 (CA5 2008)*; *Broomes v. Ashcroft, 358 F.3d 1251 (CA10 2004)*, *United States v. Campbell, 778 F.2d 764 (CA11 1985)*; *Oyekoya v. State, 558 So. 2d 990 (Ala. Crim. App. 1989)*; *State v. Rosas, 183 Ariz. 421, 904 P.2d 1245 (App. 1995)*; *State v. Montalban, 2000-2739 (La. 2/26/02), 810 So. 2d 1106*; *Commonwealth v. Frometa, 520 Pa. 552, 555 A.2d 92 (1989)*.

that **[****19]** advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. *Strickland* applies to Padilla's claim.

III

[6] Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." *466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Ibid.;* **[*367]** *Bobby v. Van Hook, 558 U.S. 4, 7, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (per curiam)*; *Florida v. Nixon, 543 U.S. 175, 191, and n. 6, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)*; *Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*; *Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. Although they are "only guides," *Strickland, 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, and **[****20]** not "inexorable commands," *Bobby, 558 U.S., at 8, 130 S. Ct. 13, 175 L. Ed. 2d 255*, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that [7] counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Defense Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, *87 Cornell L. Rev. 697, 713-718 (2002)*; A. Campbell, Law of Sentencing **[***295]** § 13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d **[****21]** ed. 1999). "[A]uthorities of every stripe--including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications--universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution §§ 6.2-6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen **[*368]** in a Criminal Case, 31 The Champion 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants **[**1483]** § 1.3 (3d ed. 2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (West 2009)).

We too have previously recognized that " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.' " *St. Cyr, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347* (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed **[****22]** by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347*. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See *8 U.S.C. § 1227(a)(2)(B)(i)* ([8] "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the

statute, which addresses not some broad classification of crimes but specifically commands **[****23]** removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: **[*369]** The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, **[***296]** and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. [9] When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[10] But when the deportation consequence **[****24]** is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, **[**1484]** a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ," though counsel is required to provide accurate advice if she **[*370]** chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor **[****25]** General's proposed rule unpersuasive, although it has support among the lower courts. See, *e.g.*, *United States v. Couto, 311 F.3d 179, 188 (CA2 2002)*; *United States v. Kwan, 407 F.3d 1005 (CA9 2005)*; *Sparks v. Sowders, 852 F.2d 882 (CA6 1988)*; *United States v. Russell, 686 F.2d 35, 222 U.S. App. D.C. 313 (CADC 1982)*; *State v. Rojas-Martinez, 2005 UT 86, 125 P. 3d 930, 935*; *In re Resendiz, 25 Cal. 4th 230, 105 Cal. Rptr. 2d 431, 19 P. 3d 1171 (2001)*. Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . . [, and] completely lacking in legal or rational bases." Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.*, at 30; *Strickland, 466 U.S., at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State v. Paredez, 2004-NMSC-036, 2004 NMSC 36, 136 N. M. 533, 538-539, 101 P.3d 799*.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even **[****26]** when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti [***297] v. United States, 516 U.S. 29, 50-51, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995)*. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.[11] Second, it would

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[10] As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

[11] As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client **[****27]** of the consequences of his plea. Tr. of Oral Arg. 37-

deny a **[*371]** class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. [10] It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation, and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Hill v. Lockhart, 474 U.S. 52, 62, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)* (White, J., concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*, see *id., at 58; 106 S. Ct. 366, 88 L. Ed. 2d 203*, but nevertheless applied **[**1485]** *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.[12]

A flood did not follow in that decision's wake. Surmounting *Strickland*'s high bar is never an easy task. See, *e.g., 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ([11] "Judicial scrutiny of counsel's performance must be highly deferential"); *id., at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a **[*372]** particular case as they are to be prejudicial"). Moreover, [12] to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)*. There is no reason to doubt that lower courts--now quite experienced with applying *Strickland*--can effectively and efficiently use its framework to separate **[****29]** specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at **[***298]** least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See *supra, at 368-371, 176 L. Ed. 2d, at 295-296*. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.[13] But they account for only approximately 30% of the habeas petitions filed.[14] The nature of relief secured by a successful collateral **[*373]** challenge to a guilty plea--an opportunity to withdraw the plea and proceed to trial **[****30]** --imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a

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38. We think the same result should follow when the stakes are not life and death but merely "banishment or exile," *Delgadillo v. Carmichael, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947)*.

[12] However, we concluded that, even though *Strickland* applied to petitioner's claim, he had not sufficiently alleged prejudice to satisfy *Strickland*'s second prong. *Hill, 474 U.S., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203*. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong.

Justice Alito believes that the Court misreads Hill, *post, at 383-384, 176 L. Ed. 2d, at 305*. In Hill, the Court recognized--for the first time--that Strickland applies to advice respecting a guilty plea. **[****28]** *474 U.S., at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203* ("We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel"). It is true that Hill does not control the question before us. But its import is nevertheless clear. Whether Strickland applies to Padilla's claim follows from Hill, regardless of the fact that the Hill Court did not resolve the particular question respecting misadvice that was before it.

[13] See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

[14] See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36-38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

different calculus informs **[**1486]** whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. **[****31]** By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that [13] the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. *Hill, 474 U.S., at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203*; see also *Richardson, 397 U.S., at 770-771, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763*. The severity of deportation--"the equivalent of **[***299]** banishment **[****32]** or exile," *Delgadillo v. Carmichael, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947)* --only underscores how critical it is for counsel **[*374]** to inform her noncitizen client that he faces a risk of deportation.[15]

V

[14] It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the "mercies of incompetent counsel." *Richardson, 397 U.S., at 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763*. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding *Sixth Amendment* precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty **[**1487]** concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as **[****34]** a result thereof, a question we do not reach because it was not passed on below. **[*375]** See *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 530, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002)*.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[15] To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (rev. Feb. 2003), http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, *e.g.*, *Alaska Rule Crim. Proc. 11(c)(3)(C)* (2009-2010); *Cal. Penal Code Ann. § 1016.5* (West 2008); *Conn. Gen. Stat. § 54-1j* (2009); *D. C. Code § 16-713* (2001); *Fla. Rule Crim. Proc. 3.172(c)(8)* (Supp. 2010); *Ga. Code Ann. § 17-7-93(c)* (1997); *Haw. Rev. Stat. Ann. § 802E-2* (2007); *Iowa Rule Crim. Proc. 2.8(2)(b)(3)* (Supp. 2009); *Md. Rule 4-242* (Lexis 2009); *Mass. Gen. Laws, ch. 278, § 29D* (West 2009); *Minn. Rule Crim. Proc. 15.01* (2009); *Mont. Code Ann. § 46-12-210* (West 2009); *N. M. Rule Crim. Form 9-406* (2009); *N. Y. Crim. Proc. Law Ann. § 220.50(7)* **[****33]** (West Supp. 2009); *N. C. Gen. Stat. Ann. § 15A-1022* (Lexis 2007); *Ohio Rev. Code Ann. § 2943.031* (West 2006); *Ore. Rev. Stat. § 135.385* (2007); *R. I. Gen. Laws § 12-12-22* (Lexis Supp. 2008); *Tex. Code Crim. Proc. Ann., Art. 26.13(a)(4)* (Vernon Supp. 2009); *Vt. Stat. Ann., Tit. 13, § 6565(c)(1)* (Supp. 2009); *Wash. Rev. Code § 10.40.200* (2008); *Wis. Stat. § 971.08* (2005-2006).

Concur by: ALITO

Concur

Justice **Alito,** with whom The **Chief Justice** joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt **[***300]** to explain what those consequences may be. As the Court concedes, "[i]mmigration law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing **[****35]** criminal charges, in either state or federal court or both, may not be well versed in it." *Ante, at 369, 176 L. Ed. 2d, at 295*. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"--but not, perhaps, in other situations. *Ibid.* This vague, halfway test will lead to much confusion and needless litigation.

I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. *466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. Until today, the longstanding and unanimous position of the federal **[*376]** courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, *e.g.*, *United States v. Gonzalez, 202 F.3d 20, 28 (CA1 2000)* (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States v. Banda, 1 F.3d 354, 355 (CA5 1993)* (holding that "an **[****36]** attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, *87 Cornell L. Rev. 697, 699 (2002)* (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"--including "eleven federal circuits, more than thirty states, and the District of Columbia"--"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante, at 364, n. 8, 176 L. Ed. 2d, at 293*, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess--and very often do not possess--expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on **[**1488]** matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction **[****37]** and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. *Chin & Holmes 705-706*. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s]," see *ante, at 374, 176 L. Ed. 2d, at 299*, but this Court has **[*377]** never held that a criminal defense attorney's *Sixth Amendment* duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante, at 367, 176 L. Ed. 2d, at 289* ("The weight of prevailing professional **[***301]** norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the *Sixth Amendment* is ultimately a task for the courts. *E.g.*, *Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)*. Although we may appropriately

consult standards promulgated by private bar groups, we cannot **[****38]** delegate to these groups our task of determining what the Constitution commands. See *Strickland, supra, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante, at 369, 176 L. Ed. 2d, at 295*, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel, IN at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante, at 368-369, 176 L. Ed. 2d, at 296*.

The Court's new approach is particularly problematic because providing advice on whether **[****39]** a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not **[*378]** specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer's Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) ("Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject"); *id.*, § 5.2, at 146 (stating that the aggravated felony list at *8 U.S.C. § 1101(a)(43)* is not clear **[**1489]** with respect to several of the listed categories, that "the term 'aggravated felonies' can include misdemeanors," and that the determination of whether a crime is an "aggravated felony" is made "even **[****40]** more difficult" because "several agencies and courts interpret the statute," including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and District Courts considering immigration-law and criminal-law issues); ABA Guidebook § 4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, § 4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").

[*302]** Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit*." *Id.*, § 5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth **[*379]** Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under *8 U.S.C. § 1101(a)(43)*." **[****41]** *Id.*, § 5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "*attempted* possession," *id.*, § 5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while "[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony," *id.*, § 5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." *Id.*, § 5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMT" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably* not a CIMT" (emphasis added)); *id.*, at 135 (misdemeanor driving **[****42]** under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may* not be a CIMT" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude

may depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may **[*380]** be hard, in some cases, for defense counsel even to determine whether a client is an alien,[1] or whether a **[**1490]** particular state disposition will result in a "conviction" for purposes of federal immigration law.[2] The task of offering advice about the immigration **[***303]** consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration **[****43]** consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes § 2:1, at 2-2 to 2-3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing **[*381]** is ever simple with immigration law"--including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook § 4.65, at 130; Immigration Law and Crimes § 2:1. I therefore cannot agree with the Court's apparent view that the *Sixth Amendment* requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine **[****45]** those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante, at 368, 176 L. Ed. 2d, at 295*. But "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ante, at 369, 176 L. Ed. 2d, at 296*. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes § 2:1, at 2-2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction **[****46]** is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know **[**1491]** conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal **[*382]** conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged **[***304]** with such an

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[1] Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook § 4.20, at 113 (explaining that U.S. citizenship conferred by blood is " 'derivative,' " and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").

[2] "A disposition that is not a 'conviction' under state law may still be a 'conviction' for immigration purposes." *Id.*, § 4.32, at 117 (citing *Matter of Salazar-Regino, 23 I. & N. Dec. 223, 231 (BIA 2002)* (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook § 4.37; accord, **[****44]** D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes § 2:1, p. 2-2 (2009) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").

offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook § 4.14, at 111 ("Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice **[****47]** may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem--such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, "28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas." Brief for State of Louisiana et al. 25; accord, *Chin & Holmes 708* ("A growing number of states require advice about deportation by statute or court rule"). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting **[****48]** the **[*383]** advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States v. Russell, 686 F.2d 35, 39-40, 222 U.S. App. D.C. 313 (CADC 1982)* (explaining that a district court's discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, "the possible existence of prejudice to the government's case as a result of the defendant's untimely request to stand trial" and "the strength of the defendant's reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge").

Fourth, the Court's decision marks a major upheaval in *Sixth Amendment* law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's *Sixth Amendment* right to counsel. As noted above, the **[****49]** Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far. See, *e.g.*, *Gonzalez, 202 F.3d, at 28*; *Banda, 1 F.3d, at 355*; *Chin & Holmes 697, 699*. The majority appropriately acknowledges that the lower courts **[**1492]** are "now quite experienced with applying *Strickland*,? *ante, at [***305] 372, 176 L. Ed. 2d, at 297*, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the *Sixth Amendment* by claiming that this Court in *Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*, similarly "applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." *Ante, at 371, 176 L. Ed. 2d, at 297*. That **[*384]** characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant's *Sixth Amendment* right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous **[****50]** advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland* v. *Washington* requirement of 'prejudice.' *474 U.S., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203*. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court's strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel's performance objectively unreasonable. After all, the Court still would have "applied *Strickland*" to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting **[****51]** affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the *Sixth Amendment* duty this Court has recognized in its past cases. In particular, we have explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys **[*385]** *in criminal cases*.' " *Strickland, 466 U.S., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (quoting *McMann v. Richardson, 397 U.S. 759, 770, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*; emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys *in criminal cases*." See *ante, at 369, 176 L. Ed. 2d, at 295* ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it"). By contrast, reasonably competent attorneys **[***306]** should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are **[****52]** not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on **[**1493]** the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.' " *253 S. W. 3d 482, 485 (2008)*.

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose--to ensure a fair trial--as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered **[****53]** with the advice of constitutionally competent counsel--or that it embodies a voluntary and intelligent decision to forsake constitutional **[*386]** rights. See *ibid.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." **[****54]** Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.[3] And several other Circuits have held that affirmative **[***307]** misadvice concerning

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[3] See *United States v. Kwan, 407 F.3d 1005, 1015-1017 (CA9 2005)*; *United States v. Couto, 311 F.3d 179, 188 (CA2 2002)*; *Downs-Morgan v. United States, 765 F.2d 1534, 1540-1541 (CA11 1985)* (limiting holding to the facts of the case); see also *Santos-Sanchez v. United States, 548 F.3d 327, 333-334 (CA5 2008)* (concluding that counsel's advice was **[****55]** not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

nonimmigration consequences of a conviction can violate the *Sixth Amendment* even if those consequences **[*387]** might be deemed "collateral."[4] By contrast, it appears that **[**1494]** no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short, the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that the Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty **[*388]** that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect **[****57]** information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's *Sixth Amendment* right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

Dissent by: SCALIA

Dissent

Justice **Scalia**, with whom Justice **Thomas** joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in **[***308]** order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The *Sixth Amendment* guarantees the accused a lawyer "for his defence" against a "criminal prosecutio[n]"--not for sound advice about the collateral consequences of conviction. **[****58]** For that reason, and for the practical reasons set forth in Part I of Justice Alito's concurrence, I dissent from the Court's conclusion that the *Sixth Amendment* requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those

[4] See *Hill v. Lockhart, 894 F.2d 1009, 1010 (CA8 1990)* (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*"); *Sparks v. Sowders, 852 F.2d 882, 885 (CA6 1988)* ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel"); *id., at 886* (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); *Strader v. Garrison, 611 F.2d 61, 65 (CA4 1979)* (?[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived **[****56]** of his constitutional right to counsel").

consequences renders **[**1495]** an attorney's **[*389]** assistance in defending against the prosecution constitutionally inadequate; or that the *Sixth Amendment* requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

* * *

The *Sixth Amendment* as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See *United States v. Van Duzee, 140 U.S. 169, 173, 11 S. Ct. 758, 11 S. Ct. 941, 35 L. Ed. 399 (1891)*; W. Beaney, Right to Counsel in American Courts 21, 28-29 (1955). We have held, however, that the *Sixth Amendment* requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright, 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)*, **[****59]** and that the right to "the assistance of counsel" includes the right to ***effective*** assistance, *Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the *Sixth Amendment's* textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery v. Gillespie County, 554 U.S. 191, 216, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)* (Alito, J., concurring) (summarizing cases). We have limited the *Sixth Amendment* to legal advice directly related to defense against prosecution of the charged offense--advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States, 377 U.S. 201, 205-206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)*; *United States v. Wade, 388 U.S. 218, 236-238, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)*, and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine, 475 U.S. 412, 430, **[*390]** 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)*. **[****60]** Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas v. Cobb, 532 U.S. 162, 164, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001)*.

There is no basis in text or in principle **[***309]** to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand--to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within "the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*. See *id., at 769-770, 90 S. Ct. 1441, 25 L. Ed. 2d 763* (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel--even those extending beyond defense against the prosecution--become constitutional commands. Cf. *Cobb, supra, at 171, n. 2, 121 S. Ct. 1335, 149 L. Ed. 2d 321*; **[****61]** *Moran, supra, at 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410*. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the *Sixth Amendment* has no application.

[1496]** Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point. As the concurrence observes,

> "[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are 'seriou[s]' . . . ." *Ante, at 376, 176 L. Ed. 2d, at 300* (Alito, J., concurring in judgment).

[*391] But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that

counsel must warn defendants of potential removal consequences, see *ante, at 387, 176 L. Ed. 2d, at 307*--what would come to be known as the "*Padilla* warning"--cannot be limited to those consequences **[****62]** except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, *18 U.S.C. § 924(e)*. We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn--not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante, at 385-386, 176 L. Ed. 2d, at 306*. But that concern properly relates to the *Due Process Clauses of the Fifth* and *Fourteenth Amendments*, not to the *Sixth Amendment*. See *McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)*; *Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)*. Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of **[***310]** his claim (and if he has properly preserved it) the state court can address it on remand.[1] **[*392]** But we should not smuggle **[****63]** the claim into the *Sixth Amendment*.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given. **[****64]** [2] Moreover, legislation could provide consequences for the misadvice, **[**1497]** nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the *Sixth Amendment* guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

References

U.S.C.S., *Constitution, Amendment 6*; *8 U.S.C.S. § 1227(a)(2)(B)(i)*

27 Moore's Federal Practice § 644.61 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law §§46.4, 46.7

L Ed Index, Deportation or Exclusion of Aliens; Plea Bargaining

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[1] I do not mean to suggest that the *Due Process Clause* would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See *Brady, 397 U.S., at 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747* (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by *Federal Rule of Criminal Procedure 11(b)* (formerly *Rule 11(c)*), which we have said approximates the due process requirements for a valid plea, see *Libretti v. United States, 516 U.S. 29, 49-50, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995)*, does not mention collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the *Due Process Clause*.

[2] As the Court's opinion notes, *ante, at 374, n. 15, 176 L. Ed. 2d, at 299*, many States--including Kentucky--already require that criminal defendants be warned of potential removal consequences.

When is **[****65]** attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. *83 L. Ed. 2d 1112*.

Supreme Court's views as to plea bargaining and its effects. *50 L. Ed. 2d 876*.

Validity of guilty pleas--Supreme Court cases. *25 L. Ed. 2d 1025*.

Accused's right to counsel under the Federal Constitution--Supreme Court cases. *93 L. Ed. 137*, *2 L. Ed. 2d 1644*, *9 L. Ed. 2d 1260*, *18 L. Ed. 2d 1420*.

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Lee v. United States

Supreme Court of the United States

March 28, 2017, Argued; June 23, 2017, Decided

No. 16-327.

Reporter

582 U.S. 357 *; 137 S. Ct. 1958 **; 198 L. Ed. 2d 476 ***; 2017 U.S. LEXIS 4045 ****; 85 U.S.L.W. 4412; 26 Fla. L. Weekly Fed. S 733; 2017 WL 2694701

JAE LEE, PETITIONER v. UNITED STATES

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Remanded by *Lee v. United States, 2017 U.S. App. LEXIS 12144 (6th Cir.) (6th Cir., July 7, 2017)*

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lee v. United States, 825 F.3d 311, 2016 U.S. App. LEXIS 10337 (6th Cir.) (6th Cir. Tenn., June 8, 2016)

Disposition: *825 F. 3d 311*, reversed and remanded.

Case Summary

Overview

HOLDINGS: [1]-Defendant had adequately demonstrated a reasonable probability that, but for counsel's erroneous advice, he would have rejected a guilty plea where his plea colloquy and surrounding circumstances showed deportation was the determinative issue in his decision to accept the plea, and it was not irrational to reject the plea deal when there was some chance of avoiding deportation, however remote.

Outcome

Judgment reversed; case remanded. 6-2 Decision; 1 dissent.

Syllabus

[*479] [**1960]** Petitioner Jae Lee moved to the United States from South Korea with his parents when he was 13. In the 35 years he has spent in this country, he has never returned to South Korea, nor has he become a U. S. citizen, living instead as a lawful permanent resident. In 2008, federal officials received a tip from a confidential informant that Lee had sold the informant ecstasy **[***480]** and marijuana. After obtaining a warrant, the officials searched Lee's house, where they found drugs, cash, and a loaded rifle. Lee admitted that the drugs were his, and a grand jury indicted him on one count of possessing ecstasy with intent to distribute. Lee retained counsel and entered into plea discussions with the Government. During the plea process, Lee repeatedly asked his attorney whether he would face deportation; his attorney assured him that he would not be deported as a result of pleading guilty. Based on that assurance, Lee accepted a plea and was sentenced to a year and a day in prison. Lee had in fact pleaded guilty to an "aggravated felony" under the Immigration and Nationality Act, *8 U. S. C. §1101(a)(43)(B)*, so he was, **[****2]** contrary to his attorney's advice, subject to mandatory deportation as a result of that plea. See *§1227(a)(2)(A)(iii)*. When Lee learned of this consequence, he filed a motion to vacate his conviction and sentence,

arguing that his attorney had provided constitutionally ineffective assistance. At an evidentiary hearing, both Lee and his plea-stage counsel testified that "deportation was the determinative issue" to Lee in deciding whether to accept a plea, and Lee's counsel acknowledged that although Lee's defense to the charge was weak, if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. A Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated. The District Court, however, denied relief, and the Sixth Circuit affirmed. Applying the two-part test for ineffective assistance claims **[**1961]** from *Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, the Sixth Circuit concluded that, while the Government conceded that Lee's counsel had performed deficiently, Lee could not show that he was prejudiced by his attorney's erroneous advice.

Held: Lee has demonstrated that he was prejudiced by his counsel's erroneous advice. Pp. 5-13.

(a) When a defendant claims that his counsel's deficient performance **[****3]** deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart, 474 U. S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*.

Lee contends that he can make this showing because he never would have accepted a guilty plea had he known the result would be deportation. The Government contends that Lee cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to acquittal. Pp. 5-8.

(b) The Government makes two errors in urging the adoption of a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. First, it forgets that categorical rules are ill suited to an inquiry that demands a "case-by-case examination" of the "totality of the evidence." *Williams v. Taylor, 529 U. S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389* (internal quotation marks omitted); *Strickland, 466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. More fundamentally, it **[***481]** overlooks that the *Hill* v. *Lockhart* inquiry focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

The decision whether to plead guilty also involves assessing the respective **[****4]** consequences of a conviction after trial and by plea. See *INS v. St. Cyr, 533 U. S. 289, 322-323, 121 S. Ct. 2271, 150 L. Ed. 2d 347*. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For Lee, deportation after some time in prison was not meaningfully different from deportation after somewhat less time; he says he accordingly would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial. Pointing to *Strickland*, the Government urges that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. That statement, however, was made in the context of discussing the presumption of reliability applied to judicial proceedings, which has no place where, as here, a defendant was deprived of a proceeding altogether. When the inquiry is focused on what an individual defendant would have done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected the defendant's decisionmaking. Pp. 8-10.

(c) Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous **[****5]** evidence to substantiate a defendant's expressed preferences. In the unusual circumstances of this case, Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation: Both Lee and his attorney testified that "deportation was the determinative issue" to Lee; his responses during his plea colloquy confirmed the importance he placed on deportation; and he had strong connections to the United **[**1962]** States, while he had no ties to South Korea.

The Government argues that Lee cannot "convince the court that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla v. Kentucky, 559 U. S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284*, since deportation would almost certainly result from a trial. Unlike the Government, this Court cannot say that it would be irrational for someone in Lee's position to risk additional prison time in exchange for holding on to some chance of avoiding deportation. Pp. 10-13.

825 F. 3d 311, reversed and remanded.

Counsel: John J. Bursch argued the cause for petitioner.

Eric J. Feigin argued the cause for respondent.

Paul M. Thompson, **A. Marisa Chun**, **Erika N. Pont**, **Matthew M. Girgenti**, for the American Bar Association, as Amicus Curiae.

Judges: Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined except as to Part I, *post*, p. ___. Gorsuch, J., **[****6]** took no part in the consideration or decision of the case.

Opinion by: ROBERTS

Opinion

[*360] **[***482]** Chief Justice Roberts delivered the opinion of the Court.

Petitioner Jae Lee was indicted on one count of possessing ecstasy with intent to distribute. Although he has lived in this country for most of his life, Lee is not a United States citizen, and he feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him there was nothing to worry about—the Government would not deport him if he pleaded guilty. So Lee, who had no real defense to the charge, opted to accept a plea that carried a lesser prison sentence than he would have faced at trial.

Lee's attorney was wrong: The conviction meant that Lee was subject to mandatory deportation from this country. Lee seeks to vacate his conviction on the ground that, in accepting the plea, he received ineffective assistance of counsel in violation of the *Sixth Amendment*. Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.

I

Jae Lee moved to the United States from South Korea in 1982. He was 13 at the time. His parents settled the family in New York **[****7]** City, where they opened a small coffee shop. After graduating from a business high school in Manhattan, Lee set out on his own to Memphis, Tennessee, where he started working at a restaurant. After **[**1963]** three years, Lee decided to try his hand at running a business. With some assistance from his family, Lee opened the Mandarin Palace **[*361]** Chinese Restaurant in a Memphis suburb. The Mandarin was a success, and Lee eventually opened a second restaurant nearby. In the 35 years he has spent in the country, Lee has never returned to South Korea. He did not become a United States citizen, living instead as a lawful permanent resident.

At the same time he was running his lawful businesses, Lee also engaged in some illegitimate activity. In 2008, a confidential informant told federal officials that Lee had sold the informant approximately 200 ecstasy pills and two ounces of hydroponic marijuana over the course of eight years. The officials obtained a search warrant for Lee's house, where they found 88 ecstasy pills, three Valium tablets, $32,432 in cash, and a loaded rifle. Lee admitted that the drugs were his and that he had given ecstasy to his friends.

A grand jury indicted Lee on one count of possessing **[****8]** ecstasy with intent to distribute in violation of *21 U. S. C. §841(a)(1)*. Lee retained an attorney and entered into plea discussions with the Government. The attorney advised Lee that going to trial was "very risky" and that, if he pleaded guilty, he would receive a lighter sentence than he would if convicted at trial. App. 167. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings. The attorney told Lee that he would

not be deported as a result of pleading guilty. Lee v. United States, 825 F. 3d 311, 313 (CA6 2016). Based on that assurance, Lee accepted the plea and the District Court sentenced him to a year and a day in prison, though it deferred commencement **[***483]** of Lee's sentence for two months so that Lee could manage his restaurants over the holiday season.

Lee quickly learned, however, that a prison term was not the only consequence of his plea. Lee had pleaded guilty to what qualifies as an "aggravated felony" under the Immigration and Nationality Act, and a noncitizen convicted **[*362]** of such an offense is subject to mandatory deportation. See 8 U. S. C. §§1101(a)(43)(B), 1227(a)(2)(A)(iii); Calcano-Martinez v. INS, 533 U. S. 348, 350, n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001). Upon learning that he would be deported after serving his sentence, Lee filed a motion under 28 U. S. C. §2255 to vacate his conviction **[****9]** and sentence, arguing that his attorney had provided constitutionally ineffective assistance.

At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." Report and Recommendation in No. 2:10-cv-02698 (WD Tenn.), pp. 6-7 (Report and Recommendation). In fact, Lee explained, his attorney became "pretty upset because every time something comes up I always ask about immigration status," and the lawyer "always said why [are you] worrying about something that you don't need to worry about." App. 170. According to Lee, the lawyer assured him that if deportation was not in the plea agreement, "the government cannot deport you." *Ibid.* Lee's attorney testified that he thought Lee's case was a "bad case to try" because Lee's defense to the charge was weak. *Id.*, at 218-219. The attorney nonetheless acknowledged that if he had known Lee would be deported upon pleading guilty, he would have advised him to go to trial. *Id.*, at 236, 244. Based on the hearing testimony, a Magistrate Judge recommended that Lee's plea be set aside and his conviction vacated **[**1964]** because he had received ineffective assistance of counsel. **[****10]**

The District Court, however, denied relief. Applying our two-part test for ineffective assistance claims from Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the District Court concluded that Lee's counsel had performed deficiently by giving improper advice about the deportation consequences of the plea. But, "[i]n light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sentence, **[*363]** and subsequent deportation," had he gone to trial. Order in No. 2:10-cv-02698 (WD Tenn.), p. 24 (Order). Lee therefore could not show he was prejudiced by his attorney's erroneous advice. Viewing its resolution of the issue as debatable among jurists of reason, the District Court granted a certificate of appealability.

The Court of Appeals for the Sixth Circuit affirmed the denial of relief. On appeal, the Government conceded that the performance of Lee's attorney had been deficient. To establish that he was prejudiced by that deficient performance, the court explained, Lee was required to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 825 F. 3d, at 313 (quoting Hill v. Lockhart, 474 U. S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); internal quotation marks omitted). **[****11]** Lee had "no *bona fide* defense, not even a weak one," so he **[***484]** "stood to gain nothing from going to trial but more prison time." 825 F. 3d, at 313, 316. Relying on Circuit precedent holding that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence," the Court of Appeals concluded that Lee could not show prejudice. Id., at 314 (internal quotation marks omitted). We granted certiorari. *580 U. S. 1039, 137 S. Ct. 614, 196 L. Ed. 2d 490 (2016).*

II

The Sixth Amendment guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea. Lafler v. Cooper, 566 U. S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Hill, 474 U. S., at 58, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203. To demonstrate that counsel was constitutionally ineffective, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" and that he was prejudiced as a result. Strickland, 466 U. S., at 688, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The first requirement is not at issue in today's case: **[*364]** The Government concedes that Lee's plea-stage counsel provided inadequate representation when he assured Lee that he would not be deported if he

pleaded guilty. Brief for United States 15. The question is whether Lee can show he was prejudiced by that erroneous advice.

A

A claim of ineffective assistance **[****12]** of counsel will often involve a claim of attorney error "during the course of a legal proceeding"—for example, that counsel failed to raise an objection at trial or to present an argument on appeal. *Roe v. Flores-Ortega, 528 U. S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)*. A defendant raising such a claim can demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 482, 120 S. Ct. 1029, 145 L. Ed. 2d 985* (quoting *Strickland, 466 U. S., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*; internal quotation marks omitted).

[1965]** But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." *Flores-Ortega, 528 U. S., at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985*. When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place." *Id., at 482-483, 120 S. Ct. 1029, 145 L. Ed. 2d 985* (internal quotation marks omitted).

We instead consider whether the defendant was prejudiced by the "denial of the entire judicial **[****13]** proceeding . . . to which he had a right." *Id., at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985*. As we held in *Hill* v. *Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable **[***485]** probability that, but for counsel's errors, **[*365]** he would not have pleaded guilty and would have insisted on going to trial." *474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*.

