Robert L. Farb
School of Government
February 1, 2010

Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues

1. Double jeopardy attaches in district court when the judge begins to hear evidence (i.e., when the first witness is sworn as the trial begins). *State v. Brunson*, 327 N.C. 244 (1990); *Serfass v. United States*, 420 U.S. 377, 95 S. Ct. 1055, 43 L.Ed.2d 265 (1975); *Crist v. Bretz*, 437 U.S. 28, 37 at n. 15, 98 S. Ct. 2156, 57 L.Ed.2d 24 (1978). Double jeopardy does not attach to a guilty plea until it is accepted by a judge. *State v. Wallace*, 345 N.C. 462 (1997). See also *State v. Ross*, 173 N.C. App. 569 (2005), *affirmed*, 360 N.C. 355 (2006) (double jeopardy did not attach to the defendant's acknowledgement of guilt in a deferred prosecution agreement when the agreement did not comprehend a plea of guilty and a judge did not determine that there was a factual basis for a guilty plea).

2. A citation, criminal summons, arrest warrant, or magistrate's order serves as the criminal pleading in district court unless the prosecutor files a statement of charges or the defendant objects to trial on a citation. G.S. 15A-922(a).

3. If the defendant objects to trial on a citation in district court, the prosecutor must file a statement of charges (or criminal summons or arrest warrant may be issued, if appropriate). G.S. 15A-922(c). But a defendant may not object to trial by citation in superior court trial de novo. *State v. Phillips*, 149 N.C. App. 310 (2002).

4. A statement of charges is a criminal pleading charging a misdemeanor or an infraction.

5. A defendant is entitled to at least three working days (for preparing one's defense) after (1) a statement of charges is filed, or (2) the time a defendant is notified about the statement of charges, whichever is later. However, a defendant is not entitled to additional time if the judge finds that the statement of charges does not materially change the pleadings, and additional time is unnecessary. G.S. 15A-922(b)(2).

   See *State v. Chase*, 117 N.C. App. 686 (1995). The defendant was convicted of misdemeanor gambling charges in district court and appealed for trial de novo. In superior court, the trial judge allowed the state to file misdemeanor statements of charges after granting the defendant's motion to dismiss the warrants because they were insufficient to charge the gambling offenses [see G.S. 15A-922(e)]. The court ruled that the trial judge did not err in failing to allow a continuance to the defendant under G.S. 15A-922(b)(2) because the statement of charges did not materially change the pleadings and additional time was unnecessary.

6. A prosecutor may file a statement of charges on the prosecutor's own determination *at any time before arraignment in district court*. It may charge the same offenses as the original pleading or *additional or different misdemeanor offenses* or infractions. G.S. 15A-922(d); 15A-1111 (infraction procedures tied to misdemeanor procedures). Because a statement of charges supplants a prior pleading [G.S. 15A-922(a)], the charge(s) in the original pleading must be included in the statement of charges if the state wants to retain those charge(s).

7. If a defendant objects to the *sufficiency* of a criminal summons, arrest warrant, or magistrate's order as a pleading, *at the time of or after arraignment in district court* or *on trial de novo in superior*

court, and the judge rules that the pleading is insufficient, a prosecutor may a file statement of charges if it does not change nature of the offense. G.S. 15A-922(e). A judge must allow a prosecutor three working days in which to file a statement of charges (or longer period if justified). If not filed timely, the charges must be dismissed. G.S. 15A-922(b)(3).

State v. Madry, 140 N.C. App. 600 (2000). The court examined an arrest warrant charging a misdemeanor wildlife violation and ruled that it was fatally defective. (1) The court noted that the state had amended the arrest warrant before trial in district court under G.S. 15A-922(f). However, the court stated, citing State v. Bohannon, 26 N.C. App. 486 (1975), that it would not consider this amendment because a fatally defective arrest warrant may not be cured by an amendment. The court noted that the state should have filed a statement of charges under G.S. 15A-922(b), thus indicating that a statement of charges is a valid process to substitute for a fatally defective arrest warrant. (2) The court ruled that although the two year statute of limitations for misdemeanors in G.S. 15-1 is tolled by the issuance of a valid arrest warrant, it is not tolled by a fatally defective arrest warrant. Thus the state could not recharge the wildlife violation because two years had already run from the date of the alleged violation. The court noted that the provision in G.S. 15-1 that permits the state to recharge a misdemeanor within one year after a charge has been found to be defective is limited to defective indictments.

State v. Killian, 61 N.C. App. 155 (1983) (prosecutor may not file statement of charges on his or her own determination in superior court for misdemeanor appealed for trial de novo when defendant did not object to arrest warrant).

8. A statement of charges, criminal summons, arrest warrant, citation, or magistrate's order may be amended *at any time before or after final judgment* when the amendment does not change the nature of the offense charged. G.S. 15A-922(f). See also G.S. 15-24.1 (allowing amendment of warrant in superior court concerning ownership of property); *State v. Clements*, 51 N.C. App. 113 (1981) (defendant was tried in district court for misdemeanor death by vehicle based on following too closely as the underlying violation; state in superior court at close of its evidence was permitted to amend charge by substituting failure to reduce speed to avoid an accident in lieu of following too closely; court ruled that the amendment did not change nature of the offense charged).

9. A prosecutor may not file a statement of charges in superior court charging a different offense than the offense for which the defendant was tried in district court and appealed for trial de novo. *State v. Caudill*, 68 N.C. App. 268 (1984) (statement of charges in superior court improperly charged nonsupport of illegitimate child when defendant had been convicted of nonsupport of legitimate child in district court and appealed for trial de novo).

10. If there is a problem with a felony pleading in district court, a prosecutor may request the judge's permission to amend pleading.

11. An indictment may be amended [despite the literal language of G.S. 15A-923(e)] if the amendment does not substantially alter the charge.

