UNC SCHOOL OF GOVERNMENT

2021 Misdemeanor Defender Training

November 2-5, 2021

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

Tuesday, November 2

12:30-12:45 pm	Welcome and Introductory Remarks
12:45-1:45 pm	**Pretrial Release Advocacy** (60 min.) Emily Mistr, Staff Attorney at the North Carolina Justice Center Raleigh, NC
1:45-2:00 pm	*Break*
2:00-3:15 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
3:15-3:30 pm	*Break*
3:30-4:15 pm	**Basics of Driving While Impaired** (*continued*) (45 min.) Shea Denning, Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
4:15 pm	*Adjourn*

Wednesday, November 3

9:30-10:30 am	**Ethical Issues in District Court** (ETHICS) (60 min.) Whitney Fairbanks, Deputy Director & General Counsel North Carolina Office of Indigent Defense Services, Durham, NC
10:30-10:45 am	*Break*
10:45-12:15 pm	**Introduction to Structured Sentencing** (90 min) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
12:15-1:15 pm	*Lunch* (60 min)
1:15-2:15 pm	**Probation Violations** (60 min) Jamie Markham, Thomas Willis Lambeth Distinguished Chair in Public Policy UNC School of Government, Chapel Hill, NC
2:15-2:30 pm	*Break*
2:30-3:15 pm	**Client Interviewing and Rapport** (45 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
3:15-3:30 pm	Check-in and Review
3:30 pm	*Adjourn*

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Thursday, November 4

9:00-9:30 am	**Negotiating Effectively** (30 min) Derek Brown, Attorney The Derek K. Brown Law Firm, PC, Greenville, NC
9:30-9:45 am	*Break*
9:45-11:00 am	**Suppressing Evidence in District Court** (75 min) Phil Dixon, Jr., Defender Educator UNC School of Government, Chapel Hill, NC
11:00-11:15 am	*Break*
11:15-12:00 pm	**Challenging Pleadings** (45 min) Candace Washington, Assistant Appellate Defender Jim Grant, Assistant Appellate Defender North Carolina Office of the Appellate Defender, Durham, NC
12:00-1:00 pm	*Lunch*
1:00-2:00 pm	**Driving Records and Getting Your Client Back on the Road** (60 min) Michael Paduchowski, Attorney Law Office of Matthew Charles Suczynski, Chapel Hill, NC
2:00-2:15 pm	*Break*
2:15-3:00 pm	**IDS Policies and Procedures** (45 min) Mary Pollard, Director Chad Boykin, Staff Attorney North Carolina Indigent Defense Services, Durham, NC
3:00 pm	*Adjourn*

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Friday, November 5 (Mini Bench Trial School Using Hypotheticals)

9:00-9:45 am	**Theory of Defense/Emotional Themes** (45 min.) Tucker Charns, Regional Defender North Carolina Office of Indigent Defense Services, Durham, NC
9:45-10:15 am	**Cross Examination** (30 min.) Jeff Connolly, Regional Defender North Carolina Office of Indigent Defense Services, Durham, 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.) Susan Brooks, Public Defender Administrator North Carolina Office of Indigent Defense Services, Durham, NC
1:30-1:45 pm	*Break*
1:45-2:30 pm	**Closing Arguments** (45 min) Fred Friedman, Associate Professor of Law University of Minnesota, Duluth MN
2:30 pm	*Final Wrap-up and Adjourn*

CLE HOURS: 15.5
Includes 1 hour of ethics/professional responsibility
Pending approval by the NC State Bar

GETTING YOUR CLIENT OUT OF JAIL

EMILY E. MISTR
STAFF ATTORNEY, NC JUSTICE CENTER
ADJUNCT CLINICAL PROFESSOR, CAMPBELL LAW SCHOOL
FORMER ASSISTANT PUBLIC DEFENDER, WAKE COUNTY, 2006-2020

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HOW DOES A PERSON END UP IN CUSTODY?

- Warrant v. 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 w electronic monitoring + secured bond

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COVID and JAILS and PRISONS

- Over the last 20 months, COVID has torn through jails and prisons.
- ACLU files suit against DPS for (lack of) response to COVID, which resulted in 3,500 incarcerated people being released "early."
- When adjusted for age, data shows that Hispanic, Black and Alaska Native people are at least 2x as likely to die from COVID-19 as their White counterparts.

Now more than ever bond hearings can mean the difference between life and death.

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WHO IS ENTITLED TO PRETRIAL RELEASE?

- 15A-533(b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with 15A-534.
- 15A-533(d)-(f): Rebuttable presumption of no bond

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IMPORTANCE OF RELEASE

To your client and family

- Psychological
- Financial
- Assistance with defense
- Physical health – particularly important in the time of COVID

To the community

- Financial
- Long term harm

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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."
(e*mphasis added*)

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Based on that, jails should mostly hold people charged with violent felonies, right?

WRONG.

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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.

Can vary and may not always find the guidelines.

Some jurisdictions are starting to use assessment tools.

Class of Offense	Wake	Durham	Cabarrus
Forsyth Buncombe			
Local Ordinance			WPA
Misd Class 3	Up to $750		WPA
WPA or <$500	$500-1K $500		
Misd Class 2	Up to $1K	$0-250	WPA or <$2K
$1K-2K $1000			
Misd Class 1	Up to $2K	$0-500	WPA or <$3K
$1200-3K $2000			
Misd Class A1	$1-5K	$0-1K	WPA or <$5K
$1500-5K $3000			

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FACTORS TO CONSIDER

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.

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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

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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

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CHARGE SPECIFIC PRETRIAL REQUIREMENTS

- 15A-534.1: Crimes of domestic violence
- 15A-534(d1): Failure to Appear
- 15A-534(d3): New charge while on pretrial release for another charge
- 15A-534.2: Detention of impaired drivers
- 15A-534.4: Sex offenses and crimes of violence against child victims
- 15A-534.5: Detention to protect public health

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CRIME VICTIM 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?

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PRETRIAL DETENTION REFORM

- Approximately 75% of the people in jails are being held PRETRIAL, and many are there because they can't afford their bail. The majority of them are people of color.
- Voluntary Reform: Judicial District 26, Judicial District 30B, Judicial District 2, Judicial District 21 and Judicial District 10
- Forced reform: Groups filed federal lawsuit challenging unjust cash bail system in Judicial District 17 (Alamance County).
- Community-initiated Reform: Judicial District 18

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DISTRICT 26 - MECKLENBURG

- Reform measures:
  - Judge first must decide if someone should be placed in jail prior to trial. If yes, they then set bail.
  - Use an evidence-based pretrial assessment tool
  - Judicial officials must provide written explanations when they choose money bail or house arrest.
  - Mecklenburg PD's office staffs first appearances.

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DISTRICT 30B – HAYWOOD AND JACKSON COUNTIES

- Adopted 5 reform measures:
  - Implement new decision-making framework to determine conditions of PTR
  - First appearances for all in-custody defendants
  - Provide for early involvement of counsel at pretrial proceedings
  - Promote increased use of summons in lieu of arrest in appropriate cases
  - Promote the increased use of citation in lieu of arrest in appropriate cases
- Results
  - Conditions of release
  - New criminal charges
  - First appearances – early involvement of counsel only in Haywood
  - Summons & Citations in lieu of arrest

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DISTRICT 2 – TYRELL, HYDE, WASHINGTON, MARTIN, BEAUFORT

- Adopted 2 reform measures:
  - Implement a new structured decision-making tool to better inform judicial officials' pretrial decisions AND ENSURE COMPLIANCE WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS
  - New first appearance proceedings for in-custody misdemeanor defendants

DISTRICT 21 – FORSYTH COUNTY

- Adopted 2 reform measures:
  - Implement a new structured decision-making tool to better inform judicial officials' pretrial decisions, modeled on the tool adopted in 30B
  - Also adopted a new ability to pay procedure

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DISTRICT 10 – WAKE COUNTY

- A group of stakeholders have been meeting for the last 12-18mo discussing bail reform. They are working with Advancing Pretrial Policy and Research initiative with the Center for Effective Public Policy.
- Some of the possible policy changes:
  - using an assessment tool to standardize the information offered for each defendant
  - creating bench cards for magistrates to use at initial appearance and judges to use at first appearance to provide consistency in bond setting
  - reviewing the secured bond schedule and making recommendations for changes
  - having attorneys present at first appearance to represent defendants
  - expectation is to implement the recommended changes in early 2022

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ALAMANCE COUNTY

- November 12, 2019 – class action lawsuit filed in federal court
  - 3 plaintiffs
  - Defendants – Senior Resident Sup Ct Judge, Chief District Ct Judge, 12 Magistrates and Sheriff
  - Alleges that county imposes money bonds on almost everyone arrested
- May 9, 2020 – parties filed a Consent Order of Preliminary Injunction
- July 1, 2020 – Defendants adopted certain policies and agreed to train local officials on new procedures

The new procedures were the most detailed and comprehensive bail reform seen to date in NC, and we hope they will serve as an example to other jurisdictions of what can and should be done.

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DISTRICT 18 - ORANGE COUNTY

The Orange County Bail/Bond Justice Project

A faith-based coalition dedicated to two goals: changing unjust bail practices and providing direct support to people charged with crimes

- Organizes court observations
- Assesses data to identify and document equity issues
- Develops a bail bond fund
- Educates the community

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RESOURCES FOR MORE INFORMATION

The Continued Need for Bail Reform in North Carolina: https://wfulawpolicyjournal.com/2021/03/23/the-continued-need-for-bail-reform-in-north-carolina/

SOG Criminal Justice Innovation Lab: https://cjil.sog.unc.edu/areas-of-work/bail-reform-2-0/

Promising Results in Two New Bail Reform Evaluation Reports: https://nccriminallaw.sog.unc.edu/promising-results-in-two-new-bail-reform-evaluation-reports/

Bail Policy for Twenty-Sixth Judicial District: https://www.nccourts.gov/assets/documents/local-rules-forms/Bail%20Policy.pdf?Ilxz6xa_CGHzzK9zpyEijZao9IRVZURc

Results from Empirical Evaluation of NC Judicial District 30B Bail Project: https://nccriminallaw.sog.unc.edu/results-from-empirical-evaluation-of-nc-judicial-district-30b-bail-project/

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

Shea Denning
School of Government
November 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rules for breath testing.

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

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

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

Rules for blood or urine testing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- enters a voluntary dismissal;

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

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

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

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

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

11. Apply DWI sentencing laws.

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

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

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

c. What is the maximum length of probation?

Five years

B. Defendant is convicted of DWI. She is 18. Her BAC was a .08. She has a "safe driving record." A 17-year-old passenger was in the car at the time of the offense. She obtained a substance abuse assessment and attended ADETS.

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

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

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

a. At what level should the defendant be sentenced and why?
Level 1. There are two grossly aggravating factors, driving while license revoked for impaired driving and a prior conviction for an offense involving impaired driving within 7 years.

b. What are the requirements for sentencing at this level?
30 days minimum to 24 months maximum
If suspended
Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days
And defendant must obtain substance abuse assessment and education or treatment required by G.S. 20-17.

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

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

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

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

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

12 months minimum to 36 months maximum.

If suspended

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

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

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

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

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

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

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

E. The defendant pleads guilty to two DWI offenses.

a. May the offenses be consolidated for sentencing?

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

b. May the sentences run concurrently?

Yes.

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

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

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

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

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

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

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

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

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

Ignition interlock. Ignition interlock is required as a condition of a limited driving privilege if the person had an alcohol concentration of 0.15 or more. In addition, a limited driving privilege issued to a person convicted of impaired driving with an alcohol concentration of .15 or more may not become effective until 45 days after the final conviction. G.S. 20-179.3(c1). 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

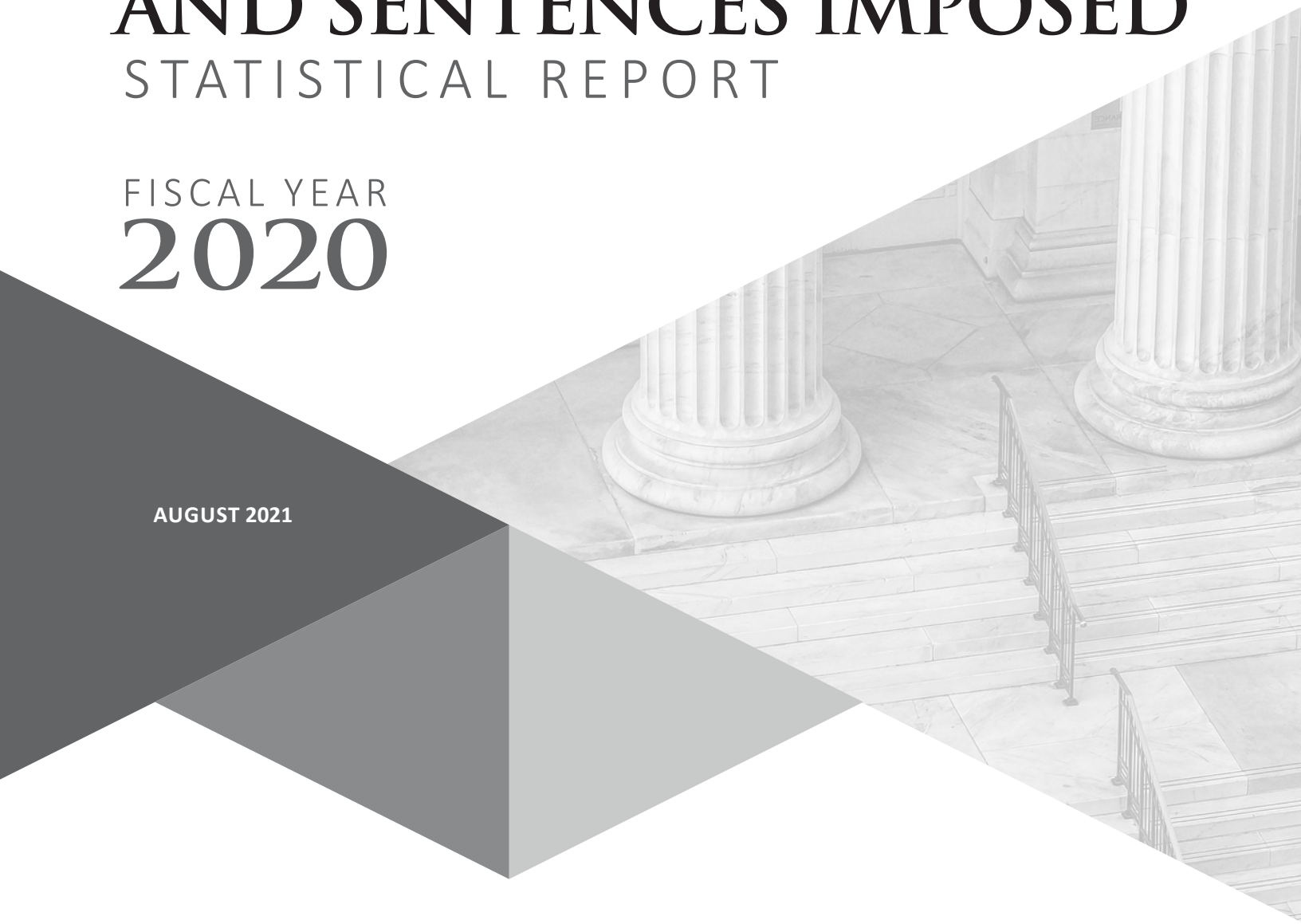
2020

NORTH CAROLINA
SENTENCING AND POLICY ADVISORY COMMISSION

DRIVING WHILE IMPAIRED CONVICTIONS AND SENTENCES IMPOSED

STATISTICAL REPORT

FISCAL YEAR
2020



AUGUST 2021

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CHAIRMAN

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APPENDICES

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 2020 (July 1, 2019 through June 30, 2020). 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))

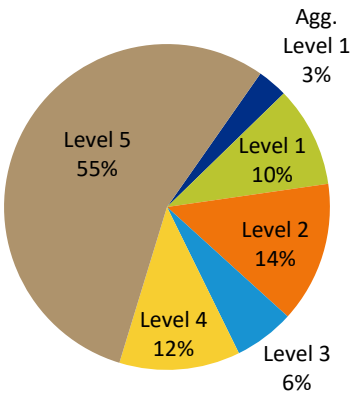
The report presents information on the number of DWI convictions, the distribution of DWI convictions across the six punishment levels, and the types of sentences imposed, as well as data about several other issues. The Appendix includes data on DWI convictions by district and county, as well as additional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

In FY 2020, the volume of DWI convictions was impacted by the postponement of certain court proceedings following emergency directives from the Chief Justice of the North Carolina Supreme Court in response to the COVID-19 pandemic, which began in March 2020.

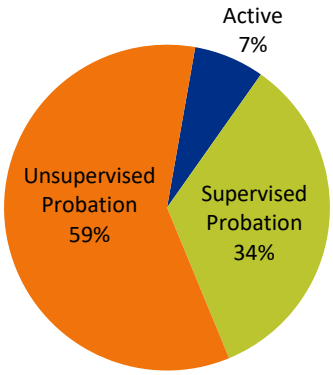
SUMMARY OF FINDINGS
FY 2020 DWI CONVICTIONS

During FY 2020, sentences for 20,414 DWI convictions were imposed.[1] Under G.S. 20-179, offenders convicted of DWI are subject to punishment in one of six punishment levels (Aggravated Level 1, Level 1 through Level 5). As shown in the figures below, a majority of DWI offenders were sentenced in Level 5 (55%) and a majority of offenders received unsupervised probation (59%).