The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession. *Premo v. Moore, 562 U. S. 115, 118, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011)*; cf., *e.g.*, *Hill, 474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203* (discussing failure to investigate potentially exculpatory evidence).

Not all errors, however, are of that sort. Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty. The Court confronted precisely this kind of error in *Hill*. See *id., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203* ("the **[****14]** claimed error of counsel is erroneous advice as to eligibility for parole"). Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial. The Court rejected the defendant's claim because he had "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Ibid.* [1]

[1] The dissent also relies heavily on *Missouri v. Frye, 566 U. S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)*, and *Lafler v. Cooper, 566 U. S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)*. Those cases involved defendants who alleged that, but for their attorney's incompetence, they would have *accepted* a plea deal—not, as here and as in *Hill*, that they would have rejected a plea. In both *Frye* and *Lafler*, the Court highlighted this difference: Immediately following the sentence that the dissent plucks from *Frye*, *post,* at 5 (opinion of Thomas, J.), the Court explained that its "application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*." *566 U. S., at 148, 132 S. Ct. 1376, 182 L. Ed. 2d 398* ("*Hill* was correctly decided and applies in the context in which it arose"). *Lafler*, decided the same day as *Frye*, reiterated that "[i]n contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection." *566 U. S., at 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398*. *Frye* and *Lafler* articulated a *different* way to show prejudice, suited to the context of pleas not accepted, not an *additional* element to the *Hill* inquiry. See *Frye, 566 U. S., at 148, 132 S. Ct. 1399, 182 L. Ed. 2d 379* ("*Hill* does not . . . provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea

[*366] **[**1966]** Lee, on the other hand, argues he can establish prejudice under *Hill* because he never would have accepted a guilty plea had he known that he would be deported as a result. Lee insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. [2] The Government responds that, since Lee had no viable defense at trial, he would almost certainly have lost and found **[***486]** himself still subject to deportation, with a lengthier prison sentence to boot. Lee, the Government **[****15]** contends, cannot show prejudice from accepting a plea where his only hope at trial was that something unexpected and unpredictable might occur that would lead to an acquittal.

B

The Government asks that we, like the Court of Appeals below, adopt a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Brief for United States 26. As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a **[*367]** guilty plea. But in elevating this general proposition to a *per se* rule, the Government makes two errors. First, it forgets that categorical rules are ill suited to an inquiry that we have emphasized demands a "case-by-case examination" of the "totality of the evidence." *Williams v. Taylor, 529 U. S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)* (internal quotation marks omitted); *Strickland, 466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill* v. *Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial.

A defendant without any viable defense will be highly likely to lose at trial. And a defendant **[****16]** facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. It is instead because defendants obviously weigh their prospects at trial in deciding whether to accept a plea. See *Hill, 474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*. Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.

But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See *INS v. St. Cyr, 533 U. S. 289, 322-323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)*. When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant **[**1967]** with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years. Here Lee alleges that avoiding deportation was *the* determinative factor **[****17]** for him; deportation after some time in prison was not meaningfully different from deportation after somewhat less time. He says he accordingly would have rejected any plea leading **[*368]** to deportation—even if it shaved off prison time—in favor of throwing a "Hail Mary" at trial.

The Government urges that, in **[***487]** such circumstances, the possibility of an acquittal after trial is "irrelevant to the prejudice inquiry," pointing to our statement in *Strickland* that "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. That statement, however, was made in the context of discussing the presumption of reliability we apply to judicial proceedings. As we have explained, that presumption has no place where, as here, a defendant was deprived of a proceeding altogether. *Flores-Ortega, 528 U. S., at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985*. In a presumptively reliable proceeding, "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" must by definition be ignored. *Strickland, 466 U. S., at 695,104 S. Ct. 2052, 80 L. Ed. 2d 674*. But where we are instead asking what an individual defendant would have

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negotiations"). Contrary to the dissent's assertion, *post,* at 8-9, we do not depart from *Strickland*'s requirement of prejudice. The issue is how the required prejudice may be shown.

[2] Lee also argues that he can show prejudice because, had his attorney advised him that he would be deported if he accepted the Government's plea offer, he would have bargained for a plea deal that did not result in certain deportation. Given our conclusion that Lee can show prejudice based on the reasonable probability that he would have gone to trial, we need not reach this argument.

done, the possibility of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking. [3]

C

"Surmounting *Strickland*'s high bar is never **[****18]** an easy task," *Padilla v. Kentucky, 559 U. S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*, and the strong societal interest in finality has "special force with respect **[*369]** to convictions based on guilty pleas," *United States v. Timmreck, 441 U. S. 780, 784, 99 S. Ct. 2085, 60 L. Ed. 2d 634 (1979)*. Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.

In the unusual circumstances of this case, we conclude that Lee has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation. There is no question that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." Report and Recommendation, at 6-7; see also Order, at 14 (noting Government did not dispute testimony to this effect). Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the **[**1968]** evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences. See Report and Recommendation, at 12 (noting "the undisputed fact that had Lee at all been aware **[****19]** that deportation was possible as a result of his guilty **[***488]** plea, he would . . . not have pled guilty"), adopted in relevant part in Order, at 15.

Lee demonstrated as much at his plea colloquy: When the judge warned him that a conviction "could result in your being deported," and asked "[d]oes that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor." App. 103. When the judge inquired "[h]ow does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice. *Ibid.* Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty. *Id.*, at 210. [4]

[*370] There is no reason to doubt the paramount importance Lee placed on avoiding deportation. Deportation is always "a particularly severe penalty," *Padilla, 559 U. S., at 365, 130 S. Ct. 1473, 176 L. Ed. 2d 284* (internal quotation marks omitted), and we have "recognized that 'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence,'" *id., at 368, 130 S. Ct. 1473, 176 L. Ed. 2d 284* (quoting *St. Cyr, 533 U. S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347*; alteration and some internal quotation marks omitted); see also *Padilla, 559 U. S., at 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284* ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may **[****20]** be imposed on noncitizen

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[3] The dissent makes much of the fact that *Hill v. Lockhart, 474 U. S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*, also noted that courts should ignore the "idiosyncrasies of the particular decisionmaker." *Post, at 7* (quoting *Hill, 474 U. S., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203*; internal quotation marks omitted). But *Hill* made this statement in discussing how courts should analyze "predictions of the outcome at a possible trial." *Id., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203*. As we have explained, assessing the effect of some types of attorney errors on defendants' decisionmaking involves such predictions: Where an attorney error allegedly affects how a trial would have played out, we analyze that error's effects on a defendant's decisionmaking by making a prediction of the likely trial outcome. But, as *Hill* recognized, such predictions will not always be "necessary." *Id., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203*. Such a prediction is neither necessary nor appropriate where, as here, the error is one that is not alleged to be pertinent to a trial outcome, but is instead alleged to have affected a defendant's understanding of the consequences of his guilty plea.

[4] Several courts have noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice. See, *e.g.*, *United States v. Newman, 805 F. 3d 1143, 1147, 420 U.S. App. D.C. 89 (CADC 2015)*; *United States v. Kayode, 777 F. 3d 719, 728-729 (CA5 2014)*; *United States v. Akinsade, 686 F. 3d 248, 253 (CA4 2012)*; *Boyd v. Yukins, 99 Fed. Appx. 699, 705 (CA6 2004)*. The present case involves a claim of ineffectiveness of counsel extending to advice specifically undermining the judge's warnings themselves, which the defendant contemporaneously stated on the record he did not understand. There has been no suggestion here that the sentencing judge's statements at the plea colloquy cured any prejudice from the erroneous advice of Lee's counsel.

defendants who plead guilty to specified crimes." (footnote omitted)). At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.

The Government argues, however, that under *Padilla* v. *Kentucky*, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id., at 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284*. The Government contends that Lee cannot make that showing because he was going to be deported either way; going to trial would only result in a longer sentence before that inevitable consequence. See Brief for United States 13, 21-23.

[*371] We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to **[****21]** deportation. Going to trial? *Almost* certainly. If **[***489]** deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, **[**1969]** as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. See *id.*, at 6. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence. Accordingly we conclude Lee has demonstrated a "reasonable probability that, but for [his] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill, 474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*.

***

The judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Gorsuch took no part in the consideration or decision **[****22]** of this case.

Dissent by: THOMAS

Dissent

Justice Thomas, with whom Justice Alito joins except for Part I, dissenting.

The Court today holds that a defendant can undo a guilty plea, well after sentencing and in the face of overwhelming evidence of guilt, because he would have chosen to pursue a **[*372]** defense at trial with no reasonable chance of success if his attorney had properly advised him of the immigration consequences of his plea. Neither the *Sixth Amendment* nor this Court's precedents support that conclusion. I respectfully dissent.

I

As an initial matter, I remain of the view that the *Sixth Amendment to the Constitution* does not "requir[e] counsel to provide accurate advice concerning the potential removal consequences of a guilty plea." *Padilla v. Kentucky, 559 U. S. 356, 388, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)* (Scalia, J., joined by Thomas, J., dissenting). I would

therefore affirm the Court of Appeals on the ground that the *Sixth Amendment* does not apply to the allegedly ineffective assistance in this case.

II

Because the Court today announces a novel standard for prejudice at the plea stage, I further dissent on the separate ground that its standard does not follow from our precedents.

A

The Court and both of the parties agree that the prejudice inquiry in this context is governed by *Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. See *ante*, at 5; Brief for Petitioner 16; Brief for United States **[****23]** 15. The Court in *Strickland* held that a defendant may establish a claim of ineffective assistance of **[***490]** counsel by showing that his "counsel's representation fell below an objective standard of reasonableness" and, as relevant here, that the representation prejudiced the defendant by "actually ha[ving] an adverse effect on the defense." *466 U. S., at 688, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

To establish prejudice under *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. *Strickland* made clear that the "result of the proceeding" refers to the outcome of the **[*373]** defendant's criminal prosecution as a whole. It defined **[**1970]** "reasonable probability" as "a probability sufficient to undermine confidence *in the outcome*." *Ibid.* (emphasis added). And it explained that "[a]n error by counsel . . . does not warrant setting aside the judgment of a criminal proceeding if the error had no effect *on the judgment*." *Id., at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (emphasis added).

The parties agree that this inquiry assumes an "objective" decisionmaker. Brief for Petitioner 17; Brief for United States 17. That conclusion also follows directly from *Strickland*. According to *Strickland*, the "assessment of the **[****24]** likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. It does not depend on subjective factors such as "the idiosyncrasies of the particular decisionmaker," including the decisionmaker's "unusual propensities toward harshness or leniency." *Ibid.* These factors are flatly "irrelevant to the prejudice inquiry." *Ibid.* In other words, "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Ibid.* Instead, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Ibid.*

When the Court extended the right to effective counsel to the plea stage, see *Hill v. Lockhart, 474 U. S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*, it held that "the same two-part standard" from *Strickland* applies. *474 U. S., at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203* (repeating *Strickland*'s teaching that even an unreasonable error by counsel "'does not warrant setting aside the judgment'" so long as the error "'had no effect on the judgment'" (quoting *466 U. S., at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674*)). To be sure, the Court said—and the majority today emphasizes—that a defendant asserting an ineffectiveness claim at the plea stage "must show that there is **[****25]** a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *474 U. S., [*374] at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*. But that requirement merely reflects the reality that a defendant cannot show that the outcome of his case would have been different if he would have accepted his current plea anyway. * In other words, the defendant's ability to show **[***491]** that he would have gone to trial is necessary, but not sufficient, to establish prejudice.

The *Hill* Court went on to explain that *Strickland*'s two-part test applies the same way in the plea context as in other contexts. In particular, the "assessment" will primarily turn on "a prediction whether," in the absence of counsel's

* It is not enough for a defendant to show that he would have obtained a better plea agreement. "[A] defendant has no right to be offered a plea," *Missouri v. Frye, 566 U. S. 134, 148, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)*; *Lafler v. Cooper, 566 U. S. 156, 168, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)*, and this Court has never concluded that a defendant could show a "reasonable probability" of a different result based on a purely hypothetical plea offer subject to absolute executive discretion.

error, "the evidence" of the defendant's innocence or guilt "likely would have changed the outcome" of the proceeding. *474 U. S., at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*. Thus, a defendant cannot show prejudice where it is "'inconceivable'" not only that he would have gone to trial, but also "'that *if he had done so* he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received.'" *Ibid.* (quoting *Evans v. Meyer, 742 F. 2d 371, 375 (CA7 1984)*; emphasis added). In sum, the proper inquiry requires a defendant to show both that **[****26]** he would have rejected his plea and gone to **[**1971]** trial *and* that he would likely have obtained a more favorable result in the end.

To the extent *Hill* was ambiguous about the standard, our precedents applying it confirm this interpretation. In *Premo v. Moore, 562 U. S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011)*, the Court emphasized that "strict adherence to the *Strickland* standard" is "essential" when reviewing claims about attorney error "at the plea bargain stage." *Id., at 125, 131 S. Ct. 733, 178 L. Ed. 2d 649*. In that case, the defendant argued that his counsel was constitutionally ineffective because he had failed to seek suppression of his confession **[*375]** before he pleaded no contest. In analyzing the prejudice issue, the Court did not focus solely on whether the suppression hearing would have turned out differently, or whether the defendant would have chosen to go to trial. It focused as well on the weight of the evidence against the defendant and the fact that he likely would not have obtained a more favorable result at trial, regardless of whether he succeeded at the suppression hearing. See *id., at 129, 131 S. Ct. 733, 178 L. Ed. 2d 649* (describing the State's case as "formidable" and observing that "[t]he bargain counsel struck" in the plea agreement was "a favorable one" to the defendant compared to what might have happened at trial).

The **[****27]** Court in *Missouri v. Frye, 566 U. S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)*, took a similar approach. In that case, the Court extended *Hill* to hold that counsel could be constitutionally ineffective for failing to communicate a plea deal to a defendant. *566 U. S., at 145, 132 S. Ct. 1399, 182 L. Ed. 2d 379*. The Court emphasized that, in addition to showing a reasonable probability that the defendant "would have accepted the earlier plea offer," it is also "necessary" to show a "reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id., at 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379*; see also *id., at 150, 132 S. Ct. 1399, 182 L. Ed. 2d 379* (the defendant "must show *not only* a reasonable probability that he would have accepted the lapsed plea *but also* a reasonable probability that the **[***492]** prosecution would have adhered to the agreement and that it would have been accepted by the trial court" (emphasis added)). In short, the Court did not focus solely on whether the defendant would have accepted the plea. It instead required the defendant to show that the ultimate outcome would have been different.

Finally, the Court's decision in *Lafler v. Cooper, 566 U. S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)*, is to the same effect. In that case, the Court concluded that counsel may be constitutionally ineffective by causing a defendant to reject a plea deal **[****28]** he should have accepted. *Id., at 164, 132 S. Ct. 1376, 182 L. Ed. 2d 398*. The Court again emphasized that the **[*376]** prejudice inquiry requires a showing that the criminal prosecution would ultimately have ended differently for the defendant—not merely that the defendant would have accepted the deal. The Court stated that the defendant in those circumstances "must show" a reasonable probability that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Ibid.*

These precedents are consistent with our cases governing the right to effective assistance of counsel in other contexts. This Court has held that the right to effective counsel applies to all "critical stages of the criminal proceedings." *Montejo v. Louisiana, 556 U. S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009)* (internal quotation marks omitted). Those stages include not only "the entry of a guilty plea," but also "arraignments, postindictment interrogations, **[**1972]** [and] postindictment lineups." *Frye, supra, at 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379* (citing cases). In those circumstances, the Court has not held that the prejudice inquiry focuses on whether *that* stage of the proceeding would have ended differently. It instead has made clear that the prejudice inquiry is the same as in *Strickland*, which **[****29]** requires a defendant to establish that he would have been better off in the end had his counsel not erred. See *466 U. S., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

B

The majority misapplies this Court's precedents when it concludes that a defendant may establish prejudice by showing only that "he would not have pleaded guilty and would have insisted on going to trial," without showing that "the result of that trial would have been different than the result of the plea bargain." *Ante*, at 5, 6 (internal quotation marks omitted). In reaching this conclusion, the Court relies almost exclusively on the single line from *Hill* that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *474 U. S., [*377] at 59, 106 S. Ct. 366, 88 L. Ed. 2d 203*. For the reasons explained above, that sentence prescribes the threshold showing a defendant must make to establish *Strickland* prejudice where a defendant has accepted a guilty plea. In *Hill*, the Court concluded that the defendant had not made that showing, so it rejected his claim. The Court did not, however, further hold that a defendant can establish prejudice by making that showing alone.

The majority also relies on a case that arises in a **[****30]** completely different **[***493]** context, *Roe v. Flores-Ortega, 528 U. S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)*. There, the Court considered a defendant's claim that his attorney failed to file a notice of appeal. See *id., at 474, 120 S. Ct. 1029, 145 L. Ed. 2d 985*. The Court observed that the lawyer's failure to file the notice of appeal "arguably led not to a judicial proceeding of disputed reliability," but instead to "the forfeiture of a proceeding itself." *Id., at 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985*. The Court today observes that petitioner's guilty plea meant that he did not go to trial. *Ante*, at 5. Because that trial "'never took place,'" the Court reasons, we cannot "'apply a strong presumption of reliability'" to it. *Ibid.* (quoting *Flores-Ortega, supra, at 482-483, 120 S. Ct. 1029, 145 L. Ed. 2d 985*). And because the presumption of reliability does not apply, we may not depend on *Strickland*'s statement "that '[a] defendant has no entitlement to the luck of a lawless **[*378]** decisionmaker.'" *Ante*, at 8 (quoting *466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*). This point is key to the majority's conclusion that petitioner would have chosen to gamble on a trial even though he had no viable defense.

The majority's analysis, however, is directly contrary to *Hill*, which instructed a court undertaking a prejudice analysis to apply a presumption of reliability to the hypothetical trial that would have occurred had the defendant not pleaded **[****31]** guilty. After explaining that a court should engage in a predictive inquiry about the likelihood of a defendant securing a better result at trial, the Court said: "As we explained in *Strickland v. Washington, supra, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *474 U. S., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203* (quoting *466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*). That quote comes from the same paragraph in *Strickland* as the discussion about the presumption of reliability that attaches to the trial. In other words, *Hill* instructs that the prejudice inquiry must presume that **[**1973]** the foregone trial would have been reliable.

The majority responds that *Hill* made statements about presuming a reliable trial only in "discussing how courts should analyze 'predictions of the outcome at a possible trial,'" which "will not always be 'necessary.'" *Ante*, at 10, n. 3 (quoting *Hill, 474 U. S., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203*). I agree that such an inquiry is not always necessary—it is not necessary where, as in *Hill*, the defendant cannot show at the threshold that he would have rejected his plea and chosen to go to trial. But that caveat says nothing about the application of the presumption of reliability when a defendant **[****32]** can make that threshold showing.

In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable. Guilty pleas "rarely" give rise to the "concern that unfair procedures may have resulted in the conviction of an innocent defendant." *Id., at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203* (internal quotation marks omitted). That is because "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly **[***494]** removes the issue of factual guilt from the case." *Menna v. New York, 423 U. S. 61, 62, n. 2, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975)* (*per curiam*) (emphasis deleted). Guilty pleas, like completed trials, are therefore entitled to the protections against collateral attack that the *Strickland* prejudice standard affords.

Finally, the majority does not dispute that the prejudice inquiry in *Frye* and *Lafler* focused on whether the defendant established a reasonable probability of a different outcome. The majority instead distinguishes those cases on the ground that they involved a defendant who did not accept a guilty plea. See *ante*, at 7, n. 1. According to the majority, those cases "articulated a *different* way to show prejudice, **[*379]** suited to the context of pleas not

accepted." *Ante*, at 366, no 1. But the Court in *Frye* and *Lafler* (and *Hill*, for that **[****33]** matter) did not purport to establish a "*different*" test for prejudice. To the contrary, the Court repeatedly stated that it was applying the "*same* two-part standard" from *Strickland*. *Hill, supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203* (emphasis added); accord, *Frye, 566 U. S., at 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379* ("*Hill* established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*"); *Lafler, 566 U. S., at 162-163, 132 S. Ct. 1376, 182 L. Ed. 2d 398* (applying *Strickland*).

The majority today abandons any pretense of applying *Strickland* to claims of ineffective assistance of counsel that arise at the plea stage. It instead concludes that one standard applies when a defendant goes to trial (*Strickland*); another standard applies when a defendant accepts a plea (*Hill*); and yet another standard applies when counsel does not apprise the defendant of an available plea or when the defendant rejects a plea (*Frye* and *Lafler*). That approach leaves little doubt that the Court has "open[ed] a whole new field of constitutionalized criminal procedure"—"plea-bargaining law"—despite its repeated assurances that it has been applying the same *Strickland* standard all along. *Lafler, supra, at 175, 132 S. Ct. 1376, 182 L. Ed. 2d 398* (Scalia, J., dissenting). In my view, we should take the Court's precedents at their word and conclude that "[a]n error **[****34]** by counsel . . . does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland, 466 U. S., at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

III

Applying the ordinary *Strickland* standard in this case, I do not think a defendant in petitioner's circumstances could **[**1974]** show a reasonable probability that the result of his criminal proceeding would have been different had he not pleaded guilty. Petitioner does not dispute that he possessed large quantities of illegal drugs or that the Government had secured a witness who had purchased the drugs directly from **[*380]** him. In light of this "overwhelming evidence of . . . guilt," *2014 WL 1260388, *15, 2014 U.S. Dist. LEXIS 36432(WD Tenn., Mar. 20, 2014)*, the Court of Appeals concluded that petitioner had "no *bona fide* defense, not even a weak one," *825 F. 3d 311, 316 (CA6 2016)*. His only chance of succeeding would have been to "thro[w] a 'Hail Mary' at trial." *Ante,* at 8. As I have explained, however, the Court in *Strickland* expressly foreclosed **[***495]** relying on the possibility of a "Hail Mary" to establish prejudice. See *supra, at 3*. *Strickland* made clear that the prejudice assessment should "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *466 U. S., at 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

In the face of overwhelming **[****35]** evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner's shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: Had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence. Finding that petitioner has established prejudice in these circumstances turns *Strickland* on its head.

IV

The Court's decision today will have pernicious consequences for the criminal justice system. This Court has shown special solicitude for the plea process, which brings "stability" and "certainty" to "the criminal justice system." *Premo, 562 U. S., at 132, 131 S. Ct. 733, 178 L. Ed. 2d 649*. The Court has warned that "the prospect of collateral challenges" threatens to undermine these important values. *Ibid.* And we have explained that "[p]rosecutors must have assurance that a plea will not be **[*381]** undone years later," lest they "forgo plea bargains that would benefit defendants," **[****36]** which would be "a result favorable to no one." *Id., at 125, 131 S. Ct. 733, 178 L. Ed. 2d 649*.

The Court today provides no assurance that plea deals negotiated in good faith with guilty defendants will remain final. For one thing, the Court's artificially cabined standard for prejudice in the plea context is likely to generate a high volume of challenges to existing and future plea agreements. Under the majority's standard, defendants bringing these challenges will bear a relatively low burden to show prejudice. Whereas a defendant asserting an ordinary claim of ineffective assistance of counsel must prove that the ultimate outcome of his case would have

been different, the Court today holds that a defendant who pleaded guilty need show only that he would have rejected his plea and gone to trial. This standard does not appear to be particularly demanding, as even a defendant who has only the "smallest chance of success at trial"—relying on nothing more than a "'Hail Mary'"—may be able to satisfy it. *Ante,* at 7, 8. For another, the Court does not limit its holding to immigration consequences. Under its rule, so long as a defendant alleges that his counsel omitted or misadvised him on a piece of information during the plea process **[****37]** that he considered of "paramount importance," *ante,* at 10, he could allege a plausible claim of ineffective assistance of counsel.

[1975]** In addition to undermining finality, the Court's rule will impose significant costs on courts and prosecutors. Under the Court's standard, a challenge to a guilty plea will be a highly **[***496]** fact-intensive, defendant-specific undertaking. Petitioner suggests that each claim will "at least" require a "hearing to get th[e] facts on the table." Tr. of Oral Arg. 7. Given that more than 90 percent of criminal convictions are the result of guilty pleas, *Frye, 566 U. S., at 143, 132 S. Ct. 1399, 182 L. Ed. 2d 379*, the burden of holding evidentiary hearings on these claims could be significant. In circumstances where a defendant has admitted **[*382]** his guilt, the evidence against him is overwhelming, and he has no bona fide defense strategy, I see no justification for imposing these costs.

***

For these reasons, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

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State v. Nkiam

Court of Appeals of North Carolina

March 4, 2015, Heard in the Court of Appeals; November 3, 2015, Filed

No. COA14-1164

Reporter
243 N.C. App. 777 *; 778 S.E.2d 863 **; 2015 N.C. App. LEXIS 910 ***

STATE OF NORTH CAROLINA v. ARCHIMEDE N. NKIAM, Defendant.

Subsequent History: Stay granted by *State v. Nkiam, 368 N.C. 685, 778 S.E.2d 437, 2015 N.C. LEXIS 1187 (2015)*

Review granted by, Appeal dismissed by, Stay granted by *State v. Nkiam, 368 N.C. 685, 781 S.E.2d 475, 2016 N.C. LEXIS 40 (2016)*

Motion dismissed by, As moot *State v. Nkiam, 368 N.C. 685, 781 S.E.2d 477 (2016)*

Motion granted by *State v. Nkiam, 783 S.E.2d 744, 2016 N.C. LEXIS 290 (N.C., 2016)*

Review improvidently allowed by *State v. Nkiam, 791 S.E.2d 457, 2016 N.C. LEXIS 809 (N.C., Sept. 23, 2016)*

Prior History: **[***1]** Wake County, No. 12 CRS 204293.

Disposition: REVERSED AND REMANDED.

Case Summary

Overview
HOLDINGS: [1]-The advice provided by defense counsel in connection with his guilty plea did not comply with Padilla, and therefore the trial court erred by denying defendant's motion for appropriate relief, where his offenses amounted to aggravated felonies, he was sentenced to a term of more than a year, his deportation upon entering his guilty plea was presumptively mandatory, and counsel merely informed him that he could be deported and did not adequately advise him of the likelihood of deportation. The case was remanded for the trial court to assess whether defendant was prejudiced by counsel's inadequate advice regarding the immigration consequences of his guilty plea.

Outcome
Order reversed and case remanded.

Counsel: Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Robert H. Hale, Jr. & Associates, Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellant.

Judges: GEER, Judge. Judges ELMORE and INMAN concur.

Opinion by: GEER

Opinion

[*777] **[**864]** Appeal by defendant from order entered 26 November 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 4 March 2015.

Barbara LAGEMANN

GEER, Judge.

Defendant Archimede N. Nkiam, an alien who had obtained permanent legal resident status in the United States, appeals from an order denying his motion for appropriate relief ("MAR") that, asserted a claim of ineffective assistance of counsel ("IAC") with respect to his guilty plea to two crimes that led to the initiation of deportation proceedings. On appeal, defendant argues that the trial court should have granted his MAR based on *Padilla v. Kentucky, 559 U.S. 356, 176 L. Ed. 2d 284, 130 [*778] S. Ct. 1473 (2010)*, which established that incorrect advice regarding the immigration consequences of a guilty plea may constitute IAC. We hold that the advice provided by defendant's counsel in connection with his plea did not comply with *Padilla*. Because the trial court did not specifically address the prejudice prong **[***2]** of defendant's IAC claim, we reverse the trial court's order denying defendant's MAR and remand for a determination whether defendant was prejudiced by the IAC and such further proceedings as are necessary.

Facts

Defendant was born on 5 January 1990 in the Democratic Republic of Congo ("DRC"). Defendant moved to the United States and settled in Raleigh with his family when he was about 11 years old. Defendant was admitted for an indefinite period as a returning asylee, and he later became a permanent resident of the United States after obtaining a green card.

On 24 February 2012, defendant was arrested in connection with an armed robbery of Jocqui Brown. On 16 April 2012, defendant was charged with having used a knife or pistol to commit armed robbery of Mr. Brown's personal property having a value of $50.00, including a cell phone and a ball cap. Defendant was also charged with conspiring with Terrence Mitchell and Leslie Martine to rob Mr. Brown. Attorney Deonte Thomas, a Wake County public defender, was assigned to represent defendant on the charges, and defendant met with Mr. Thomas several times about his case.

At a hearing on 7 January 2013, defendant appeared in Wake County Superior **[***3]** Court before Judge G. Wayne Abernathy to accept a plea offer that allowed him to plead guilty to aiding and abetting common law robbery, a Class G felony, and conspiracy to commit common law robbery, a Class H felony. After conducting a colloquy with defendant, Judge Abernathy accepted defendant's plea and sentenced him to two consecutive suspended sentences. For the aiding and abetting charge, defendant received a sentence of 13 to 25 months imprisonment, which was suspended and defendant was placed on 24 months of supervised probation. For the conspiracy charge, defendant was placed on an additional 24 months of supervised probation after suspension of a sentence of six to 17 months imprisonment.

Following defendant's guilty plea, the federal government initiated deportation proceedings against defendant. In January 2013, defendant was detained by immigration officials and transported to an immigration holding facility in Atlanta.

[*779] On 3 April 2013, defendant filed an MAR asserting IAC that the trial court denied **[**865]** without a hearing on 1 May 2013. This Court granted defendant's petition for writ of certiorari, reversed the trial court's order, and remanded for an evidentiary hearing. On **[***4]** 15 November 2013, the trial court held an evidentiary hearing at which Mr. Thomas, defendant, defendant's father, and an immigration law expert, Hans Linnartz, testified. Following the hearing, the trial court entered an order making the following pertinent findings of fact.

The trial court found that, following his arrest, defendant received "at a minimum" the following information regarding the immigration consequences of his guilty plea:

a. Defendant was informed by his attorney prior to accepting the plea that there was at least a possibility it could result in his deportation from the United States;

b. Defendant reviewed and answered question #8 on the Transcript of Plea form with his attorney, indicating that he was a permanent U.S. resident born in Congo, and that he understood his plea of guilty could therefore result in deportation from the country;

c. Judge Abernathy informed Defendant that his guilty plea "would make him subject to deportation," and his attorney responded by confirming that it could result in his deportation.

d. Defendant's attorney stated during the colloquy that he hoped the Defendant would not actually be deported, but also stated "we told him we can't do **[***5]** anything with that."
e. Judge Abernathy directly cautioned the Defendant that: i) his guilty plea could result in deportation; ii) the judge had no control over that in state court; and, iii) he could not make Defendant any promises about what would happen with his potential deportation.
f. During the colloquy, Defendant was asked three different times whether he understood that his plea could have immigration consequences, and each time the Defendant answered that he understood.

[*780] The trial court then further found that defendant testified that if he had "been advised of the high likelihood that he would be deported as a result of his negotiated plea, he would not have accepted it." However, the trial court also found that "[i]n reviewing the overall reasonableness of Defendant's decision to accept the original plea agreement," there was a "sound factual basis for th[e] plea," including (1) anticipated testimony from the victim, Mr. Brown, identifying defendant, Mr. Mitchell, and Mr. Martine as being involved in the robbery, as well as their car, the weapons used, and the stolen property found in defendant's and his accomplices' possession; (2) evidence that officers apprehended defendant and the **[***6]** other two men 30 minutes after Mr. Brown reported the crime; and (3) Mr. Mitchell's agreement in exchange for a plea to testify that defendant was driving when the robbery was committed although Mr. Mitchell denied any weapons were used.