    The following cases upheld the amendment of an indictment or other criminal pleading:

    State v. Riffe, 191 N.C. App. 86 (2008) (state was properly permitted to amend indictments during trial to amend dates of offenses).

State v. Coltrane, 188 N.C. App. 498 (2008) [trial judge did not err in allowing the state to amend the indictment of possession of firearm by felon to correct the date of offense (from December 9, 2004, to April 25, 2005) and the county in which the defendant was convicted of the underlying felony].

State v. Stephens, 188 N.C. App. 286 (2008) (when felony stalking indictment had improperly alleged prior stalking conviction in same count as stalking offense and state moved to amend indictment to transfer allegation of prior stalking conviction to separate count to comply with G.S. 15A-928, trial judge did not err in allowing amendment).

State v. Hill, 362 N.C. 169 (2008), *reversing ruling for reasons given in dissenting opinion*, 185 N.C. App. 216 (2007) (state was properly allowed to amend indictments to correct statutory citation to sexual offenses alleged in indictments).

State v. McCallum, 187 N.C. App. 628 (2007) (state was properly permitted to amend armed robbery indictments to delete amount of money alleged to have been taken).

State v. Hewson, 182 N.C. App. 196 (2007) (no error in allowing state to amend indictment to change the victim's name from "Gail Hewson Tice" to "Gail Tice Hewson").

State v. Whitman, 179 N.C. App. 657 (2006) [no error in allowing the state to amend the dates specified in the indictments charging statutory rape and sexual offense (from "January 1998 through June 1998" to "July 1998 through December 1998"].

State v. Wallace, 179 N.C. App. 710 (2006) (no error in amending date of statutory sexual offense indictment from "November 2001" to "June through August 2001"; defendant did not present an alibi defense that was adversely affected by the change in dates).

State v. Van Trusell, 170 N.C. App. 33 (2005) (no error in allowing state to amend indictment charging attempted armed robbery to charge armed robbery).

State v. Lewis 162 N.C. App. 277 (2004) (state properly was allowed to correct second conviction alleged in habitual felon indictment, which had mistakenly noted date and county of defendant's probation revocation instead of date and county of defendant's prior conviction of felonious breaking and entering).

State v. Wiggins, 161 N.C. App. 583 (2003) (amending age difference between defendant and victim under G.S. 14-27.7A).

State v. McGriff, 151 N.C. App. 631 (2002) (amending dates of sex offenses with young person).

State v. Brady, 147 N.C. App. 755 (2001) (amending indictment charging obtaining controlled substance by forgery by changing name of controlled substance).

State v. Parker, 146 N.C. App. 715 (2001) (amending description of property in false pretenses indictment).

State v. Grady, 136 N.C. App. 394 (2000) (amending address of dwelling in charge of maintaining dwelling for use of controlled substance).

State v. Snyder, 343 N.C. 61 (1996) [habitual impaired driving indictment alleged that the offense occurred on a street or highway; court ruled that the trial judge properly permitted the state to amend the indictment to include "public vehicular area"].

State v. Brinson, 337 N.C. 764 (1994) (amending felonious assault indictment was proper because it did not substantially alter the nature of the offense charged; original indictment sufficiently charged that cell bars and floor of jail were deadly weapons, in addition to fists).

State v. Price, 310 N.C. 596 (1984) (amending date of murder from date victim died to date victim was shot).

State v. Grigsby, 134 N.C. App. 315 (1999), *reversed on other grounds*, 351 N.C. 454 (2000) (amending defendant's last name from "Grisby" to "Grigsby").

State v. Campbell, 133 N.C. App. 531 (1999) (amending offense dates in indictments from June 2, 1997 to May 27, 1997).

State v. Locklear, 117 N.C. App. 255 (1994) (amending an habitual felon indictment to change the date of the commission of a felony alleged in the indictment).

State v. Joyce, 104 N.C. App. 558 (1991) (amending armed robbery indictment to substitute "knife" for "firearm").

State v. Hyder, 100 N.C. App. 270 (1990) (changing name of county in indictment).

State v. Bailey, 97 N.C. App. 472 (1990) (amending the name of the victim to correct the victim's name).

State v. Kamtsiklis, 94 N.C. App. 250 (1989) (amending dates of beginning and ending of conspiracy offense).

State v. Marshall, 92 N.C. App. 398 (1988) (amending name of victim that had inadvertently left out last name).

State v. Cameron, 83 N.C. App. 69 (1986) (amending date of offense).

State v. Clements, 51 N.C. App. 113 (1981) (defendant was tried in district court for misdemeanor death by vehicle based on following too closely as the underlying violation; state in superior court at close of its evidence was permitted to amend charge by substituting failure to reduce speed to avoid an accident in lieu of following too closely; court ruled that the amendment did not change nature of the offense charged).

State v. Tesenair, 35 N.C. App. 531 (1978) (amending date of offense).

State v. Carrington, 35 N.C. App. 53 (1978) (striking language concerning co-accessory to charge).

The following cases ruled that an amendment of the indictment was improper:

State v. Silas, 360 N.C. 377 (2006) [state was improperly permitted to amend felonious breaking and entering indictment to allege another felony intended to be committed (from "murder" to two felonious assaults) because the amendment was substantial alteration of the indictment and prohibited by G.S. 15A-923(e); court rejected the state's argument that the language alleging murder was surplusage because it was not required to be alleged].

State v. Winslow, 360 N.C. 161 (2005) (state was improperly permitted to amend habitual DWI indictment to change date of oldest DWI conviction, which elevated offense from misdemeanor to felony—that is, without the amendment the charge would have been misdemeanor DWI instead of felony habitual DWI).

State v. Cathey, 162 N.C. App. 350 (2004) (larceny indictment alleged defendant stole property from "Faith Temple Church of God."; evidence showed church's legal name was "Faith Temple Church—High Point, Incorporated"; relying on State v. Roberts, 14 N.C. App. 648 (1972), court ruled trial judge erred in allowing state to amend this fatally defective larceny indictment).