Convictions by Punishment Level

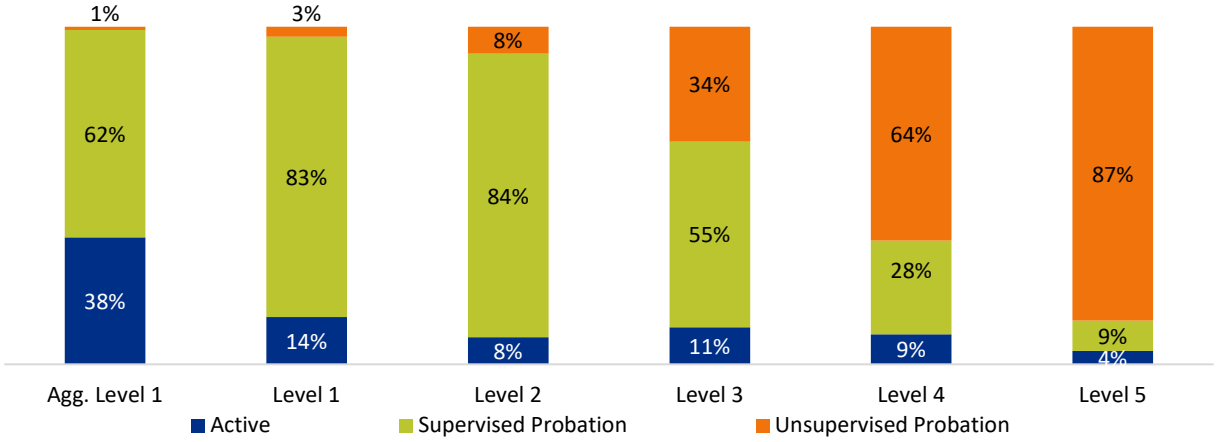


Convictions by Type of Sentence



The type of sentence imposed by punishment level is shown in the figure below. Thirty-eight percent (38%) of all offenders with an Aggravated Level 1 punishment received an active sentence. Supervised probation was the most frequent sentence imposed among Aggravated Level 1 (62%), Level 1 (83%), Level 2 (84%), and Level 3 (55%) convictions. Unsupervised probation was most frequently imposed among Level 4 (64%) and Level 5 (87%) convictions.

Type of Sentence Imposed by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

[1] For many of the tables and figures in this report, 13 of the 20,414 DWI convictions were excluded because the type of sentence imposed could not be determined.

DWI CONVICTIONS
FY 2020

I. DWI CONVICTIONS IN FY 2020

A. DWI Convictions

This report contains information on DWI convictions sentenced under G.S. 20-179[2] during Fiscal Year 2020 (July 1, 2019 through June 30, 2020) and reflects the laws and practices that were in place during this time period. Overall, sentences for 20,414 DWI convictions were imposed.[3] (This number excludes sentences imposed for aiding and abetting DWI, even though convictions for this offense are sentenced at Level 5 (G.S. 20-179(f1)).

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

B. Definition of the Unit of Analysis

The report is based on data entered into the Administrative Office of the Courts' (AOC's) management information system by the court clerk following the imposition of the sentence. The report covers all North Carolina counties. The unit of analysis is convictions disposed of in a *sentencing episode*.[4]

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). For the sake of simplicity, throughout the report the unit of analysis is referred to as "conviction."

C. Data Limitations

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

D. Convictions by Punishment Level

Figure A shows the distribution of DWI convictions across punishment levels. The majority of convictions were in Level 5 (n=11,158 or 55%). The percentage of convictions increased from Aggravated Level 1 (3%)

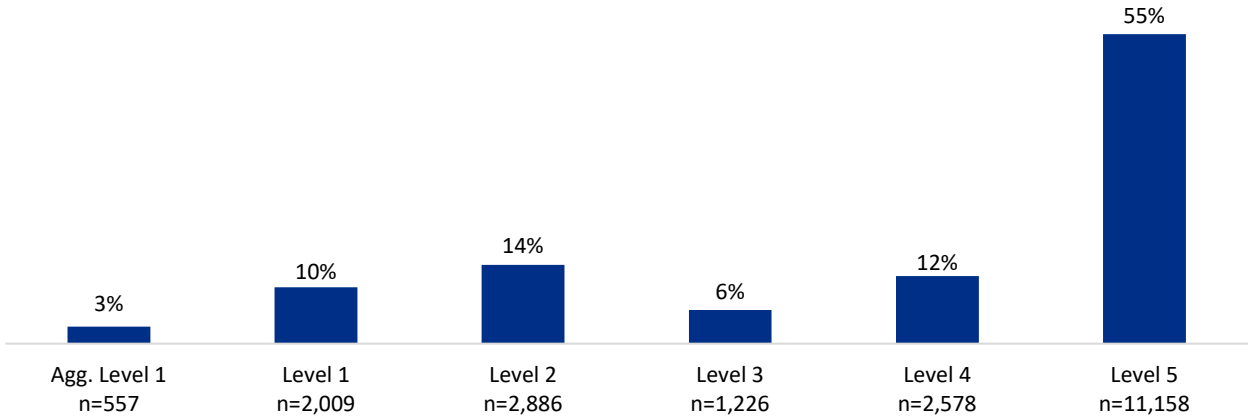
[2] In addition to convictions for impaired driving (G.S. 20-138.1), G.S. 20-179 also prescribes sentencing for impaired driving in a commercial vehicle (G.S. 20-138.2), a second or subsequent conviction for operating a commercial vehicle after consuming alcohol (G.S. 20-138.2A), and a second or subsequent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

[3] The volume of DWI convictions declined in FY 2020 following the postponement of certain court proceedings in response to the COVID-19 pandemic.

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

through Level 2 (14%), and then again from Level 3 (6%) through Level 5 (55%). Aggravated Level 1 through Level 2 punishments are based on the presence of grossly aggravating factors while Levels 3 through 5 are not.[5]

Figure A: Convictions by Punishment Level

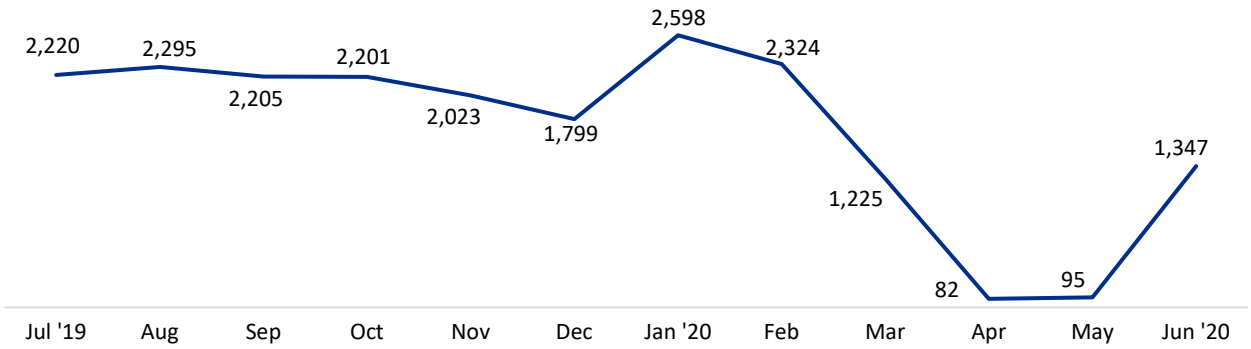


SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

E. Convictions by Month of Sentencing

Figure B shows the number of convictions by month of sentencing during FY 2020. Convictions were highest in January and dropped substantially during the last quarter of the FY due to the onset of the COVID-19 pandemic in March and the resulting postponement of certain court proceedings.

Figure B: Convictions by Month of Sentencing



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

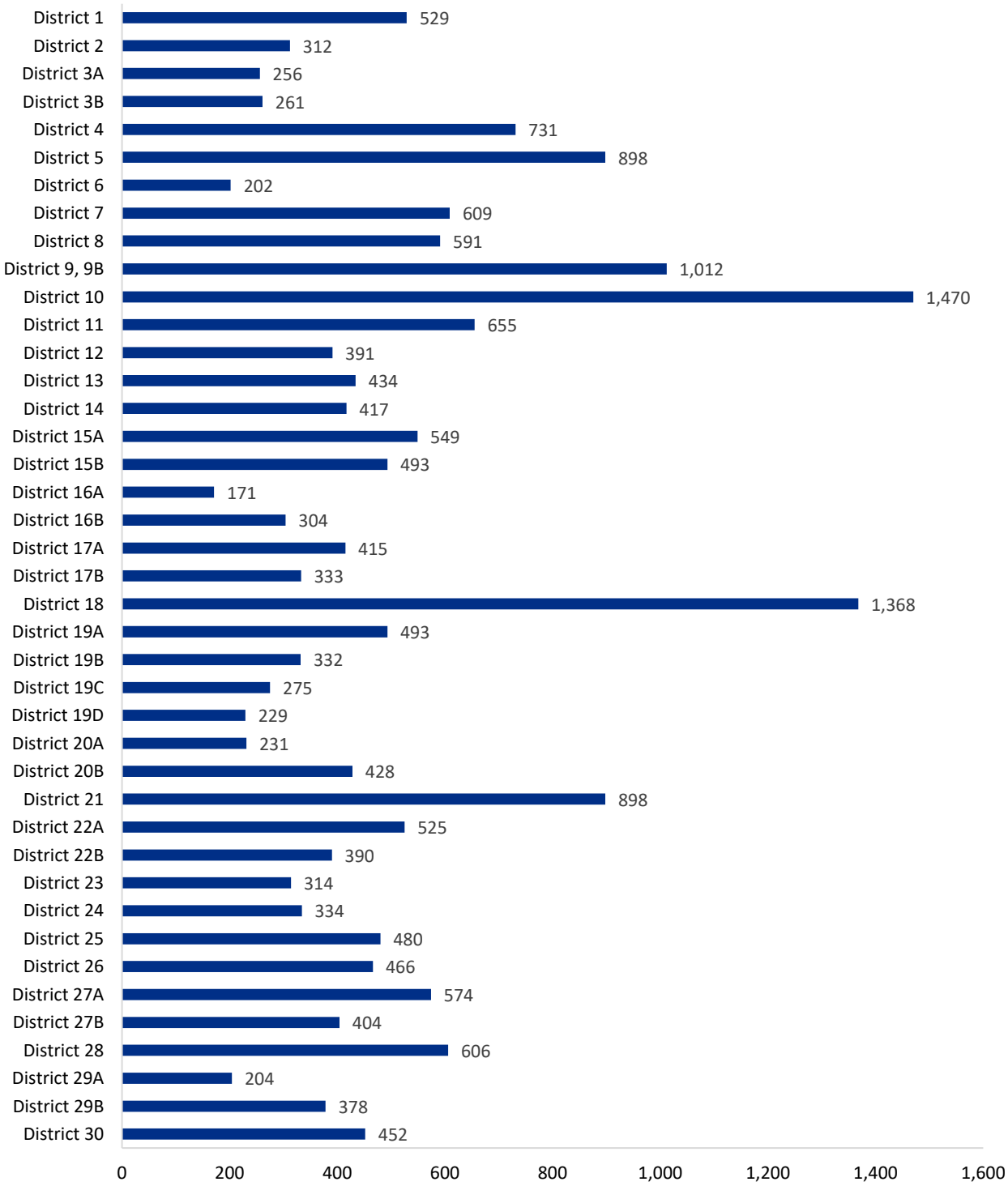
F. Convictions by Judicial District

Figure C shows the total number of convictions by judicial district (N=20,414). The districts with the most DWI convictions were District 10 (Wake County, n=1,470) and District 18 (Guilford County, n=1,368),

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

accounting for a combined 14% of convictions in FY 2020. Additional information about DWI convictions by district and county can be found in Appendix C.

Figure C: Convictions by Judicial District



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

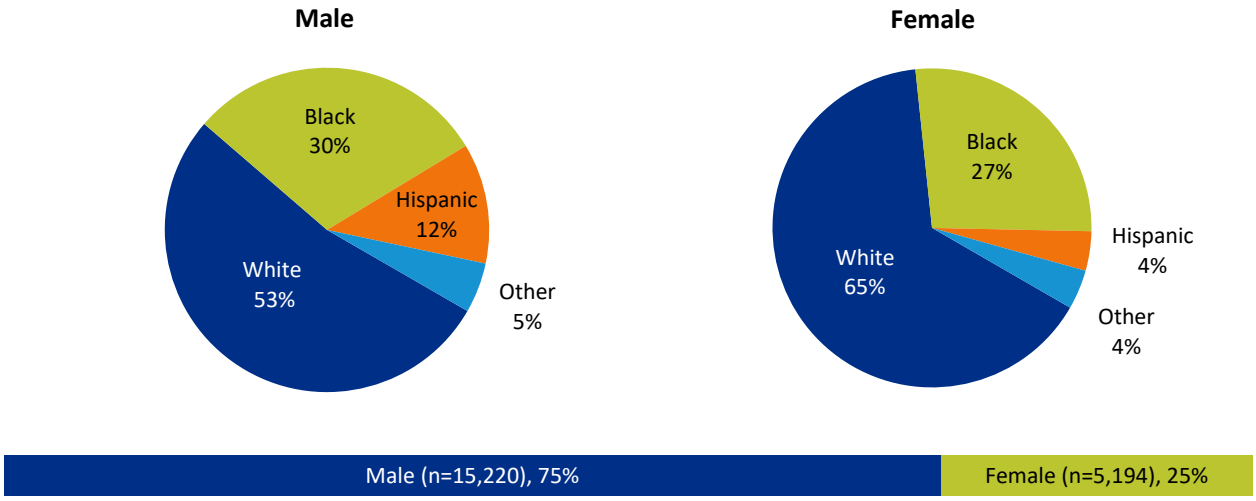
II. CHARACTERISTICS OF OFFENDERS

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

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

Of the 20,414 DWI convictions in FY 2020, 75% were for males (*see* Figure D). Overall, the majority of DWI offenders were white (56%). White females comprised a larger percentage of female convictions (65%) than white males did for male convictions (53%). Black males and females comprised the second largest racial category for each sex (30% and 27% respectively, and 29% overall).

Figure D: Convictions by Sex and Race



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Table 1 shows convictions by offenders' age at offense and punishment level. Overall, the average age of DWI offenders was 37, with Level 5 offenders being slightly younger on average (36) than offenders sentenced in the other punishment levels. Except for Level 3, at least 60% of convictions were accounted for by offenders aged 21-40 at the time of offense. Almost half (45%) of all Level 5 convictions were for offenders aged 30 and younger.

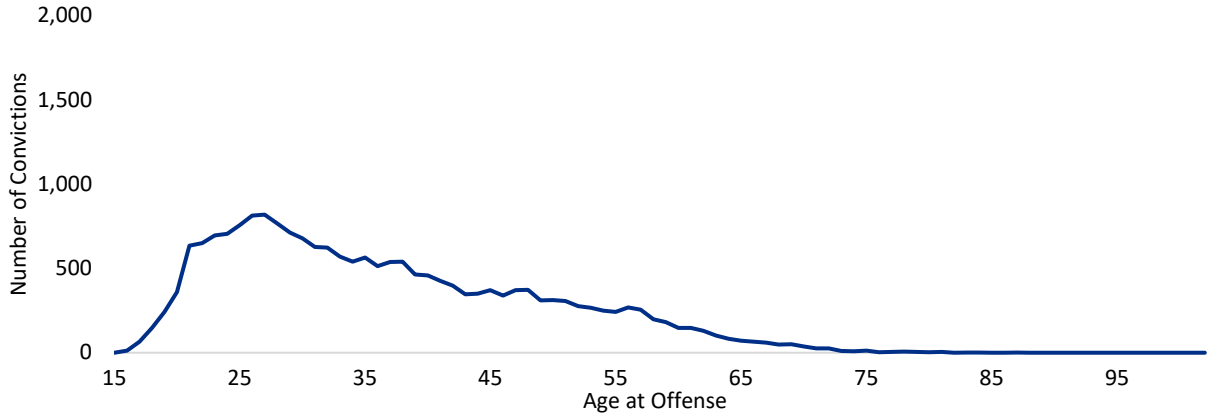
Table 1: Convictions by Age at Offense and Punishment Level

Punishment Level	#	Average Age	Age at Offense				
			<21	21-30	31-40	41-50	>50
			%	%	%	%	%
Agg. Level 1	557	38	1	30	33	18	18
Level 1	2,006	37	2	32	33	20	13
Level 2	2,884	38	2	32	28	19	19
Level 3	1,226	39	3	26	30	21	20
Level 4	2,574	38	4	31	28	19	18
Level 5	11,146	36	6	39	24	16	15
Total	**20,393**	**37**	**4**	**35**	**27**	**18**	**16**

Note: Of the 20,414 DWI convictions in FY 2020, 21 convictions with missing values for offender's age were excluded from this table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

The volume of offenders peaked at age 27, and then generally declined as age increased (*see* Figure E).

Figure E: Distribution of Convictions by Age at Offense

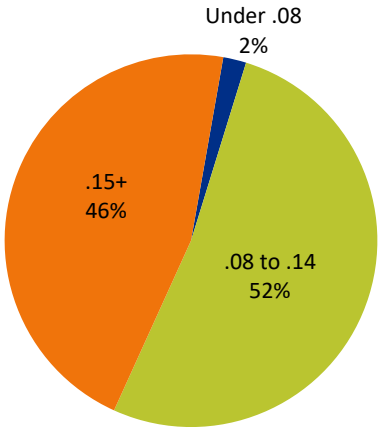


Note: Of the 20,414 DWI convictions in FY 2020, 21 convictions with missing values for offender's age were excluded from this table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

B. Convictions by Blood Alcohol Concentration (BAC)

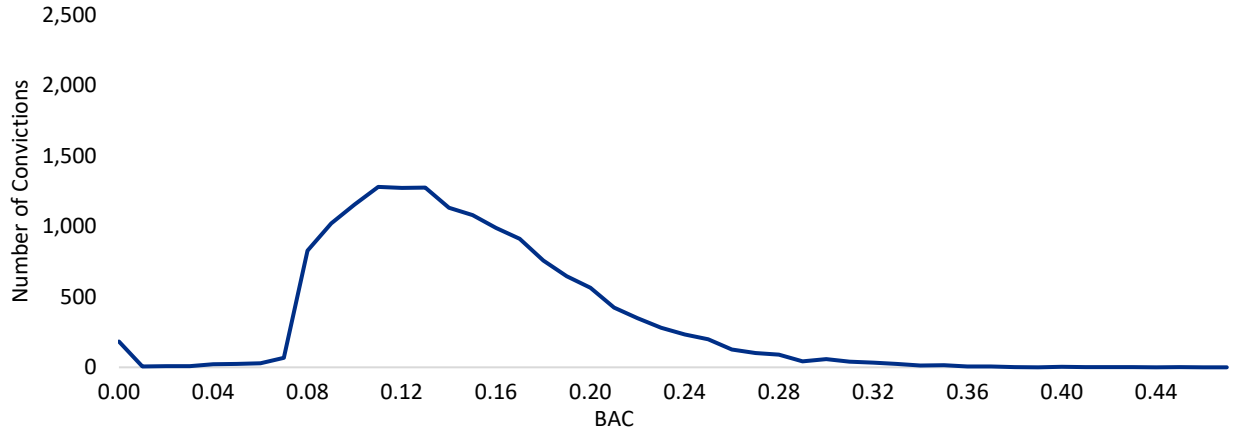
BAC levels were recorded for 75% of the 20,414 convictions.[6] Figure F shows the percentage of convictions by BAC. The greatest percentage of convictions were in the .08 to .14 category (52%), followed closely by the .15+ category (46%). Figure G illustrates the distribution of BAC for offenders convicted of DWI in FY 2020. A BAC of .11 was the most frequent (n=1,281), followed by .13 (n=1,276) and .12 (n=1,274), accounting for a combined total of 25%.