The trial court found that had defendant proceeded to trial on the robbery with a dangerous weapon charge, he could have been sentenced to 51 to 74 months in prison and would be subject to the same immigration consequences he now faces. On the other hand, the trial court acknowledged that defendant and his father both testified as to their fears of political and ethnic persecution if defendant were to return to DRC.

The trial court then determined that, given its review of defendant's testimony, the relevant immigration statutes, and Mr. Linnartz' testimony,

a. Defendant's conviction constituted an "aggravated felony" under *8 USC § 1101*, since it carried a potential prison sentence of at least twelve months.

b. Defendant therefore became "removable" and subject to deportation by accepting the plea, pursuant to *8 USC § 1227*, and he is not eligible for Asylum or Cancellation of Removal relief. *8 USC § 1229b*; *8 USC § 1158*.

c. However, several other avenues of relief from deportation were (and in some cases **[***7]** still are) possible for Defendant, such as:

i. Withholding of Removal (*8 USC § 1231*);

[866]** ii. Appeal of a denial of Withholding to the Immigration Board of Appeals or the 11th Circuit Court of Appeals (8 CFR § 1003; *8 USC § 1252*);

[*781] iii. Convention Against Torture ("CAT") Relief (*8 CFR § 208.16*);

iv. Stay of Removal on discretionary grounds (*8 CFR § 241.6*).

Although these avenues were extremely difficult to achieve, according to Mr. Linnartz, defendant and his father had testified to the threat of political persecution in the Congo, and the trial court found defendant "therefore had a reasonable basis for asserting such a claim for relief."

Based on these findings of fact, the trial court concluded that for trial counsel to satisfy his responsibility to advise his client regarding the immigration consequences of a plea, *Padilla's* "final holding" was that counsel need only "'inform her client whether his plea carries a **risk** of deportation.'" (Quoting *Padilla, 559 U.S. at 374, 176 L. Ed. 2d at*

299, 130 S. Ct. at 1486). The trial court further concluded that "Defendant's assertion that he should have been advised he 'would' be deported rather than 'could' be deported is asking for a higher standard than the United States Supreme Court has set."

The trial court then distinguished *Padilla* on the grounds that counsel for the **[***8]** defendant in *Padilla* "incorrectly 'provided him with false assurance that his conviction would not result in his deportation[,]'" (quoting Padilla, 559 U.S. at 368, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483), whereas in this case, "Defendant was correctly advised that he could be deported, and that advice was confirmed on multiple occasions throughout the colloquy." Further, the trial court noted that *Padilla* recognized that "when the law is not 'succinct and straightforward,' the defendant's attorney 'need do no more than advise a noncitizen client that pending criminal charges may carry a risk of immigration consequences.'" (Quoting Padilla, 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483). He concluded that the law was not clear because "Defendant was still eligible for various forms of relief from deportation[.]" Therefore, the standard set out in *Padilla* "was satisfied in the present case" when defendant's attorney advised defendant that he "'could' be deported." The trial court consequently denied defendant's MAR. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his MAR because the trial court misapplied the standard for determining IAC under *Padilla*. This Court has explained,

> **[*782]** "When considering rulings on motions for appropriate **[***9]** relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." State v. Frogge, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) . . . . However, "[i]f the issues raised by Defendant's challenge to [the trial court's] decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." State v. Jackson, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012)[.]

State v. Marino, 229 N.C. App. 130, 139, 747 S.E.2d 633, 640 (2013), *app. dismissed and disc. review denied*, 367 N.C. 500, 757 S.E.2d 907, *cert. denied*, __ U.S. __, 188 L. Ed. 2d 914, 134 S. Ct. 1900 (2014).

To prevail on an IAC claim,

> "[F]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984)).

This case is the first in which our appellate courts have been **[***10]** called upon to interpret and apply *Padilla's* holding. In Padilla, 559 U.S. **[**867]** at 359, 176 L. Ed. 2d at 289-90, 130 S. Ct. at 1477, the defendant, who was not a United States citizen, pled guilty to transporting a large amount of marijuana, and, as a result, he was deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (2014). 8 U.S.C. § 1227(a)(2)(B)(i) provides that any alien "convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of **[*783]** marijuana, is deportable" if the offense is committed after entry into the United States.

After discovering that his pleas made him deportable, the defendant filed a postconviction IAC proceeding in Kentucky state court seeking to withdraw his guilty pleas. Padilla, 559 U.S. at 359, 176 L. Ed. 2d at 290, 130 S. Ct.

at 1478. In support of his IAC claim, the defendant alleged that his plea counsel failed to advise him of the immigration consequences of his plea and, further, told him that he did not have to worry about his immigration status since he had lived in the United States for such a long period of time. *Id.* The defendant alleged that he relied on his counsel's erroneous advice when pleading guilty and that he would have insisted on going to trial had he received correct advice **[***11]** from his attorney. *Id.*

After the defendant was denied relief in the Kentucky Supreme Court, the United States Supreme Court granted certiorari to address whether, under the *Sixth Amendment* right to effective assistance of counsel, defense counsel had "an obligation to advise [a client] that [an] offense to which he was pleading guilty *would result in his removal* from this country." *Id. at 360, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478* (emphasis added). In describing the context of its opinion, the *Padilla* majority noted that "[w]hile once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation . . . deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." *Id.* (internal citation omitted). Consequently, "[u]nder contemporary law, if a noncitizen has committed a removable offense . . . , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General [under *8 U.S.C. § 1229b (2002)*] to cancel removal[.]" *Id. at 363-64, 176 L. Ed. 2d at 292, 130 S. Ct. at 1480*.

The *Padilla* majority acknowledged that, given the change in deportation law, "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential **[***12]** jail sentence[,]'" and "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id. at 367, 368, 176 L. Ed. 2d at 294, 295, 130 S. Ct. at 1482, 1483* (quoting *INS v. St. Cyr, 533 U.S. 289, 322, 150 L. Ed. 2d 347, 376, 121 S. Ct. 2271, 2291 (2001)*).

The *Padilla* majority, therefore, held that "counsel must inform her client whether his plea carries a risk of deportation. Our longstanding *Sixth Amendment* precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation **[*784]** on families living lawfully in this country demand no less." *Id. at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486*. In rejecting the argument that the duty to provide correct advice only applies when an attorney chooses to advise her client on immigration consequences, the majority observed: "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id. at 371, 176 L. Ed. 2d at 297, 130 S. Ct. at 1484* (quoting *Hill v. Lockhart, 474 U.S. 52, 62, 88 L. Ed. 2d 203, 212, 106 S. Ct. 366, 372 (1985)* (White, J., concurring in judgment)).

Indeed, the majority noted that "were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney **[***13]** would inform the client of the consequences of his plea. We think the same result should follow when the stakes are not life and death but merely 'banishment or exile[.]'" *Id. at 370 n.11, 176 L. Ed. 2d at 297 n.11, 130 S. Ct. at 1484 n.11* (internal citation omitted) (quoting *Delgadillo **[**868]** v. Carmichael, 332 U.S. 388, 391, 68 S. Ct. 10, 12, 92 L. Ed. 17 (1947)*).

The *Padilla* majority recognized the tension between the harshness of deportation and the fact that "[i]mmigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges . . . may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id. at 369, 176 L. Ed. 2d at 295-96, 130 S. Ct. at 1483*.

Given this tension, the majority set out the following *Sixth Amendment* duty that an attorney owes to a noncitizen defendant:

> The duty of the private practitioner in [unclear or uncertain] cases is . . . limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO [in his concurring opinion]), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may

> carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear . . . the duty to give correct* ***[***14]*** *advice is equally clear.*

Id., 176 L. Ed. 2d at 296, 130 S. Ct. at 1483 (emphasis added) (internal footnote omitted).

[*785] In *Padilla*, whether the defendant was subject to mandatory deportation was "truly clear," and his appeal was "not a hard case in which to find deficiency[.]" *Id. at 368, 369, 176 L. Ed. 2d at 295, 296, 130 S. Ct. at 1483*. The terms of the relevant immigration statute, *8 U.S.C. § 1227(a)(2)(B)(i)*, "[were] succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction. . . . [The defendant's] counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. . . . The consequences of [the defendant's] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Padilla, 559 U.S. at 368-69, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483*.

The *Padilla* majority, therefore, agreed with the defendant that, in his case, "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Id. at 360, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478*. The Supreme Court, however, remanded **[***15]** the case for the Kentucky courts to determine whether the defendant was prejudiced by his trial counsel's incorrect advice. *Id. at 374-75, 176 L. Ed. 2d at 299, 130 S. Ct. at 1487*.

In this case, the State asserts that *Padilla* still requires no more than that "counsel must inform her client whether his plea carries a *risk* of deportation." *Id. at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486* (emphasis added). However, a complete reading of the *Padilla* majority opinion indicates that the quotation the State relies upon represents a defense attorney's *minimum* duty to the client. The Supreme Court established a bifurcated duty: when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms. *Id. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483*. To read *Padilla* otherwise would disregard the majority opinion's emphasis on counsel's duty, when "the deportation consequence is truly clear," to give "correct advice." *Id.* The majority opinion recognized that "[i]t is quintessentially the duty of counsel to provide her client with *available advice* about an issue like deportation[.]" *Id. at 371, 176 L. Ed. 2d at 297, 130 S. Ct. at 1484* (emphasis added).

Moreover, Justice Alito's opinion concurring in the result confirms our interpretation of **[***16]** the majority opinion. Justice Alito warned, "the Court's opinion would not just require defense counsel to warn the **[*786]** client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be." *Id. at 377, 176 L. Ed. 2d at 301, 130 S. Ct. at 1488*. In Justice Alito's view, the majority's approach was "problematic because providing advice on whether a conviction for a particular offense will make **[**869]** an alien removable is often quite complex." *Id.* Therefore, Justice Alito would have held, "an alien defendant's *Sixth Amendment* right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject." *Id. at 388, 176 L. Ed. 2d at 307, 130 S. Ct. at 1494*.

We hold that *Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation. The State, however, alternatively contends that *Padilla*'s holding should be limited to the facts of that case and, therefore, apply only when a noncitizen **[***17]** defendant pleads guilty to a deportable offense under *8 U.S.C. § 1227(a)(2)(B)(i)*, involving crimes relating to controlled substances. The State further argues that *Padilla*'s holding should never apply to convictions for "aggravated felon[ies]," identified as deportable offenses under *8 U.S.C. § 1227(a)(2)(A)(iii)*, because the deportation consequences for an aggravated felony, as defined in *8 U.S.C. § 1101(a)(43) (2014)*, can never be "truly clear."

In support of its argument that deportation can never be a truly clear consequence when a defendant pleads guilty to an aggravated offense, the State cites no authority other than Justice Alito's opinion concurring in the result, which noted that whether an alien is convicted of an aggravated felony is not always easy to determine. *See Padilla, 559 U.S. at 378, 176 L. Ed. 2d at 302, 130 S. Ct. at 1489* ("Defense counsel who consults a guidebook on whether a particular crime is an 'aggravated felony' will often find that the answer is not 'easily ascertained.'"). However, nothing in the majority opinion limits its holding to crimes relating to controlled substances or suggests that the deportation consequence of convictions under other subsections of *8 U.S.C. § 1227* cannot also be truly clear. Instead, the majority agreed only that immigration law is not succinct and straightforward "in *many of the scenarios* ***[***18]*** posited by Justice ALITO[.]" *Padilla, 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483* (emphasis added).

However, numerous other courts considering guilty pleas to aggravated felonies have concluded that the immigration consequences of such pleas can be truly clear. *See, e.g., United States v. Bonilla, 637 F.3d 980, 984 [*787] (9th Cir. 2011)* (holding, with respect to defendant who pled guilty to aggravated felony, that "[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty"); *Hernandez v. State, 124 So. 3d 757, 762 (Fla. 2012)* (per curiam) (holding as to guilty plea to aggravated felony that "counsel was deficient under *Padilla* for failing to advise [the defendant] that his plea subjected him to presumptively mandatory deportation"); *Encarnacion v. State, 295 Ga. 660, 663, 763 S.E.2d 463, 466 (2014)* (holding with respect to guilty plea to aggravated felony that "[i]t is not enough to say 'maybe' when the correct advice is 'almost certainly will'" lead to deportation); *Chacon v. State, 409 S.W.3d 529, 537 (Mo. Ct. App. 2013)* (holding with respect to aggravated felony that "when the deportation consequence is clear, as it was in *Padilla* and as it is here, defense counsel has an equally clear duty to give correct advice"); *State v. Kostyuchenko, 2014- Ohio 324, 8 N.E.3d 353, 357 (Ohio Ct. App. 2014)* (per curiam) (holding as to aggravated felony plea that counsel "had a duty under *Padilla* to ascertain from **[***19]** the immigration statutes, and to accurately advise him, that his conviction mandated his deportation"); *State v. Sandoval, 171 Wash. 2d 163, 172, 249 P.3d 1015, 1020 (2011)* (en banc) (holding that defense counsel violated *Padilla* in connection with aggravated felony plea).

We hold that *Padilla* is not limited to its facts and that the deportation consequences resulting from a guilty plea to an aggravated felony may, depending on the particular offense, be truly clear within the meaning of *Padilla*. Defendant asserts that, in this case, (1) the offenses of aiding and abetting common law robbery and conspiracy to commit common law robbery were aggravated felonies, and (2) the deportation consequences of defendant's guilty plea were truly **[**870]** clear. Therefore, according to defendant, mere advice that his guilty plea gave rise to a risk of deportation was not adequate under *Padilla*.

The State does not seriously dispute that defendant's offenses amount to aggravated felonies. *8 U.S.C. § 1101(a)(43)(G)* defines "aggravated felony" to include "a theft offense . . . or burglary offense for which the term of imprisonment [is] at least one year[.]" Additionally, *8 U.S.C. § 1101(a)(43)(U)* provides that "an attempt or conspiracy to commit an offense described in this paragraph" is an "aggravated felony." The offense of **[***20]** aiding and abetting common law robbery is plainly one of theft under *8 U.S.C. § 1101(a)(43)(G)*, and the conspiracy to commit common law robbery under *8 U.S.C. § 1101(a)(43)(U)* is plainly a conspiracy to commit an offense under *8 U.S.C. § 1101(a)(43)(G)*. *See* John Rubin and Sejal Zota, *Immigration Consequences of a Criminal [*788] Conviction in North Carolina* 100 (2008) (stating that common law robbery is aggravated felony because it is theft offense under *8 U.S.C. § 1101(a)(43)(G)*). Defendant was also sentenced for a term of more than a year; the fact that the court suspended his sentences is immaterial. *See 8 U.S.C. § 1101(a)(48)(B)* ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

Moreover, the relevant provisions of the United States Code plainly indicate that defendant's deportation upon entering his guilty plea was "presumptively mandatory." *See Padilla, 559 U.S. at 369, 176 L. Ed. 2d at 295, 296, 130 S. Ct. at 1483* (finding deportation consequences "truly clear" when "[t]he consequences of *Padilla's* plea could easily be determined from reading the removal statute").

When other courts have found deportation consequences unclear for particular guilty **[***21]** pleas, they have pointed to the need for trial counsel to look beyond the plain language of the United States Code in order to reach a conclusion regarding the deportation consequences for the defendant. *See, e.g.*, *United States v. Chan Ho Shin, 891 F. Supp. 2d 849, 856 (N.D. Ohio 2012)* ("Given the divergent views among the few circuits that had addressed the issue, and the silence of the others, this Court cannot hold that the relevant immigration statute was . . . 'truly clear' at the time of [the defendant's] plea."); *State v. Ortiz-Mondragon, 2014 WI App 114, 358 Wis. 2d 423, 433, 856 N.W.2d 339, 344 (Wis. App. 2014)* ("If an attorney must search federal court and unfamiliar administrative board decisions from around the country to identify a category of elements that together constitute crimes of moral turpitude, and then determine whether a charged crime fits that category, then the law is not 'succinct, clear, and explicit.'" (quoting *Padilla, 559 U.S. at 368, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483*)), *aff'd, 2015 WI 73, 364 Wis. 2d 1, 866 N.W.2d 717 (Wis. 2015)*. In this case, however, there was no need for counsel to do anything but read the statute.

Rather than argue that it was unclear whether defendant was subject to presumptive mandatory deportation, the State contends that the deportation consequences for defendant were not truly clear because of the availability of other "various forms of relief from deportation," as referenced in the trial court's order. **[***22]** These forms of relief include Withholding of Removal, *8 U.S.C. § 1231(b)(3) (2014)* (prohibiting government from deporting alien if alien's life or freedom would be threatened because of race, religion, nationality, membership in particular social group, or political opinion; denial may be appealed); Convention **[*789]** Against Torture, *8 C.F.R. §§ 208.16-18 (2014)* (deferring deportation under the United States Convention Against Torture if alien can demonstrate he would be tortured if returned home); Stay of Removal, *8 C.F.R. § 241.6 (2014)* (allowing application to local immigration director for discretionary stay of removal).

According to the uncontradicted testimony of defendant's immigration law expert Mr. Linnartz, these avenues of relief from deportation were "in the realm of mathematical possibility," but such relief was a "remote possibility" at the time defendant entered his guilty plea. With respect to Withholding of Removal and the Convention Against Torture, Mr. Linnartz testified that this type of relief was rarely granted, did not confer lawful **[**871]** legal status, and the deferral of deportation would be lifted as soon as the threat to the defendant abated. With respect to the Stay of Removal, Mr. Linnartz explained that such relief **[***23]** was only temporary -- such as in the event of a medical emergency -- and was almost never granted to an alien being deported due to a criminal conviction. Mr. Linnartz emphasized that (1) none of the forms of relief would eliminate the deportation order, (2) a defendant could end up spending his life in a detention facility, (3) a defendant could be deported to a third country if there was a fear of persecution, and (4) lawful status would never be conferred.

The State has cited no authority supporting its contention that the possible availability of these forms of rare relief render defendant's deportation consequences unclear. In *Padilla*, the majority opinion noted the potential availability to the defendant of an avenue of relief from a deportation order: *8 U.S.C. § 1229b*, which grants the Attorney General discretionary authority to cancel an alien's removal. *559 U.S. at 363-64, 176 L. Ed. 2d at 292, 130 S. Ct. at 1480*. The majority explained that a noncitizen's "removal is practically inevitable but for the possible exercise" of this discretion, but still concluded that the defendant's removal was a "presumptively mandatory" consequence and that "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[.]" **[***24]** *Id. at 364, 368, 369, 176 L. Ed. 2d at 292, 295, 130 S. Ct. at 1480, 1483*. In short, *Padilla* focused on whether the defendant's conviction made him deportable under *8 U.S.C. § 1227* and not on the availability of possible avenues of relief. If, as the *Padilla* Court necessarily concluded, the availability of discretionary relief under *8 U.S.C. § 1229b* did not render the deportation consequences unclear, we cannot conclude that the unlikely avenues of relief that the trial court relied upon are sufficient to support a conclusion that the deportation consequences for defendant were not "truly clear."

[*790] Moreover, we believe that *Padilla*'s holding would be substantially undermined by the State's contention, if accepted, that the theoretical availability of relief that does not eliminate the deportation order and grant lawful status renders the law unclear. One or more of the avenues of relief relied upon by the trial court would theoretically be available to most defendants. We note that other courts have rejected the State's approach, and the State has cited no authority supporting it. *See Encarnacion, 295 Ga. at 663, 763 S.E.2d at 466* (recognizing that counsel's

advice of possibility of deportation for aggravated felony conviction pleas was incorrect despite fact that "some noncitizens convicted of an aggravated felony might avoid removal" **[***25]** because "those circumstances are exceptionally rare"); *Enyong v. State, 369 S.W.3d 593, 600 (Tex. App. 2012)* (concluding defendant's deportation consequence for pleading guilty to aggravated felony truly clear despite State's reference to internal United States Immigration and Customs Enforcement memo encouraging its employees to use prosecutorial discretion in enforcing immigration laws), *judgment vacated on other grounds*, *397 S.W.2d 208 (Tex. Crim. App. 2013)* (per curiam).

Consequently, we hold that the deportation consequences of defendant's guilty plea were truly clear in this case. Trial counsel was required, therefore, under *Padilla*, "to give correct advice" and not just advise defendant that his "pending criminal charges may carry a risk of adverse immigration consequences." *559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483*.

The trial court's findings establish only that defendant's trial counsel informed him that he could be deported, that the trial court had no control over deportation, that his plea could have immigration consequences, and that his attorney hoped that defendant would not actually be deported. While the State points to the attorney's testimony that he told defendant "you're not a legal citizen[and] it's going to result in deportation," Mr. Thomas clarified, when asked about the accuracy of that **[***26]** statement, that he actually advised defendant that he "could possibly be subject to deportation." Indeed, Mr. Thomas gave defendant a false assurance when he told Judge Abernathy: "We told [defendant] we can't do anything with [deportation], and I'm hoping that my past experience doing this kind of things [sic] -- **[**872]** the Congo is not one of the places they're apt to send you back to."[1]

[*791] The trial court's findings and the evidence, therefore, show that defendant was only advised of the risk of deportation. This advice was not sufficient under *Padilla* because it did not adequately advise defendant of the likelihood of deportation. *See, e.g., Hernandez v. State, 61 So. 3d 1144, 1151 (Fla. Dist. Ct. App. 2011)* ("It is now the law in this and every other state that constitutionally competent counsel must advise a noncitizen/defendant that certain pleas and judgments *will*, not 'may,' subject the defendant to deportation."), **[***27]** *aff'd per curiam*, *124 So. 3d 757 (Fla. 2012)*; *Encarnacion, 295 Ga. at 663, 763 S.E.2d at 466* ("It is not enough to say 'maybe' when the correct advice is 'almost certainly will.'" (quoting *Hernandez, 61 So. 3d at 1151*)).

We need not determine precisely what advice Mr. Thomas should have given defendant because, here, there can be no question that Mr. Thomas' advice fell short of what *Padilla* required. Defendant has, therefore, shown that he received ineffective assistance of counsel.

Turning to the question whether defendant was prejudiced by the inadequate advice, the State contends that any prejudice defendant might have suffered as a result of misadvice by Mr. Thomas was cured by the plea colloquy conducted by Judge Abernathy prior to defendant's entering his plea. In *Missouri v. Frye, 566 U.S. 134, 142, 182 L. Ed. 2d 379, 389, 132 S. Ct. 1399, 1406-07 (2012)* (emphasis added), the Supreme Court explained:

> At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands . . . the advantages and disadvantages of accepting [the plea deal.] . . . [*N*]*evertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered.* Still, the State, and the trial court itself, have . . . a substantial opportunity to guard against this contingency by establishing at the **[***28]** plea entry proceeding that the defendant has been given proper advice or, *if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.*

At the plea hearing in this case, Judge Abernathy announced that defendant's "guilty plea 'would make him subject to deportation[.]'" However, this isolated statement, when read in the context of the entire colloquy, cannot

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[1] Mr. Thomas also testified that he told defendant he did not practice immigration law and that he offered to put defendant in touch with an immigration attorney if defendant ran into any trouble *after* pleading guilty. This advice would have erroneously suggested that defendant still could have done something to avoid deportation after pleading guilty.

reasonably be read as advising defendant that his plea would certainly result in deportation. Immediately following this statement, Mr. Thomas interjected that defendant's plea "possibly could" **[*792]** make him subject to deportation. Then, the trial court asked defendant whether he understood that "there's a possibility, because you're not a U.S. citizen, upon your plea of guilty you could be deported from this country or denied readmission[,]" to which defendant replied that he did. Thus, the advice in the colloquy, which merely advised defendant of the risk of deportation, was incorrect and inadequate and did not cure any possible prejudice. *See Enyong, 369 S.W.3d at 603* ("[I]t would seem illogical to . . . require effective counsel to provide specific advice regarding 'clear' or 'virtually **[***29]** certain' immigration consequences, but then . . . hold that a defendant is not prejudiced by counsel's failure to provide this constitutionally required advice simply when a trial court . . . provides a boilerplate warning concerning general immigration consequences. If such general admonishments precluded a finding of prejudice, the . . . holding in *Padilla* would be stripped of much of its force.").

The question remains whether defendant has adequately demonstrated prejudice. In the plea context, "[t]he . . . 'prejudice[]' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill, 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370*. Thus, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted **[**873]** on going to trial." *Id.* The Supreme Court in *Padilla* emphasized, that in applying *Hill*, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *559 U.S. at 372, 176 L. Ed. 2d at 297, 130 S. Ct. at 1485*.

In *Padilla*, upon remand, the Kentucky Court of Appeals addressed whether the defendant had been prejudiced by the incorrect **[***30]** advice he received from his trial counsel. *Padilla v. Commonwealth, 381 S.W.3d 322, 328 (Ky. Ct. App. 2012)* ("*Padilla II*"). In doing so, the Kentucky Court of Appeals held that a defendant need not show "that an acquittal at trial was likely." *Id.* The court in *Padilla II* explained:

> A reasonable probability [that a defendant, if advised adequately, would have decided to reject the plea offer] exists if the defendant convinces the court "that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla, [559 U.S. at 372, 176 L. Ed. 2d at 297,] 130 S. Ct. at 1485*. This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland, 466 U.S. at 694, [80 L. Ed. 2d at 698,] 104 S. Ct. at 2068*.
>
> **[*793]** . . . .
>
> The [trial] court must determine whether the defendant's rejection of the plea offer would have been a rational choice, even if not the best choice. *Necessarily, the court must consider the importance a particular defendant places upon preserving his or her right to remain in the country.* A noncitizen defendant with significant ties to this country may rationally be willing to take the risk of a trial while the same decision by one who has resided in the United States for a relatively brief period of time or has no family or employment in this country may be irrational.

Id. at 328-29 (emphasis added) (internal footnote **[***31]** omitted).

Other jurisdictions addressing the question of prejudice in light of *Padilla* have adopted a similar approach to that taken in *Padilla II*. *See, e.g., Hernandez v. United States, 778 F.3d 1230, 1234 (11th Cir. 2015)* (holding defendant alleged sufficient facts to support finding of prejudice from ineffective assistance of counsel in connection with guilty plea when defendant alleged that "he would not have pleaded guilty if a plea would have 'automatically remove[d] him from his family and from a Country he ha[s] called home all [of] his adult life'"); *United States v. Urias-Marrufo, 744 F.3d 361, 368 (5th Cir. 2014)* (finding prima facie evidence of prejudice for purposes of IAC claim when defendant swore in statement that had she known she was pleading guilty to deportable offense, she would not have pled guilty); *United States v. Orocio, 645 F.3d 630, 643, 645 (3rd Cir. 2011)* (rejecting contention that defendant must show acquittal at trial likely and finding prejudice when, "if made aware of the dire immigration consequences of the proposed guilty plea, [defendant] could have reasonably chosen to go to trial even though he faced a drug distribution charge constituting an aggravated felony"), *abrogated on other grounds by Chaidez v. United States, 568 U.S. 342, 185 L. Ed. 2d 149, 133 S. Ct. 1103 (2013)*; *Bonilla, 637 F.3d at 984* (finding district

court abused its discretion when it unreasonably denied defendant's motion to withdraw his plea where "entering a plea would mean that **[***32]** after he served his sentence, [the defendant] would almost certainly be deported and separated from his wife and children"); *Commonwealth v. DeJesus, 468 Mass. 174, 184, 9 N.E.3d 789, 797 (2014)* ("If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen."); **[*794]** *State v. Tejeiro, 2015- NMCA 029, 345 P.3d 1074, 1084 (N.M. Ct. App. 2014)* ("Defendant is not required to demonstrate that he would have obtained a better result at trial than he received from his plea. He need only demonstrate a reasonable probability that he would have rejected the plea as offered had he known of its immigration consequences." (internal citation omitted)), *cert. denied, 367 P.3d 440, 2015 N.M. LEXIS 128 (N.M. 2015)*; *Kostyuchenko, 8 N.E.3d at 358* (finding evidence supporting prejudice where prior to plea negotiations defendant was unconcerned with deportation, yet, had defendant known plea would have resulted in deportation, defendant would have insisted on going to trial or seeking to negotiate plea that preserved eligibility for **[**874]** relief from deportation); *Enyong, 369 S.W.3d at 603* (finding evidence of prejudice for noncitizen defendant where "appellant stated that he would not have pleaded guilty to the offenses if his trial counsel had advised him of the immigration consequences of **[***33]** his pleas"); *Sandoval, 171 Wash. 2d at 176, 249 P.3d at 1022* (finding prejudice notwithstanding sentencing benefit of plea "[g]iven the severity of the deportation consequence"); *Ortega-Araiza v. State, 2014 WY 99, 331 P.3d 1189, 1194 (Wyo. 2014)* ("It would . . . be entirely reasonable for [the defendant] to reject the plea and insist on going to trial (or seek a different plea agreement with lesser deportation consequence) as he was facing deportation whether he was convicted pursuant to a plea agreement or as a result of trial. Better to gamble on an acquittal at trial, than the assured conviction and deportation resulting from a guilty plea.").

Some courts discussing prejudice based on insufficient advice under *Padilla* have, however, focused on whether there was a likelihood of acquittal at trial. *E.g., Clarke v. United States, 703 F.3d 1098, 1101 (7th Cir. 2013)* (no possible prejudice where defendant faced almost certain conviction of aggravated felony at trial); *Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012)* (finding no possible prejudice in light of overwhelming evidence of defendant's guilt for aggravated felony and noting that defendant cannot show prejudice on appeal "merely by telling [the Court] now that she would have gone to trial then if she had gotten different advice"); *Matos v. United States, 907 F. Supp. 2d 378, 382 (S.D.N.Y. 2012)* (holding that "[t]he overwhelming evidence of guilt forecloses any reasonable probability that [the defendant] would have proceeded **[***34]** to trial rather than accept the Government's [plea] offer" where defendant's insistence on appeal that he would have rejected plea bargain was deemed "self-serving"); *Mendoza v. United States, 774 F. Supp. 2d 791, 800 (E.D. Va. 2011)* (finding no possible prejudice in light of overwhelming evidence of defendant's guilt of deportable offenses and sentencing benefits defendant received from pleading guilty).

[*795] While the United States Supreme Court in *Hill* stated that "[i]n many guilty plea cases . . . the determination whether the error 'prejudiced' the defendant . . . will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial," *474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370*, "[t]he Supreme Court has 'never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice.'" *Padilla II, 381 S.W.3d at 328-29* (quoting *Orocio, 645 F.3d at 643*). We believe cases focusing on the likelihood of acquittal rather than considering the importance a defendant places on avoiding deportation ignore the primary focus of *Padilla*, which was in large part the recognition that the likelihood of deportation may often be a much more important circumstance for a defendant to consider than confinement in prison for any length of time. *559 U.S. at 365, 368, 176 L. Ed. 2d at 293, 295, 130 S. Ct. at 1481, 1483*. Thus, the consequence of deportation may, in certain cases, **[***35]** weigh more heavily in a defendant's risk-benefit calculus on whether he should proceed to trial. For this reason, *Padilla II's* analysis is persuasive, and we hold that a defendant makes an adequate showing of prejudice by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country.