State v. Moore, 162 N.C. App. 268 (2004) (indictment charging possession of drug paraphernalia alleged that the paraphernalia was "a can designed as a smoking device"; court ruled that trial judge erred in allowing state to amend indictment to change description of paraphernalia to a "brown paper container" because amendment constituted a substantial alteration of offense).

State v. Moses, 154 N.C. App. 332 (2002) [trial judge erred in allowing state to amend count of indictment alleging misdemeanor eluding arrest, G.S. 20-141.5(a), to add allegation of aggravating factor (indictment had alleged only one aggravating factor, when two are required) that changed offense to felony eluding arrest, G.S. 20-141.5(b); amendment impermissibly changed nature of charged offense]

State v. Abraham, 338 N.C. 315 (1994) (error to allow state to amend felonious assault indictment to change name of victim from "Carlose Antoine Latter" to "Joice Hardin"). See also *State v. Call*, 349 N.C. 382 (1998) (fatal variance when victim's name was Gabriel Gonzalez and indictment alleged his name as Gabriel Hernandez Gervacio).

State v. Hughes, 118 N.C. App. 573 (1995) (embezzlement indictments alleged that the gasoline belonged to "Mike Frost, President of Petroleum World, Incorporated, a North Carolina Corporation having [its] principal place of business in Cliffside, North Carolina"; evidence at trial showed that the gasoline was actually owned by Petroleum World, Incorporated, a corporation; the trial judge permitted the state to amend the indictments to delete the words "Mike Frost, President"; the court ruled that the amendment, changing ownership from an individual to a corporation, substantially altered the offense and therefore was improper).

A juvenile petition may not be amended, even with the juvenile's consent, if the amendment changes the nature of the offense charged. *In re Davis*, 114 N.C. App. 253 (1994) [judge erred in allowing state to effectively amend petition to charge violation of G.S. 14-66, when it originally charged a violation of G.S. 14-59, because the amendment changed the nature of the offense charged and was not a lesser-included offense—see also G.S. 7B-2400].

12. As long as the intake counselor follows the statutory procedures before the signing of a petition alleging delinquency, and a prosecutor does not encroach on the important role of the intake

counselor, the prosecutor may sign the petition as the complainant. *In re Stowe*, 118 N.C. App. 662 (1995).

13. If an indictment or other criminal pleading alleges more than one way to commit an element of a criminal offense, the state only has to prove one of the alternatives. *State v. Birdsong*, 325 N.C. 418 (1989); *State v. Pigott*, 331 N.C. 199 (1992); *State v. Montgomery*, 331 N.C. 559 (1992); *State v. Funchess*, 141 N.C. App. 302 (2000); *State v. Lancaster*, 137 N.C. App. 37 (2000); *State v. Rawlins*, 166 N.C. App. 160 (2004); *State v. Stokes*, 174 N.C. App. 447 (2005) (when indictment charging felony eluding arrest alleged three aggravating factors, state was only required to prove two aggravating factors).

    An indictment's language that is surplusage does not limit the state's proof of different theories or facts of the charged crime, but see discussion of *State v. Silas*, below.

    State v. Westbrooks, 345 N.C. 43 (1996). The first-degree murder indictment alleged that the defendant unlawfully, willfully, and feloniously did *acting in concert* with named others of malice aforethought kill and murder the victim. At trial the state proved that the defendant was guilty of first-degree murder based on the theory of accessory before the fact. The court ruled that the indictment's acting-in-concert language did not allege an element of first-degree murder and therefore was surplusage. Thus the state was not barred by this language from proving the defendant guilty of first-degree murder based on the theory of accessory before the fact. See *State v. Estes*, 186 N.C. App. 364 (2007) (similar ruling).

    *State v. Pickens***,** 346 N.C. 628 (1997). The indictment for discharging a firearm into occupied property alleged in part that the defendant discharged a shotgun, a firearm, into an occupied dwelling. The evidence showed that the weapon was a handgun. The court noted that to constitute a fatal variance, the defendant must show a variance regarding an essential element of the offense. In this case, the essential element of discharging a *firearm* was alleged. The specification of the shotgun was not necessary, making it mere surplusage. Thus, there was not a fatal variance between the indictment and evidence at trial.

    For other cases finding words in an indictment to be surplusage, see *State v. Pelham,* 164 N.C. App. 70 (2004); *State v. Dammons*, 159 N.C. App. 284 (2003); *State v. Bowens*, 140 N.C. App. 217 (2000); *State v. Qualls,* 130 N.C. App. 1 (1998); *State v. Kirkpatrick*, 343 N.C. 285 (1996); *State v. Rhome*, 120 N.C. App. 278 (1995); *State v. Roten*, 115 N.C. App. 118 (1994); *State v. Jones*, 110 N.C. App. 289 (1993); *State v. Birdsong*, 325 N.C. 418 (1989); *State v. Ollis*, 318 N.C. 370 (1986); *State v. Freeman*, 314 N.C. 432 (1986); *State v. Kornegay*, 313 N.C. 1 (1985); *State v. Moore*, 311 N.C. 442 (1984); *State v. Green*, 305 N.C. 462 (1982).

    Note, however, the ruling in State v. Silas, 360 N.C. 377 (2006). The trial judge at the jury charge conference allowed the state to amend a felonious breaking and entering indictment to amend the felony intended to be committed from murder to two felonious assaults. The court ruled that a felonious breaking or entering indictment need not allege the specific felony intended to be committed. However, if such an indictment alleges a specific felony, the state may not amend it to allege another felony because the amendment is a substantial alteration of the indictment and prohibited by G.S. 15A-923(e). The court rejected the state's argument that the language alleging intent to commit murder was surplusage because it was not required to be alleged.

14. If a defendant pleads guilty to a misdemeanor under a plea bargain in which the misdemeanor charges were reduced, dismissed, or modified, and then the defendant appeals for trial de novo in superior court, the superior court has jurisdiction to try all the misdemeanor charges that existed *before* the entry of the plea bargain. See G.S. 7A-271(b) and 15A-1431(b).