Figure F: Convictions by BAC



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Figure G: Distribution of BAC



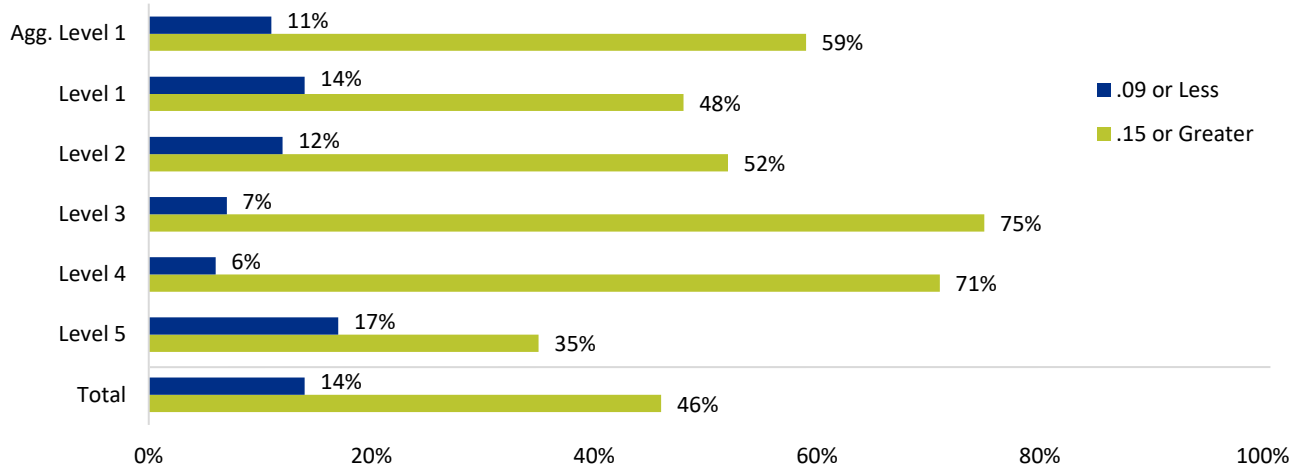
Note: Of the 20,414 DWI convictions in FY 2020, 5,084 convictions without BAC levels were excluded from these figures.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

[6] 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 2020 data showed refusals occurred in 11% of convictions, blood tests occurred in 6% of convictions, DWI under controlled substances other than alcohol occurred in 3% of convictions, and BAC was unknown in 6% 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.[7] 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.[8]

Figure H shows the percentage of convictions by punishment level with a BAC of .09 or less and those with a BAC of .15 or more. Level 3 and Level 4 convictions had the highest percentage of convictions with BACs greater than .15 (75% and 71% respectively). Correspondingly, these same punishment levels also had the lowest percentage of convictions with BACs .09 or less (7% and 6% respectively).

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



Note: Of the 20,414 DWI convictions in FY 2020, 5,084 convictions without BAC levels were excluded from this figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

III. SENTENCES IMPOSED AND METHOD OF DISPOSITION

This section provides information on DWI convictions by the type of sentence imposed (active sentence, supervised probation, or unsupervised probation) and the method of disposition (guilty plea, bench trial, or jury trial).[9]

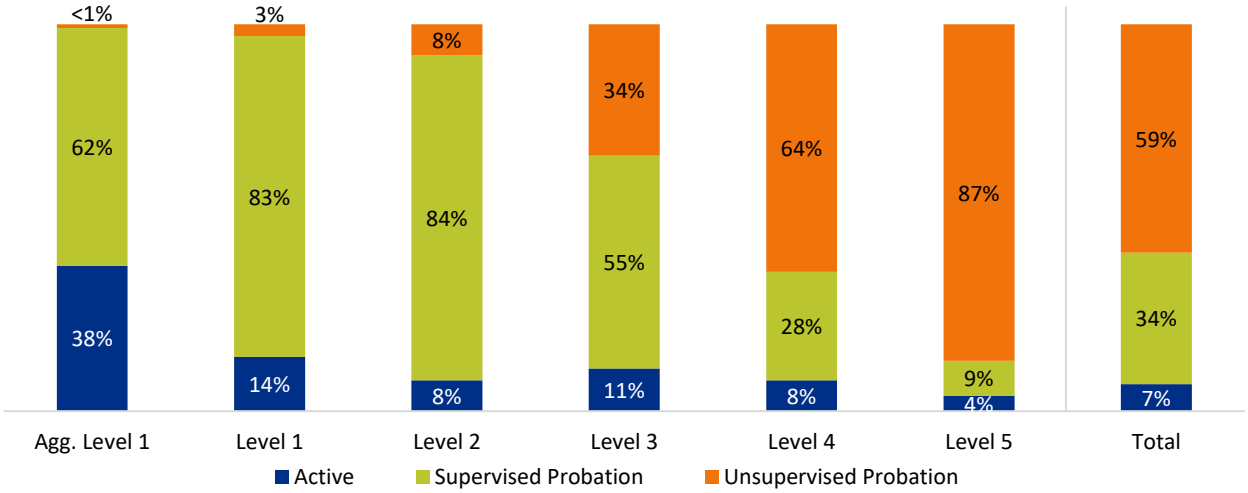
A. Convictions by Type of Sentence Imposed and Punishment Level

Figure I and Table 2 show that 7% of DWI convictions in FY 2020 resulted in an active sentence, 34% resulted in supervised probation, and 59% resulted in unsupervised probation. Thirty-eight (38%) of all offenders sentenced to an Aggravated Level 1 punishment received an active sentence. Supervised probation was the most frequent sentence imposed among Aggravated Level 1 (62%), Level 1 (83%), Level 2 (84%), and Level 3 (55%) convictions. Unsupervised probation was most frequently imposed among

[7] G.S. 20-179(f)(1)-(3)
[8] G.S. 20-179(c)
[9] Section III excludes 13 of the 20,414 DWI convictions in FY 2020 for which the type of sentence imposed could not be determined.

Level 4 (64%) and Level 5 (87%) convictions. Despite being a lower punishment level, the percentage of convictions that resulted in an active sentence for Level 3 punishments was higher (11%) than for Level 2 punishments (8%). As noted previously, Aggravated Level 1 through Level 2 punishments are based on the presence of grossly aggravating factors while Levels 3 through 5 are not.

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



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 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	212	38	343	62	2	<1	557
Level 1	269	14	1,674	83	66	3	2,009
Level 2	214	8	2,434	84	238	8	2,886
Level 3	139	11	669	55	418	34	1,226
Level 4	217	8	723	28	1,638	64	2,578
Level 5	422	4	998	9	9,725	87	11,145
Total	**1,473**	**7**	**6,841**	**34**	**12,087**	**59**	**20,401**

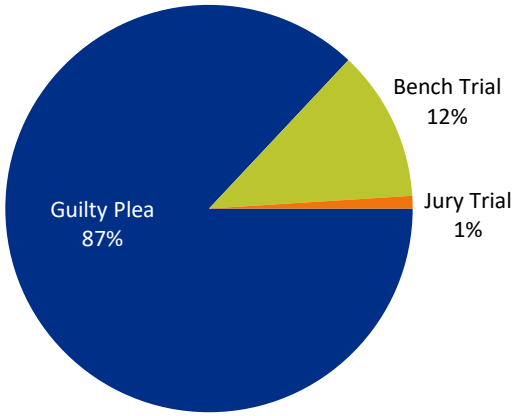
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

B. Convictions by Method of Disposition

Figure J shows that 87% of DWI convictions in FY 2020 were disposed by guilty plea and 12% by bench trial. Jury trials occurred in 1% of convictions (n=78). Across all punishment levels, Aggravated Level 1 convictions had the highest percentage of guilty pleas (91%) and Level 5 convictions had the lowest

percentage (86%). Conversely, Level 5 convictions had the highest percentage of bench trials (14%) and Aggravated Level 1 had the lowest percentage (8%).

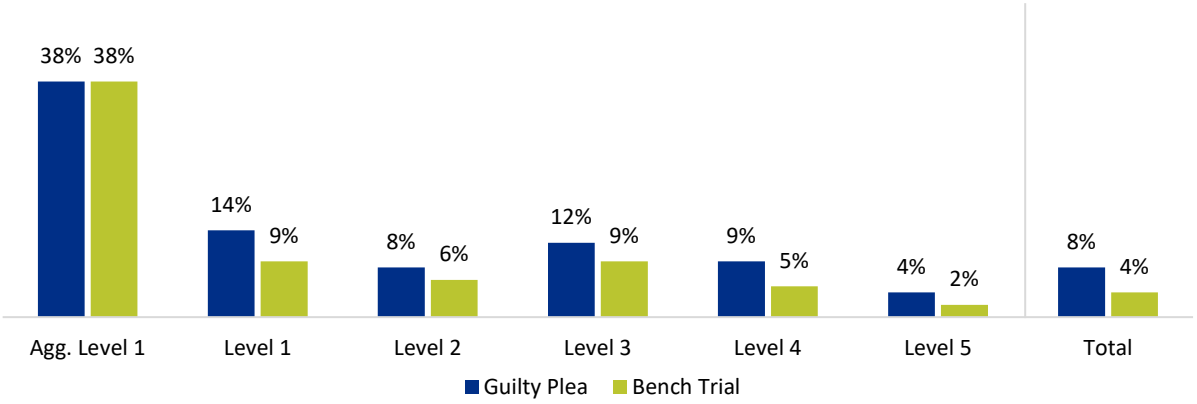
Figure J: Convictions by Method of Disposition



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Figure K shows the percentage of convictions that resulted in an active sentence for each punishment level by method of disposition. In FY 2020, 8% of all convictions obtained by guilty plea resulted in an active sentence compared to 4% of all convictions disposed by bench trial. Higher rates of active sentences for guilty plea convictions than for bench trials were found across all punishment levels except Aggravated Level 1. The overall rate of active sentences for jury trials (n=78) was 18% and is not depicted in this figure due to the limited number of observations.

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



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

C. Average Sentence Length

Under G.S. 15A-1351(b), judges must impose a maximum term of imprisonment and may impose a minimum term. For the purpose of this analysis, sentence length refers to the maximum term imposed.[10]

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

Table 3 examines active sentences only and shows the average active sentence within the context of the statutory minimum and statutory maximum possible sentences. When an active sentence was imposed (n=1,473), the average length was 7 months. Among convictions in Level 2 through Level 5, the average active sentence length was about half of the statutory maximum.

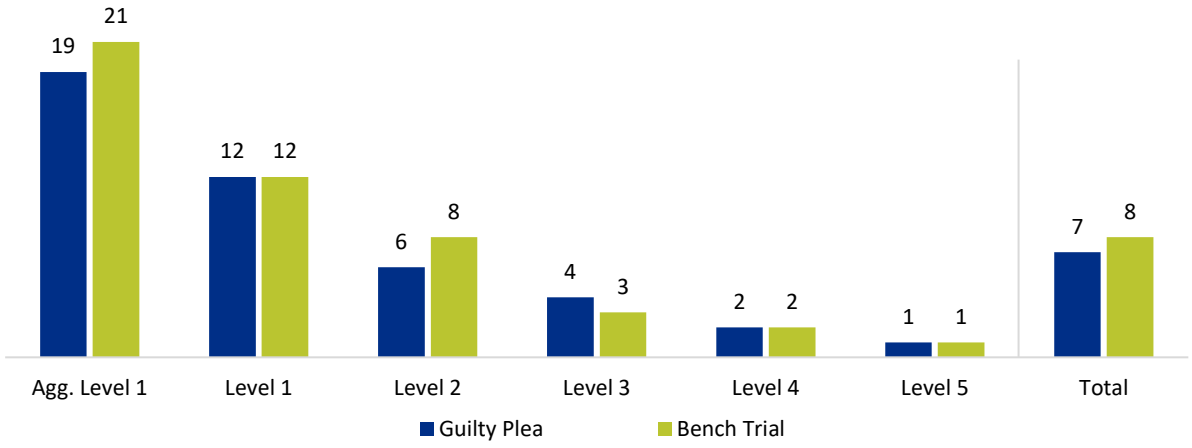
Table 3: Average Length of Active Sentences (Months) by Punishment Level

Punishment Level	Statutory Minimum	Average Active Sentence	Statutory Maximum
Agg. Level 1	12 months	19 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 2020 DWI Statistical Report Data

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

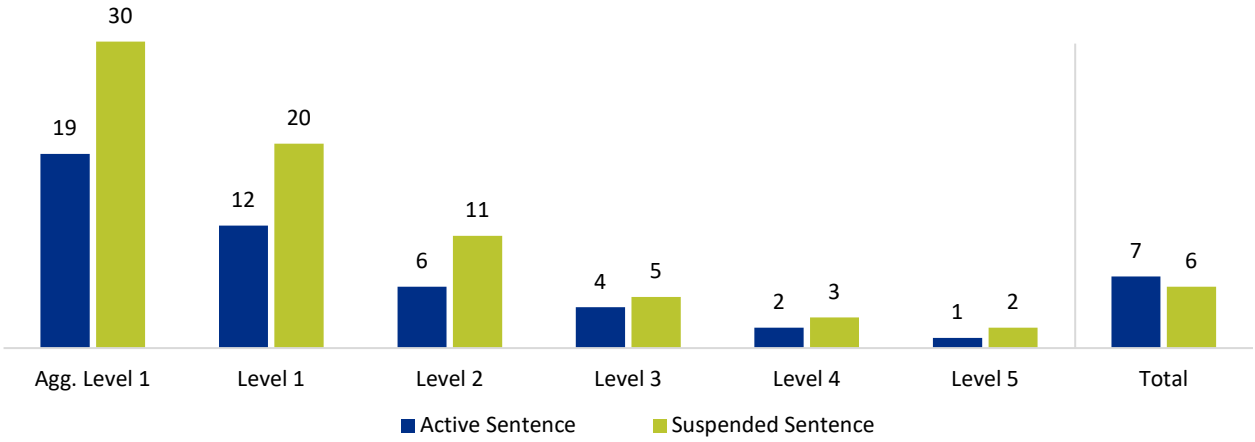
Figure L: Average Length of Active Sentences (Months) by Method of Disposition and Punishment Level



Note: The average active sentence length for jury trial convictions (n=14) was 9 months and is not depicted in this figure due to the limited number of observations. The average active sentence length for bench trials in Levels 3 and 4 were each based on fewer than 25 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Figure M provides a comparison of the average sentence imposed for active sentences and suspended sentences. As the punishment level decreased, the average sentence length decreased. Aggravated Level 1 DWIs had the longest average sentence imposed. For each punishment level, the average sentence for offenders who received a suspended sentence was longer than the average sentence for those who received an active sentence. However, the overall average sentence for active sentences was longer than the average sentence imposed for suspended sentences due to the large volume of Level 5 suspended sentences (n=10,723).