In this case, because the trial court concluded that defendant had failed to show that his attorney inadequately advised him, the court never addressed the prejudice prong of defendant's IAC claim. The trial court held that defendant's decision to accept the plea was reasonable, but did not consider whether rejection of the plea would be

a reasonable choice given the immigration consequences. We hold that defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice for defendant, taking into account defendant's fear of deportation. Even if the evidence against defendant may have made conviction for a deportable offense likely at trial, the evidence would permit a finding that, had Mr. **[***36]** Thomas provided correct advice, it would have been a rational course of action for defendant to forego the plea offered to him for the chance of acquittal at trial or even just to delay deportation. **[**875]** "Moreover, had the immigration consequences of [defendant's] plea been factored into the plea bargaining process, trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation." *Padilla II, 381 S.W.3d at 330*.[2] We therefore remand so that the trial court may address, in **[*796]** the first instance, whether defendant was prejudiced by his trial counsel's inadequate advice regarding the immigration consequences of his guilty plea.

Conclusion

We hold that the trial court's findings of fact establish under *Padilla* that defendant received ineffective **[***37]** assistance of counsel in connection with his decision whether to enter into a guilty plea. We, therefore, reverse the trial court's denial of defendant's MAR and remand for a determination whether defendant has proven the prejudice prong of his IAC claim. In the event the trial court determines that defendant has adequately shown prejudice, the trial court must set aside defendant's conviction and allow defendant to withdraw his guilty plea. *State v. Moser, 20 Neb. App. 209, 225, 822 N.W.2d 424, 436 (2012)*.

REVERSED AND REMANDED.

Judges ELMORE and INMAN concur.

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[2] We note that our own case law, consistent with other jurisdictions, forbids a finding of prejudice upon "'[a] mere allegation by the defendant that he would have insisted on going to trial[.]'" *State v. Goforth, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998)* (quoting *Barker v. United States, 7 F.3d 629, 633 (7th Cir. 1993)*). The evidence here, however, far surpasses such an allegation and affirmatively establishes circumstances demonstrating that if defendant had been properly informed of the consequences of his plea, his priority would have been avoiding deportation.

State v. Marzouq

Court of Appeals of North Carolina

October 31, 2019, Heard in the Court of Appeals; December 3, 2019, Filed

No. COA19-471

Reporter
268 N.C. App. 616 *; 836 S.E.2d 893 **; 2019 N.C. App. LEXIS 970 ***; 2019 WL 6483120

STATE OF NORTH CAROLINA v. ALI AWNI SAID MARZOUQ, Defendant.

Prior History: **[***1]** Nash County, No. 15 CRS 52330.

N.C. v. Marzouq, 2018 N.C. Super. LEXIS 165 (Dec. 28, 2018)

Disposition: AFFIRMED IN PART, REMANDED IN PART.

Case Summary

Overview

HOLDINGS: [1]-Defendant, who pled guilty to possession of heroin and maintaining a vehicle or dwelling place, received ineffective assistance of counsel when counsel only offered the possibility of deportation when defendant was facing presumptive deportation; [2]-Remand was necessary because it was not clear that there was, in fact, competent evidence to support the trial court's finding that there was no prejudice based on a prior conviction for possession of drug paraphernalia; [3]-It was therefore error for the trial court to determine that, where defendant asserted his citizenship, it was not necessary for the trial court to inform him of the risk of deportation, as such was mandatory under *N.C. Gen. Stat. § 15A-1022* (2017).

Outcome
Affirmed in part, remanded in part.

Counsel: Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Tin Fulton Walker & Owen, PLLC, by Jim Melo, Esq., for defendant-appellant.

North Carolina Advocates for Justice, by Helen L. Parsonage, and North Carolina Justice Center, by Raul A. Pinto, amici curiae.

Judges: YOUNG, Judge. Judges DILLON and DIETZ concur.

Opinion by: YOUNG

Opinion

[*617] **[**895]** Appeal by defendant from order entered 28 December 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 31 October 2019.

YOUNG, Judge.

Where defendant's guilty plea presumptively subjected him to deportation, trial counsel's advice that defendant "may" be deported constituted ineffective assistance of counsel. However, where the record does not affirmatively show whether the trial court considered defendant's prior convictions to determine prejudice, we must remand for further findings. We affirm in part, but remand in part.

I. Factual and Procedural Background

On 3 August 2015, Ali Awni Said Marzouq (defendant) was indicted by the Nash County Grand Jury for possession with intent to sell and deliver heroin, and possession of a Schedule II controlled **[***2]** substance. At some point he was also charged with maintaining a vehicle or dwelling place for the keeping or selling of controlled substances. Defendant pleaded guilty to the charges of possession of heroin and maintaining a vehicle or dwelling place, and the trial court entered judgment, namely a two-year suspended sentence. On the transcript of plea, next to Question 8, which asks whether the defendant understands that a guilty plea may result in deportation, defendant wrote "Permanent resident."

On 12 July 2018, defendant filed a motion for appropriate relief (MAR), seeking to withdraw his guilty plea. Defendant, an immigrant, alleged that roughly one year into his two-year suspended sentence, he was seized by Immigration and Customs Enforcement and placed into detention and removal proceedings. He argued that, had he known the plea would impact his immigration status and result in deportation, he would not have taken it. On 10 September 2018, the trial court entered an order, finding that defendant's **[**896]** indication of "Permanent resident" in response to Question 8 on the transcript of plea indicated an affirmative response. The court therefore denied defendant's MAR.

On 8 November 2018, **[***3]** this Court granted certiorari. In an order, this Court required the trial court to review "whether petitioner's Alford plea was induced by misadvice of counsel regarding the immigration consequences of the plea and whether any misadvice resulted in prejudice to petitioner." The matter was remanded to the trial court for review, and on 28 December 2018, the trial court entered another order. The court found that defendant had been advised that if he pleaded guilty, he might be deported; that defendant had further been advised to speak to an immigration attorney; that defendant asserted to the trial court that he was a citizen, not a permanent resident, of the United States; and that this assertion "precluded any further inquiry into his immigration status **[*618]** and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received." The court therefore found that counsel's advice did not constitute ineffective assistance of counsel, and that defendant failed to show prejudice. The trial court once more denied defendant's MAR.

On 11 March 2019, this Court granted certiorari to review the trial court's 28 December 2018 order denying defendant's MAR.

II. Standard **[***4]** of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005)* (quoting *State v. Stevens, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)*). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)* (citations omitted).

III. Ineffective Assistance of Counsel

In his first argument, defendant contends that the trial court erred in finding that defense counsel's conduct was not ineffective assistance of counsel. We agree.

In his MAR, defendant alleged that counsel informed him that his plea "may affect his immigration status or . . . that it would not affect his immigration status in any manner." Defendant attached to his MAR three affidavits. In one, his own, defendant averred that his attorney "specifically told me not to worry about Immigration." In another, his fiancée **[***5]** Shannon Pitt averred that defense counsel "said that [defendant] would not have anything to worry about with his immigration status." Defendant, citing the case of *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*, noted that counsel is "constitutionally ineffective if he fails to advise — or misadvises — his client about the immigration consequences of a guilty plea." Defendant therefore argued in his MAR, and argues now on appeal, that he received ineffective assistance of counsel as a result of his attorney's misadvice.

This Court has held that "*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to **[*619]** advise the client only that there is a risk of deportation." *State v. Nkiam, 243 N.C. App. 777, 786, 778 S.E.2d 863, 869 (2015)*. In the instant case, defendant's plea concerned possession of heroin and maintaining a dwelling place, two drug-related offenses. Federal law requires an alien or permanent resident to be deported who "has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana[.]" *8 U.S.C. § 1227(a)(2)(B)(i)*. This statute provides **[***6]** an explicit mandate — such an alien "shall" be removed if he or she falls within this or other categories.

[897]** We hold that where federal statute mandates removal, there is a presumption that deportation will happen. As such, pursuant to *Padilla* and *Nkiam*, it is not sufficient for counsel to suggest that deportation "may" happen or is possible. It is incumbent upon counsel, in a situation like this where deportation is presumed where a defendant pleads or is found guilty, to specify that deportation is probable, or presumptive. Waffling language suggesting a mere possibility of deportation does not adequately inform the client of the risk before him or her, and does not permit a defendant to make a reasoned and informed decision.

In the instant case, the evidence is somewhat inconsistent. Defendant contends that counsel did not inform him whatsoever of the consequences of his plea, while counsel avers that he informed him there may be consequences. At most, however, the evidence would permit the trial court to find that counsel only offered the possibility of deportation — "may" language, instead of "presumptive" language. As we have held, such language is insufficient when a defendant is **[***7]** facing presumptive deportation. Accordingly, we hold that defendant received ineffective assistance of counsel, and the trial court erred in finding otherwise.

We note, however, that a showing of ineffective assistance of counsel is insufficient to grant defendant the relief he seeks; he must also show prejudice. For this reason, we continue to examine defendant's arguments.

IV. Prejudice

In his second argument, defendant contends that the trial court erred in finding that defendant was not prejudiced by defense counsel's conduct. We disagree.

Defendant argues that the decision to reject the plea bargain and go to trial would have been a rational one, had he known of the immigration consequences of his decision. As a result, he contends that this guilty **[*620]** plea subjected him to prejudice, namely deportation, where he otherwise might not have been subject.

"Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)* (citations and quotation marks omitted).

The State, in its brief, cites to numerous federal cases which suggest that a defendant who is facing **[***8]** deportation on other grounds cannot show prejudice. *See e.g.* United States v. Batamula, 823 F.3d 237, 242 (5th Cir. 2016) (holding that, where a defendant was "already deportable for having overstayed his visa[,]" he "failed to show prejudice"). We agree with the State, in principle. A showing of prejudice requires a showing that, absent the allegedly erroneous action, a different outcome would have resulted. If a defendant was facing deportation for a separate charge, then regardless of whether he pleaded or went to trial on the instant charge, deportation would still result. As such, we hold that a defendant already facing deportation could not show prejudice, notwithstanding the otherwise ineffective assistance of trial counsel.

The problem that confronts us, however, is the insufficiency of the record. The State notes that "the Department of Homeland Security has taken the position that Defendant is subject to removal on the basis of two convictions: (1) his 30 June 2016 conviction for possession of drug paraphernalia, and (2) his 2 March 2017 conviction for possession of heroin." Moreover, defendant's trial counsel acknowledged his prior conviction for possession of drug paraphernalia. However, it is not clear to this Court that the trial **[***9]** court had the complete factual background, including the position of the Department of Homeland Security, before it.

The State concedes, and we so hold, that a conviction for possession of drug paraphernalia, as opposed to a conviction more directly relating to a controlled substance, does not render a noncitizen presumptively removable. *See e.g.* Madrigal-Barcenas v. Lynch, 797 F.3d 643, 645 (9th Cir. 2015) (holding that a conviction for possession of drug paraphernalia is "not categorically for violation of a law relating to a controlled substance").

In the instant case, the trial court's order noted a number of defendant's pending **[**898]** charges in other cases. It did not, however, contain any findings as to other *convictions*, nor as to whether these convictions made defendant eligible for deportation. Rather, the trial court, upon finding and concluding that defendant did not receive ineffective **[*621]** assistance of counsel, somewhat summarily found and concluded that defendant was not prejudiced by same.

It is true that, in a case such as this, where the trial court's findings are supported by competent evidence, they are binding upon this Court. And it is true that defendant's counsel conceded the existence of his prior conviction for possession of drug **[***10]** paraphernalia. However, such a conviction does not render defendant presumptively removable, and it is not clear that the trial court had the position of Homeland Security before it to support that determination. As such, it is not clear to this Court that there was, in fact, competent evidence to support the trial court's finding that there was no prejudice. We therefore remand this issue to the trial court for the entry of findings consistent with this opinion. On remand, the trial court shall consider whether defendant was prejudiced based on the ineffective assistance of counsel, and shall specifically consider whether defendant is subject to deportation on other charges.

V. Assertion of Citizenship

In his third argument, defendant contends that the trial court erred in finding that defendant's assertion of United States citizenship rendered his MAR moot. While we need not address this issue, as we have remanded this matter for further proceedings, we feel we nonetheless must clarify a matter of trial procedure.

In its order denying defendant's MAR, the trial court found:

> 23. When questioned by the Court during the plea colloquy on March 2, 2017, defendant told the Court that he was **[***11]** a citizen of the United States.
> 24. Defendant subsequently admitted that he told the Court he was a citizen of the United States.
> 25. Defendant's presentation to the Court that he was in fact a citizen of the United States precluded any further inquiry into his immigration status and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received.

As a result, the trial court concluded that "[t]he defendant's assertion to the Court that he was a citizen renders this MAR moot." Defendant contends that this conclusion was erroneous.

Simply put, the trial court's analysis was in error. Pursuant to our General Statutes:

> **[*622]** Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
> (2) Determining that he understands the nature of the charge;
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and **[***12]** his right to be confronted by the witnesses against him;
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
> (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2017). No provision is made that permits the trial court to bypass one of these questions. Indeed, all are mandatory. It was therefore error for the **[**899]** trial court to determine that, where defendant asserted his citizenship, it was not necessary for the trial court to inform him of the risk of deportation.

However, the trial court was nonetheless correct, but for a different reason. Our General Statutes also provide that "[n]oncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction **[***13]** has expired." *N.C. Gen. Stat. § 15A-1027* (2017). In other words, despite the trial court's failure to engage in proper colloquy with defendant, in violation of *N.C. Gen. Stat. § 15A-1022*, that failure ceased to be grounds for review when the time for appeal had passed. Defendant's MAR was filed in 2018, long after the **[*623]** appeal period had passed, and as such, any argument concerning the trial court's failure to comply with statute was indeed rendered moot.

We nonetheless feel the need to reinforce the importance of following this procedure. The requirements outlined in *N.C. Gen. Stat. § 15A-1022* are mandatory, regardless of what a defendant might say, and we advise the courts of this State to comply with them.

AFFIRMED IN PART, REMANDED IN PART.

Judges DILLON and DIETZ concur.

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IDS OFFICE OF INDIGENT DEFENSE SERVICES
SAFEGUARDING JUSTICE

Ethical Issues in District Court

November 15, 2023

1

Ethics for Public Defense: What are the Rules?

Attorney/Client Relationship

- Confidences
- Rights

Attorney/Others Relationship

- Honesty and Candor
- Overreaching

2

The Wrong Guy

3

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent

4

4

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

5

5

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order

6

6

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order
- Commission of a crime

7

7

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm

8

8

Rule 1.6 (a)

Cannot reveal information acquired during professional relationship without consent

Exceptions?

- RPC/court order
- Commission of a crime
- Reasonably certain death or bodily harm
- Prevent or mitigate client's crime or fraud in using lawyer services

9

9

Rule 1.2 (d)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent

10

10

Rule 1.2 (d)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent but

11

11

Rule 1.2 (d)

Cannot advise a client to engage in conduct she knows to be criminal or fraudulent but

- may discuss the legal consequences of any proposed course of conduct

12

12

Rule 3.1

May not assert factually or legally frivolous positions but

- may defend a proceeding by requiring that all elements of the case be established

13

13

Rule 3.3

May not make false statement of material fact or offer evidence that the lawyer knows to be false but

- may refuse to offer evidence she reasonably believes to be false

Exception:

- defendant's testimony

14

14

Rule 4.1

Must be truthful but

- no obligation to inform opposing party of relevant facts

15

15

The Social Drinker

Drivin drunk... classsic ;) but to whoever's vehicle i hit i am sorry. :P

16

Cases and Rulings

2014 Formal Ethics Opinion 5

In civil case, attorney must advise client regarding legal impact of postings on social media sites. If counsel determines that removing existing postings does not constitute spoilation, counsel may advise client to remove postings, but should advise client to retain a copy. Counsel may advise client to increase privacy settings if such advice does not violate the law or a court order. [But see Rule 3.4]

17

IDS Office of Indigent Defense Services

17

Cases and Rulings

2018 Formal Ethics Opinion 5

Yes, if
- it's displayed on public portion of person's page

Rule 4.1 – Lawyer cannot use deception to gain access to restricted social media

Rule 8.4(c) – Lawyer cannot instruct a third party to use deception to gain access

18

IDS Office of Indigent Defense Services

18

Rule 4.2(a)

Cannot communicate about the case with someone she knows is represented by another

- unless with consent of other lawyer or authorized by law.

19

Cases and Rulings

RPC 93

Counsel may not speak with represented persons, even when not technically co-defendants, and even when persons initiate contact, without permission of their counsel

20

Cases and Rulings

21

The Wake & Bake

22

22

Rule 1.14

Must

- Maintain a normal client-lawyer relationship
- Keep client's information confidential
  - Exception only to extent necessary to protect client's interests

May

- Take protective action
  - substantial physical, financial or other harm and
  - cannot act in own interest

23

23

The Host with the Most

24

24

Cases and Rulings

98 Formal Ethics Opinion 2

May explain the effects of service of process but may not advise client to evade service

25

Rule 3.4

Cannot and cannot help/ counsel another to

- unlawfully obstruct another party's access to evidence
- unlawfully destroy or conceal

No obligation to inform opposing party of relevant facts

26

The Host with the Most

27

Cases and Rulings

RPC 221 (1995)

Absent legal authority otherwise, lawyer may take possession, examine, return evidence to its source, and advise source of legal consequences of possession or destruction of evidence

28

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Cases and Rulings

RPC 221 (1995)

2007 FEO 2 – lawyer may not take possession of contraband

Absent legal … lawyer may take possession, examine, return evidence … advise source of legal consequences of possession or …

29

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The Over Exposed

30

RULE 1.2(A)(1)

Defendant has the authority to decide	plead guilty/ go to trial
	testify

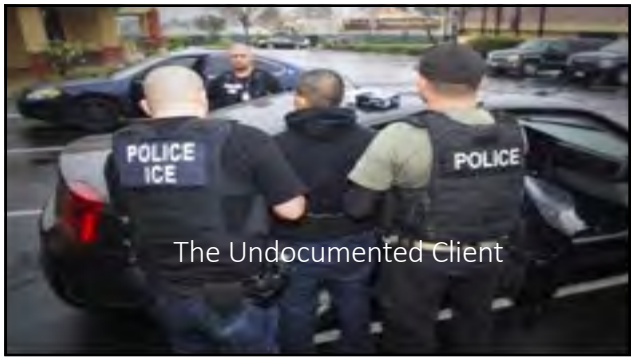
after consultation with the lawyer

31

RULE 1.4

Must keep client informed	Giving client sufficient information to make informed decisions
	can fulfill by providing a summary and consulting with the client about relevance

32



33

Cases and Rulings

2011 Formal Ethics Opinion 3

Cannot assist client in fraudulent conduct

34

34

2011 Formal Ethics Opinion 3

Cannot assist client in fraudulent conduct

May advise client on consequences of any proposed course of conduct

So, you can tell client that posting bond may speed up deportation and result in dismissal of the case

35

35

2011 Formal Ethics Opinion 3

Cannot enter a notice of appeal simply for delay or frivolous reason, but but

seeking to enforce your client's constitutional right to a trial de novo is not simply for delay or frivolous

So, you may enter notice of appeal

36

36

37

Cases and Rulings

2005 Formal Ethics Opinion 3

Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

38

Cases and Rulings

2005 Formal Ethics Opinion 3

Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5

May seek information about immigration status in discovery

39

Cases and Rulings

2005 Formal Ethics Opinion 3

Cannot threaten to report an opposing party or witness to immigration to gain advantage in civil settlement

2009 Formal Ethics Opinion 5

May seek information about immigration status in discovery

BUT

may not report status to ICE unless required to do so by law

40

The Brawler

41

Current Clients

42

Rule 1.7

Cannot represent if the representation involves a concurrent conflict of interest

43

IDS Office of Indigent Defense Services

43

Concurrent Conflict of Interest

Will representing one client

be directly adverse to the other?

materially limited responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer?

44

IDS Office of Indigent Defense Services

44

Exceptions

Do you

- reasonably believe you can provide competent and diligent representation all clients?

Is the representation

- prohibited by law?

Does it involve a claim by one client against the other?

Has the client given written consent?

45

IDS Office of Indigent Defense Services

45

Rule 1.8

Caution

Cannot use client information to the disadvantage of the client

UNLESS

- the client gives informed consent

46

46

Former Clients

47

47

Rule 1.9

Cannot

- represent another person in the same or a substantially related matter if
- Current client's interests are materially adverse to the former's interests

UNLESS

- former client gives informed consent, confirmed in writing

48

48

Cases and Rulings

2010 Formal Ethics Opinion 3

Client A is a witness in case **and**

You represent Client B in that case **and**

In order to effectively represent Client B, you would have to cross-examine Client A, **then**

49

49

Cases and Rulings

2010 Formal Ethics O

Concurrent Conflict of Interest

and

Conflict Cannot be Waived

at case **and**

ly represent Client B, you

cross-examine Client A, **then**

50

50

Cases and Rulings

2011 Formal Ethics Opinion 2

Delay on the part of a former client in objecting to conflict of interest is not, by itself, a waiver of the conflict, but is one factor to consider in whether the lawyer must now withdraw from representing their current client

51

51

The IDS Commission and IDS Office were created in 2001 at the recommendation of a legislative study commission. The study commission found that indigent defense previously suffered—as to both cost-effectiveness and quality—from a lack of any centralized agency to provide coordinated planning, oversight, and management.

Our Mission

Safeguarding individual liberty and the Constitution by equipping the North Carolina public defense community with the resources it needs to achieve fair and just outcomes for clients

Our Goals

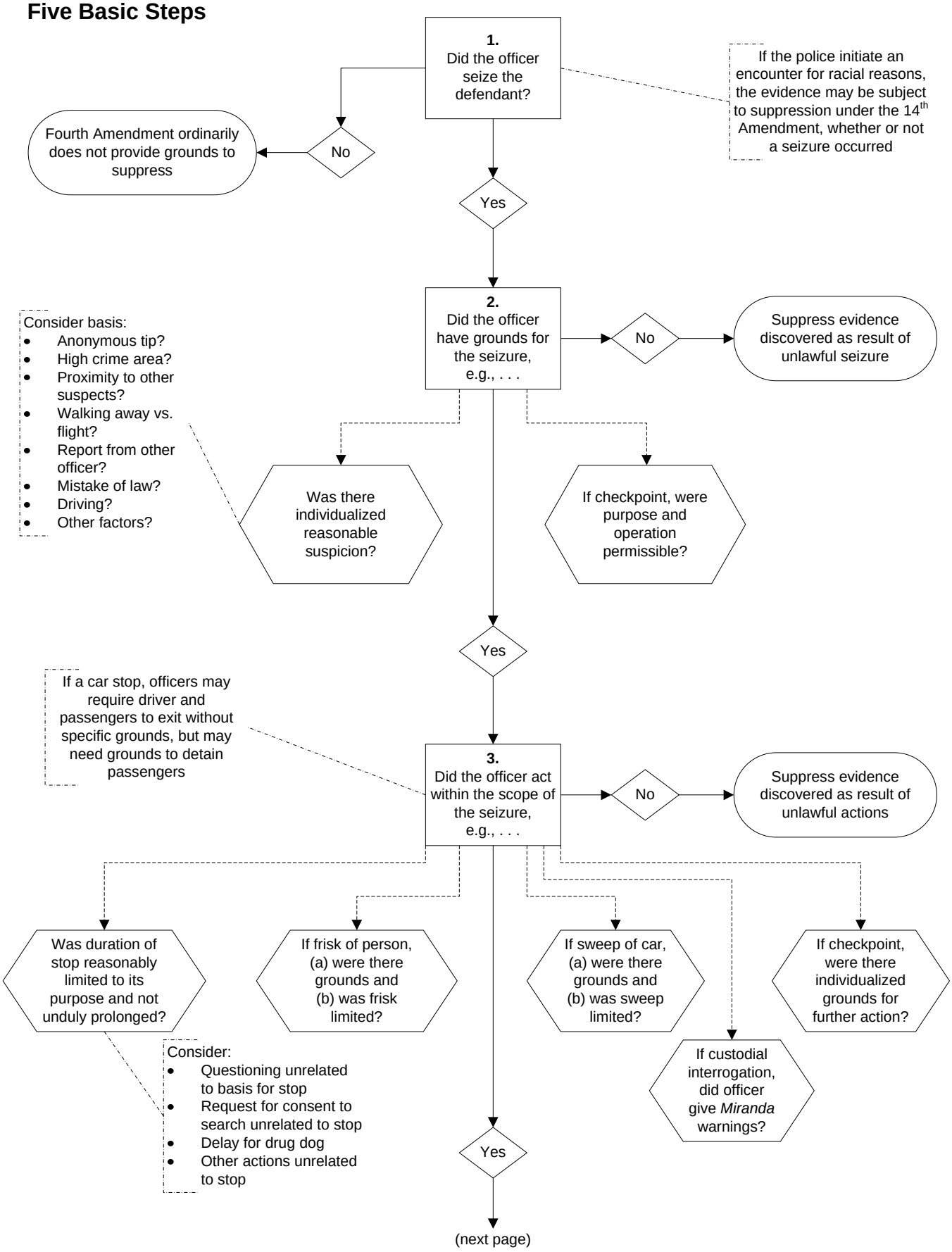
- Recruit the best and brightest North Carolina attorneys to represent indigent clients
- Ensure that every attorney representing indigent clients has the qualifications, training, support, resources, and consultation services they need to be effective advocates
- Create a system that will eliminate the many recognized problems and conflicts caused by judges appointing and compensating public defense attorneys; and to manage the state's indigent defense fund in a more efficient and equitable manner

52

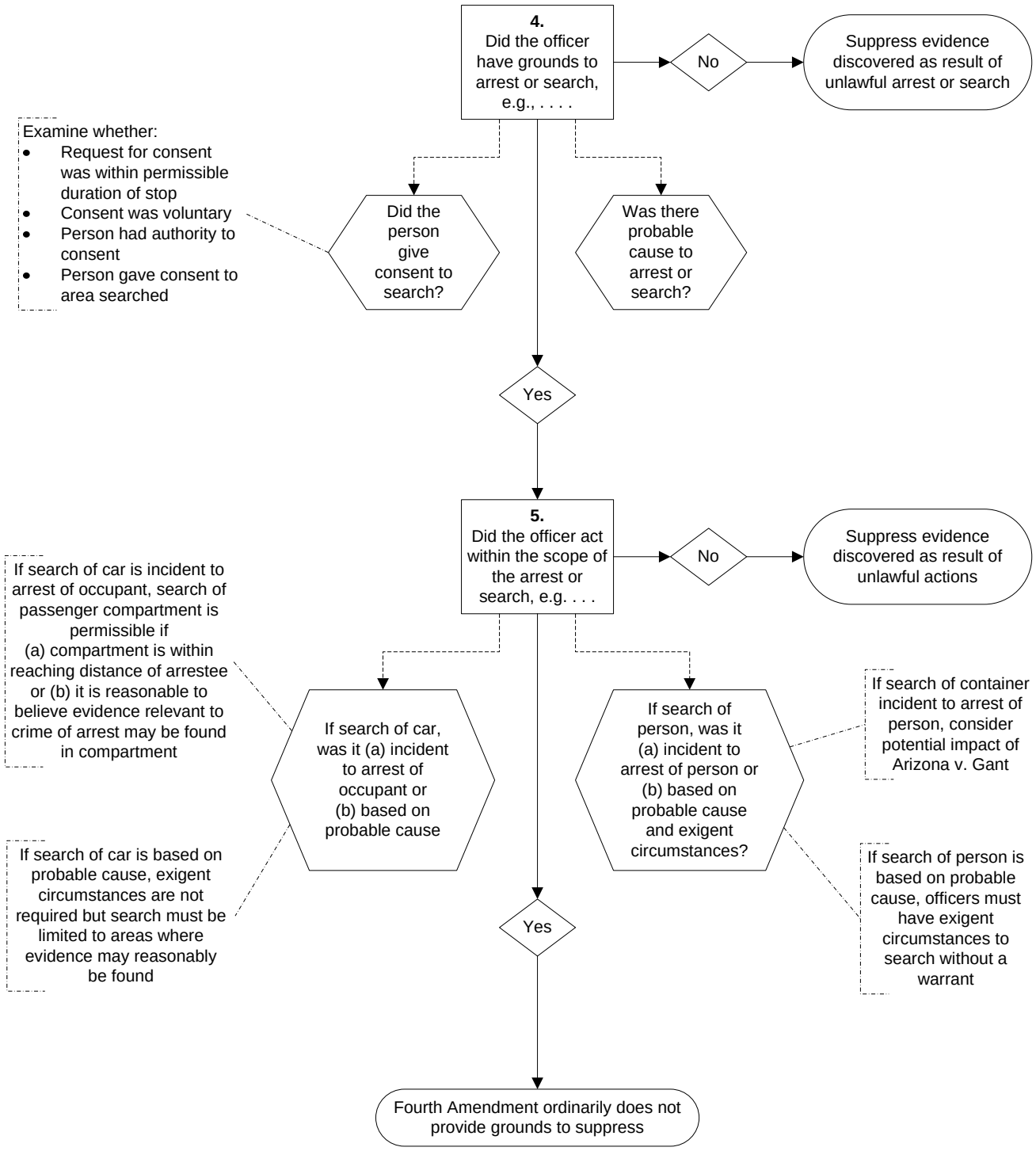
Safeguarding individual liberty and the Constitution by equipping the North Carolina public defense community with the resources it needs to achieve fair and just outcomes for clients

53

Appendix 15-1
Stops and Warrantless Searches: Five Basic Steps



Five Basic Steps (cont'd)



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Warrantless Stops and Searches:
Discussion Problems
September 2019

Did the officer seize the defendant?

1. Law-enforcement officers set up a driver's license checkpoint on a two lane city street (one lane in each direction). The officers were checking licenses at the checkpoint, but there is also evidence that the real purpose of the checkpoint was to look for drugs. One of the officers, Officer Jones, sees a car turn into a side street just before the checkpoint and begins following the car. The driver pulls into an apartment complex and parks. Jones pulls his car into the lot and approaches the defendant. Jones asks the defendant what he's doing, and the defendant replies in a slurred voice that he lives at the complex, which turns out to be true. Jones smells an overpowering odor of alcohol about the defendant and directs him to perform various field sobriety tests. The defendant does poorly, and Jones arrests him for driving while impaired. The defendant later blows a .26.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?
Did the officer have grounds for the seizure?

2. An unidentified person calls the police from his cell phone. He describes a car and its license plate and the general appearance of a man with long blond hair as the driver. He says that the car was weaving. The caller says he thinks the driver is drunk. Officer Connor receives a dispatch and pulls the car over. During the course of the stop, Connor discovers evidence that the driver is impaired and arrests him for impaired driving.

What is your theory for suppressing the evidence of defendant's impairment?

What evidence or lack of evidence would support your theory?

Did the officers seize the defendant?
Did the officers have grounds for the stop?
Did the officers act within the scope of the seizure?

3. Drug officer Jones is driving an unmarked car in an area where drug activity is common. He sees an African American man, Harold Bryant, driving a fancy car slowly through the neighborhood and stops him for not wearing a seat belt. The officer asks Bryant whether he can search his car. The officer will swear that Bryant freely gave his consent. A search of the car uncovers marijuana, and the officer arrests Bryant for that offense.