    In *State v. Fox*, 34 N.C. App. 576 (1977), the court ruled that when—as a result of a plea bargain—a felony charge is reduced to a misdemeanor in district court and then the defendant appeals for trial de novo, the state may then indict and try the defendant for the original felony charge. (When a prosecutor allows a defendant to plead guilty in district court to a misdemeanor reduced from an original felony charge, the prosecutor should consider requiring the defendant to execute a specific written waiver of the right to trial de novo; a court would likely uphold such a waiver.)

15. There is no double jeopardy bar to a second trial when a charge is dismissed because an indictment or other criminal pleading is fatally defective: *State v. Blakney*, 156 N.C. App. 671 (2003); *State v. Whitley*, 264 N.C. 742 (1965); *State v. Jernigan*, 255 N.C. 732 (1961); *State v. Coleman*, 253 N.C. 799 (1961); *State v. Barnes*, 253 N.C. 711 (1961). See also *United States v. Akpi*, 26 F.3d 24 (4th Cir. 1994); *United States v. Thurston*, 362 F.3d 1319 (11th Cir. 2004); *United States v. Davis*, 873 F.2d 900 (6th Cir. 1989).

    There is no double jeopardy bar to a second trial when a charge is dismissed because there was a fatal variance between the proof and the allegations in the charge: *State v. Mason*, 174 N.C. App. 206 (2005); *State v. Miller*, 271 N.C. 646 (1967); *State v. Stinson*, 263 N.C. 283 (1965); *State v. Johnson*, 9 N.C. App. 253 (1970); *State v. Rahaman*, ___ N.C. App. ___, ___ S.E.2d ___ (19 January 2010). However, double jeopardy will bar a retrial if the judge incorrectly dismissed a charge for a fatal variance. State v. Teeter, 165 N.C. App. 680 (2004).

    See generally *Montana v. Hall*, 481 U.S. 400 (1987); *United States v. Ball*, 163 U.S. 662 (1896).

16. A defendant has no right to a trial de novo when the defendant has admitted responsibility to an infraction in district court. *State v. Richardson*, 96 N.C. App. 508 (1989).

17. If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for trial de novo in superior court, the state's later indictment of the defendant for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause. *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628 (1974). See also *Thigpen v. Roberts*, 468 U.S. 27, 104 S. Ct. 2916, 82 L. Ed. 2d 23 (1984) (prosecution of manslaughter barred under *Blackledge* after conviction of misdemeanor traffic offenses in lower court and appeal for trial de novo in higher court; court states in footnote 6 that state may attempt to rebut presumption of vindictiveness); *State v. Bissette*, 142 N.C. App. 669 (2001) (*Blackledge* barred state prosecution of felony larceny in superior court after state in district court reduced felony larceny to misdemeanor larceny, defendant pleaded not guilty, was found guilty, and appealed for trial de novo in superior court); *State v. Mayes*, 31 N.C. App. 694 (1976) (prosecution of felonious assault barred under *Blackledge* after conviction of misdemeanor assault in district court and appeal for trial de novo in superior court).

18. The state's appeal in juvenile delinquency cases is to Court of Appeals, and is limited to challenging an order (a) finding a statute unconstitutional, (b) dismissing a charge on double jeopardy ground, (c) finding that the pleading does not charge a crime, or (d) granting a motion to suppress. See G.S. 7B-2604.

19. [See next paragraph below for the state's additional authority to appeal motions to suppress and motions to dismiss in DWI-related offenses committed on or after December 1, 2006.] The state may appeal to superior court (from a district court criminal case) only when the district court has dismissed a charge or granted a defendant's motion for a new trial. See G.S. 15A-1432; 7A-271. The state is not required to request the district court judge to make findings of fact and conclusions of law when appealing the judge's ruling. The superior court, when reviewing the state's appeal, must conduct a de novo hearing and either affirm or reverse the district court judge's dismissal. *State v. Ward*, 127 N.C. App. 115 (1997).

[For DWI-related offenses committed on or after December 1, 2006.] The state may appeal a district court preliminary indication of granting a defendant's motion to suppress or motion to dismiss to superior court in accordance with the procedures set out in G.S. 20-38.6 and 20-38.7. See the rulings in State v. Fowler, ___ N.C. App. ___, 676 S.E.2d 523 (19 May 2009), and State v. Palmer, ___ N.C. App. ___, 676 S.E.2d 559 (19 May 2009).

Consider the rulings in the following cases when appealing a midtrial dismissal of a charge by a judge:

State v. Priddy, 115 N.C. App. 547 (1994). At the close of the evidence for habitual impaired driving (G.S. 20-138.5) in superior court, the trial judge ruled that superior court did not have jurisdiction over the offense and dismissed the charge (the judge erroneously believed that the statute was a punishment enhancement provision for misdemeanor DWI). The state appealed to the North Carolina Court of Appeals. The court noted that under G.S. 15A-1445(a) that the state may appeal a dismissal of a charge only if further prosecution would not be prohibited by the Double Jeopardy Clause. The court ruled, based on *United States v. Scott*, 437 U.S. 82 (1978), that the Double Jeopardy Clause would not prohibit reprosecution because the trial judge's dismissal was not based on grounds of factual guilt or innocence. Therefore, the state had the right to appeal and also had the right to reprosecute the defendant (the court also ruled that the trial judge's dismissal was error because habitual impaired driving is a felony).

State v. Shedd, 117 N.C. App. 122 (1994). The trial judge during trial dismissed first-degree murder charges against the defendant because of two discovery violations by the state. The court ruled that the state was authorized to appeal the midtrial dismissal without violating the Double Jeopardy Clause because the dismissal was unrelated to a finding of the defendant's factual guilt or innocence; the court cited *State v. Priddy*, 115 N.C. App. 547 (1994); *United States v. Scott*, 437 U.S. 82 (1978).