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



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

D. Probation Sentences

This section summarizes information about suspended (i.e., probationary) sentences. Pursuant to G.S. 20-179, a suspended sentence may be imposed in each of the six levels of DWI punishment if the sentence contains certain conditions of probation (e.g., special probation). For all punishment levels receiving a suspended sentence, the defendant must obtain a substance abuse assessment and complete any recommended treatment or education. Unless a judge determines that supervised probation is necessary, an offender who receives a suspended sentence for DWI and meets certain conditions[11] 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.[12]

Probation was imposed for all 18,928 DWI convictions in FY 2020 with a suspended sentence. Figure N summarizes the type of probation – supervised or unsupervised – for probation sentences. Overall, unsupervised probation was imposed for almost two-thirds (64%) of all probation sentences. Of those with probation, nearly all Aggravated Level 1 and Level 1 offenders (99% and 96% respectively) received supervised probation. Level 5 offenders accounted for over half of all probation sentences imposed (i.e.,

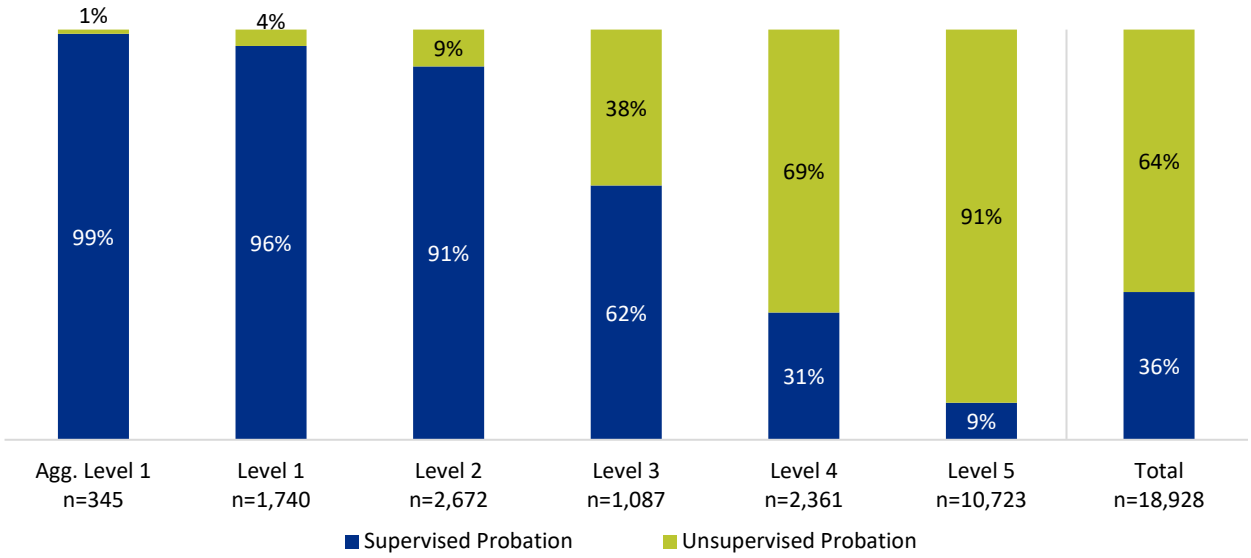
[11] Absent a judge's determination that supervised probation is necessary, unsupervised probation must be imposed if the following conditions are met: 1) if the person has not been convicted of an offense of impaired driving within the seven years preceding the date of the offense for which the defendant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

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

10,723 of 18,928 probation sentences). As the punishment level decreased, a greater percentage of offenders received unsupervised probation.[13]

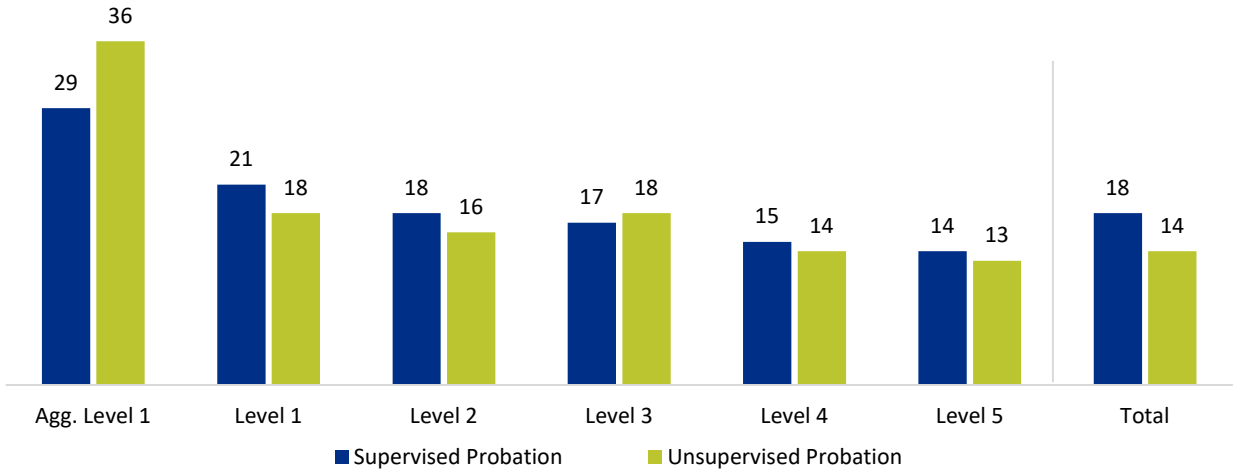
Figure O provides the average length of probation by punishment level and type of probation. The average length of probation was 18 months for supervised and 13 months for unsupervised probation. Offenders with supervised probation received longer probation terms than offenders with unsupervised probation.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

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



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Figure O: 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 10 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

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

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

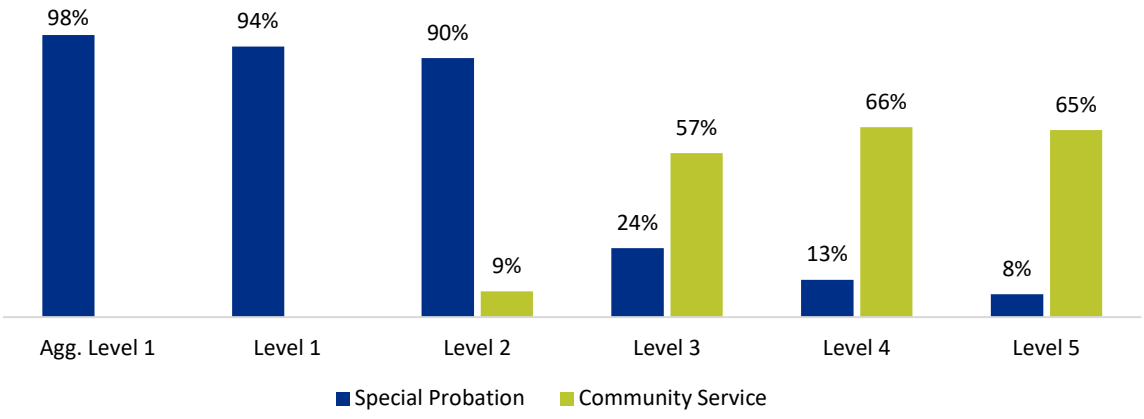
Table 4: Most Frequently Imposed Probation Length (Months) by Type of Probation and Punishment Level

Punishment Level	Total	Type of Probation					
		Supervised Probation			Unsupervised Probation		
		#	Mode	%	#	Mode	%
Agg. Level 1	345	343	36	42	2	36	100
Level 1	1,740	1,674	24	47	66	12	41
Level 2	2,672	2,434	18	44	238	12	51
Level 3	1,087	669	18	42	418	12	47
Level 4	2,361	723	12	62	1,638	12	81
Level 5	10,723	998	12	76	9,725	12	87
Total	**18,928**	**6,841**	**12**	**38**	**12,087**	**12**	**84**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Special probation is required for Aggravated Level 1 through Level 2 offenders sentenced to probation,[14] while either special probation or community service is required for Level 3 through 5 offenders sentenced to probation.[15] Mandatory probation conditions by punishment level are shown in Figure P.

Figure P: Mandatory Probation Conditions by Punishment Level



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

[14] Offenders sentenced in Aggravated Level 1 through Level 2 may receive community service as part of their sentence; it is required for some Level 2 offenders. Five percent (5%) of Aggravated Level 1 and 8% of Level 1 sentences had community service.
[15] Special probation and community service may be imposed together in Levels 3 through 5; this occurred in less than 1% of the convictions.

Table 5 shows the number, percent, and average days of special probation ordered within the context of the statutory requirements for the duration of special probation. Of all probation sentences, 31% (n=5,831) had special probation ordered (*see* Table 5). The average number of special probation days was highest for Aggravated Level 1 DWI offenders and decreased as the punishment level decreased.

Table 5: Probation Sentences with Special Probation by Punishment Level

Punishment Level	Probation Sentences # %	Special Probation Ordered % Days	Average Special Probation Days Days	Statutory Length Days
Agg. Level 1	345	98	130	At least 120
Level 1	1,740	94	33	At least 30 or at least 10 (if CAM)
Level 2	2,672	90	10	At least 7
Level 3	1,087	24	7	At least 3
Level 4	2,361	13	3	2
Level 5	10,723	8	2	1
Total	**18,928**	**31**	**22**	**N/A**

Note: All probation sentences with special probation ordered are shown regardless of whether the lengths of special probation are consistent with the terms in G.S. 20-179(f3), (g)-(k). CAM stands for continuous alcohol monitoring.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Table 6 provides information on fines imposed for probation sentences by punishment level. Fines were imposed for the majority of DWI convictions (86%), ranging from a low of 68% for Aggravated Level 1 offenders to a high of 88% for Level 4 offenders. For each punishment level, the average fine amounts were much lower than the statutory maximum. Nearly all fines imposed (95%) were $500 or less. The average fine amount decreased as the punishment level decreased.

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

Punishment Level	#	Fine Imposed %	Statutory Maximum	Average	Most Frequent Amount
Agg. Level 1	345	68	$10,000	$831	$500
Level 1	1,740	82	$4,000	$538	$500
Level 2	2,672	84	$2,000	$388	$300
Level 3	1,087	86	$1,000	$283	$200
Level 4	2,361	88	$500	$179	$100
Level 5	10,723	87	$200	$111	$100
Total	**18,928**	**86**	**N/A**	**$215**	**$100**

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

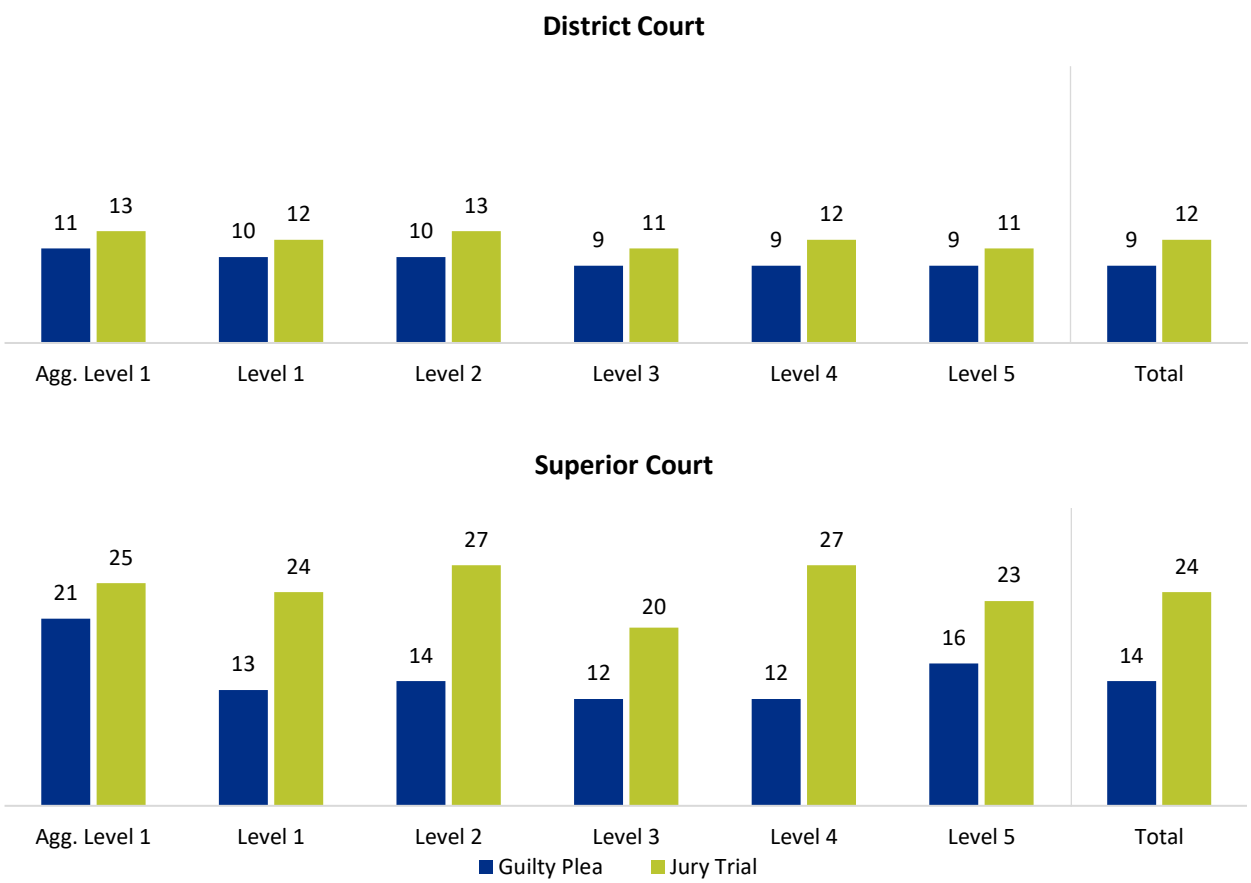
IV. SPECIAL ISSUES

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.

A. Time to Sentencing

Time to sentencing refers to the amount of time between the date the offender was charged with DWI and the date the sentence was imposed. Figure Q examines the median time to sentencing by punishment level and method of disposition for District Court and Superior Court. The median time to sentencing for DWI convictions disposed in District Court was 9 months. District Court bench trials took 3 months longer to dispose of than guilty pleas (12 months compared to 9 months). The median time to sentencing for DWI convictions disposed in Superior Court was 15 months. Guilty pleas entered in Superior Court took 10 months less time to sentencing than jury trials (14 months compared to 24 months). No distinct pattern emerged when examining time to sentencing by punishment level.

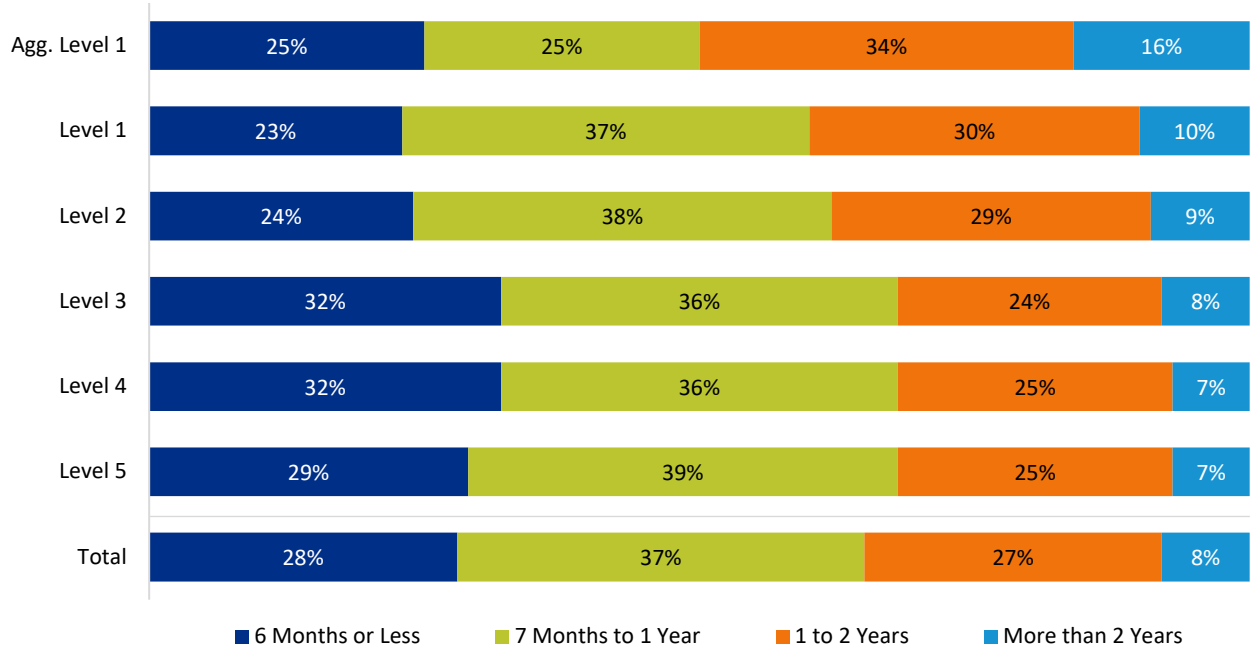
Figure Q: Median Time to Sentencing (Months) by Punishment Level and Method of Disposition for District Court and Superior Court



Note: Of the 20,414 DWI convictions in FY 2020, 6 Superior Court bench trials were excluded from this figure, as well as 14 convictions with discrepant date values. The median time to sentencing for Superior Court jury trials in Aggravated Level 1 through Level 5 were each based on fewer than 50 observations.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Figure R illustrates the distribution of time to sentencing for convictions by punishment level. Overall, 28% of convictions occurred within 6 months or less, 37% occurred within 7 months to 1 year, 27% occurred within 1 to 2 years, and 8% occurred in more than 2 years. Overall, nearly two-thirds of convictions were disposed within a year or less (65%). Fewer Aggravated Level 1 through Level 2 convictions were disposed within one year compared to Level 3 through Level 5 convictions.

Figure R: Distribution of Time to Sentencing by Punishment Level



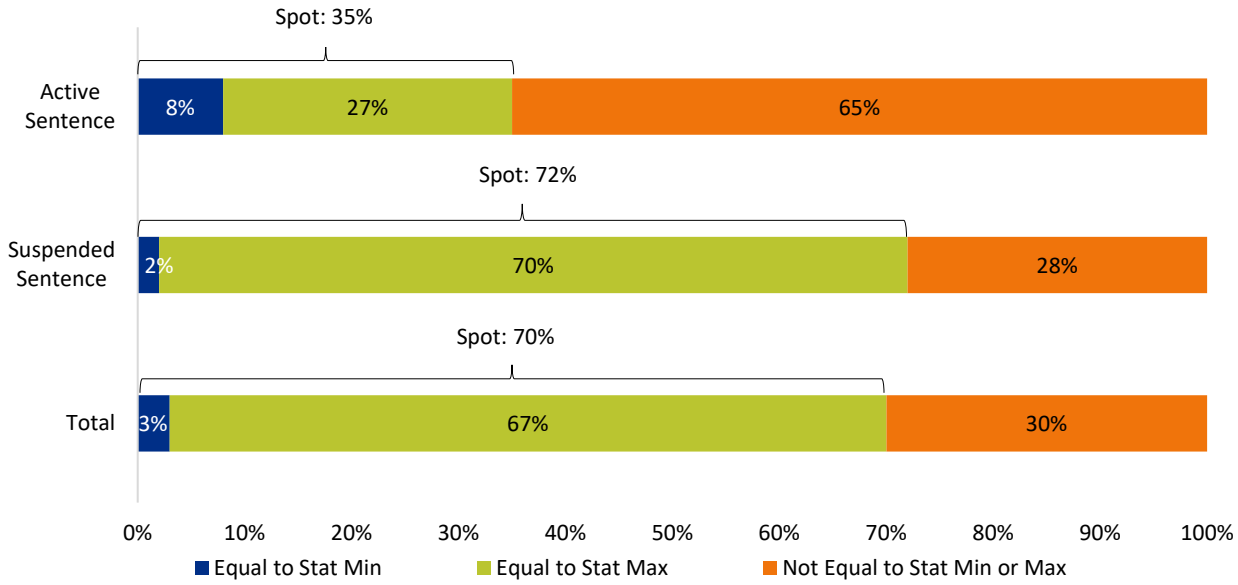
Note: Of the 20,414 DWI convictions in FY 2020, 14 convictions with discrepant date values were excluded.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

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

Figure S examines how often the minimum sentence imposed is equal to the statutory minimum or statutory maximum sentence length. Overall, the majority of minimum sentences imposed were equal to the statutory maximum (67%) and only 3% were equal to the statutory minimum – for a total of 70% on one of these two "spots." However, active sentences were only imposed on a spot 35% of the time compared to 72% of suspended sentences. The statutory minimum sentence was imposed very infrequently regardless of whether the sentence was active or suspended (with the exception of Aggravated Level 1 convictions).[16]

[16] Overall, 25% of Aggravated Level 1 offenders were sentenced to the statutory minimum (12 months), 44% were sentenced to the statutory maximum (36 months), and 31% were sentenced to a different amount of time, for a total of 69% sentenced on either the statutory minimum or statutory maximum.