What is your theory for suppressing the marijuana?

What evidence or lack of evidence would support your theory?

Did the officer seize the defendant?
Did the officer have grounds for the seizure?
Did the officer act within the scope of the stop?
Did the officer have grounds to search?

4. Officer Smith clocks a car traveling 58 in a 45-mile per hour zone. Jones turns on his blue light, and the driver pulls over to the side of the road. The officer approaches the car, directs the driver and passengers to step out of the car, inspects the car for weapons, and pats each person down. While patting down the defendant, who was one of the passengers, Smith feels a small bottle in the defendant's right pants pocket and hears a rattling noise. Smith removes and opens the bottle and sees what he believes to be a few rocks of hashish. Laboratory analysis confirms that the substance was 1/10 of an ounce of hashish.

What is your theory for suppressing the hashish?

What evidence or lack of evidence would support your theory?

Traffic Stops

Jeff Welty

August 2015

INTRODUCTION

This paper is intended to serve as a reference regarding the Fourth Amendment issues that arise in connection with traffic stops. It begins by addressing officers' conduct before a stop, proceeds to discuss making the stop itself, then considers investigation during traffic stops, and finally covers the termination of traffic stops.[1]

BEFORE THE STOP

"RUNNING TAGS"

Sometimes, an officer will decide to "run" a vehicle's "tag" – that is, run a computer check to determine whether the license plate on the vehicle is current and matches the vehicle, and perhaps whether the vehicle is registered to a person with outstanding warrants or who is not permitted to drive. When this is done randomly, without individualized suspicion, defendants sometimes argue that the officer has conducted an illegal search by running the tag. Courts have uniformly rejected this argument, finding that license plates are open to public view. See, e.g., State v. Chambers, 203 N.C. App. 373 (2010) (unpublished) ("Defendant's license tag was displayed, as required by North Carolina law, on the back of his vehicle for all of society to view. Therefore, defendant did not have a subjective or objective reasonable expectation of privacy in his license tag. As such, the officer's actions did not constitute a search under the Fourth Amendment."); Jones v. Town of Woodworth, 132 So.3d 422 (La. Ct. App. 2013) ("[A] survey of federal and state cases addressing this issue have concluded that a license plate is an object which is constantly exposed to public view and in which a person, thus, has no reasonable expectation of privacy, and that consequently, conducting a random license plate check is legal."); State v. Setinich, 822 N.W.2d 9 (Minn. Ct. App. 2012) (rejecting a defendant's challenge to an officer's suspicionless license plate check because "[a] driver does not have a reasonable expectation of privacy in a license plate number which is required to be openly displayed"); State v. Davis, 239 P.3d 1002 (Or. Ct. App. 2010) (upholding a random license check and stating that "[t]he state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records"), aff'd by an equally divided court, 295 P.3d 617 (2013); State v. Donis, 723 A.2d 35 (N.J. 1998) (holding that there is no reasonable expectation of privacy in the exterior of a vehicle, including the license plate, so an officer's ability to run a tag "should not be limited only to those instances when [the officer] actually witness[es] a violation of motor vehicle laws"). Cf. New York v. Class, 475 U.S. 106 (1986) (finding no reasonable expectation of privacy in a vehicle's VIN number because "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"). See also infra p. 8 (discussion under heading "Driver's Identity" and cases cited therein).

[1] The organization of this paper was inspired in part by Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843 (2004).

MAKING THE STOP

LEGAL STANDARD

"Reasonable suspicion [is] the necessary standard for stops based on traffic violations." State v. Styles, 362 N.C. 412 (2008) (rejecting the argument that full probable cause is required for stops based on readily observable traffic violations). That is the same standard that applies to investigative stops in connection with more serious offenses. Terry v. Ohio, 392 U.S. 1 (1968). An officer may have reasonable suspicion of a traffic violation if a law is "genuinely ambiguous," and the officer reasonably interprets it to prohibit conduct that the officer has observed, even if the officer's interpretation of the law turns out to be mistaken.[2]

PRETEXTUAL STOPS

If an officer has reasonable suspicion that a driver has committed a crime or an infraction, the officer may stop the driver's vehicle. This is so even if the officer is not interested in pursuing the crime or infraction for which reasonable suspicion exists, but rather is hoping to observe or gather evidence of another offense. Whren v. United States, 517 U.S. 806 (1996) (emphasizing that the "[s]ubjective intentions" of the officer are irrelevant); State v. McClendon, 350 N.C. 630 (1999) (adopting Whren under the state constitution).[3] However, if an officer makes a pretextual traffic stop and then engages in investigative activity that is directed not at the traffic offense but at another offense for which reasonable suspicion is absent, the officer may exceed the permitted scope of the traffic stop. This issue is addressed below, in the section of this paper entitled Investigation During the Stop.

Because the officer's subjective intentions regarding the purpose of the stop are immaterial, whether "an officer conducting a traffic stop [did or] did not subsequently issue a citation is also irrelevant to the validity of the stop." State v. Parker, 183 N.C. App. 1 (2007).

WHEN REASONABLE SUSPICION MUST EXIST

[2] Heien v. North Carolina, __ U.S. __, ___, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring). In Heien, an officer stopped a motorist for having one burned-out brake light. The court of appeals ruled that the applicable statute required only one working brake light and that the stop was therefore unreasonable. The Supreme Court reviewed the case and ruled that the brake light statute was sufficiently difficult to parse that the officer's interpretation was reasonable even if mistaken, rendering the stop reasonable also. The majority opinion does not set forth a standard for when an officer's mistaken interpretation of law is reasonable, but Justice Kagan's concurrence argues that such an interpretation is reasonable only when the law itself is "genuinely ambiguous."

[3] Indeed, a stop may be legally justified even where the officer is completely unaware of the offense for which reasonable suspicion exists and makes the stop based entirely on the officer's incorrect belief that reasonable suspicion exists for another offense. See, e.g., Devenpeck v. Alford, 543 U.S. 146 (2004) ("[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (internal citations omitted)); State v. Osterhoudt, 222 N.C. App. 620 (2012) (an officer stopped the defendant based on the officer's mistaken belief that the defendant's driving violated a particular traffic law; the court of appeals concluded that the law in question had no application to the defendant's driving, but upheld the stop because the facts observed by the officer provided reasonable suspicion that the defendant's driving violated a different traffic law, notwithstanding the fact that the officer did not act on that basis).

Normally, a law enforcement officer will attempt to develop reasonable suspicion before instructing a motorist to stop. But what if the officer does not have reasonable suspicion at that point, yet develops reasonable suspicion prior to the person's compliance with the officer's instruction? In California v. Hodari D., 499 U.S. 621 (1991), the United States Supreme Court held that a show of authority is not a seizure until the subject complies. Because the propriety of a seizure depends on the facts known at the time of the seizure, it appears that events after an officer's show of authority, but before a driver's submission to it, may be used to justify the stop. For example, an officer who activates his blue lights after observing a driver traveling 45 m.p.h. in a 55 m.p.h. zone may be without reasonable suspicion. But if the driver initially ignores the blue lights, continues driving, and weaves severely before stopping, the seizure may be upheld based on the driver's weaving in addition to his slow rate of speed. State v. Atwater, __ N.C. App. __, 723 S.E.2d 582 (2012) (unpublished) (adopting the foregoing analysis and concluding that "[r]egardless of whether [the officer] had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions [erratic driving and running two stop signs] gave [the officer] reasonable suspicion to stop defendant for traffic violations"); United States v. Swindle, 407 F.3d 562 (2d Cir. 2005) (reluctantly concluding that a court may "consider[] events that occur[] after [a driver is] ordered to pull over" but before he complies in determining the constitutionality of a seizure); United States v. Smith, 217 F.3d 746 (9th Cir. 2000) (relying on Hodari D. to reject the argument that "only the factors present up to the point when [the officer] turned on the lights of his patrol car can be considered in analyzing the validity of the stop"). Cf. United States v. McCauley, 548 F.3d 440 (6th Cir. 2008) ("We determine whether reasonable suspicion existed at the point of seizure – not . . . at the point of attempted seizure."); United States v. Johnson, 212 F.3d 1313 (D.C. Cir. 2000) (similar). Cf. generally 4 Wayne R. LaFave, Search and Seizure § 9.4(d) n.198 (5th ed. 2012) (collecting cases) (hereinafter, LaFave, Search and Seizure).

COMMON ISSUES

SPEEDING

Many traffic stops based on speeding are supported by radar or other technological means. However, an officer's visual estimate of a vehicle's speed generally is also sufficient to support a traffic stop for speeding. State v. Barnhill, 166 N.C. App. 228 (2004) (upholding a traffic stop based on the estimate of an officer who had no special training that the defendant was speeding 40 m.p.h. in a 25 m.p.h. zone, and stating that "it is well established in this State, that any person of ordinary intelligence, who had a reasonable opportunity to observe a vehicle in motion and judge its speed may testify as to his estimation of the speed of that vehicle"). However, if a vehicle is speeding only slightly, an officer's visual estimate of speed may be insufficiently reliable and accurate to support a traffic stop. Compare United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (officer's visual estimate that the defendant was speeding 75 m.p.h. in a 70 m.p.h. zone was insufficient to support a traffic stop; the officer also expressed some difficulty with units of measurement), with United States v. Mubdi, 691 F.3d 334 (4th Cir. 2012) (traffic stop was justified when two officers independently estimated that the defendant was speeding between 63 m.p.h. and 65 m.p.h. in a 55 m.p.h. zone), vacated on other grounds, __ U.S. __, 133 S. Ct. 2851 (2013).

DRIVING SLOWLY

Driving substantially under the posted speed limit is not itself necessarily unlawful. In fact, it is sometimes required by G.S. 20-141(a), which states that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." On the other hand, in some circumstances, driving slowly may constitute obstruction of traffic under G.S. 20-141(h) ("No person shall operate

a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic . . . ."), or may violate posted minimum speed limits under G.S. 20-141(c) (unlawful to operate passenger vehicle at less than certain minimum speeds indicated by appropriate signs). Furthermore, the fact that a driver is proceeding unusually slowly may contribute to reasonable suspicion that the driver is impaired. See, e.g., State v. Bonds, 139 N.C. App. 627 (2000) (driver's blank look, slow speed, and the fact that he had his window down in cold weather provided reasonable suspicion; opinion quotes NHTSA publication regarding the connection between slow speeds, blank looks, and DWI); State v. Aubin, 100 N.C. App. 628 (1990) (fact that defendant slowed to 45 m.p.h. on I-95 and weaved within his lane supported reasonable suspicion of DWI); State v. Jones, 96 N.C. App. 389 (1989) (although the defendant did not commit a traffic infraction, "his driving 20 miles per hour below the speed limit and weaving within his lane were actions sufficient to raise a suspicion of an impaired driver in a reasonable and experienced [officer's] mind").

Whether slow speed alone is sufficient to provide reasonable suspicion of impairment is not completely settled in North Carolina. The state supreme court seemed to suggest that it might be in State v. Styles, 362 N.C. 412 (2008) ("For instance, law enforcement may observe certain facts that would, in the totality of the circumstances, lead a reasonable officer to believe a driver is impaired, such as weaving within the lane of travel or driving significantly slower than the speed limit."), but the court of appeals stated that it is not in a subsequent unpublished decision, State v. Brown, 207 N.C. App. 377 (2010) (unpublished) (stating that traveling 10 m.p.h. below the speed limit is not alone enough to create reasonable suspicion, but finding reasonable suspicion based on speed, weaving, and the late hour). The weight of authority in other states is that it is not. See, e.g., State v. Bacher, 867 N.E.2d 864 (Ohio Ct. App. 2007) (holding that "slow travel alone [in that case, 23 m.p.h. below the speed limit on the highway] does not create a reasonable suspicion," and collecting cases from across the country).

It is also unclear just how slowly a driver must be travelling in order to raise suspicions. Of course, driving a few miles per hour under the posted limit is not suspicious. State v. Canty, 224 N.C. App. 514 (2012) (fact that vehicle slowed to 59 m.p.h. in a 65 m.p.h. zone upon seeing officers did not provide reasonable suspicion). Ten miles per hour under the limit, however, may be enough to contribute to suspicion. Brown, 207 N.C. App 377 (finding reasonable suspicion where defendant was driving 10 m.p.h. under the speed limit and weaving within a lane); State v. Bradshaw, 198 N.C. App. 703 (2009) (unpublished) (late hour, driving 10 m.p.h. below the limit, and abrupt turns provided reasonable suspicion). Certainly, the more sustained and the more pronounced the slow driving, the greater the suspicion.

WEAVING

G.S. 20-146 requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

ACROSS LANES

Absent exceptional circumstances, weaving across lanes of traffic generally violates this provision and supports a traffic stop. See, e.g., State v. Osterhoudt, 222 N.C. App. 620 (2012) (where the "defendant crossed [a] double yellow line . . . he failed to stay in his lane and violated" G.S. 20-146); State v. Hudson, 206 N.C. App. 482 (2010) (where the defendant "crossed the center line of I–95 and pulled back over the fog line twice," an officer was justified in stopping him for a violation of G.S. 20-146). See also State v. Kochuk, 366 N.C. 549 (2013) (per curiam) (adopting the analysis of the dissenting opinion in the court of appeals where it was explained that a driver "momentarily crossed the right dotted line once while in the middle lane" and "later drove on the fog line twice";

the opinion cites Hudson, supra, and appears to suggest that a stop was justified under G.S. 20-146; however, the opinion focuses primarily on the presence of reasonable suspicion of impaired driving as a basis for the stop); State v. Simmons, 205 N.C. App. 509 (2010) (without discussing G.S. 20-146, the court ruled that a stop was supported by reasonable suspicion of DWI where the defendant "was not only weaving within his lane, but was also weaving across and outside the lanes of travel, and at one point actually ran off the road"). But cf. State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that a stop was not supported by reasonable suspicion of DWI because it was based on only "one instance of weaving," even though "the right side of Defendant's tires crossed into the right-hand lane" during the weaving; the court did not address G.S. 20-146 as a possible basis for the stop).

Driving so that one's tires touch, but do not cross, a lane line should be treated as weaving within a lane, not weaving across lanes. Shea Denning, Keeping It Between the Lines, N.C. Crim. L. Blog (Mar. 11, 2015), http://nccriminallaw.sog.unc.edu/keeping-it-between-the-lines/ (discussing this point and citing State v. Peele, 196 N.C. App. 668 (2009), where the court ruled that there was no reasonable suspicion to stop a defendant whose tires touched the lane lines twice; although the court's discussion focuses on the presence or absence of reasonable suspicion of DWI and does not cite G.S. 20-146, the court does characterize the defendant's driving as weaving "within" a lane).

WITHIN A LANE

Weaving within a single lane does not violate G.S. 20-146 and so is not itself a crime or an infraction. In some circumstances, however, weaving within a single lane may provide, or contribute to, reasonable suspicion that a driver is impaired or is driving carelessly.

- *Moderate Weaving within a Lane: Weaving Plus.* In State v. Fields, 195 N.C. App. 740 (2009), the court of appeals held that an officer did not have reasonable suspicion that a driver was impaired where the driver "swerve[d] to the white line on the right side of the traffic lane" three times over a mile and a half. However, the court stated that weaving, "coupled with additional . . . facts," may provide reasonable suspicion. The court cited cases involving additional facts such as driving "significantly below the speed limit," driving at an unusually late hour, and driving in the proximity of drinking establishments. Thus, Fields stands for the proposition that moderate weaving within a single lane does not provide reasonable suspicion, but that 'weaving plus' may do so. Fields has been applied in cases such as State v. Wainwright, __ N.C. App. __, 770 S.E.2d 99 (2015) (mistakenly analyzing weaving across a lane line as if it were weaving within a lane, then finding reasonable suspicion of impaired driving based in part on the weaving and in part on the late hour and the proximity to bars); State v. Kochuk, 366 N.C. 549 (2013) (ruling that reasonable suspicion supported a stop where the defendant was weaving and it was 1:10 a.m.); State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (2013) (holding that weaving alone did not provide reasonable suspicion to support a stop, that driving at 10:05 p.m. on a Wednesday is "utterly ordinary" and insufficient to render weaving suspicious, and that having "very bright" headlights also was not suspicious); and State v. Peele, 196 N.C. App. 668 (2009) (finding no reasonable suspicion of DWI where an officer received an anonymous tip that defendant was "possibl[y]" driving while impaired, then saw the defendant "weave within his lane once").

- *Severe Weaving within a Lane.* While moderate weaving within a single lane is insufficient by itself to support a traffic stop, severe weaving may suffice. In State v. Fields, 219 N.C. App. 385 (2012), the court of appeals upheld a traffic stop conducted by an officer who followed the defendant for three quarters of a mile and saw him "weaving in his own lane . . . sufficiently frequent[ly] and erratic[ly] to prompt evasive maneuvers from

other drivers." The officer compared the defendant's vehicle to a "ball bouncing in a small room." The extensive weaving enabled the court of appeals to distinguish the precedents discussed in the preceding paragraph. See also State v. Otto, 366 N.C. 134 (2012) (traffic stop justified by the defendant's "constant and continual" weaving at 11:00 p.m. on a Friday night).

SITTING AT A STOPLIGHT

Like weaving within a single lane, remaining at a stoplight after the light turns green is not, in itself, a violation of the law. But also like weaving, it may provide or contribute to reasonable suspicion that the driver is impaired.[4] An important factor in such cases is the length of the delay. Compare State v. Barnard, 362 N.C. 244 (2008) (determining that reasonable suspicion supported an officer's decision to stop the defendant where the defendant was waiting at a traffic light in a high-crime area, near several bars, at 12:15 a.m., and "[w]hen the light turned green, defendant remained stopped for approximately thirty seconds" before proceeding), with State v. Roberson, 163 N.C. App. 129 (2004) (finding no reasonable suspicion where the defendant sat at a green light at 4:30 a.m., near several bars, for 8 to 10 seconds, and stating that "[a] motorist waiting at a traffic light can have her attention diverted for any number of reasons. . . . [so] a time lapse of eight to ten seconds does not appear so unusual as to give rise to suspicion justifying a stop").

UNSAFE MOVEMENT/LACK OF TURN SIGNAL

Under G.S. 20-154(a), "before starting, stopping or turning from a direct line[, a driver] shall first see that such movement can be made in safety . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required." Litigation under this statute has focused on the phrase "the operation of any other vehicle may be affected." Generally, the appellate courts have held that a driver need not signal when making a mandatory turn, but must if the turn is optional and there is another vehicle following closely. Compare State v. Ivey, 360 N.C. 562 (2006) (the defendant was not required to signal at what amounted to a right-turn-only intersection; a right turn was the "only legal movement he could make," and the vehicle behind him was likewise required to stop, then turn right, so the defendant's turn did not affect the trailing vehicle), and State v. Watkins, 220 N.C. App. 384 (2012) (suggesting that there was insufficient evidence of unsafe movement where the defendant changed lanes without signaling while driving three to four car lengths in front of a police vehicle on a road with heavy traffic, because it was not clear that another vehicle was affected), with State v. Styles, 362 N.C. 412 (2008) (where the defendant changed lanes "immediately in front of" an officer, he violated the statute; "changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle"), and State v. McRae, 203 N.C. App. 319 (2010) (similar).

LATE HOUR, HIGH-CRIME AREA

The United States Supreme Court has held that presence in a high-crime area, "standing alone, is not a basis for concluding that [a person is] engaged in criminal conduct." Brown v. Texas, 443 U.S. 47 (1979). Although the stop in Brown took place at noon, presence in a high-crime area at an unusually late hour is also alone insufficient to provide reasonable suspicion. State v. Murray, 192 N.C. App. 684 (2008) (no reasonable suspicion to stop defendant, who was driving in a commercial area with a high incidence of property crimes at 3:41 a.m.). But the

[4] Under some circumstances, it might also constitute obstructing traffic in violation of G.S. 20-141(h).

incidence of crime in the area and the hour of night are factors that, combined with others such as nervousness or evasive action, may contribute to reasonable suspicion. Cf. In re I.R.T., 184 N.C. App. 579 (2007) (listing factors); State v. Mello, 200 N.C. App. 437 (2009) (holding that the defendant's presence in a high-drug area, coupled with evasive action on the part of individuals seen interacting with defendant, provided reasonable suspicion supporting a stop).

COMMUNITY CARETAKING

The court of appeals recognized the community caretaking doctrine as a basis for a vehicle stop in State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (2014). In Smathers, an officer stopped the defendant to make sure that she was OK after her car hit a large animal that ran in front of her. The court ruled that the stop was justified, finding an objectively reasonable basis for the caretaking stop that outweighed the intrusion of the stop on the driver's privacy. The court set out a flexible test for community caretaking, yet cautioned that the doctrine should be applied narrowly, so its precise scope remains uncertain.

TIPS

Whether information from a tipster provides reasonable suspicion to stop a vehicle depends on the totality of the circumstances. Whether the tipster is identified is a critical factor, so this paper treats anonymous tips separately from other tips.

ANONYMOUS TIPS

Historically, information from an anonymous tipster has been viewed as insufficient to support a stop, at least without unusual indicia of reliability, such as very detailed information or meaningful corroboration of the tip by the police. State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (a tip that the court treated as anonymous did not provide reasonable suspicion, in part because it "did not provide any way for [the investigating officer] to assess [the tipster's] credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions"); State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013) (taxi driver's anonymous call to 911, reporting that a specific red Ford Mustang, headed in a specific direction, was "driving erratically [and] running over traffic cones," was insufficient to support a stop of a red Mustang located less than two minutes later headed in the described direction; officers did not corroborate the bad driving and the tip had "limited but insufficient indicia of reliability"); State v. Johnson, 204 N.C. App. 259 (2010) (stating that "[c]ourts have repeatedly recognized, as a general rule, the inherent unreliability of anonymous tips standing on their own" unless such a tip "itself possess[es] sufficient indicia of reliability, or [is] corroborated by [an] officer's investigation or observations"); State v. Peele, 196 N.C. App. 668 (2009) (an anonymous tip that the defendant was driving recklessly, combined with an officer's observation of a single instance of weaving, was insufficient to give rise to reasonable suspicion). This skepticism was rooted in part in Florida v. J.L., 529 U.S. 266 (2000), a non-traffic stop case in which the Court stated that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and so rarely provides reasonable suspicion. *Id.* (internal quotation marks and citation omitted.)

However, the Supreme Court recently decided Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (2014), ruling that a motorist's 911 call, reporting that a specific vehicle had just run the caller off the road, was an

anonymous tip that provided reasonable suspicion to stop the described vehicle 15 minutes later. The Court first ruled that the tip was reliable. It reasoned that the caller effectively claimed first-hand knowledge of the other vehicle's dangerous driving; that the call was "especially reliable" because it was contemporaneous with the dangerous driving; and that the call was made to 911, which "has some features [like recording and caller ID] that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." Then the Court held that running another vehicle off the road "suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues," and so provided reasonable suspicion of DWI. Because the Court found reasonable suspicion based on a garden-variety anonymous 911 call that the officers did little to corroborate, Navarette almost certainly changes the law in North Carolina regarding anonymous tips and reasonable suspicion.[5] However, it is unclear how far Navarette will extend. Will it apply when the tip is received through a means other than 911? When it concerns a completed traffic offense rather than an ongoing one like DWI? These issues will need to be decided in future cases.

OTHER TIPS

Where an informant "willingly place[s] her anonymity at risk," by identifying herself or by speaking to an officer face to face, courts more readily conclude that the information provides reasonable suspicion. State v. Maready, 362 N.C. 614 (2008) (court gave significant weight to information provided by a driver who approached officers in person, thereby allowing officers to see her, her vehicle, and her license plate, notwithstanding the fact that the officers did not in fact make note of any identifying information about her). See also State v. Hudgins, 195 N.C. App. 430 (2009) (a driver called the police to report that he was being followed, then complied with the dispatcher's instructions to go to a specific location to allow an officer to intercept the trailing vehicle; when the officer stopped the second vehicle, the caller also stopped briefly; the defendant, who was driving the second vehicle, was impaired; the stop was proper, in part because "by calling on a cell phone and remaining at the scene, [the] caller placed his anonymity at risk").[6]

DRIVER'S IDENTITY

[5] North Carolina's appellate courts could adhere to the previous line of authority by ruling that the North Carolina Constitution provides greater protection than the Fourth Amendment, but that is unlikely given the courts' repeated statements that the state and federal constitutions provide coextensive protection from unreasonable searches and seizures. See, e.g., State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (2013) (stating that "this Court and the [state] Supreme Court have clearly held that, as far as the substantive protections against unreasonable searches and seizures are concerned, the federal and state constitutions provide the same rights," and citing multiple cases holding that the two constitutions are coextensive in this regard), rev'd on other grounds, 367 N.C. 483 (2014).

[6] The Hudgins court emphasized that the caller remained at the scene of the stop, thereby relinquishing his anonymity. By contrast, in State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (2013), a taxi driver called 911 on his cell phone to report an erratic driver. The taxi driver did not give his name, but "when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver." Nonetheless, the court treated the call as an anonymous tip because "the officers did not meet [the taxi driver] face-to-face," and found that the tip failed to provide reasonable suspicion to support a stop of the other driver. See also State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (2013) (treating a telephone tip as anonymous even though "the communications center obtained the caller's name . . . and phone number").

"[W]hen a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver's license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop." State v. Hess, 185 N.C. App. 530 (2007). See also State v. Johnson, 204 N.C. App. 259 (2010) ("[T]he officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended."). Presumably, an officer would also be justified in stopping a vehicle if he determined that the registered owner was the subject of an outstanding arrest warrant or other criminal process and if the officer could not rule out the possibility that the owner of the vehicle was driving.[7]

INVESTIGATION DURING THE STOP

ORDERING OCCUPANTS OUT OF THE VEHICLE

In the interest of officer safety, an officer may order any or all of a vehicle's occupants out of the vehicle during a traffic stop. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 519 U.S. 408 (1997) (passengers). Likewise, an officer may order the vehicle's occupants to remain in the vehicle. State v. Shearin, 170 N.C. App. 222 (2005); Robert L. Farb, Arrest, Search, and Investigation in North Carolina 45 & n.191 (4th ed. 2011) (collecting cases). Whether, and under what circumstances, an officer can order a driver or passenger into the back seat of the officer's cruiser is an open question in North Carolina and is the subject of a split of authority nationally. Jeff Welty, Traffic Stops, Part II, N.C. Crim. L. Blog (October 28, 2009), http://nccriminallaw.sog.unc.edu/traffic-stops-part-ii/.

FRISKING OCCUPANTS

A frisk does not follow automatically from a valid stop. It is justified only if the officer reasonably suspects that the person or people to be frisked are armed and dangerous. Terry v. Ohio, 392 U.S. 1 (1968). For example, a frisk was justified when a driver "had prior convictions for drug offenses, [an officer] observed [the driver's] nervous behavior inside his vehicle, and [the officer] saw him deliberately conceal his right hand and refuse to open it despite repeated requests." State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (2014). An officer may frisk a passenger based on reasonable suspicion that the passenger is armed and dangerous, even if the officer does not suspect the passenger of criminal activity. Arizona v. Johnson, 555 U.S. 323 (2009).

"CAR FRISKS"

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court held that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses [reasonable suspicion] that the suspect is dangerous and the suspect may gain immediate control of weapons." Although Long was decided in the context of what might be described as a Terry stop rather than a traffic stop – because the vehicle in Long had already crashed when officers stopped to investigate – the two types

[7] In State v. Watkins, 220 N.C. App. 384 (2012), the court of appeals upheld a stop based in part on the fact that the registered owner of a vehicle had outstanding warrants even though the officers involved in the case were "pretty sure" that the driver was not the owner. The court noted that the defendant "was driving a car registered to another person," that the registered owner had outstanding warrants, and that there was a passenger in the vehicle who could have been the registered owner.

of stops are similar if not identical,[8] and the concept of a car frisk applies with equal force to traffic stops. State v. Hudson, 103 N.C. App. 708 (1991) (upholding car frisk arising out of a traffic stop).

Whether there is reasonable suspicion that a person is dangerous is similar to the inquiry that must be made in the Terry frisk context. Factors that courts have mentioned in the car frisk context include: furtive movements by the occupants of the vehicle; lack of compliance with police instructions; belligerence; reports that the suspect is armed; and visible indications that a weapon may be present in the car. See, e.g., State v. Edwards, 164 N.C. App. 130 (2004) (finding a car frisk justified where a sexual assault suspect was reported to have a gun; was noncompliant; and appeared to have reached under the seat of his vehicle); State v. Minor, 132 N.C. App. 478 (1999) (holding a car frisk not justified where a suspect appeared to access the center console of the vehicle and later rubbed his hand on his thigh near his pocket; these movements were not "clearly furtive"); State v. Clyburn, 120 N.C. App. 377 (1995) (ruling a car frisk justified where officers suspected that the defendant was involved in the drug trade and the defendant was belligerent during the stop).

Whether an officer's belief that a suspect may gain immediate control of a weapon is reasonable depends on the particular circumstances of a given traffic stop including the suspect's location relative to the vehicle and whether the suspect has been handcuffed. Compare Edwards, 164 N.C. App. 130 (defendant suspected of possessing handgun who was handcuffed and sitting on the curb was in sufficiently "close proximity to the interior of the vehicle" to gain access to a weapon), and State v. Parker, 183 N.C. App. 1 (2007) (defendant was handcuffed in the backseat of his own car when he disclosed that there was a gun in the car; two other passengers were also in the car; "these circumstances were sufficient to create a reasonable belief that defendant was dangerous and had immediate access to a weapon"), with State v. Braxton, 90 N.C. App. 204 (1988) (it was "uncontroverted that defendant [stopped for speeding] could not obtain any weapon . . . from the car" where he was not in the car and detective testified that defendant could not have reached the area searched).

As to the proper scope of a car frisk, there is little North Carolina law on point. In Parker, 183 N.C. App. 1, the court held that an officer properly searched "a drawstring bag located underneath a piece of newspaper that fell to the ground" as he assisted an occupant out of the vehicle. The court noted that the bag was located near a firearm and "was at least large enough to contain methamphetamine and a 'smoking device," perhaps suggesting a willingness to err on the side of officer safety when confronted with ambiguous facts.

LICENSE, WARRANT, AND RECORD CHECKS

Officers frequently check the validity of a driver's license, registration, and insurance during a traffic stop, and may also check for any outstanding arrest warrants against the driver. In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance" are routine and permissible parts of an ordinary traffic stop.

This statement is consistent with prior North Carolina case law allowing these checks, and the associated brief delays. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (finding "no . . . authority" for the

[8] Berkemer v. McCarty, 468 U.S. 420 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' than to a formal arrest." (internal citations omitted)); State v. Styles, 362 N.C. 412 (2008) ("Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in Terry.'" (citation omitted)).

defendant's claim that a document check exceeded the scope of a speeding stop, and noting that "officers routinely check relevant documentation while conducting traffic stops"); State v. Hernandez, 170 N.C. App. 299 (2005) (holding that "running checks on Defendant's license and registration" was "reasonably related to the stop based on the seat belt infraction"); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minute "detention for the purpose of determining the validity of defendant's license was not unreasonable" when officer's computer was working slowly). See also, e.g., United States v. Villa, 589 F.3d 1334 (10th Cir. 2009) ("It is well-established that [a] law enforcement officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." (citation omitted)); See generally Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1874-85 (2004) (noting that most courts have permitted license, warrant, and record checks incident to traffic stops, though criticizing some of these conclusions) [hereinafter LaFave, "Routine"].