State v. Vestal, 131 N.C. App. 756 (1998). After the jury had been empaneled and sworn, the trial judge on his own motion dismissed with prejudice the criminal charge against the defendant because a police department had violated a court order by using in an undercover operation drugs that had been forfeited in a prior case and were awaiting destruction. The defendant did not make a motion to dismiss. The state gave notice of appeal. G.S. 15A-1445(a) provides that the state may appeal an order dismissing a criminal charge unless the rule against double jeopardy prohibits further prosecution. The court ruled that because the rule against double jeopardy precludes further prosecution in this case, the state's appeal must be dismissed. Distinguishing State v. Priddy, 115 N.C. App. 547 (1994) (double jeopardy clause did not bar state's right to appeal midtrial dismissal motion made by defendant), the court noted that the defendant in this case did not take an active role in the process that led to the dismissal of the charge against him. Rather, the trial judge's dismissal of the charge on his own motion involuntarily deprived the defendant of his constitutional right to

have his trial completed by the jury that had been empaneled and sworn. Thus the rule against double jeopardy barred further prosecution of the defendant for this charge.

State v. Scott, 146 N.C. App. 283 (2001). A jury found the defendant guilty of DWI. The trial judge then granted the defendant's motion to dismiss the DWI charge based on insufficient evidence. The court ruled, relying on United States v. Wilson, 420 U.S. 332 (1975), that double jeopardy did not bar the state's appeal of the trial judge's ruling.

State v. Morgan, 189 N.C. App. 716 (2008). The court ruled that the state did not have a right to appeal to superior court a district court judge's dismissal of a DWI charge when the dismissal was based on a finding of insufficient evidence to support the DWI charge, even though the dismissal was erroneous (see the court's opinion on the notary public issue that led to the dismissal). The state may not appeal a dismissal of a case to superior court if double jeopardy bars a retrial [G.S. 15A-1432(a)], and a finding of insufficient evidence bars a retrial under the Double Jeopardy Clause. The court noted that this case was tried before the enactment of G.S. 20-38.6, which requires (with limited exceptions) that motions to suppress evidence or dismiss DWI charges be made before trial.

20. When the state seeks review of a district court action when it has no statutory right to appeal (for example, when a pretrial motion to suppress is granted in a misdemeanor drug case), it may seek a writ of certiorari from the superior court to review the district court action. See Rule 19, General Rules of Practice for the Superior and District Courts; *State v. Hamrick*, 110 N.C. App. 60 (1993); *State v. Freund*, 326 N.C. 795 (1990).

    If the state seeks a writ of mandamus or prohibition—for example, when a district court judge refuses to impose a mandatory minimum sentence—it must seek the writ from the Court of Appeals under Rule 22 of the Rules of Appellate Procedure. *In re Redwine*, 312 N.C. 482 (1984) (superior court judge has no authority to issue writ of prohibition or mandamus to district court judge).

21. The state may try a misdemeanor initially in superior court by an indictment when:

    (1) The misdemeanor is transactionally connected with a felony, G.S. 7A-271(a)(3). See *State v. Fearing*, 304 N.C. 471 (1981), *State v. Karbas*, 28 N.C. App. 372 (1976);

    or

    (2) The misdemeanor indictment is issued after the grand jury has returned a presentment. See G.S. 7A-271(a)(2), 15A-641(c), *State v. Birdsong*, 325 N.C. 418 (1989); *State v. Cole*, 294 N.C. 304 (1978); *State v. Gunter*, 111 N.C. App. 621 (1993) (impaired driving charge properly tried initially in superior court when defendant had been indicted after grand jury issued presentment).

22. A defendant has no right to a pretrial appeal to the appellate division of a judge's denial of a defendant's motion to dismiss a criminal charge on double jeopardy grounds. *State v. Shoff*, 342 N.C. 638 (1996).

23. An appeal of an order of transfer of a juvenile case to superior court for trial as an adult is to a superior court judge. An appeal to the North Carolina Court of Appeals is authorized only after a conviction in superior court. See G.S. 7B-2603. See also *State v. Wilson*, 151 N.C. App. 219 (2002) [juvenile waived appellate review of issues concerning transfer hearing because juvenile failed to appeal transfer order to superior court under G.S. 7B-2603(a)]; *In re E.S.,* 191 N.C. App. 568 (2008)

(superior court judge erred in reversing district court judge's order to transfer juvenile cases for trial as adult in superior court).

24. **Double Jeopardy Issues After *United States v. Dixon*.**

United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L.Ed.2d 556, 53 Crim. L. Rep. 2291 (1993). This case involved double jeopardy issues in unrelated trials with two different defendants.

Defendant Dixon. Defendant Dixon was arrested for second-degree murder and released on bond, which specified that he was not to commit "any criminal offense" and warned him that a violation of any condition of pretrial release would subject him, among other things, to prosecution for criminal contempt. Defendant Dixon was later arrested and charged with possession of cocaine with intent to distribute. Based on the violation of his pretrial release condition, he was convicted of criminal contempt based on proof beyond a reasonable doubt that he had committed the drug offense. He later moved to dismiss the cocaine charge on double jeopardy grounds.

Defendant Foster. After defendant Foster had committed physical attacks on his estranged wife, she obtained a civil protection order (CPO), which required that he not "molest, assault, or in any manner threaten or physically abuse" her. She later filed motions to hold Foster in contempt for three separate threats (on November 12, 1987, and March 26, 1988, and May 17, 1988) and two assaults (on November 6, 1987 and May 21, 1988). Her counsel prosecuted the action for contempt (although the Court noted that the United States Attorney's Office was apparently aware of the action). The trial judge noted that for the assault charges, she must prove as an element, first there was a civil protection order (CPO), and second, that Foster committed a criminal assault. Foster was acquitted of criminal contempt for the three threats violations (described above) but was convicted of criminal contempt for the two assaults (described above). The United States Attorney's Office later obtained an indictment charging Foster with simple assault on November 6, 1987 (Count I); threatening to injure her on November 12, 1987 and March 26 and May 17, 1988 (Counts II-IV); and assault with intent to kill on May 21, 1988 (Count V). Defendant Foster moved to dismiss all counts based on double jeopardy and also on collateral estoppel grounds for Counts II-IV (because he had been acquitted of those charges in the criminal contempt proceeding).