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



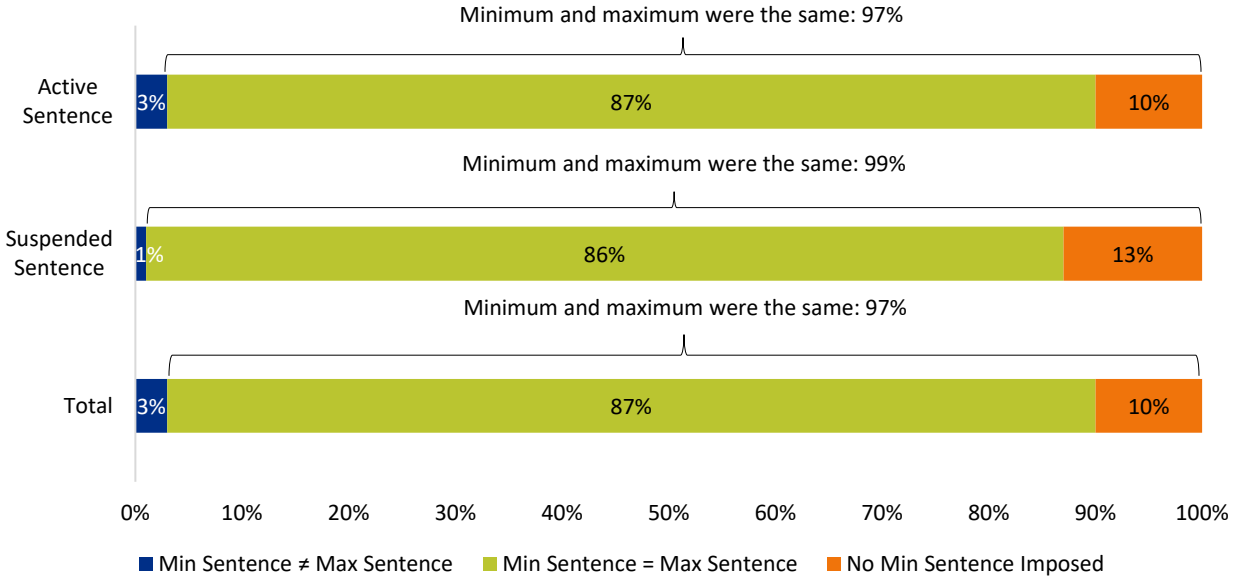
Note: Of the 20,414 DWI convictions in FY 2020, 13 convictions with missing values for type of sentence imposed were excluded from this figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

C. Use of Minimum and Maximum Sentences

Judges must impose a maximum term of imprisonment and may impose a minimum term.[17] Figure T examines whether a minimum term was imposed and whether the minimum term equaled the maximum term. Overall, 87% 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 10% of the sentences, no minimum term was indicated and only a maximum term was imposed. In the remaining 3% 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.

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

Figure T: Use of Minimum and Maximum Sentences



Note: Of the 20,414 DWI convictions in FY 2020, 13 convictions with missing values for type of sentence imposed were excluded from this figure.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

D. Credit for Time Served

Credit for time served refers to the amount of time an offender has spent committed to or confined in a State or local correctional, mental, or other institution prior to sentencing. Twenty percent (20%) of all DWI offenders received credit for time served (*see* Table 7). Two-thirds (66%) of offenders who received active sentences also received credit for time served compared to only 16% 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 (66 and 17 days respectively).

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

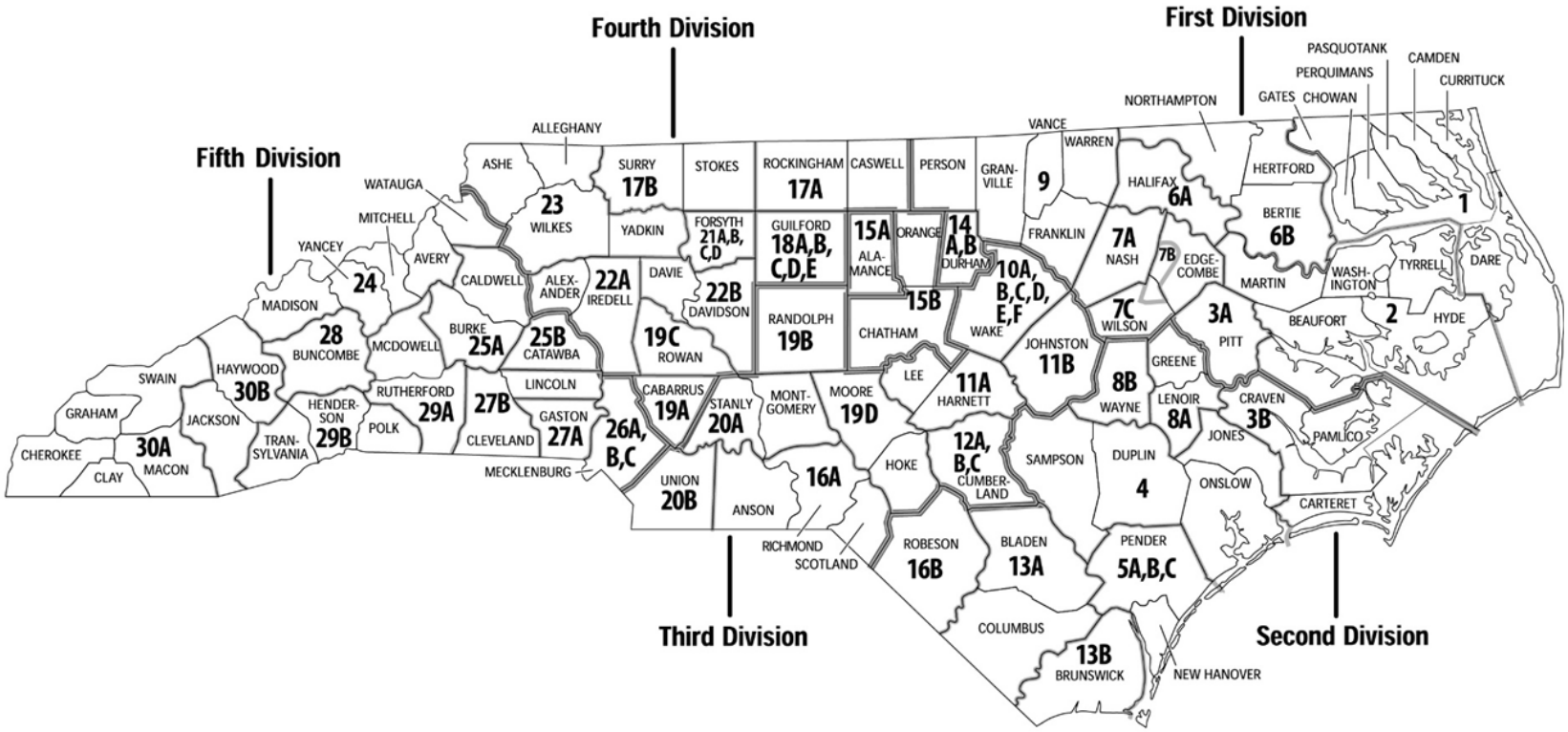
Punishment Level	Sentence Type	#	Convictions with Credit for Time Served		
			%	Average	Median
Agg. Level 1	Active	212	58	83	32
	Suspended	345	44	59	30
	Subtotal	**557**	**49**	**69**	**30**
Level 1	Active	269	56	83	57
	Suspended	1,740	35	26	20
	Subtotal	**2,009**	**38**	**38**	**25**
Level 2	Active	214	60	72	52
	Suspended	2,672	27	16	7
	Subtotal	**2,886**	**30**	**24**	**7**
Level 3	Active	139	71	70	55
	Suspended	1,087	23	19	5
	Subtotal	**1,226**	**28**	**34**	**13**
Level 4	Active	217	73	55	42
	Suspended	2,361	13	13	2
	Subtotal	**2,578**	**19**	**27**	**10**
Level 5	Active	422	75	52	34
	Suspended	10,723	9	6	1
	Subtotal	**11,145**	**11**	**18**	**2**
Total	**Active**	**1,473**	**66**	**66**	**42**
	Suspended	**18,928**	**16**	**17**	**5**
	Total	**20,401**	**20**	**29**	**8**

Note: Of the 20,414 DWI convictions in FY 2020, 13 convictions with missing values for type of sentence imposed were excluded from this table.
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

APPENDIX A
MAPS OF JUDICIAL DIVISIONS AND DISTRICTS

North Carolina Superior Court Districts

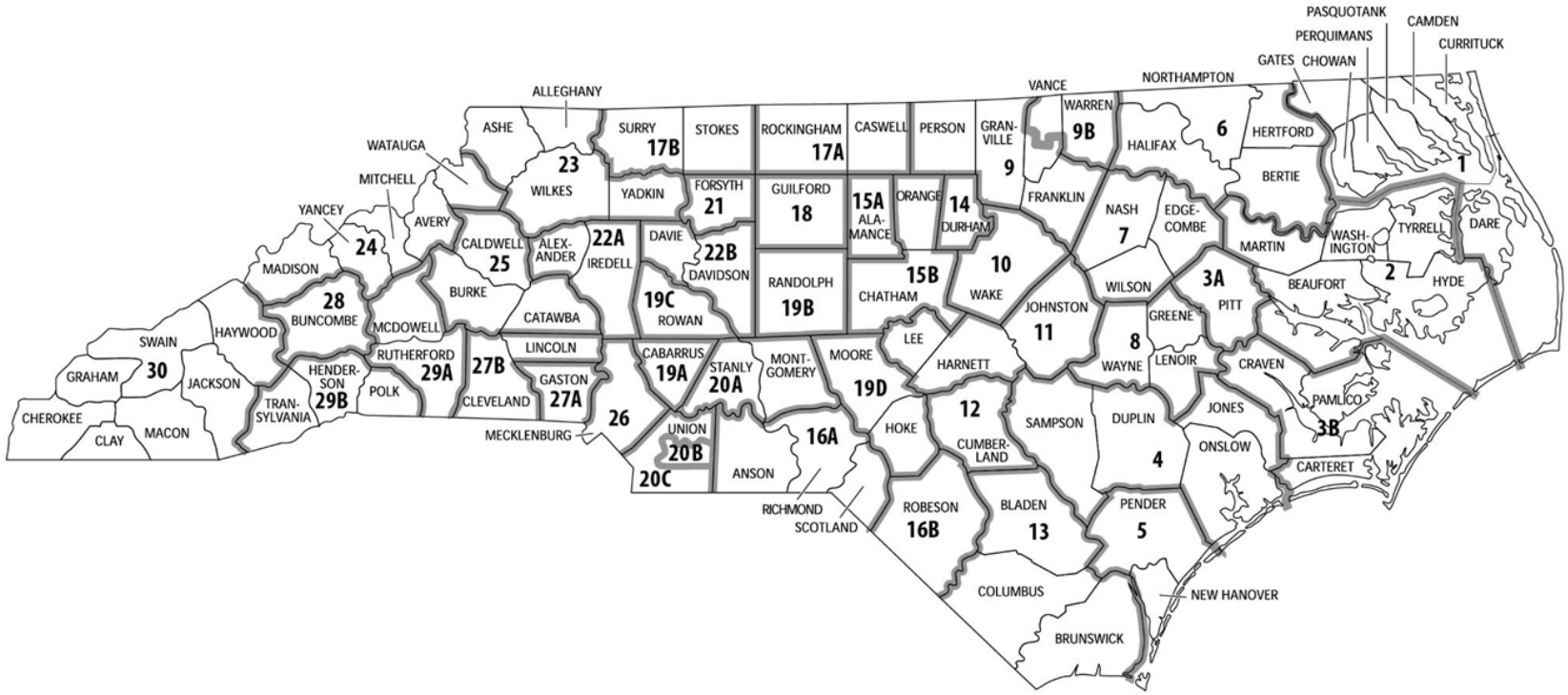
Effective January 1, 2019



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

North Carolina District Court Districts

Effective January 1, 2019



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

APPENDIX B
DWI PUNISHMENT TABLE

SENTENCING FOR IMPAIRED DRIVING OFFENSES

PUNISHMENT LEVELS	FACTORS	PUNISHMENT	FINE
Aggravated Level One (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 One (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 Two (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 Three (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 Four (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 Five (20-179(k))	Mitigating factors substantially outweigh aggravating factors.	**Active sentence range:** Min: 24 hours Max: 60 days **Or split sentence:** 24 hours **Or community service:** 24 hours	Maximum of $200

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

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

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

Offenses

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

Sentence

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

Place of confinement for active sentences

For convictions on or after January 1, 2015:

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

APPENDIX C
ADDITIONAL CONVICTION DATA BY JUDICIAL DISTRICT AND COUNTY

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

Judicial District and County		DWI Convictions	Convictions per 1,000 Adults (16+)
District 1	Camden	15	2
	Chowan	23	2
	Currituck	110	5
	Dare	269	9
	Gates	9	1
	Pasquotank	64	2
	Perquimans	39	3
	Total	**529**	**4**
District 2	Beaufort	195	5
	Hyde	10	2
	Martin	64	3
	Tyrrell	20	6
	Washington	23	2
	Total	**312**	**4**
District 3A	Pitt	256	2
	Total	**256**	**2**
District 3B	Carteret	144	2
	Craven	102	1
	Pamlico	15	1
	Total	**261**	**2**
District 4	Duplin	149	3
	Jones	30	4
	Onslow	337	2
	Sampson	215	4
	Total	**731**	**3**
District 5	New Hanover	720	4
	Pender	178	3
	Total	**898**	**4**
District 6	Bertie	32	2
	Halifax	111	3
	Hertford	40	2
	Northampton	19	1
	Total	**202**	**2**
District 7	Edgecombe	169	4
	Nash	259	3
	Wilson	181	3
	Total	**609**	**3**
District 8	Greene	56	3
	Lenoir	93	2
	Wayne	442	5
	Total	**591**	**4**
District 9,9B	Franklin	249	4
	Granville	241	5
	Person	170	5
	Vance	288	8
	Warren	64	4
	Total	**1,012**	**5**
District 10	Wake	1,470	2
	Total	**1,470**	**2**
District 11	Harnett	133	1
	Johnston	454	3
	Lee	68	1
	Total	**655**	**2**
District 12	Cumberland	391	2
	Total	**391**	**2**
District 13	Bladen	73	**3**
	Brunswick	281	2
	Columbus	80	**2**
	Total	**434**	**2**
District 14	Durham	417	2
	Total	**417**	**2**
District 15A	Alamance	549	4
	Total	**549**	**4**
District 15B	Chatham	104	2
	Orange	389	3
	Total	**493**	**3**
District 16A	Anson	33	2
	Richmond	63	2
	Scotland	**75**	**3**
	Total	**171**	**2**
District 16B	Robeson	304	3
	Total	**304**	**3**
District 17A	Caswell	71	4
	Rockingham	344	5
	Total	**415**	**4**
District 17B	Stokes	149	4
	Surry	184	3
	Total	**333**	**3**
District 18	Guilford	1,368	3
	Total	**1,368**	**3**
District 19A	Cabarrus	493	3
	Total	**493**	**3**