Checks that focus on a motorist's criminal history rather than his or her driving status and the existence of outstanding arrest warrants may be permissible also, though the issue is less clearly settled. The Rodriguez Court briefly suggested that criminal record checks may be permissible as an officer safety measure. 135 S. Ct. at 1616 (citing United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (en banc), for the proposition that running a motorist's criminal record is justified by officer safety). However, the Court did not address the issue in detail and at least one state court has since found one variety of record check to be improperly directed at detecting evidence of ordinary criminal wrongdoing. United States v. Evans, 786 F.3d 779 (9th Cir. 2015) (ruling that an officer improperly extended a traffic stop to conduct an "ex-felon registration check," a procedure that inquired into a subject's criminal history and determined whether he had registered his address with the sheriff as required for certain offenders in the state in which the stop took place).

QUESTIONS ABOUT UNRELATED MATTERS

The United States Supreme Court held in Muehler v. Mena, 544 U.S. 93 (2005), that questioning is not a seizure, so the police may question a person who has been detained about matters unrelated to the justification for the detention, even without any individualized suspicion supporting the questions. Although Muehler involved a person who was detained during the execution of a search warrant, not the subject of a traffic stop, its reasoning applies equally in the traffic stop setting. The Court has recognized as much. Arizona v. Johnson, 555 U.S. 323 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). See also e.g., United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007); United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007).

It should be emphasized that the questioning in Muehler did not extend the subject's detention; whether a traffic stop may be prolonged for additional questioning is discussed below.

USE OF DRUG-SNIFFING DOGS

Having a dog sniff a car is not a search and requires no quantum of suspicion. Illinois v. Caballes, 543 U.S. 405 (2005). Therefore, a dog sniff is permitted during any traffic stop, so long as the sniff does not extend the stop. Whether a traffic stop may be prolonged for a dog sniff is discussed below.

ASKING FOR CONSENT TO SEARCH

Requests to search made during a traffic stop probably should be analyzed just like any other inquiry about matters unrelated to the purpose of the stop: because such a request is not, in itself, a seizure, it does not implicate the Fourth Amendment unless it extends the duration of the stop. 4 LaFave, Search and Seizure § 9.3(e). See also United States v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (because "officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop," a request for consent to search that did not substantially prolong a traffic stop was permissible).

However, at least one North Carolina Court of Appeals case has stated that "[i]f the officer's request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity." State v. Parker, 183 N.C. App. 1 (2007). The court's reasoning appears to have been that such a request inherently involves at least a minimal extension of the stop and is therefore unreasonable.[9] But cf. State v. Jacobs, 162 N.C. App. 251 (2004) ("Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search [during an investigative stop]. No such showing is required.").

PROLONGING THE STOP TO INVESTIGATE UNRELATED MATTERS

In Rodriguez v. United States, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court ruled that an officer could not briefly extend a traffic stop to deploy a drug sniffing dog. The Court reasoned that a stop may not be extended beyond the time necessary to complete the "mission" of the stop, which is "to address the traffic violation that warranted the stop . . . and attend to related safety concerns." That is, "[a]uthority for the seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Because a dog sniff is not a task "tied to the traffic infraction," but rather is "aimed at 'detect[ing] evidence of ordinary criminal wrongdoing,'" any delay to enable a dog sniff violates the Fourth Amendment. The Court rejected the idea, widely endorsed by the lower courts,[10] that "de minimis" delays of just a few minutes did not rise to the level of Fourth Amendment concern. It therefore effectively overruled State v. Sellars, 222 N.C. App. 245 (2012) (delay of four minutes and thirty-seven seconds to allow a dog sniff to take place was de minimis and did not violate the Fourth

[9] This may not be so in some cases, as when one officer asks for consent to search while another is writing a citation. The issue of delays is addressed later in this manuscript.

[10] See, e.g., United States v. Rodriguez, 741 F.3d 905 (8th Cir. 2014) (a seven- or eight-minute delay to deploy a drug-sniffing dog was "a de minimis intrusion" that did not implicate the Fourth Amendment), vacated, __ U.S. __, 135 S. Ct. 1609 (2015); United States v. Green, 740 F.3d 275 (4th Cir. 2014) (running a "criminal history check added just four minutes to the traffic stop" and "at most, amounted to a de minimis intrusion . . . [that] did not constitute a violation of [the defendant's] Fourth Amendment rights"); United States v. Mason, 628 F.3d 123 (4th Cir. 2010) ("The one to two of the 11 minutes [that the stop took] devoted to questioning on matters not directly related to the traffic stop constituted only a slight delay that raises no Fourth Amendment concern."); United States v. Harrison, 606 F.3d 42 (2d Cir. 2010) (per curiam) (five to six minutes of questioning unrelated to the purpose of the traffic stop "did not prolong the stop so as to render it unconstitutional"); Turvin, 517 F.3d 1097 (asking a "few questions" unrelated to the stop that prolonged the stop by a "few moments" was not unreasonable, and collecting cases). See generally United States v. Everett, 601 F.3d 484 (6th Cir. 2010) (collecting cases and concluding that whether a delay is de minimis depends on all the circumstances, including whether the officer is diligently moving toward a conclusion of the stop, and the ratio of stop-related questions to non-stop-related questions).

Amendment), and State v. Brimmer, 187 N.C. App. 451 (2007) (delay of approximately four minutes to allow a dog sniff to take place was de minimis).[11]

The reasoning of Rodriguez extends beyond dog sniffs. The case clearly implies that an officer may not extend a stop in order to ask questions unrelated to the purpose of the stop, such as questions about drug activity. Lower courts have uniformly understood that implication. See, e.g., United States v. Archuleta, __ F. App'x __, 2015 WL 4296639 (10th Cir. July 16, 2015) (unpublished) (citing Rodriguez while ruling that a bicycle stop was improperly prolonged "in order to ask a few additional questions" unrelated to the bicycle law violations that prompted the stop); Amanuel v. Soares, 2015 WL 3523173 (N.D. Cal. June 3, 2015) (unpublished) (extending a traffic stop by 10 minutes to discuss a passenger's criminal history, ask whether the passenger had been subpoenaed to an upcoming criminal trial, and caution the passenger against perjuring himself, would amount to an improper extension of the stop in violation of Rodriguez); United States v. Kendrick, 2015 WL 2356890 (W.D.N.Y. May 15, 2015) (unpublished) (agreeing that "absent a reasonable suspicion of criminal activity, extending the stop . . . in order to conduct further questioning of the driver and the occupants about matters unrelated to the purpose of the traffic stop would appear to violate the . . . rule announced in Rodriguez," though finding that reasonable suspicion was present in the case under consideration).[12]

Presumably, Rodriguez also makes it improper for an officer to extend a stop in order to seek consent to search. See United States v. Hight, __ F. Supp. 3d __, 2015 WL 4239003 (D. Colo. June 29, 2015) (an officer stopped a truck for a traffic violation, ran standard checks on the driver and spoke briefly with him, and decided that he wanted to ask for consent to search; the officer called for backup and spent at least nine minutes waiting for another officer and working on a consent form; when backup arrived, the officer terminated the stop, then asked for and obtained consent; the court ruled that the nine-minute extension of the stop was improper and that it required suppression even if consent to search was obtained voluntarily after the stop ended). Of course, as noted above, Parker, 183 N.C. App. 1, is also a relevant precedent in this area.

Officers may respond to Rodriguez by multitasking: deploying a drug dog while waiting for a response on a license check, or asking investigative questions of the driver while filling out a citation. Defendants may argue that such multitasking inherently slows an officer down. Whether that is so in a particular case is a factual question. At least in two early cases on point, courts seem to have accepted officers' multitasking. See, e.g., State v. Jackson, __ N.E.3d __, 2015 WL 3824080 (Ohio Ct. App. 2015) (a traffic stop conducted by one Trooper was not impermissibly extended when a different Trooper conducted a dog sniff while the first Trooper investigated the defendant's background and wrote a traffic citation); Lewis v. State, 773 S.E.2d 423 (Ga. Ct. App. 2015) (similar). It may be worth noting that both Jackson and Lewis involved multiple officers, with one handling the dog while the other addressed the traffic violation.

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[11] Even before Rodriguez, the North Carolina Court of Appeals had limited Brimmer and Sellars in State v. Cottrell, __ N.C. App. __, 760 S.E.2d 274 (2014), where the court stated that it did "not believe that the de minimis analysis applied in Brimmer and Sellars should be extended to situations when, as here, a drug dog was not already on the scene."

[12] Even before Rodriguez, it was risky for an officer to measurably extend a stop to ask questions unrelated to the purpose of the stop in light of State v. Jackson, 199 N.C. App. 236 (2009) (finding that an officer unreasonably extended a traffic stop when she asked just a handful of drug-related questions).

One question that arises from Rodriguez is what sorts of conversation relate to the traffic stop. May an officer engage in brief chit-chat with a motorist, or does such interaction constitute an extension of the stop? What about inquiring about a motorist's travel plans, or a passenger's, where such inquiries may bear on the likelihood of driver fatigue but also may be used to seek out inconsistencies that may be evidence of illicit activity? One early case of note is United States v. Iturbe-Gonzalez, __ F. Supp. 3d __, 2015 WL 1843046 (D. Mont. April 23, 2015), where the court indicated that an officer may make "traffic safety-related inquiries of a general nature [including about the driver's] travel plans and travel objectives," and said that "any suggestion to the contrary would ask that officers issuing traffic violations temporarily become traffic ticket automatons while processing a traffic violation, as opposed to human beings." Of course, even if Iturbe-Gonzalez is correct that a question or two about travel plans are sufficiently related to the purpose of a traffic stop, a court might take a different view of an officer's extended discussion of itineraries with multiple vehicle occupants.

TOTAL DURATION

There is no bright-line rule regarding the length of traffic stops. As a rule of thumb, "routine" stops that exceed twenty minutes may deserve closer scrutiny. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina 43 (4th ed. 2011). Stops of various lengths have been upheld by the courts. See, e.g., State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) (thirteen minutes was "not unduly prolonged"), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __U.S. __, 135 S. Ct. 530 (2014); State v. Castellon, 151 N.C. App. 675 (2002) (twenty-five minutes, though some portion of that time may have been after reasonable suspicion developed); United States v. Rivera, 570 F.3d 1009 (8th Cir. 2009) (seventeen minutes); United States v. Eckhart, 569 F.3d 1263 (10th Cir. 2009) (twenty-seven minutes); United States v. Muriel, 418 F.3d 720 (7th Cir. 2005) (thirteen minutes).

TERMINATION OF THE STOP

WHEN TERMINATION TAKES PLACE

As a general rule, "an initial traffic stop concludes . . . after an officer returns the detainee's driver's license and registration." Jackson, 199 N.C. App. 236; State v. Heien, __ N.C. App. __, 741 S.E.2d 1 (2013) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), aff'd per curiam, 367 N.C. 163 (2013), and aff'd on other grounds, __ U.S. __, 135 S. Ct. 530 (2014). When an officer takes other documents from the driver, such as registration and insurance documents, these, too must be returned before the stop ends. State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (2014) (even though an officer had returned a driver's license and issued a warning citation, "[t]he purpose of the stop was not completed until [the officer] finished a proper document check [of registration, insurance, and other documents the officer had taken] and returned the documents"). As the Fourth Circuit explains, when an officer returns a driver's documents, it "indicate[s] that all business with [the driver is] completed and that he [is] free to leave." United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996).

This rule is not absolute and specific circumstances may dictate a different result. The North Carolina Court of Appeals has held, in at least one case, that under the totality of the circumstances, the occupants of a vehicle remained seized even after the return of the driver's paperwork, in part because the officer "never told [the driver] he was free to leave." State v. Myles, 188 N.C. App. 42 (2008), aff'd per curiam, 362 N.C. 344 (2008). See also State v. Kincaid, 147 N.C. App. 94 (2001) (suggesting that the return of a driver's license and registration is a necessary, but not invariably a sufficient, condition for the termination of a stop).

Some commentators have argued that many motorists will not feel free to depart until they are expressly permitted to do so. LaFave, "Routine" at 1899-1902. Certainly many officers mark the end of a stop by saying "you're free to go" or "you can be on your way" or something similar. Nonetheless, the United States Supreme Court has rejected the idea that drivers must expressly be told that they are free to go before a stop terminates. Ohio v. Robinette, 519 U.S. 33 (1996) (adopting a totality of the circumstances approach).

EFFECT OF TERMINATION

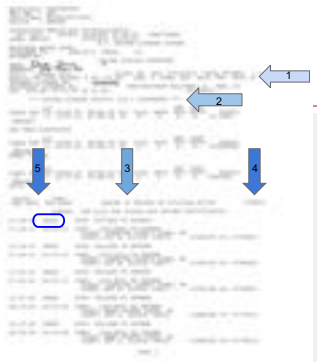
Once a stop has ended, the driver and any other occupants of the vehicle may depart. Any further interaction between the officer and the occupants of the vehicle is, therefore, consensual. The officer may ask questions about any subject at all, at any length; may request consent to search; and so on. In other words, the "time and scope limitations" that apply to a traffic stop cease to be relevant. LaFave, "Routine" at 1898.

Driving Records & Getting Your Client Back On The Road

2023 MISDEMEANOR DEFENDER TRAINING
November 14-17, 2023
MATT SUCZYNSKI - PARTNER
MIKE PADUCHOWSKI – PARTNER
MATTHEW CHARLES LAW

1

Driving Record



1. Personal Information Section
   a. Defendant's Name; Address; Date of Birth; License Number
2. Driver's License Status
   a. Active; Expired; Suspended; Inactive; Eligible for Reinstatement; Suspended –Pick up License
3. Nature of Record or Division Action
   a. Conviction, County in which case originated, and Original Case Number.
   b. Action DMV took as a result of the Conviction or Inaction of defendant.
4. Points/PJC
   a. Points assessed as a result of conviction or record of PJC
      Note: Zero points is blank
5. Important Dates
   a. Occurrence / Beginning
   b. Conviction / Ending

2

Driving Record

- 1st moving violation while suspended

3

How To Read a NC Driving Record

- Be familiar with abbreviations
  - PERM – Permanent Revocation
    - Permanent means forever? Yes, but that is where you come in
  - INDEF – Indefinite Revocation
    - Revoked until whenever the revocation is ended
      - Note: CJ Leads records do not say INDEF, just blank
  - PJC – Prayer for Judgment Continued
    - Shows when a PJC was used
  - ACDNT – Accident
    - If an accident was reported, then it is on the record. This does NOT mean the person was at fault, just that they were involved.
  - CLS – Class
    - Describes the class of license to let you know if a Commercial Drivers License (CDL) is in play (Class C is a typical non-CDL)

4

2 Types of Suspension

N.C. Gen. Stat. § 20-24.1 (Indefinite Suspension)

- Revocation (INDEF) for FTA or FTP/FTC
- Remains in effect until the FTA case is disposed or FTC case is paid

N.C. Gen. Stat. § 20-28 (a) and N.C. Gen. Stat. § 20-28.1 (Definite Suspension)

- Any moving violation conviction requires additional suspension of 1 year, 2 years or permanently if the moving violation was committed while in a state of suspension (20-28.1).
- Same with any conviction of DWLR-Impaired or DWLR-Non-Impaired with an offense date before 12/1/2015

5

Other Possible Causes of a Revocation

North Carolina General Statute § 20-16 provides, that the Division of Motor Vehicles has the authority to suspend the license of any driver, if a driver has:

- Accumulated twelve or more points within a three year period
- Been convicted of Driving While Impaired
- Been convicted of Speeding more than 80 MPH in a 70 MPH zone
- Been convicted of Speeding more than 75 MPH in a less than 70 MPH zone
- Been convicted in 12 months of Speeding 55 to 80 MPH and:
  - Speeding 55 to 80 MPH; or
  - Careless and Reckless Driving; or
  - Aggressive Driving;
- Committed Fraud involving a Driver's License or Learner's Permit
- Been Convicted of Illegally Transporting Alcohol
- Been Ordered Suspended as part of a Court Order

6

Moving vs. Non-Moving Violations

Moving Violations

- DWLR (Impaired)
- Speeding
- Stop Sign/Stoplight
- No Insurance
- Unsafe movement
- Reckless Driving (C&R)
- Move Over Law
- DWLR Non-Impaired**
- No Operator's License (NOL)**

**Offense Date Before 12-1-2015

- Driving While Impaired (DWI)
- Open Container
- Following Too Closely
- Left of Center
- Passing a Stopped School Bus
- Failure to Yield to Emergency Vehicle
- Illegal Passing
- Child Seat/Child Seatbelt (<16 years)

7

Moving vs. Non-moving

Non-moving Violations

- Improper Equipment
- Adult Seatbelt (age ≥ 16)
- Exp/Rev/Fict Registration
- Exp Inspection
- Fictitious Info to Officer
- Parking in a Handicapped Space

- Failure to Notify DMV of Address Change
- Window Tint
- All City Ordinance Violations
- DWLR (Non-Impaired)*
- No Operators License*

*Offense 12/1/15 or later

8

Alternatives to a Moving Violation Conviction

- Dismissal or Acquittal
- Reduce or Amend to Non-Moving Violation
- Prayer for Judgment Continued (PJC)

9

Dismissal/Acquittal

- Acquittal (i.e. a NG verdict) is usually an impractical route in these cases (exceptions apply)
- Outright dismissal of moving violations
  - Exception: Defendant agrees to plea to another moving violation, a non-moving violation, a criminal charge, etc. (Dismissal per plea)
  - Exception: Unsafe movement, Failure To Reduce Speed, etc. resulting from a vehicle collision – Defendant presents a letter from his insurance company
- BUT, a dismissal of CHARGED non-moving violation is quite common – FIX IT and show proof!
  - Expired Inspection, Registration
  - Improper Equipment, Window Tint

10

Reduce or Amend to Non-moving Violation

- Speeding → Improper Equipment-Speedometer
  - Exception: IE is NOT available if speed > 25mph over
- Stoplight/Stop Sign → City Code Violation (or Improper Equipment-Brakes)
- DWLR/NOL → A non-moving violation for offense dates on/after Dec 1, 2015

11

Prayer for Judgment Continued (PJC)

- PJC is unique to North Carolina
- Guilty but not a "conviction" (court agrees to continue the judgment indefinitely)
- ***NOTE:*** only 2 PJCs per driver every 5 years for DMV purposes
- ***BUT*** only 1 PJC per *household/policy* every 3 years for insurance purposes
  - See N.C. Gen. Stat. § 58-36-75(f)

- DMV will not honor a PJC for the following:
  - DWI
  - Passing Stopped School Bus
  - Speed > 25mph over
  - Any offense committed while driving a commercial vehicle OR possessing a commercial drivers license

12

Extraordinary Relief

- (1) FTA Sent in Error
- (2) Nunc pro Tunc
- (3) Motion for Appropriate Relief (MAR)
- (4) Chapter 14 Criminal Charge of FTA

13

FTA Sent In Error

- Judge orders the clerk to transmit to the DMV that the clerk sent the FTA in error.
- If the FTA is removed (on the original charge), the moving violation no longer occurred while in a state of suspension. Cindy now can plead to the current moving violation. This effectively removes the FTA INDEF Suspension (and the FTA fee).
- Practical Tip: Prepare an order saying the FTA is "Stricken and Sent In Error by no fault of the clerk"

14

Nunc Pro Tunc (now for then)

- Rewrite history by changing the date a conviction, PJC or other action is entered. Has a retroactive legal effect. It is as though the action had occurred at an earlier date.
- Can use on an open or closed case. BUT, if want to Nunc Pro Tunc a date on a closed case, you need a way to open the closed case (see MAR…)
- VERY difficult to do in most counties

15

Motion for Appropriate Relief (MAR)

- N.C. Gen. Stat. § Section 15A-1415
- Allows an old case to be opened and change what happened in the past. Use when:
  - PJC was used improperly and need to get it back to use today
  - PJC was available and was not used OR is now available
  - Pled to speed when IE was an option
  - Change a Speeding plea to Exceeding a Safe Speed in a situation where there are two speeds greater than 55mph within a year

16

Chapter 14 Criminal Charge of FTA

- Ask ADA to amend the Chapter 20 traffic ticket (DWLR or moving violation) to the *criminal* charge of Failure to Appear (Chapter 14).
- Chapter 14 is not a traffic charge. If person pleads Guilty to a Chapter 14 charge of Failure to Appear, their DL will NOT be revoked because this is NOT a Chapter 20 moving violation.

17

Limited Driving Privilege

- N.C. Gen. Stat. § 20-20.1 Petition and Order (2 step process)
- COURT order allowing a person with a revoked license to drive on a limited basis. Prior to implementation of this statute, a DMV hearing was the only way to obtain a driving privilege.
- License is still revoked but Judge grants a limited driving privilege (work, school, household maintenance, religious worship)

18

Limited Driving Privilege (cont'd)

- Does not need a DMV hearing (issued by Judge).
- The person's license must be currently revoked under N.C. Gen. Stat. § G.S. 20-28.1 and this must be the ONLY revocation currently in effect.
- Can not be granted if person currently has any indefinite suspensions, has pending traffic charges or the suspension was a result of a DWI.

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Limited Driving Privilege Cont'd

- Eligible to file petition in district court in the county of the person's residence:
  - 90 days after 1 year revocation period begins
  - 1 year after 2 year revocation period begins
  - 2 years after Permanent revocation period begins
- If Judge issues, clerk of court sends copy of the limited driving privilege to DMV.
- After one year of driving on a limited driving privilege for a Permanent Revocation, the license must be reinstated (but, for some reason, a hearing is still required)

20

Misdemeanor Reclassification

- DWLR – Impaired Revocation is still a Class 1 misdemeanor where counsel may be appointed
- DWLR – Non-Impaired Revocation is a Class 3 misdemeanor with a cost/fine disposition therefore eliminating the ability to apply for appointed counsel
  - Exception: Where a defendant has 4 or more previous convictions, a disposition other than a cost/fine is possible so the defendant may apply for court appointed counsel
  - Practical Tip: Courts will often appoint counsel on DWLR Non-Impaired if the defendant already has appointed counsel on other charges

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NC Drivers License Restoration Act

What Does the NC DL Restoration Act do?

- The Act provides some weapons in the fight against the License Revocation Cycle
- The Act made great strides in ending additional license suspensions from "Driving While Poor"
- The Act has provided traction for programs in some counties to clean up old FTA'd cases

22

In a Nutshell…

- The Act makes DWLR (Non-Impaired) a NON-MOVING violation
  - This eliminates any suspensions for DWLR (as they currently stand…like moving violations while suspended)
  - Applies to anyone who is charged with DWLR on or after December 1, 2015
    - NOTE: "Charged" not "Convicted" – Changed in the Technical Corrections phase of the law
    - Practical Tip: DMV is not currently issuing suspensions for convictions after 12/1/2015 regardless of offense date

23

What Did This Do?

- You can now enter a plea to DWLR to (hopefully) get the accompanying moving violation (speeding, etc.) dismissed ➔ No Additional Suspension (Stops the DWLR Cycle)
- The Act was INTENDED TO encourage those with old charges to add them on to a docket and resolve them by plea. They can enter a plea of guilty to DWLR charges, pay off what they owe, and get a license back. Now it encourages new charges first.
- Get more licensed, insured drivers on the road (or reduce the amount of unlicensed/uninsured drivers)

24

Potential Pitfalls

- DMV may still view any pleas to non-moving violations as evidence of driving.
  - Even though a non-moving violation will not make a defendant ineligible for a hearing, it can be used against them as evidence of driving during the suspension (very common)
  - Practical Solution: Evidence of driving is irrelevant in consideration for the limited driving privilege, and after successfully having the privilege for 1 year, the license is reinstated (although a hearing is still required for a perm susp)

25

Potential Pitfalls

- The act encourages pleas that will result in a criminal record
  - DWLR (misdemeanor) will not suspend you further…Speeding 1mph over the limit (infraction) will suspend you for 1 year, 2 years, or permanently
  - There is a strong motivation to enter a plea of guilty to a misdemeanor (creating a criminal record if otherwise clean) instead of a traffic infraction to avoid a license suspension

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NC DMV Hearings

- Most DMV hearings and interviews cannot be scheduled until a hearing fee has been paid
- DMV will let you pay for a hearing, schedule a hearing, and show up for a hearing…just to tell you that you are not eligible for a hearing
- Things that are perfectly fine for court and limited privilege purposes can be held against you in a DMV hearing and prevent license reinstatement

27

Filing Fees for DMV Hearings

DMV HEARING FEES	
Driver improvement clinic eligibility	$40
Commercial driver license disqualification	$200
Violation of Safety & Responsibility law	$200
Compliance with probation or restoration agreement	$220 (billed after hearing)
Pre-interview held before license restoration (situations involving alcohol-related convictions, suspensions or revocations)	$225
License restoration (DWI)	$425
License restoration (driving with revoked license)	$200
License restoration (moving violations while driving with revoked license)	$200
Refusal to submit to chemical analysis	$450
Alcohol concentration restriction violation	$450
Ignition interlock device restriction violation	$450 (billed after hearing)
License suspensions or revocations not otherwise listed to include those found in [redacted]	$100

28

Affidavit of Indigence for DMV Hearings

- Available in English and Spanish online
- Income must be verified
  - Recent W-2 or 1099 tax docs
  - Tax Filings or Statement
  - Pay Stubs
  - Proof of government assistance

29

Tips For License Restoration

- Always keep the DL in mind when resolving criminal cases. Even if unrelated, you can often help get a license back by getting charges dismissed with the same plea you were going to enter anyway. Always check CIPRS (NC Public Criminal & Infraction Records) before a plea!
- You can never have a license if you don't resolve the INDEF suspensions!
  - If indefinite suspensions exist you will be in a revoked status
  - If definite/permanent suspensions exist you have an end date

30

Tips for License Restoration

- Keep money in mind! Your client definitely will.
  - An FTA can cost $200 extra.
  - Just because you can get something dismissed doesn't always mean you should
  - Post-Act, you can save the $200 fee and avoid the additional suspension by entering a plea on the new DWLR charge (non-moving violation)
    - Remember: It is a criminal charge

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Tips for License Restoration

- Use and Build Your Network!
  - Call around and find out how a client can reset an old case in another county and if that is feasible to do without an attorney
  - Some counties will really try to help those who are trying to help themselves obtain a valid license
  - You will be surprised how many people will volunteer to help and can often just get an old case dismissed by showing what the client has done/paid so far

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Any Questions?

Feel free to contact me at any point in the future if I can help you out in any way.

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Introducing Evidence:

Get it In and Keep it Out

JOHN DONOVAN
MAGISTRATE

1

Categories of Evidence

- **Demonstrative Evidence**
  - Evidence that shows what something looks like (a neighborhood) or how something was done (an assault, a sobriety test). This can also include an attorney or witness demo.
- **Documentary Evidence**
  - Paper documents, Phone records, Medical Records, Employment records.
- **Physical Evidence**
  - Physical objects of evidentiary value.

2

Demonstrations: Safety First!

3

Rehearse in Advance

4

A Demonstration is Not an Experiment

- North Carolina recognizes a distinction between demonstrations and experiments. An experiment is a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried. A demonstration, on the other hand, is an illustration or explanation, as of a theory or product, by exemplification or practical application.
- Evidence pertaining to an experiment is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence. In contrast, a demonstration does not require substantially similar circumstances.

  State v. Witherspoon, 199 N.C. App. 141, 141, 681 S.E.2d 348, 348 (2009)

5

Laying the Foundation

For physical or documentary evidence, proponent must establish:

- **1) Identity** - Can the witness identify it? (Rule 901)
  - Requirement of an "original" or acceptable "duplicate," (Rules 1001-1003)
- **2) Authentication** – Is the item what you say it is (Rule 901) or is item self-authenticating (Rule 902)?
- **3) Relevance** - Does it make a consequential fact more or less probable? (Rules 401, 402, 403)
- **4) Chain of Custody** – Has it changed or been altered since it was collected? (Custody requirements may be relaxed with some documentary evidence, e.g. medical records).

6

Relevance: Does it Move the Ball?

7

Identification and Authentication

- Often used interchangeably in Rule 901
- Identification – How can the witness identify it?
  - Markings on object, individual characteristics of the item, serial number
  - Witness is record custodian, or created the item herself
- Authentication – How does the evidence "connect to the relevant facts of the case"?
  - Linked to a relevant person, place, time, event?
  - Authentication is a "special aspect of relevancy"
    - G.S. 8C-901, Official Commentary

8

RULE 901 – Requirement of Authentication or Identification

- Must present "evidence sufficient to support a [rational] finding that the matter in question is what its proponent claims."
  - Intentionally broad language – threshold standard
  - Rule 901 details many different ways to authenticate
  - Even if 'authenticated' and admitted, the jury need not believe the authenticating witness' testimony, or even believe that the admitted evidence is actually what it the witness says it is. Fact finder does not have to rely on evidence just because the judge admitted it.
    - *State v. DeJesus*, 265 N.C. App. 279 (2019)

9

Admissibility is a Screening Process

10

Just because it's admissible doesn't mean it's persuasive.

11

The Fact Finder Decides

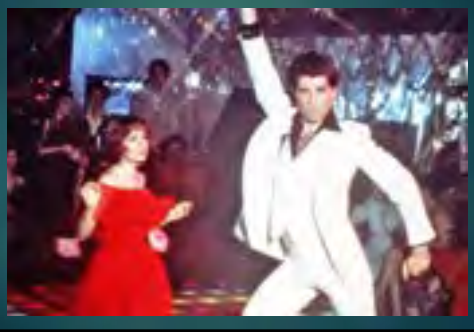
- Doubts about authentication generally go to the weight, not the admissibility, of the evidence.
  - Jeffrey Welty, *Digital Evidence*, UNC SOG, p. 157

12

Admission is only the entry ticket

13

You must still win the dance contest



14

Rule 901(b)(1), Testimony of Witness with Knowledge & Chain of Custody

- 901(b)(1) - "Testimony that a matter is what it is claimed to be"- a witness with first-hand knowledge can establish the foundation through testimony.
- First-hand knowledge means detailed sensory perceptions.
- "Show, don't tell" during direct examination
  - Present the sights, sounds, smells, feelings the witness experienced
  - Don't jump to conclusions – lay the groundwork that leads to the conclusion.

15

16

First-Hand Knowledge

- Incriminating text messages found on defendant's phone
- Text messages admissible where a witness testified that she was the person who composed and sent the text messages to the defendant.
- No requirement to present technical evidence about how telecommunications companies transmit text messages.
  - *State v. Gray*, 234 N.C. App. 197, 758 S.E.2d 699 (2014)

17

Custody authentication

- A series of witnesses who can account for the whereabouts and condition of an object from the time it is found in connection with the relevant facts of the case until the moment it is offered into evidence.

18

They Crushed My Crack!

- "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility."

  State v. Dawkins, 269 N.C. App. 45, 48, 837 S.E.2d 138, 141 (2019)

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Biological sample in hot car?

20

Beware of documentary evidence containing hearsay!