Court's Rulings

1. *Plenary Criminal Contempt Is Included Within Double Jeopardy*. The Court ruled that the Double Jeopardy Clause applies to a prosecution of a criminal charge after a defendant has been tried in plenary proceedings for criminal contempt for violating a pretrial release order that prohibited the defendant from committing "any criminal offense." (The Court specifically did not decide if the Double Jeopardy Clause applies to summary criminal contempt.)

The Court applied to each defendant the *Blockburger* [*Blockburger v. United States*, 284 U.S. 299 (1932)] test, also known as the same-elements test, which determines whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution. [But remember there is a different rule for multiple punishments at a *single trial*; see *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983).]

Defendant Dixon. The Court ruled under the *Blockburger* test that defendant Dixon's drug offense did not include any element not contained in his previous criminal contempt offense, and therefore his subsequent prosecution for the drug offense was barred under the Double Jeopardy Clause.

Defendant Foster. The Court ruled that the subsequent prosecution for Count I (simple assault) was barred because it was based on the prior criminal contempt conviction for violating the CPO provision forbidding him from committing simple assault. The Court ruled that the subsequent prosecutions for Counts II-IV were not barred, because the criminal contempt prosecution required

proof of an element (knowledge of CPO) that Counts II-IV did not, and Counts II-IV required proof of element (threat to kidnap, threat to inflict bodily injury, or threat to damage property) that the conviction for criminal contempt based on the CPO (Foster must not "in any manner threaten") did not. The Court ruled that Count V was not barred, because the criminal contempt prosecution required proof of an element (knowledge of CPO) that Count V did not, and Count V required proof of an element (specific intent to kill) that the conviction for criminal contempt did not (it only required proof of simple assault). [Note that collateral estoppel principles, not decided in this case, may effectively bar the subsequent prosecutions of Counts II-IV, because defendant Foster was acquitted of criminal contempt for elements included within those offenses; see, for example, *State v. McKenzie*, 292 N.C. 170 (1977).]

2. *Court Overrules Grady v. Corbin*. The Court overruled *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L.Ed.2d 548 (1990). [The *Grady* ruling had prohibited a subsequent prosecution if, to establish an element of an offense charged in that prosecution, the prosecutor had to prove conduct that constituted an offense for which the defendant had already been prosecuted.]

The Court's overruling of *Grady v. Corbin* affects prior North Carolina case law as follows. The court's result in *State v. Hamrick*, 110 N.C. App. 60 (1993), remains correct. In *Hamrick,* the defendant on May 1, 1990, was involved in an automobile accident with another vehicle, and the operator of that vehicle died. The defendant was charged the same day with the infraction of driving left of center and in a separate criminal summons with misdemeanor death by vehicle, based on the left-of-center violation. On May 18, 1990, the defendant pled responsible before a magistrate to the left-of-center infraction. On May 30, 1990, in district court, the defendant moved to dismiss the misdemeanor death by vehicle charge on double jeopardy grounds. Without discussing *Grady*, the court of appeals ruled that the plea to the left-of-center infraction did not bar prosecution of remaining pending charge of misdemeanor death by vehicle, based on the ruling in *Ohio v. Johnson*, 467 U.S. 493 (1984) (defendant's plea of guilty over prosecutor's objection to one count of multi-count indictment did not bar state's prosecution of greater offense in indictment). The ruling in *Hamrick* also is correct under the *Blockburger* test, because the driving left of center violation contains an element (driving left of center) that is not required to be proven in misdemeanor death by vehicle (any motor vehicle violation is sufficient) and misdemeanor death by vehicle contains an element (the death of the person resulting from the violation) that is not an element of driving left of center.

The Court's ruling (overruling *Grady v. Corbin*) effectively overruled *State v. Griffin*, 51 N.C. App. 564 (1981) (defendant was involved in accident with another vehicle and was charged with failing to yield right-of-way, and pled guilty that same day; later, the driver of the other vehicle died from injuries received in the accident; the defendant was then charged with death by vehicle; court upheld dismissal of that charge on double jeopardy grounds). *Griffin* had relied on dicta in *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L.Ed.2d 228 (1980), that clearly was disavowed in *United States v. Dixon*. In any event, the *Griffin* ruling appeared to be incorrect when it was decided, because double jeopardy principles do not apply when a defendant pleads guilty to a lesser offense when the greater offense could not be charged (for example, because the victim had not died yet); see *Diaz v. United States*, 223 U.S. 442, 32 S. Ct. 250, 56 L.Ed. 500 (1912); *Garrett v. United States*, 471 U.S. 773, 105 S. Ct. 2407, 85 L.Ed.2d 764 (1985); and *State v. Meadows*, 272 N.C. 327 (1968).

State v. Gilley, 135 N.C. App. 519 (1999). The defendant, after a plenary hearing, was found in criminal contempt for violating a domestic violence protective order (DVPO) that provided (1) the defendant shall not assault, threaten, abuse, follow, harass, or in any way interfere with a named female or her minor children who are currently in her custody; and (2) the defendant shall stay away from her residence. The adjudication of contempt was based on events that later were the

subject of criminal prosecution and convictions of kidnapping, misdemeanor breaking or entering, domestic criminal trespass, and assault on a female (the female named in the DVPO was the victim of all these offenses) There was no transcript of the contempt hearing, and the contempt order simply recited that the defendant willfully failed to comply with the DVPO and was in criminal contempt. The court stated that it must assume, for the purpose of deciding the double jeopardy issues, that all the prohibited conduct in the DVPO was the basis of the adjudication of criminal contempt.