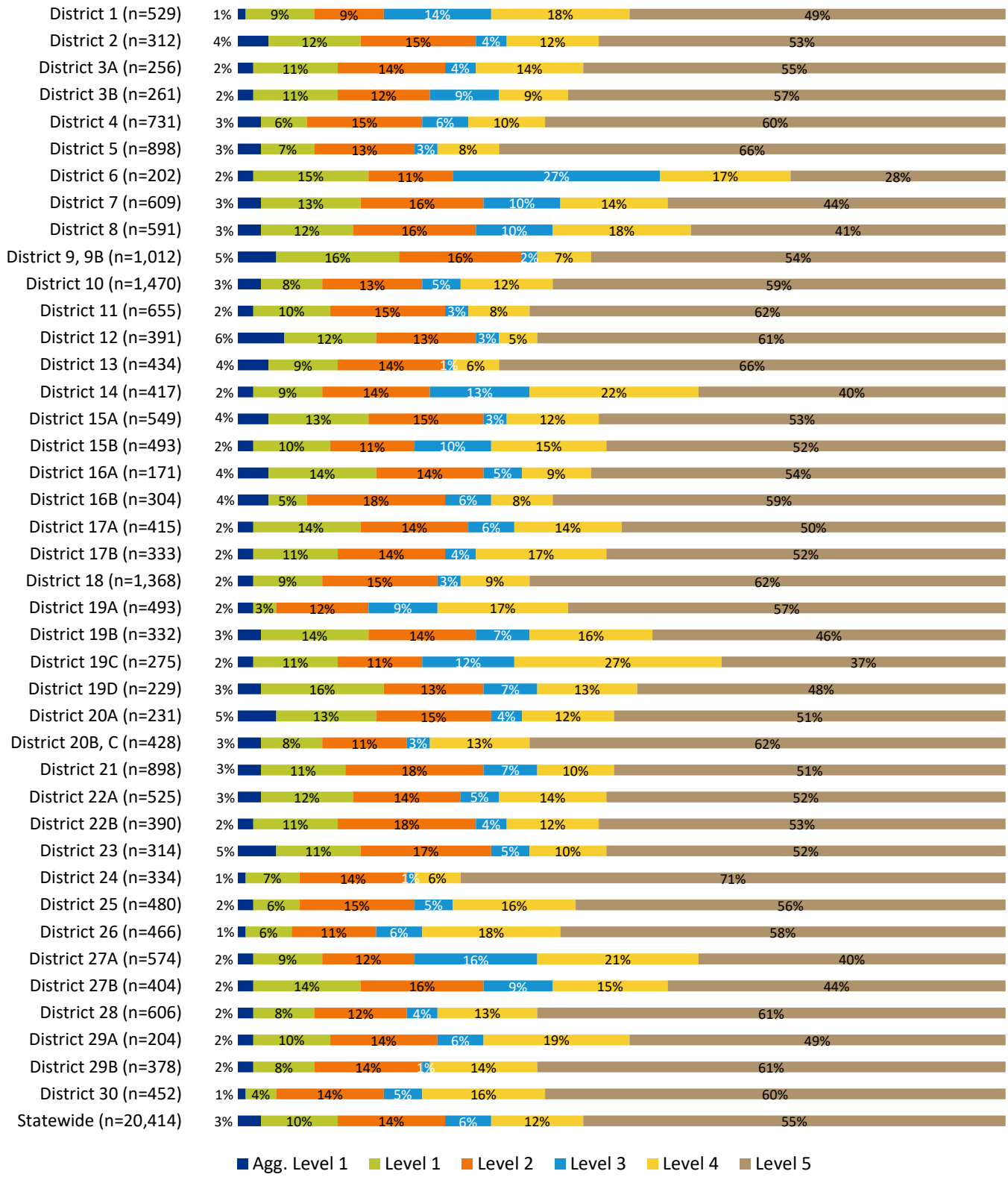
continued

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

Judicial District and County		DWI Convictions	Convictions per 1,000 Adults (16+)
District 19B	Randolph	332	3
	Total	**332**	**3**
District 19C	Rowan	275	2
	Total	**275**	**2**
District 19D	Hoke	68	2
	Moore	161	2
	Total	**229**	**2**
District 20A	Montgomery	78	4
	Stanly	153	3
	Total	**231**	**3**
District 20B,C	Union	428	2
	Total	**428**	**2**
District 21	Forsyth	898	3
	Total	**898**	**3**
District 22A	Alexander	69	2
	Iredell	456	3
	Total	**525**	**3**
District 22B	Davidson	280	2
	Davie	110	3
	Total	**390**	**2**
District 23	Alleghany	26	3
	Ashe	65	3
	Wilkes	115	2
	Yadkin	108	3
	Total	**314**	**3**
District 24	Avery	42	3
	Madison	53	3
	Mitchell	46	4
	Watauga	154	3
	Yancey	39	2
	Total	**334**	**3**
District 25	Burke	156	2
	Caldwell	57	1
	Catawba	267	2
	Total	**480**	**2**
District 26	Mecklenburg	466	1
	Total	**466**	**1**
District 27A	Gaston	574	5
	Total	**574**	**5**
District 27B	Cleveland	217	3
	Lincoln	187	3
	Total	**404**	**3**
District 28	Buncombe	606	3
	Total	**606**	**3**
District 29A	McDowell	120	3
	Rutherford	84	1
	Total	**204**	**2**
District 29B	Henderson	255	3
	Polk	48	3
	Transylvania	75	2
	Total	**378**	**3**
District 30	Cherokee	46	2
	Clay	33	3
	Graham	13	2
	Haywood	114	2
	Jackson	114	3
	Macon	83	3
	Swain	49	4
	Total	**452**	**3**
	State Total	***20,414***	***2***

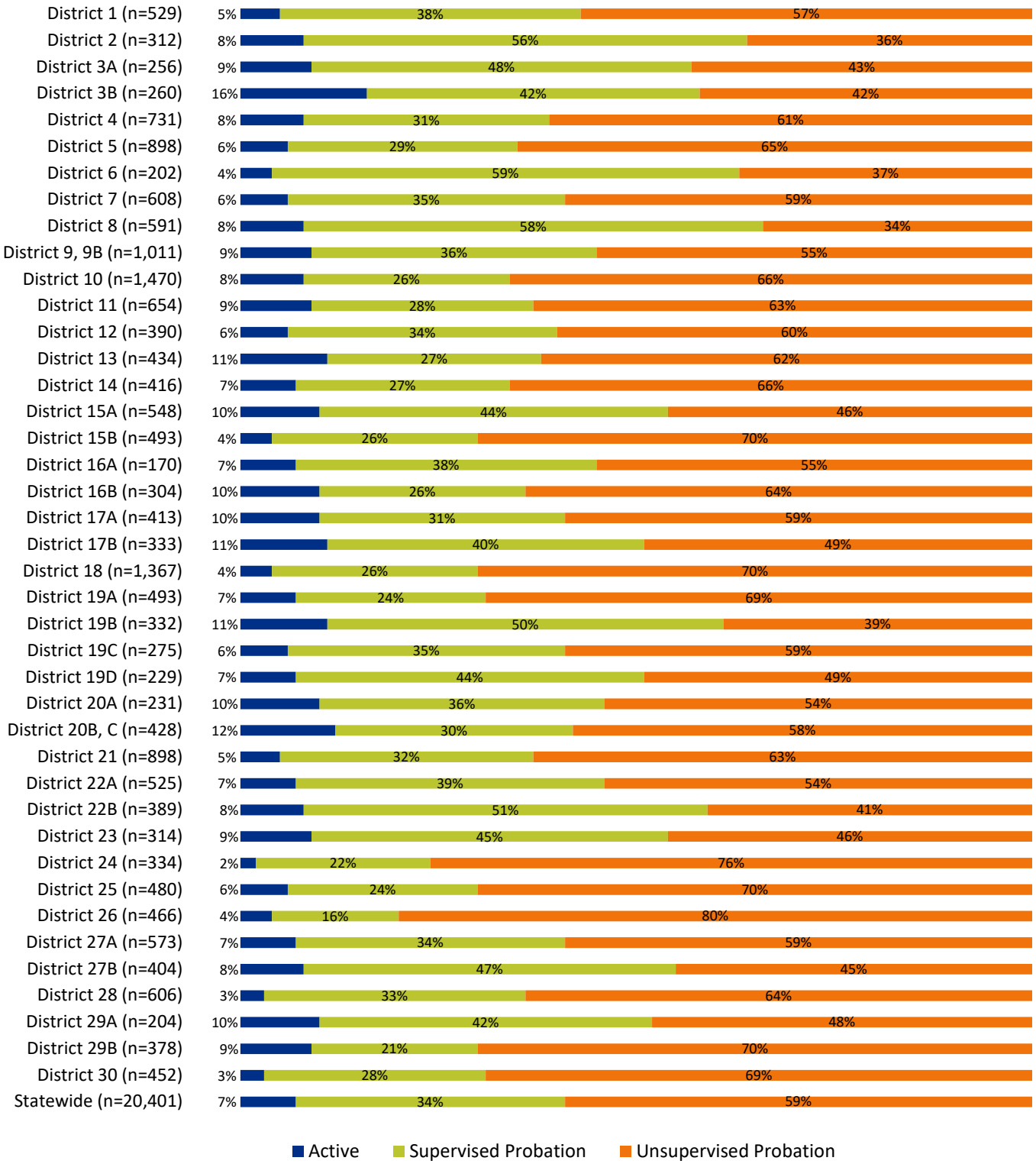
SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data and NC Office of State Management and Budget, 2020 Population Estimates from https://demography.osbm.nc.gov/explore/ (*see* Population Projections).

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



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

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



Note: Of the 20,414 DWI convictions in FY 2020, 13 convictions with missing values for type of sentence imposed were excluded from this figure.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

APPENDIX D
ADDITIONAL CONVICTION DATA BY PUNISHMENT LEVEL

Appendix D, Table 1: Offender Characteristics and Punishment Imposed by Punishment Level N=20,414

	Agg. Level 1 n=557	Level 1 n=2,009	Level 2 n=2,886	Level 3 n=1,226	Level 4 n=2,578	Level 5 n=11,158
Offender Characteristics						
Gender						
Male	81%	74%	78%	81%	77%	72%
Female	19%	26%	22%	19%	23%	28%
Race						
White	42%	48%	53%	51%	56%	60%
Black	44%	38%	34%	36%	29%	25%
Hispanic	8%	10%	8%	9%	11%	10%
Other	6%	4%	5%	4%	4%	5%
Age at Offense						
Less than 21 Years	1%	2%	2%	3%	4%	6%
21-30 Years	30%	32%	32%	26%	31%	39%
31-40 Years	33%	33%	28%	30%	28%	24%
41-50 Years	18%	20%	19%	21%	19%	16%
Over 50 Years	18%	13%	19%	20%	18%	15%
Average Age	38	37	38	39	38	36
Median Age	36	35	36	37	35	32
Blood Alcohol Concentration						
Less than .08	2%	3%	2%	3%	2%	2%
.08 to .14	39%	49%	46%	22%	27%	62%
.15 or More	59%	48%	52%	75%	71%	36%
Punishment Imposed						
Method of Disposition						
Guilty Plea	91%	90%	87%	89%	90%	86%
Bench Trial	8%	9%	13%	10%	10%	14%
Jury Trial	1%	1%	<1%	1%	<1%	<1%
Sentence Type						
Active Sentence	38%	14%	8%	11%	8%	4%
Supervised Probation	62%	83%	84%	55%	28%	9%
Unsupervised Probation	<1%	3%	8%	34%	64%	87%
Sentence Length/Location						
Active						
Average Length (Months)	19	12	6	4	2	1
Sentenced at Stat. Minimum	42%	3%	3%	2%	2%	1%
Sentenced at Stat. Maximum	13%	16%	26%	37%	24%	38%
Sentence Other than Stat. Min/Max	45%	81%	71%	61%	74%	61%
Suspended						
Average Length (Months)	30	20	11	5	3	2
Sentenced at Stat. Minimum	14%	2%	2%	1%	1%	2%
Sentenced at Stat. Maximum	63%	67%	80%	68%	61%	71%
Sentence Other than Stat. Min/Max	22%	31%	18%	31%	38%	27%

Note: Convictions with missing data were excluded.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 DWI Statistical Report Data

Appendix D, Table 2: Conditions of Probation for Probation Sentences by Punishment Level N=26,272

	Agg. Level 1 n=345	Level 1 n=1,740	Level 2 n=2,672	Level 3 n=1,087	Level 4 n=2,361	Level 5 n=10,723
Supervised Probation	99%	96%	91%	62%	31%	9%
Length						
1 Year or Less	5%	19%	34%	39%	63%	77%
13-18 Months	14%	26%	45%	43%	26%	15%
19-24 Months	34%	47%	18%	15%	10%	7%
More than 2 Years	47%	8%	3%	3%	1%	1%
Average Length (Months)	28	21	18	17	15	14
Unsupervised Probation	1%	4%	9%	38%	69%	91%
Length						
1 Year or Less	0%	41%	51%	47%	82%	89%
13-18 Months	0%	29%	35%	35%	12%	7%
19-24 Months	0%	27%	10%	11%	4%	3%
More than 2 Years	100%	3%	4%	7%	2%	1%
Average Length (Months)	36	18	16	18	14	13
Mandatory Conditions						
Special Probation	98%	94%	90%	24%	13%	8%
Community Service	5%	8%	9%	57%	66%	65%
Both	5%	7%	7%	1%	1%	<1%
Fines						
Convictions with Fine Imposed	68%	82%	84%	86%	88%	87%
Fine Amount						
Less than $100	1%	2%	2%	3%	4%	7%
$100 to $199	10%	13%	17%	23%	52%	84%
$200 to $299	10%	18%	22%	34%	32%	8%
$300 to $499	14%	24%	29%	22%	9%	1%
$500 or More	65%	43%	30%	18%	3%	<1%
Average Fine Imposed	$831	$538	$388	$283	$179	$111
Median Fine Imposed	$500	$400	$300	$200	$150	$100

Note: Convictions with missing data were excluded. The average length of probation for unsupervised probation in Aggravated Level 1 was based on fewer than 10 observations.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2020 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.

DISTRICT COURT PLEADINGS "TO GO"

APDs A. Maris & J. Donovan 2011

What are they? **CAMCSI!**
Citation (15A-302(b), 15A-922(c)),
Arrest Warrant (15A-304(b)),
Magistrate's Order (15A-511(c)),
Criminal Summons (15A-301(b)),
Statement of Charges (15A-922(a))
& **I**nformation & indictment!

Misdemeanor Pleadings (N.C. Gen. Stat. §15A-921, 922)

What do I Say: (Defective Pleading = missing element of correct charge or allege wrong charge, Ex's: RDO (no duty) or Prost'n should be CAN)

"Objection, Your Honor…I move to dismiss. The pleading in the case is defective. It fails to properly allege the elements of a (*insert offense*)."

When to Object (& Why) → Do you have a **Fatal Defect or Fatal Variance?...** DURING TRIAL

FATAL DEFECT Pleading fails to charge offense properly → Object after witness sworn in

- Generally, any objection of defense that can be addressed pre-trial is addressed then, 15A-952(a)—but don't!
- Wait until **after arraignment, at least!** Why?...
  ---The State **cannot** fix the defect by filing a *misdemeanor statement of charges* where it would **change the nature of the offense** *after* arraignment (15A-922(e)).
  *****Also note—*amendments:* State may **amend** pleading, incl. a misd. statement, if doesn't change nature of offense prior to or after final judgment (15A-922(f)).---
- **Nature of offense** changed when—misd. statement (or amendment) changes to *another* charge or makes a "substantial alteration" of the charge as set out in case law (310 NC 596, *see also* "Specific Offense Reqts").
- Wait until **after witness sworn**? Not necessary but good practice…
  *This is when **jeopardy** attaches. ("In a nonjury trial, jeopardy attaches when the court begins to hear evidence," 420 US 377. However, a dismissal based on fatal variance or a fatal defect does not create a DJ bar to subsequent prosecution, 156 NCA 671.)
  IN PRACTICE: DA/PO may not pursue once J. attaches.
- Statute also says can make defective pleading motion "at any time," 15A-952(d).

TO REVIEW PLEADING:
| *See **back side**:* 15A-924(a)
| & Specific Offenses Reqts

NOTE: REVIEW YOUR PLEADING FOR DEFECTS BEFORE TRIAL→→ **BACK SIDE→**

FATAL VARIANCE The proof at trial (evidence presented) is different from what was alleged in pleading → Object at close of State's evidence & at close of ALL the evidence!!

- "It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment."
- "The question of variance…is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. *In other words, the proof does not fit the allegation, and therefore, leaves the latter without any evidence to sustain it*." State v Faircloth, 297 NC 100 (1979)

What if the state files a **Misdemeanor Statement of Charges** BEFORE TRIAL? 15A-922(a),(b)&(d)

The state can file a **Misdemeanor Statement of Charges** (supersedes all previous pleadings → becomes the pleading!) to add offenses or change the original offense before arraignment under **15A-922(d)** → You are entitled to **a motion to continue of at least "3 working days"** from the time it is filed or D is 1st notified (whichever is later) unless the "judge finds that the statement…makes no material change in the pleadings" **15A-922(b)(2) ***PRACTICAL NOTE: A 3-day MTC may = a 30 day MTC & be wise, esp. if case turns on a civ. witness not inclined to return or to meet with your client again.

Are there additional limitations on **Amendments**?

Yes! State 1) must amend in writing (10 NCA 443) & 2) cannot amend original charge to greater offense (add aggravating factors w/ felonies, e.g. charged with (M) Oper. MV to Elude Arrest & State amended to add aggravating factor to become (F) Oper. MV Elude Arrest – can't do! Elevating offense = changing its nature! 154 NCA 332)

"DUE PROCESS IS NOT A TECHNICALITY" THE MOTION GOES BEYOND STATUTES.
How do I respond to arguments that pleading defects are "just a technicality"/minor statutory violations?? **Constitution! Constitution! Constitution! DP, DJ.** → A pleading "must allege lucidly and accurately all the essential elements of the [crime]…charged." This ensures: 1) identification of offense charged, 2) D on notice of what is alleged so he can prepare for trial, 3) D not put in jeopardy twice for same charge & 4) proper sentencing, 357 N.C. 257, 166 N. C. App. 202

STATUTORY REQUIREMENTS --&-- CASE LAW FOR SPECIFIC OFFENSES…

15A-924(a) IS YOUR FIRST STOP. It will tell you what all pleadings must contain.15A-922 controls changes to pleadings by amendment or misdemeanor statement (referenced on *front* side).

STATUTORY REQ'TS (all pleadings)

The pleading is facially defective; it fails to charge offense properly. **15A-924(a)**

"(a) A criminal pleading must contain:
(1) Name or other identification of D
→ name totally unknown, fatally defective, 302 NC 613 → name in caption, not body ok, 77 NCA 583 → ok to amend & doctrine of *idem sonans*, 123 NCA 361
(2) Separate count for each offense charged
(3) County where offense took place
→ establishes venue, not fatal if not material
(4) Date or time period when offense took place → grounds to dismiss if time is "of the essence," e.g. SOL or alibi, 307 NC 645 *and* the error misled D to his prejudice, 162 NCA 715
→ amendments-if time not of essence, amendment does not change nature of offense!
(5) Plain & concise factual statement supporting *every* element of offense charged! (What are charge's elements?) – says must be "with sufficient precision clearly to apprise the D or Ds of the conduct" which is subject of accusation
(6) Reference to the statute or ordinance D allegedly violated
→ not grounds for dismissal, (not fatal-body of pleading properly alleges crime & amend ok, 362 NC 169) → *but see* ordinances: 160A-79, 153A-50, 283 NC 705, 33 NCA 195.

Warrant failing to charge any offense: The trial court must dismiss the charge against a D if the criminal pleading fails to charge offense, *State v. Madry*, 140 NCA 600 (2000) (warrant insufficient b/c "it did not adequately apprise D of the specific offense with which he was being charged").

General rule – pleading for statutory offense is sufficient if charges offense in words of statute. (161 NCA 686) Exceptn: the words of statute do not unambiguously set out all elements (238 NC 325, also 15A-924(a)(5)), e.g. PDP (162 NCA 268, What is the "PDP?" Officer must describe!), Prostitution charged under subsection (7) (see 244 NC 57).