- If the DA attempts to introduce documentary evidence that does not fall under a hearsay exception, OBJECT on hearsay and 14th Amendment Due Process grounds, as well as 6th Amendment Confrontation Clause grounds if appropriate.
- (If you are proffering the evidence, perhaps you are actually "refreshing recollection" of the witness and stopping short of moving to introduce the item.)
- What is the item being offered for? Impeachment purposes? Illustrative purposes? Substantive purposes?
- Hearsay is not permitted if an item is being offered for substantive purposes without a hearsay exception.

21

Types of Evidence to Introduce

- Phone records (often in the phone itself), Text messages, Social Media posts
- Business records - Rule 803(6) hearsay exception - including Medical records.
- Photographs
- Video
- Voice recordings
- Diagrams

22

Go for it! You are among friends.

23

Business Records - Custodian

- 1) Mark documents for identification
- 2) Show documents to opposing counsel
- 3) Approach witness
- 4) Show documents to witness
- 5) Ask witness to identify the documents
- 6) Ask how the records are made, i.e. in the ordinary course of business by someone with a business duty to record such info
- 7) Storage of the documents, where the documents are retrieved from
- 8) Whether it is a regular part of business to keep and maintain this type of record
- 9) Whether documents of this type would be kept under the witness's custody or control – any changes since the records were made?
- 10) Move for admission of the documents

24

The Pause That Refreshes

25

Present Recollection Refreshed

- If the State's hearsay objection is sustained, ask the witness if reviewing the records would refresh his present recollection of the times and dates of the calls in question (Rule of Evidence 612).
- But remember the witness can't directly read from the records and they can't be introduced into evidence over a sustained hearsay objection.
- However, the witness is allowed to refer to the document as an aid to memory
- State is entitled to see the document
- Can't be a "mere recitation of the refreshing memorandum".
  - *State v. Harrison*, 218 N.C. App. 546 (Feb. 7, 2012); *State v. Jones*, 280 N.C. App. 241, 2021-NCCOA-592 (Nov. 2, 2021)

26

Computerized Business Records

- If records are computer-generated, the custodian-witness must have personal knowledge of how the computers gather and store information about the business activity so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.
  - *State v. Springer*, 283 N.C. 627, 636 (1973).

27

Jury or Judge Still Get to Decide if the Records are Reliable

- Authentication only establishes that the evidence supports a rational finding that they are business records.
- The fact-finder gets to decide if the records are actually accurate.
- And if the record-keeping process really produces reliable records.
- And if the specific foundation witness is credible.
  - *See State v. Crawley*, 217 N.C. App. 509 (Dec. 20, 2011).

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The Special Case of Medical Records

- NC law provides a method for you to subpoena medical records and introduce them into evidence without in-person authentication.
- Pursuant to N.C.G.S. §§ 1A-1 Rule 45(c)(2) and 8-44.1, a medical records custodian need not appear in response to subpoena so long as the custodian delivers certified copies of the records requested to the judge's chambers.
- The records must be accompanied by a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business.
- Medical records can come in without further authentication if this procedure is followed.

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Photographs

- Photographs are admissible under N.C.G.S. § 8-97 as either illustrative or substantive evidence.
- Under the NC Pattern Jury Instructions, the jury may consider a "substantive" photograph itself as "evidence of facts it illustrates or shows."
- An "illustrative" photograph may only be considered by the jury to the extent it "illustrates and explains" the testimony of a witness and not for any other purpose. The testimony is evidence, not the photograph.

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Photos: Illustrative

- Photos for illustrative purposes need not be authenticated in the same way as photos for substantive purposes
  - *State v. Little*, 253 N.C. App. 159, 799 S.E.2d 427 (2017)
- Photos staged to be used as visual aids can be used to illustrate a witness's testimony
  - *State v. Moultry*, 246 N.C. App. 702, 784 S.E.2d 572 (2016)

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Facebook photo: Illustrative

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Facebook Photo: Illustrative

- *State v. Thompson*, 254 N.C. App. 220, 801 S.E.2d 689 (2017)
- OK for trial court to allow introduction of a printed Facebook photo of defendant flipping the *digitus impudicus* where victim had showed same photo to investigator to identify perpetrator and accomplice
  - The investigator's testimony was the evidence, not the photo
  - Trial court gave limiting instruction to that effect, and photo was otherwise authenticated properly

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Introducing Photo - Illustrative

1) Mark exhibit and show to opposing counsel
2) Approach witness and show exhibit
3) Ask whether the witness recognizes and is familiar with the image (person, place, object, etc.) portrayed in this photograph
4) How the witness recognizes what is shown in this photograph
5) Whether the photograph fairly and accurately represents the subject as the witness remembers it on the date in question
6) Would the photo assist you in illustrating your testimony?
7) Move for admission of the exhibit
8) Expect State's request for limiting instruction (illustrative purposes only)
9) Consider publishing photo to jury or placing on display screen during testimony

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Photographs as Substantive Evidence

- To introduce a photograph as substantive evidence, you must lay a foundation showing that the photograph establishes a relevant fact and that the photograph has not changed or been altered since it was taken.
- To lay such a foundation you need the witness to confirm:
  - First-hand knowledge of when and how the photo was taken, developed or displayed
  - The photograph accurately depicts its subject as it appeared at a relevant time
  - No methods were used during photography, processing or display to distort how the subject looks
  - The photograph has not been altered or changed since it was taken or processed

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Introducing Photo - Substantive

- Who took the picture?
- What kind of camera? Film? Digital?
- Does the picture accurately depict how the subject looked at the relevant time?
- How was the picture processed or stored?
- Any special methods used in processing or display to alter how the subject looks?
- Any alterations since the photo was first taken?

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Voice Recording

- Authentication of recording upheld where:
  - (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number;
  - (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number;
  - (3) a witness familiar with the defendant's voice identified the defendant as the caller;
  - (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and
  - (5) the caller discussed circumstances similar to those involved with the defendant's arrest.
    - *State v. Mobley,* 206 N.C. App. 285 (Aug. 3, 2010).

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Voice Recording 2

- Jail call to intimidate witness made using inmate's ID number
- Jail PayTel administrator testifies to the operation of the phone ID system
- Presented auto-generated spreadsheet showing date, time, duration, name and ID number associated with call
- Records kept in the ordinary course of business
- Not an abuse of discretion to introduce spreadsheet to identify caller, and to form a basis to publish a recording of the call to the judge
  - *State v. Steele*, 286 N.C. App. 136, 879 S.E.2d 387 (2022)

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Video Authentication

- Authentication upheld where:
  - Witness established that the recording process was reliable by testifying:
    - He was familiar with how video surveillance system worked, equipment was "industry standard," "in working order" on [the date in question], and the videos produced by the surveillance system contain safeguards to prevent tampering.
    - Witness established that the video introduced at trial was the same video produced by the recording process and was the same video that he saw on the digital video recorder display.
    - Because Defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody.
      - *State v. Snead,* 368 N.C. 811 (April 15, 2016)

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Don't allow a mere foundation witness to tell the fact finder what they are seeing!

- Don't blithely allow the witness to narrate the video.
- Unless the video is being used to illustrate what the witness saw with his own eyes, he doesn't get to tell the jury or judge what they are seeing.
- If the video "fairly and accurately depicts" what the witness actually saw, it can be introduced for illustrative purposes and the witness can narrate the video to illustrate her testimony.
  - *State v. Fleming*, 247 N.C. App. 812, 786 S.E.2d 760 (2016).

40

"Functioning Properly" Testimony

- If the witness can only testify that the video equipment was "functioning properly" at the time the video was made, she lacks first-hand knowledge and should not be allowed to narrate or explain the video, since it is the video that is evidence, not her testimony.
  - *State v. Snead*, 368 N.C. 811, 783 S.E.2d 733 (2016)
- If the witness is not an expert and does not have first-hand knowledge of the events shown, she is no better equipped than the jury or judge to decide what the video shows.
- State might try to qualify the witness as an expert to explain the video. Be ready to challenge under Rule 702.
  - *State v. Snead*, 368 N.C. 811, 783 S.E.2d 733 (2016)

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Proper functioning - surveillance

- Video can be authenticated as "the accurate product of an automated process" by a witness who can testify that the surveillance equipment was functioning properly, and the video introduced is the same video originally produced by that process. Can then be introduced as substantive evidence.
  - *State v. Jones*, 884 S.E.2d 782, 793 (N.C. Ct. App. 2023)

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Video Authentication Elements

- Video equipment functioning properly
  - Date and time stamps accurate
  - Other diagnostics show system working as intended
- System is monitored and maintained to prevent tampering and ensure functioning
- Video has not been edited or altered since the video custodian (store employee) first watched it
  - *See, e.g.*, *State v. Ross*, 249 N.C. App. 672, 792 S.E.2d 155 (2016)

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Cell phone video of surveillance video (Pt. 1)

- Officer took cell phone video of store surveillance video monitor.
- Officer testified the cell phone video accurately showed the contents of the video that he had seen at the store.
- The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he had observed on the day in question.

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Cell phone video of surveillance video (Pt. 2): Need foundation.

- Need foundation testimony about the type of recording equipment used to make the original surveillance video, its condition on the day in question, and its general reliability.
- Must ask witness if the video accurately depicts events he observed personally.
- Without this, proponent lacks proper foundation for introduction of the video as either illustrative or substantive evidence.
  - *State v. Moore*, 254 N.C. App. 544, 803 S.E.2d 196 (2017)

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Diagrams

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Diagrams

- A picture is worth a lot – especially if it illustrates your story of innocence.
- Can clarify and simplify complicated testimony
- Can help guide awkward or rambling witnesses
- Can serve as a symbol and reminder of your most important points

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Diagrams - Illustrative

1) Mark exhibit and show exhibit to opposing counsel
2) Approach witness and show exhibit
3) Ask if witness is familiar with the area that this diagram depicts. If so, how?
4) Whether this diagram/map appears to be an accurate depiction of the area as the witness recalls it on the date in question
5) Is the diagram to scale?
6) Whether the diagram/map would help the witness describe the area included in the diagram or any events that occurred during the day in question
7) Move to admit the diagram into evidence for illustrative purposes

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Internet Diagrams: Substantive

- If the diagram is created by a program such as Google Maps, consider asking the court to take judicial notice of the printout as substantive evidence.
- Potential substantive evidence includes layout of neighborhoods, distance between points, arrangement of highways, etc., under Rule of Evidence 201(b).
- Google Maps' diagrams have been recognized by federal appellate courts as a source containing information "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See *U.S. v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *Ke Chiang Dai v. Holder*, 455 Fed. Appx. 25, 26 n.1 (2d Cir. 2012); *Pahls v. Thomas*, 718 F.3d 1210 n.1 (10th Cir. 2012).

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Google maps not hearsay

- A tack placed by the Google Earth program and automatically labeled with GPS coordinates isn't hearsay. The hearsay rule applies only to out-of-court *statements*, and it defines a statement as "a *person's* oral assertion, written assertion, or nonverbal conduct." Fed. R. Evid. 801(a) (emphasis added). Here, the relevant assertion isn't made by a person; it's made by the Google Earth program…machine statements aren't hearsay.

  United States v. Lizarraga-Tirado, 789 F.3d 1107, 1109-10 (9th Cir. 2015)

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But Authentication required

- A machine might malfunction, produce inconsistent results or have been tampered with. But such concerns are addressed by the rules of authentication, not hearsay…A proponent must show that a machine is reliable and correctly calibrated, and that the data put into the machine (here, the GPS coordinates) is accurate.

  United States v. Lizarraga-Tirado, 789 F.3d 1107, 1110 (9th Cir. 2015)

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901(b)(4)– and After

- Allows low tech methods for authenticating high tech evidence
- Courts appear to be accepting "common sense" empirical ways to authenticate social media and electronic communications

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Text Messages - Substantive

- Courts will usually require circumstantial evidence tending to show who sent a text message, above and beyond evidence of the number the text was sent from.
- Rule of Evidence 901(b)(4) allows for the use of "distinctive characteristics and the like" to identify or authenticate writings, including "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

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Text Messages – circumstantial evidence

- Robbery case with multiple accomplices.
- A detective testified that he took pictures of text messages on the defendant's cell phone while searching the phone incident to arrest.
- The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them.
- Another accomplice, with whom the defendant was communicating in the text messages, also testified to the authenticity of the exhibit.
- Court rejected defendant's argument that authentication required testimony by phone company employees.
  - *State* v. *Gray*, 234 N.C. App. 197 (June 3, 2014).

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Circumstantial Foundation for Text Messages:

- Defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called the police;
- Eyewitness provided a license plate number and a description of the car that matched the defendant's car, and testified that the driver appeared to be using a cell phone;
- Morning after the crime, the same car was found parked at the defendant's home with some of the stolen property in the trunk;
- Phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone;
- Text message itself referenced a stolen item;
- By analyzing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a route tracking the phone from the area of the defendant's home to the area of the victim's home and back.
  - *State v. Wilkerson*, 223 N.C. App. 195, 733 S.E.2d 181 (2012)

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If you can avoid it, don't use the phone itself

- Consider printing out text messages
- Consider printing out pictures in color
- Consider burning a DVD of video evidence
  - You may want to hand up copies to the judge, and will also have to give copies to the State. Will also want a copy for the witness and for yourself.
  - Better to play a video on a laptop or overhead screen than to have all the parties crowded around a phone.
- In the chaotic reality of district court practice, this may not be possible.

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Text Message - Example

1) Mark phone (showing text) – or printout of text - as exhibit
2) Show phone to opposing counsel
3) Approach witness and show phone with text
4) Whose phone is this
5) Is the witness familiar with the text – if so, how?
6) What number the text came from
7) Whether the defendant recognizes the number – if so, how?
8) What if any other communication to or from this number during the time in question
9) Later communication – by phone or in person – in response to or referring to this text
10) Other distinctive characteristics of the text message (use of nicknames, reference to prior texts whose origin in verified, reference to private details only the alleged sender would likely know, threats or promises in the text later carried out by alleged sender, later admission by alleged sender, etc.)
11) Who witness believes sent the text
12) Move to admit into evidence
13) Remember – just need enough evidence to allow a rational finding that the text message was sent by the person alleged

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Not all dogs are this nice.

58

Social Media Screenshots: Foundation

- Pit bull kills man – voluntary manslaughter charge against owner
- State attempts to introduce MySpace screenshots
- Court finds screenshots properly authenticated where:
  - State presents evidence Defendant goes by "Flex", and page in question has name "Flexugod/7."
  - Page contained photos of the defendant and of the dog allegedly involved in the incident.
  - Link to a YouTube video depicting dog that killed victim.

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Screenshots: Circumstantial Foundation

- Circumstantial evidence was sufficient to support a prima facie showing that the MySpace page was the defendant's webpage.
- Court noted: "While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant".
  - *State v. Ford*, 245 N.C. App. 510, 782 S.E.2d 98 (2016)

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Facebook Screenshots

- The victim's testimony that she took the screenshots of her Facebook account was sufficient to authenticate the images as photographs.
- The victim's testimony of receiving letters from the defendant while he was in prison and distinctive phone calls from a blocked number after his release, together with evidence of the defendant's access to the daughter's Facebook account was sufficient to authenticate the comments as written statements potentially made by the defendant such that admission of the screenshots into evidence was proper.
  - *State v. Clemons*, 274 N.C. App. 401, 852 S.E.2d 671 (2020)

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Use Often!

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Contact Information:

- John.C.Donovan@nccourts.org
- (919) 636-8357

Thanks – please feel free to contact me with questions!

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Indigent Defense Services Policies and Procedures

Misdemeanor Defender Training

Thursday, November 16, 2023

1

Client/Representation Related Policies and Procedures

2

Client/Representation Related Policies and Procedures

- Scope of Representation
- Class 3 Misdemeanors
- Expert witnesses
- Immigration consults
- Interpreter services
- Transcripts

3

Scope of Representation Reminders

- Deferred prosecution or diversion (including GS 90-96)
  - Ensure that the case is dismissed if deferral or diversion is successful
  - Defend client against charge if deferral or diversion fails
- If client FTA, attorney will continue to represent on original charge and any FTA until
  - Dismissed w/leave; or
  - After 6 months after FTA, attorney may file a motion to withdraw.
- DWI – Obligation to seek limited driver's privilege
- Seized Property – Obligation to file petition for return of property, upon request of client
- DWLR
  - Address underlying issues if in same county
  - Give limited advice and guidance for underlying issues in other counties

4

Scope of Representation Reminders

- Prior convictions (in NC state court) that are subject to challenge (e.g., guilty plea w/out counsel) that may impact trial/sentencing in the assigned case
  - Same county – Challenge the prior conviction, including filing for MAR, if complex, may seek additional compensation or credits
  - Different county – Write Chief Dist. Court Judge or Sr. Resident Superior Court Judge in county of prior conviction(s), ask court to appoint local counsel to investigate OR potentially file MAR for additional compensation or credits
- For more see: https://www.ncids.org/resources/scope-of-representation-policy/

5

Class 3 Misdemeanors

- Defendant charged w Class 3 Misdemeanor ("C3M") shall not be exposed to active or suspended term of imprisonment unless the court finds defendant has 4 or more prior convictions.
- If <4 prior convictions and the defendant is not in custody, the Court should not appoint counsel regardless of the defendant's indigency and the case should proceed.
- If the Court finds evidence of four or more prior convictions at a later stage in the proceedings, the Court should either appoint counsel if the defendant is indigent and give counsel an appropriate amount of time to prepare a defense OR find that the defendant will not receive an active or suspended term of imprisonment.

6

C3M Exceptions – Statutory

- If the General Statutes otherwise provide that a Class 3 misdemeanor charge against a defendant who has three or fewer prior convictions is punishable by an active or suspended term of imprisonment.
  - Example: second or subsequent violation of G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol) or G.S. 20-138.2B (operating a school bus after consuming alcohol).
- If the General Statutes provide that an offense that would otherwise be a Class 3 misdemeanor under some circumstances is a higher class of misdemeanor under other circumstances, such as G.S. 20-28 (providing that driving while license revoked is a Class 1 misdemeanor if the person's license was originally revoked for an impaired driving revocation).

7

C3M Exceptions – Statutory

- G.S. 14-72.1 – Shoplifting
  - Shoplifting by concealment of goods, is a class 3 misdemeanor on first conviction but is (on first conviction) punishable by imprisonment ("term of imprisonment may be suspended only on condition that defendant perform community service for a term of at least 24 hours").
  - Entitled to counsel, payable by IDS.

8

C3M Exceptions – Limited Appearance

- Defendant is in custody at the time the Court determines entitlement to counsel
  - Court should consider modifying the pretrial detainee's conditions of release to allow them to be released pending trial without posting a secured bond, such as by imposing one of the conditions set forth in G.S. 15A-534(a)(1) through (a)(3)
  - Or, if the defendant is indigent, appoint counsel to represent the pretrial detainee during the period of pretrial confinement on the Class 3 misdemeanor charge to ensure that he or she has meaningful access to the courts.
- This type of appointment would constitute a limited appearance pursuant to G.S. 15A-141(3) and G.S. 15A-143. An attorney so appointed would have authority to represent the defendant both for purposes of modifying the conditions of release and in the underlying Class 3 misdemeanor case, but the appointment would end at the time of the defendant's release from custody.

9

C3M – No Right to Appointed Counsel

- If the Court appoints a private attorney, an attorney who is under contract with IDS, or a public defender office to represent a defendant who is charged with a Class 3 misdemeanor, and the Court has *not* found that the defendant has four or more prior convictions and defendant is not in pretrial custody

Then

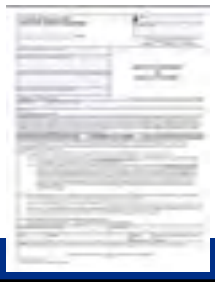
- The attorney should inform the Court that the appointment is not authorized by North Carolina law and/or file a motion to withdraw.

If the Court appoints a private attorney in violation of this policy, IDS shall not compensate that attorney for the case. If the Court appoints an attorney who is under contract with IDS or a public defender office in violation of this policy, IDS shall not award dispositional credit for the case.

10

C3M Fee Application Requirements

- Fee application for C3M must establish that client was entitled to appointed counsel.
- Attach a valid form CR-224 (Order of Assignment or Denial of Counsel) if submitting a fee app where the most serious charge is a C3M, including traffic.



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Misdemeanor Classification

- IDS website houses a list of misdemeanor offenses by class, statute, and offense title.
  - Misdemeanor Classification Under The Structured Sentencing Act (Offenses Committed After December 1, 2020).
- Policy memo on Class 3 Misdemeanors: Appointment and Payment of Counsel.

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Expert Witnesses

- Finding an expert witness
  - http://www/ncids.org
    - Defense Team
    - Get Help
    - Find and Expert
- Expert witness policies, forms, reimbursement rates
  - http://www/ncids.org
    - Defense Team
    - Get Paid
    - Experts and Investigators

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Expert Witnesses

- IDS Policy
- When representing an indigent client in a Non-Capital Criminal case (or Non-Criminal case)
  - Submit to the *judge*
    - AOC-G-309 Form *and*
    - Supporting motion
  - If permitted by case law, attorney for defendant may submit form and motion *ex parte*.

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Immigration Consult

- The United States Supreme Court, in Padilla v. Kentucky, 559 U.S. 356 (2010), held that the effective assistance of counsel may require advice about potential immigration consequences faced by a client.
- To assist counsel in meeting this requirement, IDS has contracted with an experienced immigration attorney. Thomas Fulghum will provide immigration consultations for counsel representing appointed clients.
- Request Form: IDS Website - Defense Team – Case Consultations - Immigration Consultations
- Make sure you have all the information required by the form and are submitting the consultation request at least 72 hours before you need the advice.
  - See UNC SOG Immigration Consequences Manual by Sejal Zota and John Rubin, part of the IDS Manual Series.

15

Interpreters

- The Office of Language Access Services provides spoken foreign language court interpreters for all Limited English Proficient (LEP) parties in interest in most court proceedings, child custody mediation, child planning conferences, and out-of-court communications on behalf of public defenders, assigned/appointed counsel, district attorneys and the GAL Program.
- To request in-court interpreter:
  - Complete online form if Language Other Than Spanish (LOTS)
- To request out-of-court interpreter:
  - For Spanish: contact interpreter directly from the Registry
  - For LOTS: complete online form

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Interpreters

- To request American Sign Language (ASL) interpreter or CART captioning:
  - Complete online form through AOC Disability Access Accommodation Form
- Note: Disability Access Accommodation Form can be used to request other accommodations as well

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Internal Policies and Procedures

18

Internal Policies and Procedures

- Mileage and travel reimbursements
- Training, publications, and resources
- Contacts

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Travel and Expense Reimbursement

Governed by G.S. 138-6

https://ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_138/GS_138-6.pdf

Public Defender Expense Reimbursement (Mileage, rates, procedures)

Location:

https://www.ncids.org/ids-defenders/for-public-defenders/

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Training, Publications and Resources

- Non-Capital Criminal and Non-Criminal Cases at Trial Level – Compensation
- IDS Motions Bank (Adult Criminal)
- UNC SOG Defender Training Resources
- IDS and UNC SOG Training and CLE Resources

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IDS - Who to Contact

- Financial
  - Chad Boykin
    - 919-890-2128
    - Chadwick.F.Boykin@nccourts.org
  - Aaron Gallagher
    - 919-890-1660
    - Aaron.M.Gallagher@nccourts.org
- Regional Defenders
  - Tucker Charns
    - 919-354-7263
    - Tucker.Charns@nccourts.org
  - Kevin Boxberger
    - 919-354-7200
    - Kevin.Boxberger@nccourts.org
- Defender Policy & Planning Attorney
  - Becky Whitaker
    - (919) 354-7241
    - Rebecca.B.Whitaker2@nccourts.org

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Thank You

Becky Whitaker, Defender Policy & Planning Attorney
www.ncids.org

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North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

Impeachment

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I. Some General Principles for Impeachment

A. Plan Your Impeachment

1. Make sure you have done a complete investigation and have obtained all discovery and Brady/Kyles materials before trial. Remember -- the U.S. Supreme Court has explicitly held that anything in the State's possession that can be used to impeach a State's witness must be disclosed under Brady. This applies even if the impeachment material does not in any way exculpate the defendant. As long as it can be used to impeach, contradict, or discredit a prosecution witness, it is Brady material.

2. Before the witness takes the stand, you should know what information you have about the witness's convictions, bad acts. and bad character that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

3. Before the witness takes the stand, you should know what information you have about the witness's biases and interests in the case that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

4. Although you cannot know in advance what the witness will say on direct, you must know in advance exactly what prior testimony and statements the witness has made. Make sure you are completely familiar with all of these prior statements, so if the witness testifies to something inconsistent, you are ready to impeach.

5. Be familiar with your theory of defense. That way you will know if you should be doing an impeachment. If the witness testifies to something inconsistent with a prior statement, only use the prior statement to impeach if the prior statement is more favorable to your theory of defense than the statement the witness just made on direct.

B. Never Ask an Impeaching Question That Calls For an Opinion or Explanation

C. Keep Your Questions Short and Simple

1. No multi-sentence questions.

2. No questions with a long preface or "wind up."

3. Use normal, clear language – no lawyer talk, no cop talk.

4. Don't be a wise ass. Let the impeachment material stand for itself.

E. The Ethics of Cross-Examination

1. You must have a good faith basis for every impeaching question you ask.
2. It is unethical to insert innuendo based on untrue facts.

3. It is unethical to ask accusatory questions for the purpose of embarrassing or rattling a witness if the answer to the question is irrelevant to the case at hand.

EX: The witness has a son who is in prison for child abuse. Unless this is somehow relevant to your case, it is improper to cross-examine the witness about this just for the purpose of embarrassing him or getting him to lose his temper on the stand.

F. Stop When You Are Done

1. Don't ask one too many questions.

2. If the witness refuses to answer the impeaching question, don't rush in with another question. Every moment of silence just emphasizes that the witness is stuck.

3. Resist the urge to ask the conclusory question after the witness has been impeached. Save the conclusions about the witness for your closing argument.

II. Impeachment With Prior Inconsistent Statements

A. Know the Witness's Prior Statements Inside Out Before You Reach Trial

B. Listen Carefully to the Witness's Answers on Direct. If you Don't Remember What He Said on Direct, You Won't Know If He Can Be Impeached

C. There is a formula for impeaching someone with a prior inconsistent statement. If you follow the simple formula in asking impeachment questions, you can't go wrong.

D. The Formula For Impeachment By Prior Inconsistent Statement

1. Get the witness to repeat the statement he just made at trial

2. Ask the witness if he made a prior statement (Don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute)

3. Mark the prior statement for identification (don't try to introduce it into evidence yet).

4. Confront the witness with the substance of the prior statement and ask the witness if he made that statement.

a. If the witness admits making the prior statement, stop there. You have established the inconsistency and are not allowed to actually introduce the prior statement in evidence – the inconsistency is already before the jury. [Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.]

b. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Then read it to the jury or have the witness read it aloud to the jury. [Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.]

5. *Do NOT give the witness a chance to explain the inconsistency.*

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. Q: Did you testify on direct examination that the light was red?
   A: Yes.

2. Q: Do you remember testifying at a preliminary hearing on March 15th of this year?
   A: Yes.

Defense counsel then marks the relevant lines of the preliminary hearing for identification.

3. Q: And at that preliminary hearing do you remember being asked the following question and giving the following answer? "Question: 'What color was the light?' Answer: 'Green'"
   A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency, and is Impeached

OR

A: No.

Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence Then Read Them to the Jury, or Have the Witness Read Them to the Jury

NOTE: Do not offer the entire transcript into evidence:

a. Everything except the inconsistent statement is both irrelevant and hearsay.
b. It probably contains a lot of other stuff that you don't want the jury seeing.

DIRECT EXAMINATION

New Misdemeanor Training

Direct and Cross Similarities

Witnesses in *State v. Clements*

Chapters in *State v. Clements*

Open-ended but purposeful questioning

Tools for bringing questions and scenes to life

Closing Arguments

KEVIN BOXBERGER
REGIONAL DEFENDER, IDS

1

Overview

- What is a closing argument and what is its purpose?
- When do you give a closing argument?
- How much time do you get?
- Contents of an effective closing argument?
- Dos and Don'ts

2

What is it?

- "the lawyer's final opportunity in a trial to tell the judge and/or jury why they should win the case." *Cornell Law School Legal Information Institute*
- Every defendant has a constitutional right under the Sixth Amendment to make a closing argument. *Herring v. New York*, 422 U.S. 853 (1975). The judge cannot deny that right no matter how strong the prosecution's case may be. *Id*.

3

slido

What is the purpose of a closing argument?

ⓘ Start presenting to display the poll results on this slide.

4

Purpose

- "provide the jury with a summation of the evidence, which in turn 'serves to sharpen and clarify the issues for resolution by the trier of fact' and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127 (2002) (citations omitted) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).
- "explain to the jury what it has to decide and what evidence is relevant to its decision." *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000) "to assist th*United States v. Morris*e jury in analyzing, evaluating, and applying the evidence.", 568 F.2d 396, 401 (5th Cir. 1978)

5

slido

When do we give a closing argument?

ⓘ Start presenting to display the poll results on this slide.

6

When do we give a closing argument?

- In jury trials, after the charge conference.
- In bench trials, after the close of all the evidence and judge denies your motion to dismiss for insufficient evidence.

7

Duration

- Length, number, and order of arguments allotted to the parties are governed by **G.S. 7A-97. G.S. 15A-1230(b)**
- Time Limits: judge may limit time, but
  - "not less than **one hour** on each side" in **misdemeanor** cases and
  - "**not less than two hours** on each side" in **noncapital felony** cases.

** On motion of a party, the trial judge, in his or her discretion, may allow additional time if the interests of justice require it.

8

Contents of an Effective Closing Argument

9

slido

What should you include in a closing argument?

ⓘ Start presenting to display the poll results on this slide.

10

Hook

- Like an opening scene of a movie
- Word or phrase that will catch the jury's attention
- Keep the jury engaged

11

Themes and Labels

- Themes are emotional anchors and images that summarizes your position in the case.
  - Must be memorable
  - Weave and repeat into all aspects of the trial (e.g., opening, direct, cross)
  - Single word or short phrase
- Labels are identifiers for the people and events involved in the trial
  - Defendant v. Mr. Jones
  - Victim v. Mr. Jones
  - Identified v matches the description of

12

Story of Innocence

- The criminal incident never happened.
- The criminal incident happened, but I didn't do it.
- The incident happened, I did it, but it wasn't a crime.
- The criminal incident happened, I did it, it was a crime, but not the crime charged.
- The criminal incident happened, I did it, it was the crime charged, but I'm not responsible.
- The criminal incident happened, I did it, it was the crime charged, I'm responsible, but who cares?

13

Telling the Story

- Craft the story that shows why your client is innocent.
- Identify three main characters
  - Humanize your client
  - Have a hero and a villain
- Determine when and where the story of innocence starts
- Identify three main scenes

14

Telling the Story (cont'd)

- Use demonstrative evidence/visual aids
- Use trilogies ("Rule of threes")
- Use present tense
- Give the jury a reason to rule in your client's favor
- Be believable

15

Highlight Weakness in State's Case

- Point to specific evidence introduced at trial
  - Testimony from witnesses
  - Lack of testimony from witnesses
  - Credibility
- Reiterate themes and labels

16

Address Weaknesses in Your Case

- Gives you credibility
- Shore up concerns the jury may have about your story of innocence
- Okay not to address weaknesses, when appropriate

17

Dos and Don'ts

The whole case as well of law as of fact may be argued to the jury. G.S. 7A-97.