The court discussed and interpreted the double jeopardy rulings in United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). The court determined that the *Dixon* ruling requires that a court must consider the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the later-charged criminal offenses.

The court ruled that the finding of criminal contempt barred the later prosecution of assault on a female because the DVPO prohibited the defendant, a male, from assaulting the named female. All the elements in the contempt adjudication were included in the later prosecution of assault on a female. (Author's note: The court noted that a later prosecution for assault with a deadly weapon might not be barred because the DVPO and the criminal contempt adjudication on which it was based did not include an assault *with a deadly weapon*. See a similar ruling in *Dixon*).

The court ruled that the criminal contempt adjudication did not bar the later prosecutions of first-degree kidnapping, misdemeanor breaking or entering, and domestic criminal trespass. All the elements of these offenses were not included in the criminal contempt adjudication for violating the DVPO. (1) The DVPO prohibited the defendant from interfering with and following the named female. The court ruled that the order's language did not encompass the elements of first-degree kidnapping. For example, the elements of confinement and the purpose to do serious bodily harm or to terrorize were not set out in the DVPO. (2) Misdemeanor breaking or entering requires a wrongful breaking or entering into a building. The court noted that the DVPO simply required that the defendant "stay away from the parties' residence." (3) The DVPO directed the defendant to "stay away" from the marital residence, while domestic criminal trespass prohibits a person from entering after being forbidden to do so or remaining on the premises occupied by a present or former spouse.

State v. Dye, 139 N.C. App. 148 (2000). The defendant and her husband divorced and several years later entered into a civil consent order that the defendant "shall not come to the residence of [the husband]." The defendant later came to the husband's residence. After a hearing, a judge found the defendant in criminal contempt "for going to the residence of [the husband]." Thereafter, the defendant was prosecuted for and convicted of domestic criminal trespass based on the same incident that had resulted in the criminal contempt finding. The court ruled, relying on its double jeopardy analysis in State v. Gilley, 135 N.C. App. 519 (1999) (there must be a comparison of the elements of the offense actually considered to have been violated in the criminal contempt proceeding with the elements of the substantive offense), that double jeopardy barred the prosecution for domestic criminal trespass. The court ruled that the phrase "shall not come to the residence" in the consent order was equivalent to the domestic criminal trespass element of "enter[ing] . . . upon the premises" for purposes of double jeopardy. The court distinguished its ruling in *Gilley* (contempt for violating order that defendant "stay away" from residence did not bar later prosecution for domestic criminal trespass).

25. **Collateral Estoppel Issues Still Exist After *United States v. Dixon*.** In district court, if a defendant is found not guilty of a misdemeanor (for example, DWI) or not responsible for an infraction, that verdict will bar the use of that offense or violation in *subsequent* felony prosecution (for example, second-degree murder, involuntary manslaughter, felony death by vehicle) in superior court. *Cf.*

State v. McKenzie, 292 N.C. 170 (1977) (dicta). Thus, the state may not want to try a misdemeanor or infraction in district court if it plans to later try the defendant for a felony, because an acquittal or finding of not responsible may bar the state from using that misdemeanor or infraction as an element in the later felony prosecution.

See also *State v. Solomon*, 117 N.C. App. 701 (1995) [A search of a cigarette case incident to the defendant's arrest resulted in the seizure of rolling papers, marijuana, and cocaine. On March 29, 1993, the defendant was found not guilty in district court of possession of marijuana and possession of drug paraphernalia. On June 30, 1993, the defendant was convicted of felony possession of cocaine. The court rejected the defendant's argument that the district court acquittals barred the later cocaine prosecution. The defendant asserted that the acquittals were based on a reasonable doubt that she knew of the contents of the cigarette case. The court noted that because there was no transcript of the district court prosecution, the basis of the acquittals was speculative and therefore insufficient to support the application of the collateral estoppel doctrine.]

26. **Advice to Prosecutors after *United States v. Dixon*.** Until the issues involved in *United States v. Dixon* are definitely resolved by North Carolina appellate courts, it would be prudent for the state:

A. When vehicular homicide charge (second-degree murder, involuntary manslaughter, felony or misdemeanor death by vehicle) is brought or is likely to be brought:

Never charge a waivable offense, *or*

Charge a waivable offense only in a citation that also charges an offense for which a court appearance is mandatory. See *Uniform Policies Relating To Traffic Offenses Adopted by the Conference of Chief District Court Judges*, which provide that traffic offenses for which court appearance is mandatory include any violation charged in the same citation, warrant, magistrate's order, or summons with a mandatory court appearance violation.

B. When a felony vehicular homicide charge is brought, a prosecutor should never try transactionally-related misdemeanors (for example, DWI, speeding over 15 mph over speed limit) or infractions (for example, stop sign violation, speeding 15 mph or less over speed limit) in district court. The prosecutor should take a voluntary dismissal of these charges. The misdemeanor charges do not have to be tried in district court. The prosecutor may indict for misdemeanor offenses occurring during the felony homicide offense because the superior court has original jurisdiction over these offenses. G.S. 7A-271(a)(3). *State v. Fearing*, 304 N.C. 471 (1981); *State v. Karbas*, 28 N.C. App. 372 (1976). However, there is no statutory authority to indict for an infraction under these circumstances.

An alternative to taking a voluntary dismissal of transactionally-related misdemeanors is to announce to the district court that the state is joining the felony and misdemeanors together for a probable cause hearing for both the felony and the misdemeanors. A probable cause hearing may be held for misdemeanors in such a case because both G.S. 15A-601 and Article 30 (see, for example, G.S. 15A-612) of Chapter 15A refer to an offense within the original jurisdiction of superior court and a misdemeanor is such an offense under G.S. 7A-271(a)(3). A probable cause hearing, therefore, is not limited to felonies.