SPECIFIC OFFENSE REQ'TS:

Larceny & Embezzlement—Grounds for dismissal if pleading fails to id person w/ property interest or legal entity capable of owning property, e.g. must say "Walmart, Inc." → ask: what is the legal name of the entity in my case? = element! → "takes personal property belonging to another" Remember—larceny can occur if taken from someone in lawful poss'n of item at time (e.g. bailee) or *in loco parentis* (137 NCA 553). Generally, can't amend! (162 NCA 350) (149 NCA 588) Fatal variance if—person named not owner in evidence (282 NC 249) **Exception: Shoplifting** b/c offense always commitd against a store (18 NCA 652)
FTRRP—2 statutes: **14-167 & 14-168.4** (contract w/ purchase option). Charge correct statute? Can't amend
RDO-must id PO by name, duty & how D R/D/O'd in factual allegations (262 NC 472, 263 NC 694). (Rem-onstrating w/ PO ok, 278 NC 243, 118 NCA 676)
Disorderly Conduct-do factual allegations support a DC? D's conduct "fighting words" or gesture "intended & plainly likely to provoke violent retaliation & thereby cause a breach of the peace?" (14-288.4, 282 NC 157) "MFs ought to be arrested."
PDP—Pleading must describe PDP item in allegation to "sufficiently apprise D," error to allow amend (267 NC 755, common household item could be PDP)
Prostitution or CAN?—14-203 defines prostitution as act of *sexual intercourse* & nothing else. Sexual intercourse is, "The actual contact of the sexual organs of a man and a woman, & an actual penetration into the body of the latter." If legislature wishes include w/in 14-204 other sexual acts (cunnilingus, fellatio, masturbation, sodomy) it should do so w/ specificity since 14-204 is a criminal statute. 307 N.C. 692.
Remember! Solicitation to commit I (F) is a Cl. 2 (M), 14-2.6 & Cl. 2 doesn't count toward (F) sentencing record level, but Cl. 1 does. 15A-1340.14(b)(5).
Assault or Assault by Show of Violence—assault by show of violence must allege more than assault: (1) a show of violence by D; (2) "accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed"; (3) causing the vic "to engage in a course of conduct which she would not otherwise have followed." 146 NCA 745
B&E—must id bdlg. w/ particularity, 267 NC 755
Shopl/Poss Marij/Worth Check—must allege facts showing subseqt crime to subject D to higher penalty, 237 NC 427, 21 NCA 70

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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Indigent Defense Services Policies and Procedures

Misdemeanor Defender Training

Thursday, November 4, 2021

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

- If assigned to case that ends in deferral or diversion (including GS 90-96 deferral)
  - 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.

4

Scope of Representation

- Client has 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 and 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 the Court does not find that the defendant has four or more prior convictions at the time the Court determines entitlement to counsel and the defendant is not in custody, the Court should not appoint counsel regardless of the defendant's indigency and the case should proceed as a fine only case.
- 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(a) (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, price tag switching is a class 3 misdemeanor on first conviction and 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

- If a defendant who is not entitled to counsel for a Class 3 misdemeanor is in custody at the time the Court determines entitlement to counsel, the 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.


STATE OF NORTH CAROLINA

County

ORDER OF ASSIGNMENT
OR
DENIAL OF COUNSEL

11

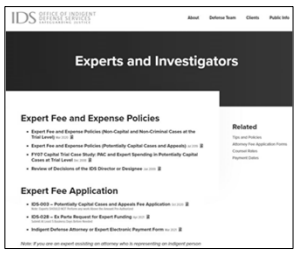
Misdemeanor Classification

- 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 01, 2018).
- Policy memo on Class 3 Misdemeanors: Appointment and Payment of Counsel.

12

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

- When representing an indigent client in a Non-Capital Criminal case (or Non-Criminal case) use:
  - AOC-G-309 Form

and

  - Supporting motion (link to motions bank).
- 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.

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Interpreter

- The Judicial Branch provides spoken foreign language court interpreters at state expense 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 a Court Interpreter. www.nccourts.org
- Request for Court Interpreter (link)
- https://www.nccourts.gov/help-topics/disability-and-language-access/language-access

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Transcripts

When a court appointed attorney needs a transcript from a non-appellate criminal proceeding, the attorney must:

- Use an authorized and approved transcriptionist

and

- Submit a completed AOC-CR-395 form (including judge's signature)
- For questions regarding the policies and procedures for ordering transcripts in non-appellate criminal cases contact David Jester, CVR-M, at 919-890-1601 or David.E.Jester@nccourts.org.

See IDS Transcript Ordering Policy & Procedure

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Internal Policies and Procedures

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Internal Policies and Procedures

- Mileage and travel reimbursements
- Training, publications, and resources
- Contacts

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Travel and Expense Reimbursement

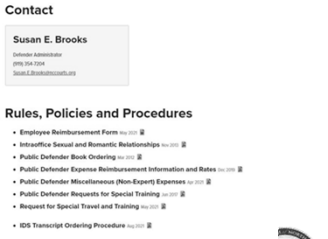
Governed by G.S. 138-6

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
- COVID-19 Emergency Teleconference Policies, Access, and Reimbursement

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IDS-Who to Contact

- Financial
  - Chad Boykin
    - 919-890-2128
    - chadwick.e.boykin@nccourts.org
  - Amy Ferrell (Accounts Payable)
    - 919-890-1660
    - Amy.M.Ferrell@nccourts.org
- Regional Defenders
  - D. Tucker Charns
    - 919-354-7263
    - Tucker.Charns@nccourts.org
  - Jeff Connolly
    - 919-354-7207
    - Jeffrey.B.Connolly@nccourts.org
- Public Defender Administrator
  - Susan Brooks
    - 919-354-7204
    - Susan.E.Brooks@nccourts.org

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Thank You

Mary Pollard, IDS Executive Director
Chadwick Ellis Boykin, Staff Attorney, IDS Financial Services
http://www.ncids.org/staff/

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CROSS EXAMINATION

2021 MISDEMEANOR DEFENDER

JEFF CONNOLLY
IDS REGIONAL DEFENDER

1

MAIN POINTS

1. Organized plan
2. Effective delivery

2

The Basics of Cross-Examination

The Purpose of Cross-Examination.
Obtain **1** to **7** facts that will be used in closing argument (or 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

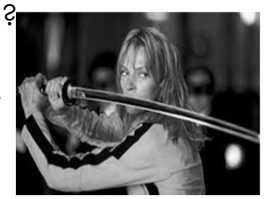
1) Never ask a question when you do not know the answer.

2) Always ask leading questions.

3) Always ask one-fact questions.

3

WHY DO WE CROSS?



- To advance your theory of the case
- To discredit prosecution case
- To lay foundation for closing argument
- If cross isn't serving these purposes, you don't need to cross

4

HOW TO GET READY FOR CROSS?

- Know your case
- Have a theory of innocence
- Think about the state's case
- Organize your trial file – especially impeachment material

5

HOW TO PREPARE A CROSS

- Write out questions or points to be made
- Organize points and questions by chapters
- Begin thinking about the order of your chapters

6

HOW TO CROSS

- Short, simple questions – One fact per question
- Have the witness confirm or deny your facts (no more or less)
- ONLY USE LEADING QUESTIONS

7

Stop (pg.3)
- Activated Lights
- Turn Signal
- Pulled into parking lot
- Complete Stop
- Rolled down windows

SFST (pg.4)
- Explained tests
- She understood
- Completed W&T
- No clues

Breath (pg. 5)
- Willing to give sample
- Machine not working
- Go to Hospital
- Gave blood sample
- Sample lost

8

HOW TO CROSS

- Utilize all relevant facts (but only ask questions with a purpose)
- Start and End Strong – Primacy and Recency
- LISTEN – to the direct testimony, and to their answers on cross
- Use Transitions – "Now I'd like to talk to you about . . ."

9

HOW NOT TO CROSS

- Don't be unnecessarily combative or rude
- Don't argue with the witness (just impeach them)

10

MORE NOT TO DO ON CROSS

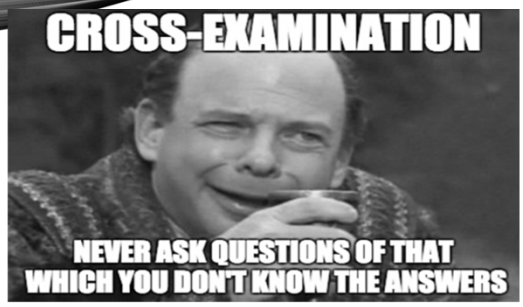
- Don't repeat the direct examination
- Don't ask the ultimate question (So, . . .)

11

MORE NOT TO DO ON CROSS

- Don't let the witness avoid the question
- Don't be a smartass (usually)
- Lose the lawyer/cop talk
- Don't cross just for the sake of asking questions

12



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COMMON GROUNDS OF IMPEACHMENT

- Bias, Memory, Perception of Witness
- Prior Convictions
- Character for Truthfulness
- Contradictions, Inconsistencies, Failure to Investigate

14

OTHER CROSS TECHNIQUES

- Stretching
- Looping
- Omissions
- Impeachment by Prior Statement

15

BASIC LAW OF CROSS

- Wide-Open Cross (but watch for opening doors . . .)
- Courts have wide discretion to limit for relevance, cumulative evidence, badgering, etc.
- 5th and 6th Amendments protect Defendant's right to present a defense, to a full and fair cross-examination, and to confront their accusers.

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BASIC LAW OF CROSS

- Good Faith Requirement
- Rules of Evidence Apply (402, 403, 404, 608, 609, 611)
- No undue harassment, embarrassment

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MAIN TAKEAWAYS

- Organized Plan
  - Theory of innocence
  - Outline of questions
- Effective Delivery
  - Leading questions ONLY
  - One fact per question
- Have the courage to EDIT

18

QUESTIONS?

- JEFF CONNOLLY
- JEFFREY.B.CONNOLLY@NCCOURTS.ORG
- 919-423-7494 (call or text)

19

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.]

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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.

Final Argument

Fred Friedman

Tips for Writing a Final Argument

FIND AN OPENING HOOK

START WITH A SCENE

AVOID LEGAL LANGUAGE

DO NOT WRITE AS IF YOU ARE GIVING A LECTURE. YOU ARE WRITING PERSUASIVELY TO DECISION MAKERS

BLOCK YOUR ARGUMENTS OFF OF YOUR THEORY

ORGANIZE YOUR ARGUMENTS OFF OF YOUR THEORY AND DETERMINE THE ORDER OF THE ARGUMENTS

DECIDE WHAT TESTIMONY CAME UP AT TRIAL THAT YOU WANT TO HIGHLIGHT IN FINAL. DECIDE WHEN IN FINAL YOU WANT TO INSERT IT.

USE DEMONSTRATIVE EVIDENCE/VISUAL AIDS

WORK ON CRAFTING YOUR LANGUAGE

USE TRILOGIES

REPEAT YOUR THEME

TELL TWO STORIES.

- -Not about the case but about what really is
- -Relate facts of the case but in story fashion

HAVE A BETTER STORY

BE A BETTER STORY TELLER

FIND A CLOSING HOOK

Tips for Delivering a Final Argument

ACKNOWLEDGE YOUR CLIENT

DEFINITELY USE VISUAL AIDS—PowerPoint, diagrams, maps, something . . . .

REFER TO AND HANDLE ALL ADMITTED EXHIBITS—either they help you or discard them because they are of no relevance or miss the point or do not go to guilt

1. ASSERT YOUR CLIENT'S INNOCENCE

2. THEME—say it once early and once late

3. THEORY—say nothing that is inconsistent with your THEORY

4. GENRE—one and only

5. WHAT IS NOT AT ISSUE?

6. WHAT IS AT ISSUE?

7. HUMANIZE YOUR CLIENT

8. HUMANIZE YOURSELF. BE CREDIBLE WITH THE JURY

9. CONSIDER TELLING TWO STORIES

    -A story with a moral
    -The story of innocence in this case

10. DECIDE WHAT FACTS YOU MUST MENTION

11. CONSIDER REFERENCE TO THE INSTRUCTIONS

12. POSE A QUESTION FOR THE PROSECUTOR THAT HE/SHE CANNOT POSSIBLY ANSWER

13. REMIND THE JURY THAT YOU GET ONE FINAL ARGUMENT AND THE GOVERNMENT GETS TWO IF YOU ARE IN A STATE WHERE THE GOVERNMENT GOES TWICE

14. BE TOTALLY HONEST

15. BE SINCERE

16. ARGUE WITH PASSION

17. LET EXPERIENCES IN EVERY PHASE OF YOUR LIFE ENRICH AND IMPROVE YOUR ARGUMENTS

a Ten-Step Guide to CLOSING ARGUMENT

by

Cathy R. Kelly

Director of Training

Missouri State Public Defender System

STEP ONE: LIST THE BLOCKS OF YOUR ARGUMENT

You cannot argue effectively that which you cannot yourself believe. List first for *yourself* all the facts that support the verdict you want the jury to return, whether that verdict is not guilty or a verdict of guilty on some lesser-included offense. Once you have them listed, group them together into related blocks and give each a working title. These will become the "chapters" of your closing argument.

Ex: 1. Problems with the identification.

2. Alibi

3. Physical evidence

4. Police screw-ups

TIPS: Try to come up with a minimum of three chapters, but make sure you have no more than seven. Listeners have a tough time retaining the cohesion of your argument if you throw more than seven categories at them. Four or five is probably ideal. List each block title at the top of its own page, then go on to Step Two.

STEP TWO: LIST BENEATH EACH CHAPTER TITLE *EVERY*

PIECE OF EVIDENCE WHICH SUPPORTS THAT POINT.

Scour the discovery in your case -- every police report, lab report, motion hearing transcript, witness interview, photograph, piece of physical evidence, record or fact of any other kind you can get your hands on. Pull out each piece of evidence which can be used to support your theory of the issues and list it beneath the appropriate chapter heading(s).

Ex: Problems with the Identification

> Only saw man 1 to 2 seconds across parking lot

> Orig told police could give no description

> 2d time, gave descrip of beige pants

> 3rd time, descrip changed to bib overalls

TIP: You will often encounter one piece of evidence that supports more than one chapter of your argument. Go ahead and list it under as many chapters as it fits.

Caveat: The first time a piece of evidence or a particular witness is mentioned in your argument, the temptation is to launch into a discussion of all the other inferences that can be drawn from that same piece of evidence or particular witness. *"As-long-as-we're-talking-about-so-and-so . . .* "

DON'T DO IT!

Think of it as a play. The *issue* you are arguing is the scene. The pieces of evidence and the individual witnesses are the actors, brought out to say their few lines in support of the issue currently on center stage *and then sent back to the wings* to wait for their next scene. If they have more lines to share on other blocks of your argument, call them back out when *that* block moves onto center stage and refer to them again. But do not allow them to destroy the progress of the show by launching all of their lines for

the entire production the first time they make an appearance!

STEP THREE: DEVELOP A *COMPLETE* ARGUMENT WITHIN EACH CHAPTER

Every chapter must have a beginning, a middle, and an end:

1. In the **beginning**, tell your listeners what your point is.

In other words, *tell them what you're going to tell them.*

2. In the **middle**, discuss each piece of evidence that supports your point, using to your advantage the good facts and neutralizing as best you can the negative ones.

In other words, *tell them.*

3. At the **end**, *repeat* the overall point you are trying to make, highlighting its connection to the verdict you seek. In other words, *tell them not only what you told them but why you told them*. Don't just set out the facts and fail to articulate the significance of those facts to your theory of the case. The close of each block of your argument is often an ideal place to repeat your *case theme* if you can make it fit smoothly.

PREPARATION TIP:

Talk first, write second. None of us talks the same way we write. If you write out your argument first, and *then* practice speaking it, your end product is much more likely to sound stilted and to be unpersuasive. Instead, try developing each of your arguments by *talking* aloud to yourself. Make each point of your argument, playing with the phrasing, word choices, points of emphasis, etc. When you're satisfied with a particular point, *then* stop and write down whatever notes you need to help you remember what you've just developed beyond the next 30 minutes and move on to the next point of your argument.

CONTENT TIPS:

I. Avoid Legal Arguments!

Only lawyers are persuaded by legal arguments (and sometimes not even them!) The rest of the world is persuaded by *higher* principles than legal loopholes -- things like justice, fairness, right & wrong. If your case is built on a legal argument, find a way to argue your point *without* invoking the dry, legal technicality itself. Remember those technicalities jurors detest were in fact created to protect or implement those very principles that so appeal to their hearts. Find ways to tie your argument to the *principle* rather than to the *technicality*!

Ex: To most jurors, the requirement of proof beyond a reasonable doubt is a legal technicality. The fear of convicting an innocent man is not.

II. Consider Your Audience!

David Ball, a trial consultant extraordinaire, teaches that you have three audiences during your closing argument and a different mission to fulfill with each. Your audiences are:

a) Jurors who are already in your favor. *Your mission is to give them the ammunition with which to fight your battle for you in the jury room.*

b) Jurors who are undecided. *Your mission is to persuade them to your point of view and likewise give them the ammunition to support it.*

c) Jurors who are already against you. *Your mission is to avoid entrenching them further and allow them room to both save face and change their minds. (In other words, you* don't *want to say things like "only an idiot would believe . . .!")*

STEP FOUR: DECIDE UPON THE ORDER AND WEED OUT THE CHAFF

1. Select the chapter that you believe is your very strongest argument. Place it at the very end of your closing.

2. Select the chapter that you believe is your *second* strongest argument. Place it at the beginning of your closing.

3. Evaluate each chapter of your argument for weak or inconsistent arguments. You will often find that some don't really carry their weight. They're throw-away arguments, so throw them away. Less is more.

TIP: When selecting the order of your remaining chapters, you want your arguments to build upon each other both logically *and emotionally*. The emotion of your argument should *build* throughout to a strong ending, not wax and wane. 'Tis not a tide we're creating here. If you have a very emotional plea in one chapter and another which is not so emotional, you will generally want to put the emotional argument toward the end of your closing and your less emotional chapters toward the front.

STEP FIVE: POLISH THE PERSUASIVENESS

There are ways to say things and there are *ways to **say** things*. All is *not* equal when it comes to the power of the spoken word. Listed below are a number of devices to consider when you begin putting together your argument:

1. **Trilogies** -- For reasons known only to those folks who study such things, the human mind seems to hang on to things that come in threes *longer* than it does to things that come solo or in any other combination. There is something poetic and memorable about trilogies, so look for opportunities to build trilogies into your argument. Those who doubt the power of the trilogy need only look at those built into their own history:

Ex: "drugs, sex, and rock & roll"

"blood, sweat, & tears"

"red, white, & blue"

2. **Metaphors** - Sentiments, which may be difficult to understand when expressed in the abstract, can often be made much more real and memorable through the use of metaphorical word pictures. Not only do such word pictures capture our imagination and, therefore, our memories more than any abstract concept can, they also appeal to our other senses in ways the word alone does not.