18

Don'ts

- Pursuant to G.S. 15A-1230(a):
  - become abusive,
  - inject personal experiences,
  - express personal belief as to the truth or falsity of the evidence
  - express personal belief as to the guilt or innocence of the defendant,
  - make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.
- Reveal legal rulings made by the trial judge outside the presence of the jury. *State v. Allen*, 353 N.C. 504 (2001).

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Dos

- Argue any position or conclusion with respect to a matter in issue based on his or her analysis of the evidence. G.S. 15A-1230.
- Argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence. *State v. Forte*, 360 N.C. 427 (2006).
- State the law applicable to the case. G.S. 7A-97; *State v. Monk*, 286 N.C. 509 (1975)
- Comment on the demeanor of witnesses before the jury. *State v. Cummings*, 323 N.C. 181 (1988), vacated on other grounds, 494 U.S. 1021 (1990).

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Dos

- Argue that a witness is credible or incredible. See State v. Augustine, 359 N.C. 709 (2005); *State v. Golphin*, 352 N.C. 364 (2000).
- Draw the jury's attention to the opposing party's failure to produce certain available witnesses (other than the defendant) or introduce particular evidence. *State v. Walters*, 357 N.C. 68 (2003)

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22

State v. Big Bad Wolf

1

Leading Questions

- Rule 611(c) "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony."

2

Hearsay

- Rule 801(c) " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."
- Rule 802: "Hearsay is not admissible except as provided by statute or these rules."

3

Lack of Personal Knowledge

- Rule 602: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

4

Speculation

- Rule 602 "Lack of Personal Knowledge"
- Rule 701: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, and (b) is helpful to a clear understanding of his testimony or determination of a fact in issue."

5

You can lead on cross

- Rule 611 (c): "Ordinarily leading questions should be allowed on cross examination."

6

Impeachment

- A prior statement that is inconsistent with the witnesses testimony may be used to impeach that witness.

7

Right to confrontation

- Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."
- Crawford v. Washington, 541 U.S. 36 (2004)

8

Other crimes evidence

- Rule 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."
- Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

9

Privileges

- Husband-wife (communications) N.C Gen. Stat. 8-57
- Doctor-patient 8-53
- Clergyman-communicants 8-53.2
- Psychologist-patient 8-53.3
- Social worker privilege 8-53.7
- Optometrist-patient privilege 8-53.9
- Attorney client privilege

10

Polygraphs

- The results of polygraph examinations are strictly forbidden to be placed into evidence.

11

Rule 702

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

12

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

13

Opinion on truth telling

- Improper opinion evidence under Rule 701 and improper expert evidence under Rule 702.

14

Evidence of prior crimes for impeachment purposes subject to limitations

- Rule 609 "General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

15

Can't ask about bad, but not dishonest, misconduct

- Rule 608(b) "Specific instances of conduct.--Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

16

Can't ask a witness about their religious beliefs

- Rule 610: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias."

17

Corroboration

- In North Carolina, prior consistent statements of the witness may be introduced to corroborate that witness's testimony.

18

Third party guilt evidence

The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. Under Rule 401 such evidence must tend *both* to implicate another *and* [to] be inconsistent with the guilt of the defendant.

State v. Cotton, 318 N.C. 663, 351 S.E.2d. 277 (1987)

19

Out of court statements not hearsay if not being offered for truth of the matter asserted.

20

Hearsay exception: statement against interest

- Rule 804(b) ( ) "(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- Statement Against Interest.--A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."

21

Class A1

Assault by Pointing Gun (14-34)
Assault Inflicting Serious Injury (14-33(c)(1))
Assault on a Child Under 12 (14-33(c)(3))
Assault on a Female (14-33(c)(2))
Assault on Firefighter / EMS (14-34.6) F
Assault on a Govt Official (14-33(c)(4)) F
*Assault on Handicapped Person (14-32.1)
Assault on School Personnel (14-33(c)(6)) F
Assault with a Deadly Weapon (14-33(c)(1))
Assault and pers rel in presence of minor (14-33(d))
Child Abuse (14-318.2) F
Food Stamp Fraud $100-$500 (108A-53.1)
Ind Lib by School Personnel, not Teacher (14-202.4)
Interfering with Emergency Comm (14-286.2)
Patient Abuse (14-32.2) F
@Secret Peeping #2 or w/photo device (14-202) F
Sex with Student by School, not Teacher (14-27.7)
*Sexual Battery (14-27.5A)
*Stalking *(14-277.3) Felony if prior or while 50B/C
Unfair Trade of Cigarettes (14-401.18)
Violation of 50B Order (50B-4.1)

Class 1

Alcohol offense, not otherwise specified (18B-102(b))
Altering Serial Number (14-160.1)
Assault on Sports Official (14-33)
Blackmail (14-118)
Breaking or Entering (14-54) F
B&E Coin Operated Machine (14-56.1) F
Communicating Threats (14-277.1)
Contrib to Delinq of Juvenile (14-316.1)
Criminal Domestic Trespass (14-134.3) F
Damaging Computers < $100 (14-455) F
Death by Vehicle (20-141.4) F
Disorderly Conduct #2 (14-288.4) F
DWLR (20-28)
Escape by Misdemeanor (148-45) F
Ethnic Intimidation (14-401.14)
Failure to File State Tax Return (105-236) F
Failure to Stop for School Bus (20-217)
Failure to Yield Emerg Vehicle w/ Dam (20-156-57) F
False Imprisonment (CL)
Food Stamp Fraud < $100 (108A-53) F
Forgery (CL)
Going Armed to the Terror (CL)
Hit and Run w/ Prop Dam (20-166) F
Inciting a Riot (14-288.2) F
Injury to Personal Prop > $200 (14-160)
Injury to Real Prop (14-127)
Injury to Trees, Crops, Lands (14-128)
Larceny $1000 or Less (14-72) F
Loitering for Prostitution (14-204.1)
Obstruction of Justice (CL)
Passing a Stopped School Bus (20-217) F
Picketing Courthouse (14-225.1)
Poss Weapon on School Grounds (14-269.2) F
Possession of Drug Paraphernalia (90-113.22)
Possession of M/J > ½ oz. (90-95) F
Possession of Stolen Goods (14-72) F
Prearranged Racing (20-141.3)
Prostitution / Maintaining Place (14-204 & 208)
Receiving Stolen Goods (14-72) F
Secret Peeping (14-202) F
Shoplifting #3 w/in 5 yrs (14-72.1) F
Speeding to Elude (20-141.5) F
Soliciting for Prostitution (14-204-208) F
Toxic Fumes Violations (90-113.10-.13)
Unauthorized Use of MV (14-72.2) F
Unlawful Assembly (CL)
Welfare Fraud (108A-39) F
Worthless Check $2000 or Less 4th Conv (14-107) F
Worthless Check with Closed Acct (14-107(d)(4)) F

Class 2

Adult Establishment #2 (14-202.11-.12)
Carrying Concealed Weapon (14-269) F
Cyberstalking (14-196.3)
Defacing Public Property (14-132)
Defrauding Innkeeper (14-110)
Disorderly Conduct (14-288.4) F
Driving After Consuming <21 (20-138.3)
Driving w/ Open Cont Alcohol in System #2 (20-138.7)
Failure to Disperse (14-288.5)
Failure to Notify DMV of Address Change (20-7.1)
Failure to Work After Being Pd (14-104)
Failure to Return Rental Prop (14-167) F
Fail to Yield / Stop Emerg Vehicle (20-156-57) F
Filing False Police Report (14-225)
Fornication / Adultery (14-184)
Furnishing False Information (20-29)
Gambling (14-291-292)
Harassing Phone Calls (14-196)
Hit and Run Failure to Notify (20-166.1)
Indecent Exposure (14-190.9) F
Injury to Personal Prop $200 or Less (14-160)
Littering #2 (14-399) F
Lottery Viol (14-289-291)
MV Law, not otherwise specified (20-176)
NOL (20-35)
Obtaining Prop by WC (14-106)
Possession of Handgun by Minor (14-269.7)
Reckless Driving (20-140)
RDO (14-223)
Scalping (14-344)
Setting Fire to Woods (14-137)
Shoplifting #2 w/in 3 yrs (14-72.1) F
Simple Assault / Battery / Affray (14-33)
Soliciting for CAN (CL)
Tampering with MV (20-107)
Trespass, 1st degree (14-159.12)
Willful Racing (20-141)
Worthless Check $2000 or Less (14-107) F

Class 3

Adult Establishment Viol (14-202.11-.12)
Driving Comm Vehicle after Cons (20-138.2A)
Driving w/ OC Alcohol in System (20-138.7)
Fishing w/o License (133-271)
Hunting w/o License (133-270.2)
Intoxicated and Disruptive (14-444)
Littering (14-399) F
Permitting Bitch at Large (67-2)
Possession of M/J < ½ oz. (90-95) F
Shoplifting (14-72.1) F
Solicitation to Commit Mis Assault (CL)
Solicitation to Commit Obst of Justice (CL)
Trespass, 2d degree (14-159.13)
Unsealed Wn / Lqr in Pass Area (18B-401(a))
Using Profane Lang on Rdwy (14-197)
Violation of City or County Ord (14-4)

Infraction

Violation of Ord re: operation of vehicles (14-4(b))

KEY
*Subject to DNA Sample (15A-266.4)
@ Potential Sex Offender Registry (14-202)
F = possible felony enhancement
DV / Knowing female is pregnant is 1 class higher. If A1, becomes class I felony (14-18.2)
50B viol w/3 prior = Class H felony

Conspiracy – 1 class lower Attempt – 1 class lower

Multiple Prior Convictions §15A-1340.21(d) If an offender is convicted of more than one offense in a single session of District Court, or in a single week of Superior Court or of a court in another jurisdiction, only one of the convictions may be used to determine prior conviction level.

Multiple Convictions §15A-1340.22(a) If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1 or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

Concurrent and consecutive terms of imprisonment §15A-1354(a) If not specified or not required by statute to run consecutively, sentences shall run concurrently.

Prior Record Level for Felony Sentencing §15A-1340.14(b)(5) For each prior misdemeanor conviction as defined in this subsection, one point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (GS 20-138.1), impaired driving in a commercial vehicle (GS 20-138.2) and misdemeanor death by MV (GS 20-141.4(a2)) but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.

Sentences of Imprisonment §15A-1351(a) Split sentence may not exceed ¼ of the maximum sentence of imprisonment imposed for the offense. The judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation.

Standard Probation Lengths §15A-1343.2 Community Punishment 6-18months / Intermediate Punishment 12-24 months

CLASS	I – No Priors	II – One to Four Priors	III – 5+ Priors
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A

INTERMEDIATE PUNISHMENTS

§15A-1340.11
Special Probation / Split Sentence
Residential Program
Electronic House Arrest
Intensive Supervised Probation
Day Reporting Center
Drug Treatment Court Program

FINES §15A-1340.23(b)
Unless otherwise specified:
Class A1 = discretion of court
Class 1 – discretion of court
Class 2 - $1000

Revised 3/11

New Misdemeanor Defender
Training Fact Problem

State v. Ronny Clements: misdemeanor larceny of beer from Quickie Mart

1) Report of Alice Tubbs, Quickie Mart Clerk

Tubbs is a 60 year-old African American woman who has been working at the Quickie Mart on South Blount Street in downtown Raleigh for two years. On July 11, she was working as the cashier at the Quickie Mart at 10:00pm, when five teenage males came in. Two of them were black and three were white. Some of them had on baggy pants and necklaces and they were "cutting up". She had the feeling they were up to no good and started watching them using the mirrors in the corners of the store. They spread out in different aisles, cracking jokes and laughing loudly while they handled merchandise.

Two of the white males went to the beer cooler and Tubbs focused on them because they did not seem of age to buy alcohol. One was wearing a black T-shirt with an eagle on it and no hat. His hair was dark but he had long hair in the back dyed blonde, which stood out to Tubbs as unusual. The other was wearing an oversized white T-shirt, a backpack, and a Durham Bulls cap. The one in the cap looked shorter (between 5'6" and 5'9") and thinner than the male in the black T-shirt, who was at least 6 feet tall and muscular. The one in the cap started to walk in the direction of the store exit, but the taller male yanked him by the backpack, pulled off the backpack, and stuffed it in the smaller male's hands. Ms. Tubbs could not hear what they were saying, except that the taller man addressed the other, "Boy!" in a stern voice. The one in the cap then unzipped his backpack and held it open while the taller male took a case of Pabst Blue Ribbon beer from the cooler, put it in the backpack, and zipped it. The smaller male in the cap put the backpack on and they both started walking towards the checkout counter. The other three males also quickly approached the checkout counter. One of them asked Ms. Tubbs, "How much is this?" holding up a box of candy, while the two males who had taken the beer walked by the checkout counter and towards the store exit. They were about five feet from the exit when Ms. Tubbs said in a loud voice, "You need to pay for what's in that backpack." They all started to run except the young man in the Bulls cap who froze. Someone yelled, "Boy, you better run!" and pulled him by his backpack strap out of the store. All five then took off running down the block.

Ms. Tubbs called 911 and reported the theft. Officer Davis arrived and learned that the store's video camera was not functional. Ms. Tubbs said the owner of the Quickie Mart was so cheap and mean that he would sooner see his employees get killed than pay a dime for proper security. She had called him to report the theft right after she called the police and he had berated her for causing the store to lose money. She had had it with that man and was going to quit. Now that she thought about it, those kids had done her a favor and she wished they had gotten away with more merchandise.

2) Report of Officer Davis

I knew from Ms. Tubbs' description that the male in the black T-shirt with the eagle on it was Harland White. White has short, dark hair with a long "rat tail" peroxided white, and a muscular build from his high school football days. I have dealt with White many times before. In fact, I asked him some questions about break-ins in the neighborhood earlier this week when I ran into him on Fayetteville Street. I thought he might want to provide a little cooperation since he has a court date coming up for misdemeanor B & E and he already has one on his record.

The next day, July 12, I went to White's home and told him he had been caught on video tape stealing beer from the Quickie Mart. He said, "Man, that was all Ronny Clements. You can't pin that shit on me. I was just along for the ride and had no idea that boy was going to pull that stunt. You know he's joined the family business, dealing smack with his brother Jordie. They are messed up." We discussed the possibility of a PJC for White's pending charge in exchange for his honest testimony against Ronny Clements.

That afternoon, I interviewed Ronny Clements at his apartment building. I told him that he was caught on video tape stealing beer from the Quickie Mart and that Harland White was prepared to testify against him. He said, "Harland White? That guy has always had it in for me. He used to give Jim Sharp and me wedgies in the locker room in high school. He beat the hell out of Jim too when Jim told on him. Broke his drum for marching band too." Ronny denied involvement in the larceny but did not account for his whereabouts, saying, "I know my rights. I don't have to talk to you. This is BS."

Consistent with Ms. Tubbs' description, Ronny Clements was a young, white male, 5'8", and slight of build, wearing a silver chain with a cross on it and a Durham Bulls cap. I obtained warrants for arrest for misdemeanor larceny for Ronny Clements and Harland White.

3) Interview of Client and Family Members

a) Your client, Ronny Clements, a 19 year-old white man, is 5'8", weighs 135 lbs., wears his hair in a "mohawk", and often wears a necklace with a big silver cross on it. He lives in an apartment in downtown Raleigh with his mother and brother. He says that he has two prior juvenile delinquency adjudications for misdemeanor larceny, and one prior adult misdemeanor conviction for possessing marijuana.

Ronny says that he was not at the Quickie Mart on the night of July 11. He was home with his 25 year-old brother, Jordan Clements, from 8:00pm on. (His mother was working an extra shift and was gone all day, arriving home after midnight.) When asked what he and Jordan were doing at home that night, Ronny initially says "Nothing, hanging out," but when pressed, admits he was helping his brother package marijuana and make small sales to clients who dropped by. He only knows the clients by their first names or street names, and does not know how to contact them.

b) Jordan Clements has a record for drug offenses, including two felony convictions of sale of cocaine for which he recently served 12 months in prison. He also pled guilty to forging checks belonging to an elderly neighbor in 2012. Jordan confirms that Ronny was at home with him on

the night of July 11, and remembers that they were watching the Cubs/Cardinals game on TV. Other than that, he claims he does not remember what they were doing or whether anyone visited the apartment.

c) Mrs. Clements says that Ronny graduated from high school, but academics were a struggle for him because he has a learning disability. She had to take time off from work for school meetings about his IEP. She wishes that he would attend college but so far he does not show any interest. She is worried that he is spending too much time with his older brother Jordan, who has had drug trouble and may not be a good influence. Ronny's father died of cancer when Ronny was six years-old, which was very hard on him. He has always been a small boy, and she thinks his size combined with not having a father around made him a target for bullies. He is an obedient son who takes pride in cleaning and maintaining her car.

Cross and Direct Workshop Assignments

1. Decide on a theory of defense.

2. Prepare a direct examination that advances your theory of defense through one of the following witnesses:

- Your client, Ronny Clements
- Your client's brother, Jordan Clements
- Your client's mother, Mrs. Clements
- Jim Sharp

3. Prepare a cross examination that advances your theory of defense through one of the following witnesses:

- Alice Tubbs, the store clerk
- Harland White

The Basics of Cross-Examination

The Purpose of Cross-Examination:
Obtain FACTS that will be used in closing argument (*as opposed to making a closing argument during cross-examination*). [There is crucial difference between eliciting facts from a witness and making an argument to a jury based upon those facts.]

I. Preparation

1) List all of the facts you need from each witness.

2) Organize, by topic, how you want to elicit (or present) the facts. Use one page for each topic or major fact (i.e., the "chapter" method).

3) On each page, list all of the predicate (or foundation) questions required to get the fact or cover the topic.

II. Courtroom Technique

1) Never ask a question when you do not know the answer.

2) Always ask leading questions.

3) Always ask one-fact questions.

DIRECT EXAMINATION WORKSHOP

This workshop will work the same as the cross workshop and you will use the same fact pattern. The potential witnesses for direct examination are:

- Client, Ronny Clements
- Client's brother, Jordan Clements
- Client's mother, Mrs. Clements
- Jim Sharp

They will have to decide which two witnesses would most advance their theory of defense. If they pick the genre that the client was not the guy in the store/alibi, they will most likely call Ronny and his brother Jordan. Discuss whether they run the risk that information about the drug dealing may come out. How might they deal with that concern? If they pick the genre that the client was there at the store but was coerced/had no criminal intent, they will most likely call Mrs. Clements and Jim Sharp on direct.

Susan's "Three P's of Direct Examination" follow will give you an idea of the skills you should focus on in the workshop. There just may be more material to cover than there is for cross. If you find that to be the case, you can ask the participant to limit their direct to key scenes or portions they want to cover.

THE THREE P'S OF DIRECT EXAMINATION

1. PLAYERS

   Select witnesses who advance your theory of the case

2. PREPARATION

   a. Think about your questions

      i. Open-ended

      - Who
      - What
      - When
      - Where
      - How
      - Why
      - Tell us about/Describe

      ii. Specific

   i. Prepare and practice with the witness

3. PRODUCTION

   a. Remember primacy & recency

   b. Use "chapters" and "signposts"

   c. Elicit factual details

   d. Tap into your frustrated inner actor

   e. Have a conversation with the witness

   f. LISTEN

Charge: **Resist Officer**
Name: Rhonda/Raymond Jones
Age: 17

Facts:

Client was the back seat passenger in a stolen car that was pulled over by police. Client ran from police along with other passengers so was charged with resist/delay/obstruct.

Additional Charge Information: (known to all parties)

Client has a pending charge of disorderly conduct for fighting in school and is on probation for a simple assault that was reduced from assault on a government official (teacher).

Public Defender Information: (known to Public Defender only)

Client's thinking seems delusional to you. For example, Client thinks that the police have been following him/her. However, you got an ex parte order for funds and had Client evaluated by an expert who found that Client is capable of proceeding to trial. The expert said Client is impulsive and vulnerable to peer pressure. You have learned that Client has been prescribed Ritalin for ADHD, but Client often forgets to take it. Client's parents say they are too busy with work to supervise Client and Client is old enough to take care of self. Client is getting stuck in a revolving door with the criminal justice system at age 17. The probation officer says Client is regularly attending meetings, and as far as the officer knows, Client continues to meet with a psychiatrist and take medications, which are conditions of probation.

Client did not know the car was stolen. The other passengers were friends and Client was going for a ride with them when Client was supposed to be at a school basketball game. Client ran because the others did. You have investigated the pending disorderly conduct charge and it looks like the State has a strong case.

Factual Background:

Charge: **Disorderly Conduct and Carrying a Concealed Weapon.**
Name: Sylvester/ Sylvia Smith
Age: 39

Facts:

Defendant became loud at bar after several drinks. The bartender refused to serve him and told him to leave. Client put money down on counter and refused to leave. The police were called. While patting Client down, they discovered the box cutter in his jacket pocket.

Additional Charge Information: (known to all parties)

The warrant does not state the exact words used in the disorderly conduct statute.

Public Defender Information: (known to Public Defender only)

The Box cutter was less than three inches long. Client works at a labor force and uses a box cutter on the job. He was coming from work and stopped for a drink. After several drinks, Client became loud. The bartender refused to serve him and told him to leave. Client put money down on counter and refused to leave. The police were called. While patting Client down, they discovered the box cutter in his jacket pocket.

Client spent a number of years in the local shelters and living on the streets. Client was mugged and beaten badly while living on the streets. Client had two years of college, but dropped out when he became homeless.

Client has pending felony that s/he thinks should be misdemeanor. Client has spoken about this to other attorney, Client is alcoholic with several convictions for driving while impaired, Client doesn't want to go to jail.

Charge: **Assault on a Female**
Name: John Doe
Age: 28

Facts:

Domestic violence case where argument happened after defendant and girlfriend had been drinking in a bar. Defendant refused to leave girlfriend's residence. PW called police and said Client hit her. Client says he didn't hit her and just passed out on couch.

Additional Charge Information: (known to all parties)

Client has at least three other misdemeanors, plus two prior AOF convictions against his girlfriend. The District Attorney could indict this case for habitual misdemeanor assault.

Public Defender Information: (known to Public Defender only)

Prosecuting witness is Client's longtime girlfriend. On this occasion they were both drinking at a bar and then went back to her place. An argument started over Client seeing another woman and PW ordered him to leave. Client says he refused to leave, fell asleep on the couch, and woke up to police pointing a gun at him.

Client has spent 25 days in jail and wants credit for time served. Client is not interested in a trial, but says he is innocent. Client has previously been on probation, but was terminated unsuccessfully. Client has heard about some program for DV offenders and would be willing to go only if it got him out of jail.

Client has been charged with three previous AOF; two with the same victim who refused to show up on either occasion. There was a pending DV order, but it had been rescinded by PW 1 week before date of offense.

Client says he can stay with PW if released from custody and has no other stable residence.

Charge: **DWI**
Name: Donald/Donna Drake
Age: 45

Facts

Defendant charged with DWI and DWLR. Stopped for expired registration, but not charged. Upon stopping him, the officer notice strong odor of alcohol and red glassy eyes. The client refused to perform any field sobriety tests but was unsteady on his feet and not speaking clearly. He refused to blow in the intoximeter.

Additional Charge Information: (known to all parties)

Client was stopped for expired registration, but was not charged. He was also charged with driving while license revoked. The license was revoked for failing to pay for a seat belt infraction.

Public Defender Information: (known to Public Defender only)

Client has been to court on two previous occasions and has gotten a continuance to hire private counsel. At the last appearance, the judge appointed the Public Defender. Client never made an appointment because s/he said would come to court with private counsel. However, Client has not managed to hire counsel yet on this third setting. The judge has denied the Assistant Public Defender's motion to continue and says the case will be tried next (within the hour). Client doesn't want to talk about the case because s/he's going to hire a "real lawyer."

Client is adamant about pleading not guilty. Client has talked to "real" lawyer who said case is a winner. Client must keep license because of work. Client was a manager at First United Bank, but was fired because of a dispute with superior.

Charge: **Possession of Drug Paraphernalia**
Name: Larry/Lana Lane
Age: 19

Facts:

Defendant charged with crack pipe found on ground near defendant when police approached to discuss use of drugs. Police approached group of people on corner who appeared to be engaging in drug activity. Searched defendant found no drugs. Found crack pipe next to defendant.

Additional Charge Information: (known to all parties)

Defendant already on probation for paraphernalia and misdemeanor marijuana charge.
Crack pipe was not tested for drugs.

Public Defender Information: (known to Public Defender only)

Client says the police set him/her up. Client is known as in that area as "Baby L."
Client was with friends on the corner and police pulled up. Client says police know him/her from neighborhood and are always harassing. Client says after police came up they just started searching him/her. Client swears the police found nothing on Client, but they saw a crack pipe on the ground and are trying to blame it on Client. Client says crack heads are always hanging out on that corner, and some people may have been smoking crack, but not him/her. S/he had problems with drugs in the pass, but is all through with that now.

Client says s/he never noticed the pipe on the ground because so many others were around. Client says some people walked away when the police pulled up but there were at least four others present when Client was patted down. Client doesn't know names of any of the others.

Client denies any previous convictions.

Charge: **Simple Affray**
Name: Sydney Slurrey
Age: 39

Facts:

Defendant was at a Panther's Game and a fight broke out. More than 10 people were arrested.

Additional Charge Information: (known to all parties)

Some of the other defendants have already pled guilty others have already received deferred prosecutions. Client has no prior convictions.

Public Defender Information: (known to Public Defender only)

Client contends s/he was only defending self when three people jumped him/her.
Client had a broken nose, sprained wrist and mild concussion from blow to back of head.
This case is ready for trial. All the witnesses for the defense are present. However, Client reeks of alcohol, is loud and obnoxious, and is slurring speech. Client does not want a continuance. Client has no prior convictions and would qualify for deferred prosecution, but maintains his/her innocence.

Charge: **Resist Officer**
Name: Rhonda/Raymond Jones
Age: 17

Facts:

Client was the back seat passenger in a stolen car that was pulled over by police. Client ran from police along with other passengers so was charged with resist/delay/obstruct.

Additional Charge Information: (known to all parties)

Client has a pending charge of disorderly conduct for fighting in school and is on probation for a simple assault that was reduced from assault on a government official (teacher).

District Attorney Information: (known to District Attorney only)

You assume that the Defendant is in a gang because the driver of the car was, and Defendant keeps picking up charges. You want to nip this in the bud and plan to seek a gang enhancement to a Class 1 unless public defender convinces you that this is not gang related.

Factual Background:

Charge: **Disorderly Conduct and Carrying a Concealed Weapon.**
Name: Sylvester/ Sylvia Smith
Age: 39

Facts:

Defendant became loud at bar after several drinks. The bartender refused to serve him and told him to leave. Client put money down on counter and refused to leave. The police were called. While patting Client down, they discovered the box cutter in his jacket pocket.

Additional Charge Information: (known to all parties)

The warrant does not state the exact words used in the disorderly conduct statute.

District Attorney Information: (known to District Attorney only)

This DA likes to use plea negotiations as social engineering and put every possible term and condition in the plea. For example, she is likely to ask for alcohol assessment and classes even though there is no driving, because of his history for DWI and because this happened in a bar. She is likely to want an enormous number of hours of community service. She may even ask for impatient alcohol treatment. It takes a lot of work to get her to agree to a "normal" sentence offer. The bartender has called the DAs office several times wanting to follow the case and make sure the defendant gets the full punishment of the law.

Charge: **Assault on a Female**
Name: John Doe
Age: 28

Facts:

Domestic violence case where argument happened after defendant and girlfriend had been drinking in a bar. Defendant refused to leave girlfriend's residence. PW called police and said Client hit her. Client says he didn't hit her and just passed out on couch.

Additional Charge Information: (known to all parties)

Client has at least three other misdemeanors, plus two prior AOF convictions against his girlfriend. The District Attorney could indict this case for habitual misdemeanor assault.

District Attorney Information: (known to District Attorney only)

Defendant was in a relationship with prosecuting witness. An argument broke out at her residence and prosecuting witness asked defendant to leave. Defendant refused to leave and PW claims Defendant assaulted her by punching her face. Defendant was found asleep on her couch by arresting officers. There was a pending DV order, but it had been rescinded by PW 1 week before date of offense. Client has been charged with three previous AOF; two with the same victim who refused to show up on either occasion.

District Attorney is likely to request active time because of prior convictions and the threat of habitual prosecution. Probation would include anger management classes

District Attorney's personality is that she is very hard on domestic violence offenders, especially if they have prior convictions against the same victim. She usually prosecutes felonies, and is just filling in for another DA in District Court. She would need a very special circumstance to give this guy probation.

The PW does not want him back, and is seeking another DV protective order based on a more recent episode of threatening her in the parking lot of a grocery store.

Charge: **DWI**
Name: Donald/Donna Drake
Age: 45

Facts

Defendant charged with DWI and DWLR. Stopped for expired registration, but not charged. Upon stopping him, the officer notice strong odor of alcohol and red glassy eyes. The client refused to perform any field sobriety tests but was unsteady on his feet and not speaking clearly. He refused to blow in the intoximeter.

Additional Charge Information: (known to all parties)

Client was stopped for expired registration, but was not charged. He was also charged with driving while license revoked. The license was revoked for failing to pay for a seat belt infraction.

District Attorney Information: (known to District Attorney only)

Although the defendant did not perform any field sobriety test, he blew .10 twice on the alcosenser before he was booked. D.A. likes to leave sentencing up to the Judge, and only negotiate charges.

Charge: **Possession of Drug Paraphernalia**
Name: Larry/Lana Lane
Age: 19

Facts:

Defendant charged with crack pipe found on ground near defendant when police approached to discuss use of drugs. Police approached group of people on corner who appeared to be engaging in drug activity. Searched defendant found no drugs. Found crack pipe next to defendant.

Additional Charge Information: (known to all parties)

Defendant already on probation for paraphernalia and misdemeanor marijuana charge.
Crack pipe was not tested for drugs.

District Attorney Information: (known to District Attorney only)

Defendant is known as in that area as "Baby L." Police officers saw defendant throw something down as they approached. They found crack pipe in area where they saw her throw something down.

This district attorney specializes in drug prosecution. He prefers negotiating to trying cases – especially misdemeanors. Would probably agree to Case II probation if the probation officer agrees that he is doing well on probation. He knows he will likely get a conviction if the case is tried in District Court, but he might not get a conviction if the case is appealed.

Charge: **Simple Affray**
Name: Sydney Slurrey
Age: 39

Facts:

Defendant was at a Panther's Game and a fight broke out. More than 10 people were arrested.

Additional Charge Information: (known to all parties)

Some of the other defendants have already pled guilty others have already received deferred prosecutions. Client has no prior convictions.

District Attorney Information: (known to District Attorney only)

Witnesses are present and ready for trial. This District Attorney is very reasonable. She has a good reason for everything he does. She would definitely agree to a deferred prosecution, and might agree to 15-20 hours rather than the typical 50 hours for a deferred prosecution first offenders program.