C. When misdemeanor death by vehicle is charged, a prosecutor should never try in district court the underlying misdemeanor or infraction if it has been separately charged. Instead the prosecutor should take a voluntary dismissal of that violation.

D. The state should never try misdemeanors in district court when it intends to try transactionally-related felonies in superior court (see generally G.S. 15A-926). The state should take a voluntary dismissal of the misdemeanors (or hold a probable cause hearing for the misdemeanors with the felonies, as described in B. above) and add them in the indictments for the felonies as permitted under G.S. 7A-271(a)(3).

27. **Defendant's Opportunity to Raise Double Jeopardy Issue after Guilty Plea or by Collateral Attack**

North Carolina case law has provided that a defendant must properly assert a double jeopardy issue at trial to raise the issue on appeal or collateral attack, *State v. McKenzie*, 292 N.C. 170 (1977), and a guilty plea waives a double jeopardy issue. *State v. Hopkins*, 279 N.C. 473 (1971); *State v. Hughes*, 136 N.C. App. 92 (1999). As a result of two decisions of the United States Supreme Court—*Menna v. New York*, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975), as modified by *United States v. Boce*, 488 U.S. 563, 108 S. Ct. 757, 102 L. Ed. 2d 195 (1975)—a guilty plea waives a double jeopardy issue on appeal or collateral attack *except if* the double jeopardy issue can be resolved by examining the face of the criminal pleadings themselves. Thus, if other evidence must be considered, a guilty plea waives a double jeopardy issue on appeal or collateral attack. See, for example, United States v. Falkowski, 900 F. Supp. 1207 (D. Alaska 1995), *affirmed*, 97 F.3d 1461 (9th Cir. 1996) (unpublished opinion); People v. Higgins, 920 P.2d 898 (Col. App. 1996); and Thompson v. State, 23 Kan.App.2d 305, 929 P.2d 803 (1996). See also *United States v. Brown*, 155 F.3d 431 (4th Cir. 1998) (judge erred under *United States v. Boce* in holding evidentiary hearing to determine if defendant's second drug conviction—based on a guilty plea—was barred by double jeopardy, because issue must be resolved solely by examining record of prior proceedings).

28. **Vehicular Homicide Offenses and Lesser-Included Offenses**

A. **Second-degree murder.** Class B2 felony. *State v. Snyder*, 311 N.C. 391 (1984); *State v. Vance*, 98 N.C. App. 105 (1990); *State v. McBride*, 109 N.C. App. 64 (1993).

1. Lesser-included offenses: involuntary manslaughter; misdemeanor death by vehicle. See *State v. Williams*, 90 N.C. App. 614 (1988) (felony death by vehicle is not a lesser-included offense of involuntary manslaughter); *State v. Grice*, 131 N.C. App. 48 (1998) (felony death by vehicle is not a lesser-included offense of second-degree murder).

B. **Repeat felony death by vehicle offender.** G.S. 20-141.4(a6). Same punishment as second-degree murder, Class B2 felony.

1. Lesser-included offenses: unclear (perhaps felony death by vehicle).

C. **Aggravated felony death by vehicle.** G.S. 20-141.4(a5). Class D felony.

1. Lesser-included offenses: felony death by vehicle.

D. **Felony death by vehicle.** G.S. 20-141.4(a1). Class E felony (effective for offenses committed on or after December 1, 2006). For offenses committed before December 1, 2006, Class G felony.

1. Lesser-included offenses: none. *State v. Williams*, 90 N.C. App. 614 (1988).

E. **Involuntary manslaughter.** Class F felony. *State v. McGill*, 314 N.C. 633 (1985).

1. Lesser-included offense: misdemeanor death by vehicle. *State v. Williams*, 90 N.C. App. 614 (1988).

F. **Misdemeanor death by vehicle.** G.S. 20-141.4(a2). Class 1 misdemeanor.

1. Lesser-included offenses: none.

29. **Double Jeopardy Issues Under Felony Habitual Impaired Driving (G.S. 20-138.5) and Habitual Misdemeanor Assault (G.S. 14-33.2)**

Under the ruling in *State v. Weaver*, 306 N.C. 629 (1982), concerning what constitutes a lesser-included offense: (1) misdemeanor offense of impaired driving (G.S. 20-138.1) is a lesser-included offense of felony habitual impaired driving (G.S. 20-138.5), and (2) the triggering misdemeanor assault in habitual misdemeanor assault (G.S. 14-33.2) is a lesser-included offense of habitual misdemeanor assault. Therefore the trial of misdemeanor impaired driving or the triggering misdemeanor assault will bar the subsequent trial of felony habitual impaired driving or habitual misdemeanor assault, respectively. Jeopardy attaches in district court when the first witness is sworn, *State v. Brunson*, 327 N.C. 244 (1990).

Advice: The state should never charge (1) both felony habitual impaired driving (G.S. 20-138.5) and misdemeanor impaired driving (G.S. 20-138.1); or (2) the triggering misdemeanor assault and habitual misdemeanor assault (G.S. 14-33.2). However, if both have been charged and are pending in district court, the state should take a voluntary dismissal of misdemeanor impaired driving (or the triggering misdemeanor assault) and either hold a probable cause hearing for the felony habitual impaired driving (or habitual misdemeanor assault) or indict before the date of the probable cause hearing.

30. **Statutory Bar When State Fails To Join Related Offenses; G.S. 15A-926(c)**

State v. Warren, 313 N.C. 254 (1985) [no error in state's bringing burglary and larceny charges after trial for related murder when there was insufficient evidence at time of murder trial to charge burglary and larceny offenses; see G.S. 15A-926(c)(2)c.].

State v. Jones, 50 N.C. App. 263 (1981) [defendant waived right to dismissal of joinable offenses tried separately when defendant failed to make motion for joinder of all pending joinable offenses; see G.S. 15A-926(c)(1) and -926(c)(2)b.].