Ex: "All of his life, he'd been pricked with sharp needles of humiliation."

--Robert Pepin

3. **Alliteration** - A series of words that begin with or include the same sound tend to be more memorable and more powerful than words with no auditory connection to one another.

Ex: "A small-time snitch searching for someone to sacrifice."

"Close enough for Callahan" (the sloppy investigating officer)

" Like most teenagers, she was curious and confused, seduced by and scared of sex."

4. **Quotations** -- Not only are quotations a much more succinct and powerful way of making the point we want to make, they also invoke the imprimatur of the wisdom of the ages upon the actions of your client.

Ex: Where your client remained at the scene until police arrived, you may want to invoke the wisdom of the Proverbs*: "The wicked flee when no man pursueth, but the righteous* ***stand****, bold as a lion.."* Or if you want to highlight how a witness has been caught in his own lies, there is always Sir Walter Scott's wonderful quote, *"Oh, what tangled webs we weave when first we practice to deceive."*

TIPS: When using a quotation in your argument, play with placing the emphasis upon different words within the quote to vary the meaning and power. In the Proverbs quote above, I had always placed the emphasis on the word "righteous" and was surprised at how much more powerful the quote became for my case simply by shifting the emphasis to the action of my client!

5. **Analogies** -- As with metaphors, it is sometimes easier for us to understand a situation if we can analogize it to an experience or story that is familiar to us. This is true for jurors as well. Fairy tales, children's stories, or everyday experiences can all be valuable tools for analogy in a closing argument.

Caveats:

(a) Make it *succinct*. Analogies are notorious for running rampant and swallowing up large chunks of argument time while your jury fidgets and wishes you would get to the point!

(b) Only use an analogy if it is *unquestionably* and *directly* on point to a *significant* issue of your case. Analogies are too time-consuming to waste on an insignificant point; nor do you want to get bogged down in a side battle over whether your analogy fits the point you're trying to make. (Such battles can be loud and painful if the prosecutor chooses to ram it down your throat during rebuttal, or silent and secret within a juror's own mind. Either is deadly to your case.)

6. **Silence** -- This is an incredibly powerful tool often overlooked by lawyers who are uncomfortable with it.

• *Use silence at the beginning* of your closing argument to build tension in the courtroom and to gather the attention of your audience. Have you ever been in a noisy classroom where the teacher suddenly stops talking? You can literally watch the silence move, row by row, all the way to the back of the room until every eye is turned to the teacher and you could literally hear a pin drop in that room. THAT is a level of attention you want to use your benefit in a courtroom. You get it, easily and instantly, by using silence.

• *Use silence during your argument* as a nonverbal parenthesis to set apart and emphasize a powerful point or to let an argument float in the air for a bit before moving on to the next one. Give the jurors time not only to taste but to savor your point, before moving to the next one.

• *Use silence at the end* of your argument after you have said your last words. Simply stand for a moment, meeting the eyes of each of your jurors, letting your last words soak in before you simply, softly say *thank-you* and return to your seat. All that will happen when you sit down is the prosecutor starts talking again. That alone is worth postponing. But the silence also again gives the jurors time to savor and absorb your argument and to note your obvious belief in what you're saying as you solidly stand your ground and meet their eyes

Do not clutter it up by moving about! Movement destroys the power of the silence. Learn to simply stand and let the silence speak for you on occasion.

BUYERS BEWARE: Each of the techniques discussed above is a valuable tool that you need to know how to use. Each can be very powerful *if* used effectively. As with most good things, however, they must be used in moderation! Too much of even a good thing can quickly descend into gimmickry and undercut the sincerity of your plea.

STEP SIX: CREATE CHAPTER HEADINGS & TRANSITIONS

Ever try to read a book of several hundred pages with no chapters? Probably not. There is a *reason* for that. Without some framework for processing it all, the reader gets information overload and just gives up. The same is true for closing arguments. *You* have lived and breathed this case for days, weeks, and months by the time of closing. *You* can jump back and forth between issues & topics & players without once losing the action. Jurors don't have that luxury. This is their one and only time through. It is much easier for them to get lost than you realize! And if you lose them? You lose.

1. Chapter Headings:

Always give your jurors a "heads-up" that you are moving to a new topic. This can be as simple as a *"Now let's talk about the sloppy police work brought to you in this case."* Or you may want to use a flip chart to list *"the five things you heard in this case that show us the police have the wrong man,"* then simply flip the page to the next chapter of your argument when you're ready to move on. Another excellent method of chapter headings is to simply ask the questions you know the jury wants answered. *Ex.* In a rape case where the defense is consent but all parties agree the victim was found in tears, *If this is what she wanted, if this were her choice, then why was she crying?* Then answer the question! There are any number of ways to communicate your chapter headings to your jurors and by all means draw upon your own creativity in the process. Just make sure you DO it.

2. Transitions Between Chapters

Even *with* a chapter heading, shifts of topic can be jarring if they are too abrupt or seem wholly unrelated or unconnected in any way to what has gone before. It's as if you're speeding down a street and suddenly slam on your brakes to make a sharp, right turn. Your passengers may be dragged along with you, but if they didn't know it was coming they may take a few minutes to catch their breath again. You cannot afford for your jurors to spend a few minutes "catching up" to you during your closing argument. After all, you only *have* a few minutes! How to avoid it?

Make sure you slow down *before* you reach the turn:

a) Give each chapter of your argument a clear and definite closure;

b) *Pause*;

c) Announce your next chapter heading; (ask your question, flip your chart, etc.)

d) *Pause* briefly again to give your jurors time to make that move with you, then begin.

TIP: One excellent transition technique is to tie each of your chapters back to your theme. Not only does this give you added opportunity to repeat your theme, it also helps jurors understand that the various chapters of your closing are simply different branches of the same tree.

Ex: [Closing of Chapter One] *The victim's description does not match Joe Defendant because the police have the wrong man.*

<pause>

[Heading of Chapter Two] *What's the second piece of evidence you heard from that stand that shows the police have the wrong man?*

And then launch into your second chapter.

step seven: DECIDE YOUR OPENING HOOK

the first few moments of your closing is the most attentive your jury will be throughout your argument. *Do not waste it with thank-you's or apologies for how long the trial has taken.* Start with something strong and attention-grabbing that will make your jurors want to stay with you beyond your opening lines!

STEP EIGHT: DECIDE ON YOUR CLOSING LINES:

All too often you will see an otherwise great closing argument trickle off into a mumbled thanks at the end, draining the power of the defense away with it. Don't leave your closing lines to chance! You want to take that opportunity to ask the jury for the verdict you want, but there are thousands of ways to do just that. The goal is to find a way that is powerful, persuasive, and that comes from your heart.

STEP NINE: Practice it

You must prepare not only the content of the closing, but the delivery, and that can only be done through practice. Practice it aloud -- to yourself, to your mirror, to your spouse, colleague or pets -- but ***practice it.***

Do not *memorize* it. Few of us are sufficiently gifted thespians to deliver a memorized monologue and make it ring sincere. Simply talk it through several times. Each time you do, your argument will come out slightly different and that is the way it should be. That's what keeps it fresh and sincere and real. What you want to *remember* are those key phrases you've chosen, the metaphors, analogy, or trilogies; the silences you've built in; the transitions you've decided upon-- as well as, of course what evidence you want to discuss under each chapter!

STEP TEN: reduce it to outline form

You cannot read a closing argument and persuade anyone of anything. Your persuasiveness comes from your own passion about that of which you speak. If you don't know it well enough to remember it without reading it, you've just spoken volumes to the jury about just how passionately you feel about it!

"But there is SO much to remember!!" Yes, there is. That's why you must PRACTICE, PRACTICE,

PRACTICE until you know your arguments so well that you *can* speak from the heart about each and every one of them.

Then reduce your argument to a **one-page outline form** which you can lay on the lecturn or table corner as your safety net in case you go blank. The outline will list your chapter headings and *no more* than a word or two prompt for each of the pieces of evidence you plan to discuss under that heading.

Ex: ***I. ID Probs***

> 1-2 secs

> distance

> descriptions

If your notes are any more detailed than this, you will not be able to even find your *place* in a glance, much less your *prompt;* and a glance is all you can spare for notes during closing!!

TIPS: Place your cup of water beside your outline during your closing. Then if you DO go blank and have to refer to them, you can simply pause, walk to your cup, take a sip (while you're frantically scanning your outline) and as far as the jury knows, you simply had a dry throat.

Or you can list your chapters and supporting evidence on a flip chart for use as demonstrative evidence during your closing argument. Not only does this allow the jury to follow your argument more easily as you go through each topic, you don't have to worry about using your notes!

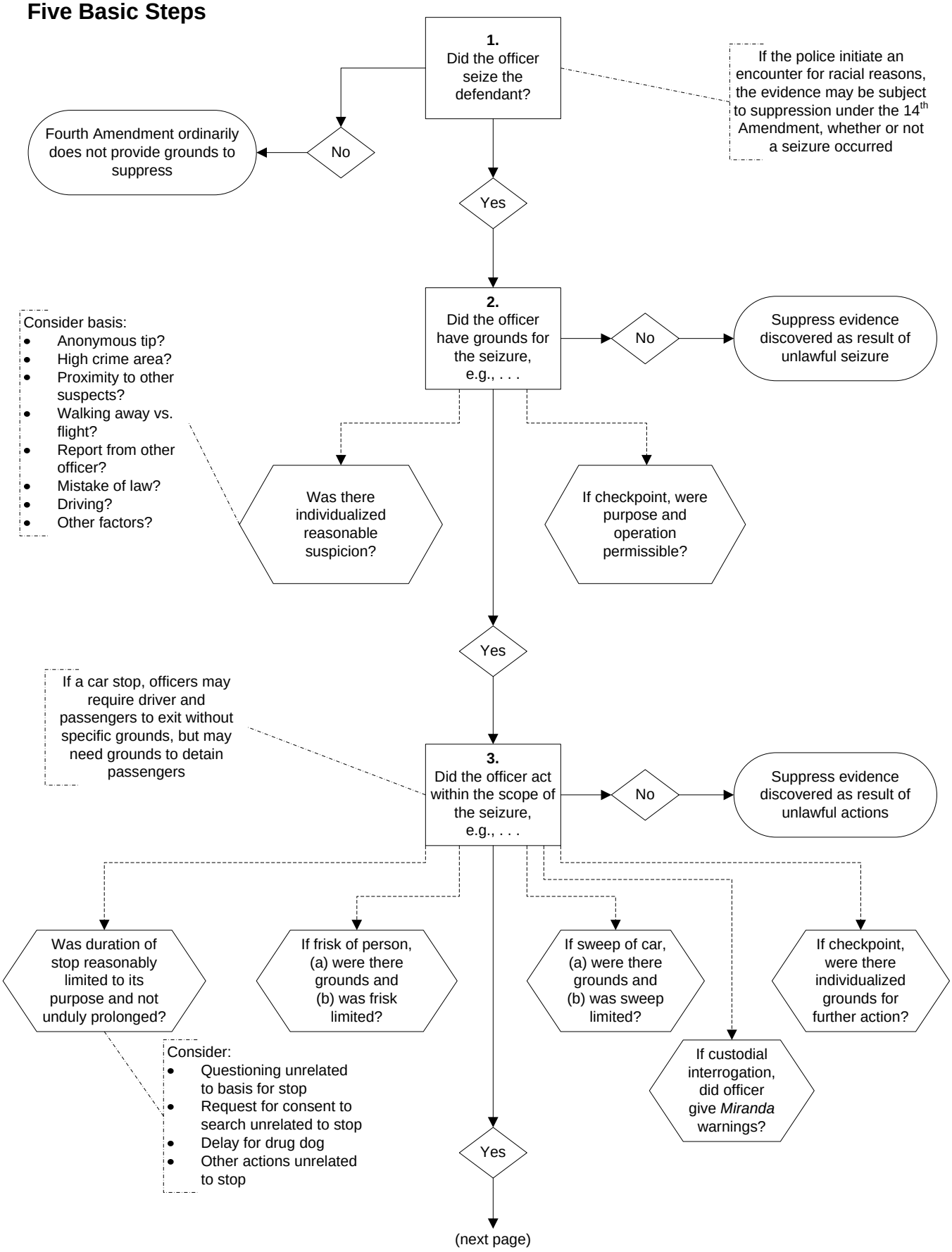
A Word About Storytelling:

The new touchstone in trial practice is *storytelling* and I am one of its avid disciples. However, I am convinced that the best storyteller will fail to persuade the jury if s/he uses closing argument *only* as an opportunity to tell a story. A story told well may hold the jurors' interest and even entertain them, but if the lawyer fails to explain why it matters to their verdict, in the end, the lawyer will still lose. For that reason, I encourage you to think of a good closing argument not as a single story, but as a well-organized photo album; each page of vivid, vibrant photographs carefully attached in its appropriate place beside a succinct, running commentary. The commentary points out the significance of and subtleties within each photograph that might easily be missed or overlooked by the casual observer.

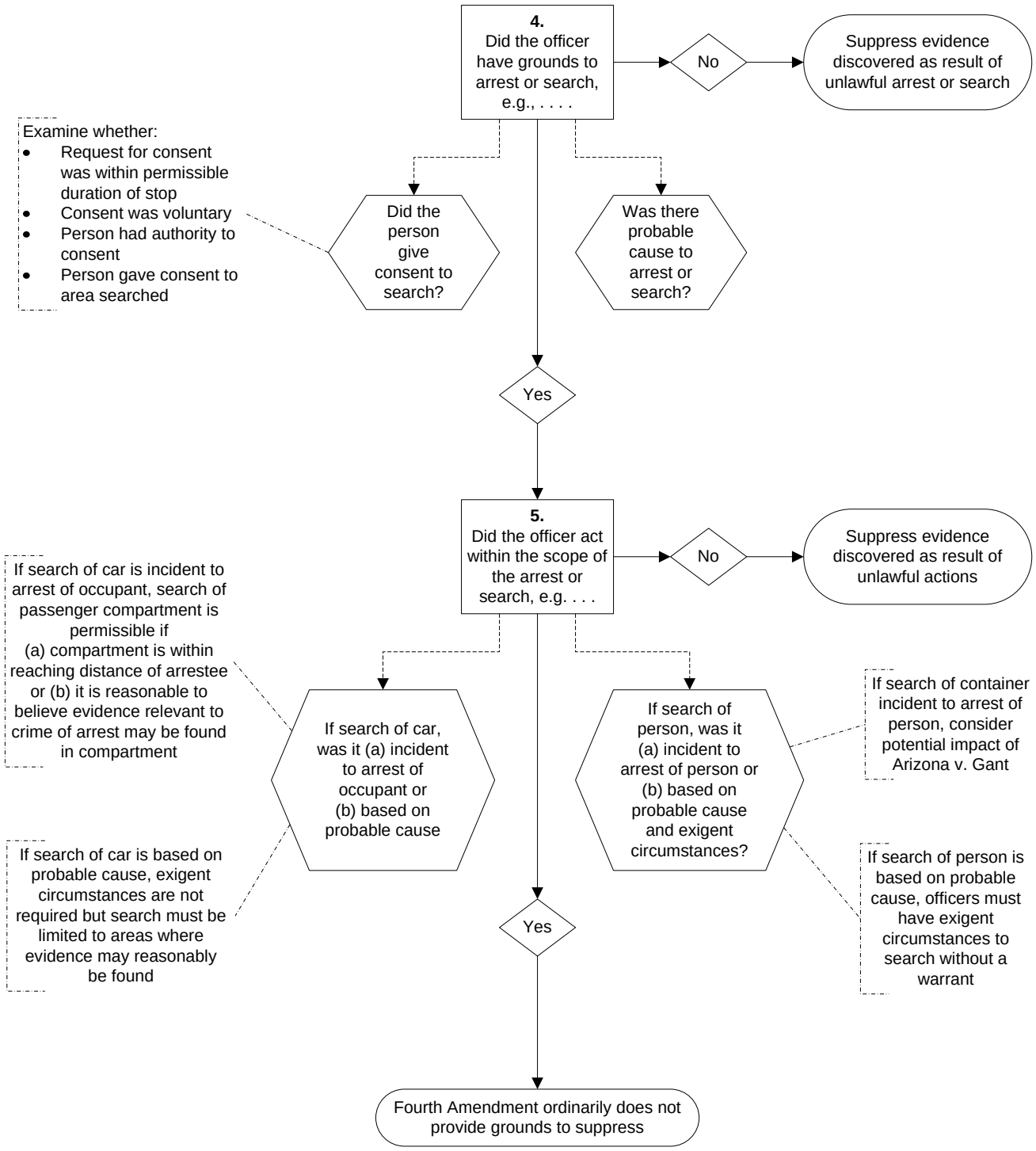
The photographs in your closing argument are the vignettes and scenes carefully culled from the evidence and vividly painted for your jurors through the skills of storytelling to prove a point. The moment your innocent client learns he's falsely accused and yet does not run away is a photograph that supports his innocence. The harsh reality of an interrogation room is a photograph which explains why the confession does not match the physical evidence and is therefore not believable. Each of these scenes must be brought to life again for the jurors during your argument through the skill of storytelling. *Yet they do not and cannot stand alone*. Without benefit of an accompanying commentary, a carefully-crafted explanation of how each of these events fit together to paint a picture of innocence, you run the very real risk that your jurors may never understand the significance of or subtleties within your photographs. Absent that understanding, the likelihood they will reach the conclusion you want them to reach is a risk no gambler would want to take.

Of course, the opposite extreme is equally ineffective. The perusers of our proverbial photo album will quickly lose interest in the most thorough of commentaries if there are no photographs to accompany it! A dry exposition on how the evidence supports a finding of not guilty does not move us, capture our attention or imagination, or make us care. BOTH vivid photographs (storytelling) and carefully crafted commentary (argument) are critical to an effective closing. Equal attention must be paid to both.

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
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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?